
Ernest St. clair Easterly III
Louisiana State University and Agricultural & Mechanical College

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GEOJURISPRUDENCE: STUDIES IN LAW, LIBERTY, AND LANDSCAPES

A Dissertation

Submitted to the Graduate Faculty of the
Louisiana State University and
Agricultural and Mechanical College
in partial fulfillment of the
requirements for the degree of
Doctor of Philosophy

in

The Department of Geography
and
Anthropology

by

Ernest St. C. Easterly, III
B.A., Louisiana State University, 1973
J.D., Louisiana State University, 1977
May 1980
We shall not cease from exploration
And the end of all our exploring
Will be to arrive where we started
And know the place for the first time.

T. S. Eliot, *The Four Quartets*. 
FOREWORD

Geojurisprudence provides for a merger of cultural and political geography through the study of the pattern and order of legal cultures on the earth's surface. It is concerned with the relationships among differing legal cultures and the origin and development of the patterned relationships of legal cultures as they articulate with the earth's surface.

Legal cultures embrace a complex of laws, principles, and procedures that often cross cultural boundaries and leave their impression in diverse areas. Much of the diffusion and reception of legal systems occurred during and in consequence of the expansion of European settlement and conquest. The European systems of law frequently overlapped and intermingled with other legal cultures. These receptions of European law, through articulation with the laws and principles of legal systems reflecting other cultures, effected the formation of new national legal cultures.

This study presents various aspects of geojurisprudence that are reflected in a study of global patterns of legal diffusion. A geopolitical scheme of classification is set forth in order to provide a legal map of the world that shows the global distribution of the major legal systems and that emphasizes the diffusion of western legal systems. Cultural preadaptation is introduced to account for legal prevenience in the reception of certain legal forms.
This project offers neither a study in comparative law nor in legal ethnology. Neither does it present more than the briefest introduction to the history of colonial law or actual legal impress on the landscape. Thus, we shall largely rely upon the work of previous scholars in this regard. Similarly, apart from secondary illustration, we shall leave consideration of "law landscapes" to future efforts. This work does, however, propose a retheoretization for the study of comparative jurisprudence in terms of geographic and geopolitical relations. In that way, the theoretical delimitation of a new geographical subdiscipline is accomplished.
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ABSTRACT

Every culture must generally possess an order that is either deliberately created (human design) or the result of experience (human action). Two ordering forces, Human Design and Human Action, manifest themselves in the form of laws and legal systems which govern the individuals who form the thus ordered civil society. The Anglo-American Common Law family of legal systems and the Romano-Germanic Civil Law family of legal systems basically reflect the ordering forces of Human Action and Human Design, respectively. Because laws and legal systems leave the imprint of sovereign authority on the landscape, the study of the culture history and underlying philosophy of differing legal systems is necessary to an adequate understanding of man's existence in a region. Such a study is within the realm of the cultural-legal science of geojurisprudence.

Geojurisprudence is first and foremost concerned with the geographic and geopolitical aspects of legal phenomena. As such, it emphasizes the particular themes of cultural geography, such as culture area and culture history, as these relate to laws and legal systems. It is thus concerned with the historical expansion of laws across the globe. The general shape of such an historical consideration can be explained by delineating certain general principles, such as legal prevenience, a term that designates a certain advance preparedness to accept an innovation.
This study presents various aspects of geojurisprudence that are reflected in a study of global patterns of legal diffusion. A geopolitical scheme of classification is set forth in order to provide a legal map of the world that shows the global distribution of the major legal systems and that emphasizes the diffusion of western legal systems. Cultural preadaptation is introduced to account for legal prevenience in the reception of certain legal forms.
CHAPTER I

PRINCIPLES OF GEOJURISPRUDEANCE

It is one of the maxims of the civil law that definitions are dangerous. --- Samuel Johnson, The Rambler, 1751.

Notes Toward a Definition

Geojurisprudence is the application of a knowledge of the legal process to the interpretation of various earth relations. It is also the study of the geographic aspects of legal phenomena. Geojurisprudence is a formal (analytical) legal science in the sense that it endeavors to perceive the underlying legal philosophy involved in the processes by which laws and legal systems interrelate with the land. It is a cultural science in that it utilizes the concepts and principles of cultural geography (particularly in the present study, culture history and cultural preadaptation) in explaining its special subject areas.

The structure of civil order as it is reflected in legal systems, individual laws, and juridical institutions leaves an impress on the earth's surface that can be seen as the political landscape, the landscape manifestation of law and its relation to transcendent order. The philosophy of law and the history of legal institutions may be projected into the realm of geography in an attempt to gain a more adequate understanding of political landscapes. Because the activities characteristic of civil order leave their imprint upon the landscape are crucial to an adequate understanding of man's existence in a region, the
specialty to geojurisprudence is essential.

Legal systems mirror the territorial expansion and contraction of cultures and their historical struggles for space. Ideas and institutions cannot move far without encountering other ideas and institutions, and unless outright rejection takes place, the contacts thus established result in varying degrees of modification and assimilation (Wagner and Mikesell, 1962, p. 206). The origin and dispersal of legal cultures is the culture history of law. The culture history of legal systems is within the realm of geojurisprudence. An interface of law and geography, geojurisprudence inquires into the localization of the origins of laws and legal systems, the way by which they occupy and interrelate with the land, the transition of legal systems that overlap, and the decline and collapse of superceded systems of law. It is essential to study the geographic patterns of systems of law, together with the cultural patterns that they create in their relations with the landscape (such as laws affecting the use of land--property rights, inheritance, and survey systems--and natural resources--water rights, mineral and energy resources regulation, environmental protection law). Areal distributions of legal systems experience shifts of centers, change in the function of peripheries, and changes of structure (see Sauer, 1941). Cultural energy (creativity) and adaptability (receptivity to acquire new ways), as well as preadaptive shifts revealing a continuity in legal transitions, are discovered and explained in a study of the geographic expansion of systems of law.

Because these legal relations leave their imprint on the earth's surface, the study of geojurisprudence is significant for geographers.
"to the geographer, the culture area is the geographic expression of culture processes and not the cultural expression of a geographic process" (Kniffen, as quoted in Haag and Walker, 1974).

**Geojurisprudence versus Legal Ethnology and Comparative Law**

At the foundation of current ethnology is the view that legal categories are dependent upon the structures of society (Hoebel, 1946). Legal ethnology begins with the general definition of law as rights and obligations of social control through the binding force of sanction administered by some constituted authority (Radcliffe-Brown, 1952, pp. 205-11). Social control may then be analyzed into a set of binding rights and obligations. The study of legal ethnography thus emphasizes those institutions of culture that fulfill the functions of maintaining order and stability.

One of the first levels of analysis in legal ethnology is the distinction between law and custom. Diamond refers to this as the "rule of law versus the order of custom" (1971, p. 47):

Law . . . is symptomatic of the emergence of the state; the legal sanction is not simply the cutting edge of institutions at all times, and in all places. . . Custom--spontaneous, traditional, personal, commonly known, corporate, relatively unchanging--is the modality of primitive society; law is the instrument of civilization, of political society sanctioned by organized force, presumably above society at large, and buttressing a new set of social interests. Law and custom both involve the regulation of behavior, but their characters are entirely distinct; no evolutionary balance has been struck between developing law and custom, whether traditional or emergent.

Legal ethnologists also sometimes speak of the "jurial" community, a concept that indicates the social control functions of the rules to

---

1We shall accept as given the following anthropological concepts, with full realization that alternative illustrations exist.
be obeyed in lineage systems. The principle of jural relations as set forth by Hoebel (1942, p. 952-53) holds that the "least common denominator of civilized law is the least common denominator of primitive law." Hoebel also recognizes the importance of form in the study of primitive law. Influenced by A. L. Kroeber, Hoebel relates legal norms to the total cultural system of society (1954, pp. 15-16):

Legal norms are subject to the test of consistency with the guiding principles set in the basic postulates of their respective societies, . . . The postulates . . . that are used for operation in determination of legal principles may be isolated for separate study through comparative jurisprudence.

On a related theme, Stone, who also influenced Hoebel, said that jural postulates (1950, p. 337)

are generalized statements of the tendencies actually operating, of the presuppositions on which a particular civilization is based . . . . They are ideally presupposed by the whole social complex, which can thus be used to bring the law into harmony with it . . . . They are, as it were, directives issuing from the particular civilized society to those who are wielding social control through law in it.

Hoebel, therefore, seeks to place primitive law into the framework of the value system of the group. He defines law in terms of sanction:

"A social norm is legal if its neglect or infraction is met by the application, in threat or in fact, of the absolute coercive force by a social unit possessing the socially recognized privilege of acting" (Hoebel, 1940, p. 45; and 1954, p. 28).

In terms of methodology, Hoebel tries to determine jural postulates by which the social relations of individuals possess a normative cultural pattern. Postulates thus provide a series of fundamental reference points concerning the order of cultural society (Hoebel, 1965). Accord-
ing to Hoebel's view of sociological jurisprudence, positive law does not obtain sanction from inherent power, but through the ethical content of norms. Culture provides the shared meanings and norms for ordering the individual relations of its members. Thus, it is because a rule is considered obligatory by the culture that a measure of coercion ensues.

Leopold Pospisil (1971), a social anthropologists trained in the Civil Law, argues, contrary to Hoebel, that the existence of certain universal and invariant characteristics of law renders possible the transfer of concepts and forms among different legal cultures. His method is to identify the characteristics of an analytical basis for law that lends itself to comparative study. Characteristics so identified include: authority (the power to induce or force adherence to a decision), intent of universal application (intention of authority to apply the results of a decision to similar situations in the future), obligation (rights and duties of parties to a dispute), and sanction (separation of laws from non-legal custom). Unlike Radcliffe-Brown and Malinowski who emphasize sanction and obligation, respectively, Pospisil finds it necessary to use a complex of characteristics to delimit the anthropological structure of legal order.

Another aspect of legal ethnology emphasized by Hoebel is the legal process. Hoebel relies primarily on the method of case histories. He believes that the nature of law is to be found in legal decisions (1940, pp. 6-7):

The case histories hold within themselves the juice of life situations, revealing the sway and counter play of emotion and motive, demonstrating the broad range of
variability in conduct in given situations. Case histories give the native's coloring to the report. Transmitting to the reader the imponderabilia of native life which Malinowski so aptly insists be given.

To Hoebel, then, cases offer a means for describing the legal process. The case method serves to reconstruct actual events in the past of a particular people. From the assembled cases, generalizations concerning the legal principles by which a society was ordered may be discerned.

According to Llewellyn and Hoebel (1941, p. 20), three "roads" exist into the exploration of the "law-stuff of a culture:" 1) abstract rules of society, 2) actual patterns of behavior, and 3) principles derived from decision of legal authorities. Cochrane (1972), on the other hand, introduces a "processual model" not based on principles of sociology, but on actual legal techniques. He views law as a decision-making activity (1972, p. 50):

If law is to be viewed as a decision-making field of activity then . . . at least three types of decision must be examined . . . These decisional types are: 1) the decision to seek a legal remedy; 2) the decision by authority; 3) the decision on the part of administrative personnel, or the general public, to accept and enforce the authority's decision. Anything less than this number of decisional types . . . would only give a truncated account of legal processes.

Finally, like Pospisil, Gluckman and Bohannan use technical concepts derived from Anglo-American jurisprudence in an attempt to understand the legal ethnology of any given group. They, too, emphasize the legal process in their studies, together with such concepts as "judge," "court," and "reasonable man," which tend to characterize the Common Law tradition. Like Hoebel, Gluckman and Bohannan utilize case his-
tories to determine generalized principles of legal order. Reflecting his Civilian training, Pospisil's approach to legal ethnology is generally one of seeking to identify those attributes of a legal culture which lend themselves to comparative study. Such attributes can be studied on a cross-cultural basis because their actual occurrence in legal cultures reveals certain general features common to all.

As in the case of legal ethnology, there exist many approaches to the study of comparative law, such as analytical, historical, and philosophical (Pound, 1957, pp. 70-84). A brief review of a few of the methods employed should suffice. Zweigert (1972, pp. 465-74) postulated a use of comparative method based on "functional equivalence," i.e., the techniques of decision-making. Such an approach lends itself to studies in geojurisprudence, but raises a question as to the basis of comparison. For example, one might preferably rely on Natural Law theory, which emphasizes universal principles of right order, or one might use a comparative historical approach as the underlying basis. Another approach to comparative law distinguishes between concepts upon which legal systems operate and the interests that they protect. This view often serves as an interface between comparative law and humanism (Yntema, 1960, pp. 493-9). Friedman (1967, p. 515), considers the comparative law approach to include the comparison of the substantive laws and other accepted characteristics of legal systems. A related view focuses on the search for concepts common to particular legal systems or families of legal systems (Malmstrom, 1969; Dainow, 1966).

Geojurisprudence uses the methods and approaches of both legal
ethnology and comparative law as the basis for the study of the geographic aspects of legal phenomena. It differs from both in that it emphasizes geographic relations rather than ethnological or purely legal aspects of reality. As ethnojurisprudence provides an interface between legal ethnology and comparative jurisprudence, geojurisprudence serves as an interface between comparative law and legal geography, i.e., the study of the geographic aspects of legal phenomena.

The Historic Struggles for Space of Legal Cultures

One of the principal concerns of geojurisprudence is the distribution of legal cultures. In order to account for past and present distribution, it is necessary to study the geographic expansion of legal cultures, a matter of culture history. As Carl Sauer (1941) noted:

A culture trait or complex originates at a certain time in a particular locality. It gains acceptance---that is, is learned by a group---and is communicated outward, or diffuses, until it encounters sufficient resistance, as from unsuitable physical conditions, from alternative traits, or from disparity of cultural level.

So it is, too, with Laws and legal systems. The origins, dispersals, and competition of legal cultures in their historic struggles for space provide the very substance of geojurisprudence.

As legal cultures and legal systems expand beyond their culture hearths, the process of reception occurs. Plants growing in one soil quite moderately and organically may, if transported, either shrivel and die or grow, perhaps luxuriantly. So it is with legal transplants. Legal transplants in the form of individual rules or large parts of
legal systems are extremely common. This is true of both earlier times and more recent events. Such a transfer of laws and legal systems is probably the most fertile source of development in legal cultures. Most changes in systems may be traced to earlier borrowing as can be seen, for example, in the overwhelming importance for private law of the Anglo-American Common Law and the Romano-Germanic Civil Law that, as we will see, today encompass virtually the globe. As F. W. Maitland (1909, p. 296) said: "The forms of action we have buried, but they will rule us from their graves." Law is generally rooted in the past. Thus, we find the historical perspective a necessity in the study of legal diffusion.

Voluntary reception usually involves a change in the law that can be the result of any of several factors, such as climate, economic conditions, religious circumstances, general historical trend, or even chance. Generally, the time of reception is one when law can be reformed or made more sophisticated. This is especially true when the law system of the receiving people is less advanced than that of the exporting culture. A system that is inventive or creative may remain largely free from receptions even when foreign influence is great.

The most fruitful area for study in geojurisprudence is perhaps that of the colonial expansion of the Western systems of law during the eighteenth and nineteenth centuries and voluntary receptions during the early twentieth century. Such a study reveals the global influence of what we may refer to as "legal acculturation." Such a study becomes one of considering the multiplicity of legal systems in evolving cultures which overlap. Legal pluralism occurs as colonial laws are transplanted in areas
with non-competitive indigenous legal cultures and areas where the
transplanted system interacts with native religious systems of juris-
prudence and customary bodies of law. Voluntary adoption of legal
systematics for purposes of modernization, wherein existing systems
are generally replaced with a national legal system, provides further
occasions for acculturation. Finally, when traditional systems are
abolished in favor of an introduced revolutionary ideology, legal ac-
culturation again provides a new state of legal pluralism. The
geographic aspects of these factors are central to the sub-discipline
of geojurisprudence.

If legal systems in broad outlines are images of
the regions in which they function, sometimes faithful,
and sometimes distorted, individual laws in detail mirror
the society and the habitat by and in which they are
created. Because humanity occupies its habitat dynamically,
laws tend to become outmoded. When this occurs they are
usually revoked, sometimes they are disregarded, occa-
sionally they are given new meaning. (Whittlesey, 1958,
p. 566)

Legal systems reflect the cultures which spawned them and their exist-
ence through time.

Culture and Order

The Eternal works and stirs in all;
For All must into nothing fall,
If it will persist in Being. (dissertation author's translation)
Goethe, Eins und Alles, 1821

Every culture must possess an order that is either deliberately
created (Human Design) or the result of human experience (Human Action).
The implementation of this choice within a society results in civil or-
der, the structure of which is then reflected in laws and legal systems
that leave the impress of sovereign authority on the earth's surface.
The distribution of laws and legal systems and the processes by which they interrelate with the land are proper subjects of concern for the specialized area of political geography that is here called "geojurisprudence" (Easterly, 1977, p. 209).

For our purposes, the proper setting for discussion concerning certain aspects of culture and order, which are central to the study of geojurisprudence, is provided in a brief review of Eric Voegelin's ideas on legal order. After all, the interface between culture and order, in a mundane sense, is legal order. That is to say, when the values (culture) of a group of men are given explicit formulation, they commonly take the form of laws. Voegel (1957, p. 29) asserts that law "is the substance of order in all realms of being." In the course of history can be seen "an ordering substance that pervades the hierarchy of being from God, through the world and society, to every man" (Voegelin, 1957, p. 31). Such an ordering is inherent in society. The law-making process becomes the method for securing the substance of this order by explicit rules. "The lawmaking process partakes of the nature of the law in as much as it serves the purpose of securing the substance of order in society" (Voegelin, 1957, p. 32).

The legal order is the means of expressing in "pervasive and concrete form the lasting of an order of society through time" (Voegelin, 1957, p. 53). True order in society cannot be simply created by man as part of some preconceived plan, but could be effected by the acts of representative men through an evolutionary process of temporal experience (Evans-Pritchard, 1951, p. 23; Gluckman, 1965a, p. 17). These acts performed by men take place in a state of permanent tension be-
tween what ought to be and what actually is. "Man has the experience of participating through his experience, in an order of being which embraces, besides himself, God, the world and society. This is the experience which can become articulate in the creation of symbols of the pervasive order of being" (Voegelin, 1957, p. 59).

In Voegelin's view, the Ought was "the experienced tension between the order of being and the conduct of man" (1957, p. 59). Thus, one can clearly see the interface between culture and order as law. The normativity of the rule of law embrace three elements. It is intended as a true proposition concerning the concrete order of society. It appeals for the integration of its inherent truth into the lives of its addressees. Finally, it claims to be heard (Voegelin, 1957, p. 61).

According to Voegelin, the making of laws is a process that aims "to project and realize the order of society" (1957, p. 67). Some efforts intend to realize through construction, such as political activities from the enactment of statutes to doctrinal debates concerning social reforms; others intend to initiate true order by establishing standards, such as the classical approaches to constitutional theory. "The true order of society is the order in which man can fully unfold the potentialities of his nature" (Voegelin, 1957, p. 73).

The empirical order of a society is capable of degrees of reality in the measure to which it articulates the tension of the Ought in the ontological sense, that is the object of philosophical inquiry. The normativity of the law is its participation in the true order. (Voegelin, 1957, p. 76)
Cosmos versus Taxis

Order, in the temporal sense of the term, denotes

a state of affairs in which a multiplicity of elements of various kinds are so related to each other that we may learn from our acquaintance with some spatial or temporal part of the whole to form correct expectations concerning the rest, or at least expectations which have a good chance of proving correct. (Hayek, 1973, p. 36)

The two sources of intramundane order that are manifest in the rules governing the behavior of the individuals who form the orders may be identified by the Greek terms, cosmos and taxis. Cosmos denotes a spontaneous order, the word earlier meaning "a right order in a state of community." Taxis signifies a made order, the results of human will. Cosmos, or spontaneous order, is a consequence of the ordering force of human action. Human design results in taxis, or made order.

In human society, the effect of human design arises from the belief in the superiority of deliberate design and central planning over the spontaneous forces in society. Human action, by contrast, emphasizes the undesigned results of individual action and spontaneous order; its exponents conceive of the growth and development of purposive cultural institutions as the result of the combined effects of individual action, without the necessity of a designing and directing mind (Hayek, 1969, pp. 96-105). Because human action is the cumulation of separate responses to the particular circumstances that act on the individuals composing the cultural entity, an order gradually emerges that is "polycentric" (Hayek, 1973, pp. 35-54). The resulting order is a state of affairs in which the resultant legal structure is produced through gradual, piecemeal change in the law, rather than by sys
tematic design and central planning over a large area. In other words, the ordering process in the vein of human action recognizes that "only a minority of social institutions are consciously designed while the vast majority have just 'grown' as the undesigned results of human action" (Popper, 1957, p. 65).

Although nature evolves, its law emerges, and this emergence, as a process, is a matter of discovery by man, not creation by man. The process by which Natural Law is discovered and articulated is human action. This logically open system leaves man receptive to those Engendering Experiences\(^1\) by which the discovery of Natural Law principles occurs. This is a logical consequence of the universal human experience of participating in the timeless while existing in time. The symbols that embrace Natural Law principles thus "express man's consciousness of existing in tension toward the divine ground of his existence" (Voegelin, 1967, p. 271). Therefore, the idea of experiences that engender man's understanding of true order derives from the very nature of man's existence.

Existence has the structure of the In-Between, of the Platonic metaxy, and if anything is constant in the history of mankind, it is the language of tension between life and death, mortality and immortality, perfection and imperfection, time and timelessness, be-

\(^1\)There exists no basis for exchange of rational argument where there is a profound difference of attitude concerning fundamental questions of human existence, such as the nature of man, his place in the world, his place in society and history, and his relation to God. "The universe of rational discourse collapses . . . when the common ground of existence in reality has disappeared" (Voegelin, 1967, p. 143).
between order and disorder, truth and untruth, sense and senselessness of existence; . . . between the virtues of openness toward the ground of being such as faith, hope, and love and the vices of unfolding closure such as hybris and revolt; . . . between alienation in its double meaning of alienation from the world and alienation from God. If we split these pairs of symbols, and hypostatize the poles of the tension as independent entities, we destroy the reality of existence as it has been experienced by the creators of the tensional symbolisms; we lose consciousness and intellect; we deform our humanity and reduce ourselves . . . In the language of Heraclitus and Plato: Dream life usurps the place of wake life. (Voegelin, 1970, p. 220)

The experiences of existence and the principles that they engender are the substance of order in the individual soul and of true order in society. They provide the basis of cosmos and the reason underlying human action. The existence of spontaneous order can be intuitively perceived by experience; and not being a thing, it cannot legitimately be said to have a purpose dependent upon man's will (Hayek, 1973, pp. 36-52; Popper, 1957, pp. 64-70; Arendt, 1978). The significance of man's relation to the rules of conduct derived from the experiences of Natural Law may be described as follows: In a social order, the particular circumstances to which each individual will reacts will be those known to him. These individual responses to particular circumstances will, however, result in an overall order only if individuals obey such rules as will produce an order (Hayek, 1973, p. 44).

1"Soul" is used here in the realist, rather than either the materialist or idealist, metaphysical position. Such a choice has the advantage of making the least sweeping assumption; the realist is not required to affirm the absence of either spirit or matter.
If they obey other rules or if the rules are forceably imposed, then a positivistic state of man's relation to his fellow man exists. The rules derived from man's experience of the Beyond arise from observing the duties due to others as a consequence of preserving right order. Legal rules are perfect in proportion as they conform to the Natural Law. Without the experience and expectation of the Natural Law, legal rules are only blind expressions of exalted reason and unenlightened worldly experience. After all, can man make lawful that which is contrary to the experience of Natural Law? Can man make that unlawful which was once lawful or indifferent? In that event, law and truth would be interchangeable and replaceable at the will of the individual or the ruling power, with a corresponding loss of universality of legal rules and a reduction in the status of true order among men in society.

Liberty Defined

Liberty is a condition in which all are allowed to use their knowledge for their purposes, restrained only by rules of just conduct of universal application (Hayek, 1960). Liberty exists largely as the product of a prevailing respect for the fundamental principles of Natural Law. The condition of liberty "can be preserved only by following principles and is destroyed by following expedience" (Hayek, 1973, p. 56). Liberty, thus, rests upon the idea that there is an arbitrary,

1As with Hayek, I use the words liberty and freedom interchangeably. To Hayek, there appears to exist no acceptable distinction as to meaning between them (1960, pp. 11, 421 n. 1).
eternal standard for determining which human actions are just and, accordingly, beneficial to society and which are not (Mises, 1966; 1969).

Liberty or freedom is not, as the origin of the name may seem to imply, an exemption from all restraint, but rather the most effectual application of every just restraint to all members of a free state, whether they be magistrates or subjects.

It is under just restraints only that every person is safe, and cannot be invaded, either in the freedom of his person, his property, or innocent action. The establishment of a just and effectual government is of all circumstances in civil society the most essential to freedom; that everyone is justly said to be free in proportion as the government under which he resides is sufficiently powerful to protect him, at the same time that it is sufficiently restrained and limited to prevent the abuse of this power (Ferguson, 1792, v. 2, p. 258).

Liberty, thus, prevails only if it is accepted as a general principle whose application to particular instances requires no legislative justification. Even so, enforced rules of conduct restraining undue interference with the general condition of liberty may be necessary.

Two Sources of Order

The two ordering forces of civil society are human action, grounded in experience, and human design, based on willfullness. These two sources are reflected in different conceptions of the relation between law and liberty. One historic trend involves those who maintain that law and liberty are inseparable; from the ancient Greeks and Cicero, to such classical liberals as John Locke, David Hume, Immanuel Kant, and the Scottish moral philosophers, down to various American statesmen of the nineteenth and twentieth centuries, for whom law and liberty
could not exist apart from each other. The other position views law
and liberty as irreconcilable: Thomas Hobbes, Jeremy Bentham, many
French thinkers, and the modern legal positivists to all of whom law
of necessity means an encroachment on freedom (Hayek, 1973).

Human Action

"We ascribe to a previous design, what came to be known only by
experience, what no human wisdom could foresee, and what, without the
concurring humour and disposition of his age, no authority could en­
able an individual to execute" (Ferguson, 1767, pp. 187-188). The
rise of the evolutionary approach to reason as the basis of civil soci­
ety grew in part out of an eighteenth century reaction to constructivist rationalism. Among the earliest to articulate the position of hu­
man action were Bernard Mandeville and David Hume, who were inspired
more by the tradition of the English Common Law than by the law of na­
ture. They contend that the formation of regular patterns in human re­
lations are not necessarily or commonly the consequence of the conscious
aim of human action. This view was advanced and refined during the
latter part of the eighteenth century by the Scottish moral philoso­
phers, including Adam Smith and Adam Ferguson (Campbell, 1967). It is
Ferguson (1767, p. 187), perhaps, who enunciated the evolutionary approach
to human reason in its clearest and most succinct form: "Nations stum­
bles upon establishments, which are indeed the result of human action,
but not the execution of any human design."

Under the premise of human action, order in human affairs is the
unforeseen result of individual decisions. Such a view is grounded in
the recognition of the constitutional limitation of man's knowledge, the fact that he cannot know more than a small part of the whole society and that, therefore, all that can enter into his motives are the immediate effects that his actions will have in the sphere of his immediate intimacy (Hayek, 1978, pp. 3-34; Popper, 1957). From this awareness of the limitations on individual knowledge and from the fact that no person or small group of persons can know all that is known to somebody, the philosophy of human action derives its primary practical conclusion, its demand for a strict limitation of all coercive or exclusive power. This demand, of course, drives straight to the core of the relation between law and liberty. Man must have rules referring to typical situations, defined in terms of what can be known to the acting persons and without regard to the presumed distant effects in the particular instance, rules that, if they are regularly observed, will in the majority of cases operate beneficially (Hayek, 1973). The emergence of social order depends on the general acceptance of principles of universal validity; that is, a good society depends on good will among the denizens. These principles, in the practical effect, are discretionary rules that prevent clashes between conflicting aims and not a set of fixed ends. Men discover them through the experience that engenders an understanding of the Natural Law\(^1\). Because society

\(^1\)Natural Law, when capital letters are used, approximates the medieval or scholastic employment of the term. I have used small letters to indicate natural law in the classical sense (Bodenheimer, 1974). Although not a complete break with earlier conceptions of Natural Law, natural law as developed during the seventeenth and eighteenth centuries does process certain distinguishing qualities: 1) a separation of law from theology; 2) an elaboration of detailed rules believed to be directly deducible from human reason; 3) an emphasis on natural rights; and, 4) a generally empirical view of human nature.
is composed of men, laws must be accepted and enforced by men. Rule of law may be the best or worst rule by the best or worst men according to the best or worst laws determined by the best or worst men. Only in the presence of Natural Law are criteria available for distinguishing that which is best from that which is worst in the legal relations of men. Thus, through application of the principles of Natural Law in the regulation of his cultural relations, a man adds to his intramundane experience precedents that form part of his expectations concerning the continuing order of actions. "The man who acts according to the rules of perfect prudence, of strict justice, and of proper benevolence, may be said to be perfectly virtuous" (Smith, 1812, p. 418).

Such a view of order, in turn, tends to confirm the evolution of law rules. This view has been historically maintained by Edward Coke, Mathew Hale, David Hume, Edmund Burke, F. C. von Savigny, H. S. Maine, and J. C. Carter, to name but a few of the doctrinal writers on the subject. The underlying principle of law, arising gradually from custom and precedent, is that the law consists of purpose-independent rules that govern the conduct of individuals towards each other. Further, those law rules will apply to an unknown number of future instances and, by defining a protected domain of each, will enable an order of actions to form itself wherein the individuals can make feasible plans (Hayek, 1973, pp. 8-34). Although grown law may require correction by legislation, the rules have evolved through man's experience of existence. In that way, transcendent order from Beyond becomes immanent. Thus moves the course of obligation (Voegelin, 1939; my trans-
Just as the contracts and testaments of the subjects can alter the ordinances of the magistrate; as the edicts of the magistrate can not alter those of custom; as custom can not alter the laws of the sovereign prince, so too are the laws of the sovereign prince unable to alter the laws of God and of Nature.

The deification of the earthly ruling order, its world-immanent formulation, and the simultaneous decapitation of natural order by the removal of the world-transcendent God is tied up with a large number of preconditions manifest in the ordering forces of human design, but not necessarily with human action. The fundamental attitude of human action is one of formal institutional humility toward the processes by which man has achieved things that have been neither designed nor understood by any individual, but are indeed greater than and beyond individual minds (Hayek, 1948, pp. 1-32).

**Human Design**

The belief in the superiority of deliberate design and central planning stems from a form of Gnosticism known as cartesian constructivist rationalism, a propensity to ascribe institutions of culture to invention or design by man's reason, rather than to the spontaneous forces of civility (Hayek, 1973, pp. 9-11). Gnostic-creed movements attempt to fuse the normative authority of law into the authority of power (Voegelin, 1957). The result is an often positivistic conception of law derived for "a factually untrue anthropomorphic interpretation of grown institutions as the product of design" (Hayek, 1969, p. 102). This attitude leads to a view of the rule of law as a rule of conduct, intertwined with ideas of justice and morality, that is primarily de-
terminated by the activity of legal scholars and legislators. The resultant civil order is established upon laws that are the free inventions of the designing mind of the legislator. Laws, thus, derive their authority as expressions of legislative will. Accordingly, human design identifies with the expression, "What man has made, he can also alter to suit his desires." "Any content whatever can be legal; there is no human behavior which could not function as the content of a legal norm," and "Legal norms may have any kind of content" created by a legislation (Kelsen, 1935, p. 517). This contention is only a logical result of the view that "norms prescribing human behavior can emanate only from human will, not from human reason," grounded in the experience of true order (Hayek, 1976).

In its most profound form, the belief that "norms prescribing human behavior can emanate only from human will" serves as the basis for what is generally termed "legal positivism" (Kelsen, 1967, p. 20). The modern history of legal positivism embraces the view that law is a deliberate creation of human will, which is the very essence of human design. This view of law is not without historical antecedents. Thomas Hobbes (1588-1679), an English political philosopher, defines law as "the command of him that have the legislative power" (1681, p. 26). One of the principal proponents of utilitarian doctrine, Jeremy Bentham (1748-1832), construes law as existing in two forms: 1) "Real law, really existing law, which is legislator-made law," such as modern codes in Civil Law jurisdictions and statutes in Common Law systems, and 2) "The appellation of unreal, not really existing, imaginary, fictitious, spurious, judge-made law," such as the common law of England (1827, p.
Bentham, in turn, strongly influenced John Austin (1790-1859), an English jurist who founded the analytical school of law and who asserted, "there can be no law without a legislative act" (1879, p. 555). The most articulate defender of legal positivism is probably Hans Kelsen (1881-1973), whose "pure theory of law" presumes to view law as a normative "science," in what Popper terms "methodological essentialism, i.e. the theory that it is the aim of science to reveal essences and to describe them by means of definitions" (1963, p. 32). To Kelsen, law is a command of human behavior, and "order" is but a system of rules. A factual order is substituted for the existence of a spontaneous order of actions. Order as taxis is the only order acknowledged. The "social order, termed 'law', tries to bring about a certain behavior of men, considered by the lawmaker as desirable (1957, p. 289). By the 1920s, legal positivism was so entrenched that "to be found guilty of adherence to natural law theories was a kind of intellectual disgrace" (Voegelin, 1927, p. 269). Legal positivism, involving an assertion of the omnipotence of legislative will, translates as a form of constructivism, an ideology emerging from the desire to attain complete control over the social order, a belief that man can deliberately determine his destiny.

The underlying philosophy of Human Design leads man to believe that, by his unaided reason alone, he is able to construct society anew. The legal order embraced by any political community is always arranged in relation to man's experience of world and God, one in which the legal-political sphere assumes in the hierarchy of Being a lower degree of divine order. The existence of men in a political
community cannot, therefore, be accurately defined as a profane sphere in which we only have to deal with questions of law as political mobilization of forces. The community is also a realm of religious order, and the characterization of a legal or political situation is incomplete in one decisive point, if it does not also embrace the religious forces of the community. In Voegelin's analysis (1939): "If a creature attributes something good to himself—such as essential nature, life, knowledge, recognition, ability, in short, all that that one would have to call good—as if the creature were this thing or had it, as if he belonged to it or emanated from it, then the creature goes astray." To give the argument Biblical form, what else did the Devil do? "What else was the Fall and renunciation for him, other than that he presumed he too was something, and claimed to be Someone and to be his Own." This presumption and his "I" and "Me," his "to Me" and "My"—that was his renunciation and his Fall. And so it continues to be (1939, p. 69; my translation).

**Political Culture and Religion**

Yet, all political cultures are religious, and each sets one or more gods at its head. In some, such as most modern totalitarian states, the state itself, the person of the leader, the party, or the presumed purpose of history takes the status of a deity. Each case, however, consists of an apothesis of hubris, the overweening pride that classical writers oppose to virtue. The placement of a deity within the world, particularly where that deity is the self, results in a temporal (worldly) religion.
Temporal religiosity, that of the collectivity, be it mankind, the Volk, the class, the race, or the state, which is expressed as the Realissimum, is a falling away from true order. The hubristic belief that man is the source of good and of the betterment of the world, such as dominated the Enlightenment (Voegelin, 1976), and the belief in the collectivity as a ordering force is a renunciation of true, spontaneous order.

In this context, principles of Natural Law are severed from their engendering experiences by doctrinization, an immanent rendering through human discourse, the texts of which assume an aura of authority. There is, however, no In-Between (metaxy) of existence as a self-contained object, rather existence experienced as a part of reality that extends beyond the metaxical relation. This experience of the Beyond, of existence experienced, this consciousness of the Beyond, which constitutes consciousness by reaching into reality, is the area of reality that becomes articulated through the symbols of mythical imagination, including the principles of Natural Law. The Beyond of existence becomes present in existence as Truth. The historical drama in the metaxy, then is a unity through the common presence of the Beyond in the men who respond to His "drawing" and to one another (Voegelin, 1971).

De-formation

The truth conveyed by the symbols (and their inherent principles) becomes the source of right order in human existence. When doctrinalized, however, the ultimate tension between a reality engendering and the symbols engendered is liable to dissociate into a piece of informa-
tion and its subject-matter (Voegelin, 1967), a process called "deformations" (Voegelin, 1979). The attempt at the meditative reconstruction of the engendering reality through doctrine has the result, often unintended, of severing man from the engendering experiences. This lost contact with the truth experienced that has engendered the principles of right order may, subsequently, render the derived doctrine susceptible to manipulation by various ideologies, or civil political religions that appeal to the reality, not of truth experienced, but of the world (Voegelin, 1967a). Doctrine, empty of its engendering experience, transforms the apocalyptic into the ideological millennium and the eschatological metastasis through action from the Beyond into the world-immanent metastasis through human will (Voegelin, 1967a).

The process of de-formation lies at the base of the "perennial heresy" of utopianism (Molnar, 1972). The derailment of true order through doctrinalization into various Gnostic departures, such as scientism, historicism, and positivism, is at the root of the speculative systems of the Comtean, Cartesian, Hegelian, and Marxian type (Popper, 1957; Voegelin, 1948, 1968, 1975; Hayek, 1955, 1960). These are all de-formations of the life of reason through the magic practice of self-divinization and self-salvation (Voegelin, 1971). The process of derailment into Gnosticism is doctrinalization, or stated in another term, Human Design. Natural Law is first reduced to a set of principles. Then, the set becomes something that can be manipulated as an "other". This is de-formation, and it is fallacious because man the scholar cannot in fact get outside the set, no matter how sophisticated his models, theories, or methods.
Engendering Experience Severed

In its legal aspect, engendering experience is the experience in reality of truth that may be articulated as rules of right order. These rules may then be legitimated as either customary or positive law, according to the prevailing legal philosophy of either human action or human design. Under the philosophy of human design, ordering principles have been severed from their engendering experience and produce mere rules that have no legitimate basis beyond being arbitrarily established by the sovereign authority, however, much he may subscribe to Natural Law as his personal belief. In perhaps the purest form of Human Design, law becomes doctrinalized through the practice of legal positivism; that is, ultimately as law prescribed in the service of a triumphant ideology (Kuehnelt-Leddihn, 1974, p. 428).

The problems of legal positivism have been adequately discussed elsewhere; suffice here to say that it results in legal order that takes what passes for a purely empirical attitude toward the law and maintains a disinclination to search for, or even to postulate, ultimate values in the legal order (Bodenheimer, 1974; Hayek, 1960, 1973, 1976; Voegelin, 1957). Perhaps, like Milton's Lucifer, the positivist believes that it is better "to reign in hell, than serve in heaven". Because legal positivists believe that it is the legislator that determines the content of the law, legal rules are severed from the restraint of Natural Law criteria for what is right or wrong. Law as a product of legislative will\(^1\) is not limited by conceptions of justice.

\(^1\)Will is used in the context of Hayek's employment of the term to denote "deliberate design" or "designing reason". Such rendering of meaning is not altogether incompatible with Arendt's explanation (1978, p. 205).
and piety (see Weaver, 1948, pp. 170-87). The contention is that the
lawgiver is the creator of justice. As the positivist Kelson asserts,
a wrong of the State must under all circumstances be a contradiction
in terms. From Hobbe's "No law can be unjust" (1651, pt. 1, ch. 13)
to Kelson's "Just is only another word for legal or legitimate" (1934,
p. 482), there exist no criteria of justice in determining law rules.
Legal positivism succeeds in substituting for the Natural Law philos­
ophy that maintained true cultural order, an ideology that postulates
all orders are results of human design.

To the positivist, Natural Law must be either the design of a
super-human intelligence or a discovery through experience, a process
of evolution and natural selection. At any rate, it is a process not
wholly dependent upon any rational human design; therefore, to be re­
jected. "Natural Law is--in the last analysis--divine law because
its nature is supposed to create law it must have a will and the will
can only be the will of God which manifests itself in the nature cre­
at ed by Him" (Kelson, 1966, p. 2). This secular, rationalist view of
Natural Law, devoid of such ideas as "revelation" and "engendering
experiences", prepares the way for legal constructivism in its purest
form. At the advent of positivism, there was a de-formation of Nat­
ural Law. Law, without Natural Law, as defined by the positivists
has unfortunate consequences. Even Kelson had to admit, "From the
point of view of the science of law, the law under the Nazi-govern­
ment was law. We may regret it, but we cannot deny that it was law"
A Blurred Dichotomy

It becomes possible, in any case, to classify all of the world's legal cultures into two main species, with two or three small residual species. The bases for this classification include the manner of handling hubris, the formal status of legislation, the standing in law of custom, the role of doctrine, and the relative status of the judge. It must be remembered, however, that all modern legal systems are today infected with the constructivist design of legal positivism (Merryman, 1969). So, too, does human action survive in most legal systems through the survival of custom, of what is called "super-eminent principles" (David, 1972), and inability of the state fully to impose its will. We cannot, therefore, classify legal cultures purely on a basis of the dichotomy between the competing philosophies of action and design. The spectrum is not one of black and white, but varying shades of grey. Nevertheless, the degree to which the spontaneous order of Human Design is dominant at the time of reception, serves as a crucial basis for distinguishing certain families of legal systems.
CHAPTER II

GEOGRAPHICAL CLASSIFICATION OF LEGAL SYSTEMS

So speak ye, and so do, as they that shall be judged by the law of liberty.
--James 2:12.

For the purposes of scholarly exchange and general surveys, we need a systematic classification of the various legal systems of the world. This need has prompted a number of attempts at ordering legal systems into various groups and families. Any such attempt is inherently imperfect, however, and should "be considered merely as a provisional means of facilitating description and comparison of existing legal systems" (Malmstrom, 1969). Each effort of organizing the world's legal systems is correct, therefore, if it is accomplishes its purpose. Where that purpose is to prepare a legal map of the world, more than one of the possible schemes may be of equal value (Wigmore, 1929). Where the purpose is to map the geopolitical distribution of legal systems, to determine the global patterns of legal systems, or to study the process of legal reception and cultural diffusion through law, various geographic affinities and influences, as well as the strictly legal criteria, must be taken into consideration.

Systems of Classification

For our purposes, legal system denotes the dominant legal style in national jurisdiction. Concern is with the private law that governs the relationships between individuals and between individuals
and state (exclusive of administrative law). Because constitutional law develops independently, it will not be considered in determining the style of legal systems. Throughout this discussion, I have capitalized the first letter of terms designating legal systems (for example, Common Law), and I have left not capitalized the terms for substantive law or legal doctrines (for example, common law when used as a body of case law derived from ancient usages and customs).

Legal Cultures and Legal Systems

Legal systems, or legal styles, embrace various rules, principles, and procedures from different sources. When discussing legal systems, three crucial ideas must be kept in mind. To compare and group legal systems, classification is organized in terms of the prevailing national systems, each containing in various degrees elements of international and supranational law. Almost every legal system consists of several layers of laws, each layer being attributable to a different period of its history. These layers may be the products of an evolution that results in successive strata of legal accretion or the outcome of violent upheaval, such as revolution, conquest, or massive immigration; and virtually all legal systems are hybrid in that their formulators have borrowed from other legal systems (Schlesinger, 1970, p. 253). For example, the legal systems of developing countries in Asia and Africa are so eclectic that they are difficult to classify on the basis of style or historical development. When legal systems blend with various bodies of substantive law rules, differing blends and composites emerge, such as Anglo-Islamic law or
Civil Law with submerged Islamic Law; these actual blends are called "legal cultures." (Note that in a somewhat different context, the term "legal culture" implies those aspects of a culture which gives rise to a legal system.) These several and various legal cultures provide the substance of national systems of law, which in turn compose the different families of legal systems. For example, Anglo-Islamic law and Anglo-Hindu law are both legal cultures embracing the English Common Law system and embraced within the Anglican Common Law family of legal systems.

Earlier Attempts at Classification

In a Panorama of the World's Legal Systems, John H. Wigmore, professor of law at Northwestern University, traced some sixteen legal systems in the world's history (1928). Of these sixteen, eight had disappeared (the Egyptian, Mesopotamian, Hebrew, Greek, Roman, Celtic, Maritime, and Canon Law systems). The remaining eight were determined to be surviving as late as the early twentieth century (the Chinese, Hindu, Japanese, Germanic, Slavic, Mohammedan, Romanesque, Anglican). The particular importance of this classification scheme is that it delineates legal cultures, rather than legal systems per se.

Wigmore, for mapping purposes, also provides a scheme for the categorization of various mixtures of laws. The first of four types of mixture is that of the "pure" systems, such as England or France. The second class of systems are the "national blends," where a people having a native system adopted in some degree or manner an alien
system, often by recasting its native system in alien categories, thus developing a single blended system under native sovereignty, such as Japan's use of the Civil Law to give positive expression of Japanese customary practice. In a blend, various institutions from two systems that are combined into a single jurisdiction under national authority. Wigmore's third type of mixture was that of the "colonial composites" where an alien power holding foreign territory, imposes its own legal system, but allows the private law of the natives to persist, in whole or in part. Examples include Malaysia and Algeria. The final type is that of the "colonial duplex composites" where an alien power imposes its own system, but continues to enforce two or more native systems for separate classes of natives. India is the only country placed in this classification (Wigmore, 1929). The basic weakness of Wigmore's system of classification is that it is based on largely inadequate social and historical criteria. However, it is important for the same reason; i.e., the underlying cultural patterns reflected in the classification of the law.

Another major effort at classification of legal systems was that of Konrad Zweigert, a German comparative law scholar. Zweigert (1961) asserts that the theory of legal families is subject to the principle that the correctness of a classification is only relative and restricted to a given subject matter. Zweigert (1961, p. 46), thus, proposes the notion of legal style:

What is decisive are, rather, the following elements. Individual legal systems and entire groups of systems each have their particular style. Comparative research must endeavor to comprehend these "legal styles" and to accord to the element of style, the facts which make up a specific style, a decisive
importance both for the establishment of groups of legal systems and for the attribution of single systems to such groups. (my translation)

According to Zweigert, the following elements should be taken into account in determining a specific style: 1) historic origin, 2) a specific habit of legal thinking, 3) particularly characteristic legal institutions, 4) the nature of sources of law and their interpretation, and 5) ideological elements. Zweigert arrived at the following classification of legal styles: 1) Romanischer Rechtskreis, 2) Deutscher Rectskreis, 3) Nordischer Rechtskreis, 4) Angelsachsischer Rechtskreis, 5) Kommunistischer Rechtskreis, 6) Fernöstlicher (nichtkommunistischer) Rechtskreis, 7) Islamischer Rechtskreis, and 8) Rechtskreis des Hindu-Rechts.

A difficulty with Zweigert's otherwise admirable approach is its lack of consideration of certain geopolitical relations and influences. As a consequence of this shortcoming, the laws of the recently independent countries of Asia and Africa are especially hard to classify. Apparently, certain categories based on geopolitical realities must be considered for the purposes of adequate and convenient classification.

After several revisions, the scheme of classification presented by the French comparative law scholar, Rene David, and his colleague, John Brierly, results in four broad categories of legal systems (three families and one residual category): 1) the Romano-Germanic Family, 2) the Common Law, 3) Socialist Laws, and 4) other conceptions of Law and Social Order. The last category embraces those systems in which traditional and religious elements appear as inherited com-
ponents in the modern law, together with principles and institutions that have been imported from the Occidental world and that today have decisive importance in those countries.

Two successful attempts at mapping the world's major legal systems have appeared in the geographical literature of the English-speaking countries. The first of these efforts appeared in The Geographical Review (Wigmore, 1929, pp. 114-20), with classification based on legal cultures as of that time, rather than legal systems with emphasis on the source of law and style of administration. This map by James Wigmore, a law professor, served for decades following its publication as the standard portrayal of the world's law. With slight modification it has appeared in books by Whittlesey (1939, p. 560) and Jordan and Rowntree (1976, p. 144). The second successful venture at mapping (see Fig. 1) was also published in The Geographical Review (Easterly, 1977, pp. 209-20). This map was part of an effort to re-introduce geojurisprudence to geographers. It, too, has served as the basis for subsequent depictions of global distribution of legal systems (Jordan and Rowntree, 1979, p. 119).

Other attempts by geographers to map the world's legal systems have generally proved disastrous. A ludicrous example is provided in a textbook by Spencer and Thomas (1978, pp. 158-59). A subsequent revision has failed either to correct the fundamental and factual errors of portrayal or to remove the discrepancies between the map and the more correct accompanying text (1978, pp. 158-159). For example, such clearly Civilian jurisdictions as Spain, Portugal, West Germany, the Scandinavian countries, much of Latin America, Zaire, Japan and
The World's Major Legal Systems
As of January 1, 1976

Legend

- Anglo-American Common Law
- Romano-Germanic Civil Law
- Mixed Civil and Common Law
- Nordic Law
- Socialist Law (s Soviet Law)
- Islamic Law
- Not Determined

Fig. 1
Fig. 1 (continued)
Taiwan are classified by Spencer and Thomas as modelled after the English Common Law. Furthermore, the map fails to acknowledge the mixed character of the laws of Ethiopia, South Africa, the Philippines, and Guyana; the influence of "Roman Law" in Egypt (which they classify as a mixture of Islamic Law and English Common Law); or the presence of English Common Law in the Sudan.

It is not our purpose to discuss these previous attempts in detail, but to note in broad fashion the outlines of a few of the more notable schemes for the classification of legal systems. It is to be noted that the geopolitical scheme of classification that is suggested below is in many respects similar to its antecedents; indeed, it is a modification and synthesis of these previous efforts. Yet, the geopolitical scheme of classification is more than a modification and synthesis; it is also a retheoretization (Voegelin, 1952, pp. 1-26) based on underlying principles of human action and human design, as well as certain geopolitical elements that permit an individual classification of each jurisdiction.

A Geopolitical Classification

A geopolitical classification (Fig. 2) of legal systems suits the purposes of geojurisprudence. This scheme takes into consideration both legal and geographic criteria, with emphasis on those criteria that underscore the dichotomy between Human Action and Human Design: habit of legal thinking, the relative position of the judge and the legislator, and the character of the judicial process.
THE WORLD'S MAJOR LEGAL SYSTEMS
AS OF JUNE 1, 1977

LEGEND

* Anglo-American Common Law
• Romano-Germanic Civil Law
* Mixed Civil and Common Law
Nordic Law
Non-Soviet Socialist Law
Islamic Law
? Not Determined

Fig. 2
Fig. 2 (continued)
The Occidental Group

Among the Occidental group of legal systems (Table 1), differences among them are fewer than similarities. Each of these systems is a product of Western civilization. The differences in philosophical background, however, distinguish two significantly different principal families of legal systems (Anglo-American Common Law and Romano-Germanic Civil Law), and the difference is significant for understanding certain aspects of subsequent and consequent legal reception and legal prevenience.

The Anglo-American Common Law

A people without history
Is not redeemed from time, for history is a pattern
Of timeless moments. So, while the light fails
On a winter's afternoon, in a secluded chapel
History is now and England.

--T. S. Eliot, The Four Quartets

The Anglo-American (Anglican) Common Law family of legal systems includes all those national systems derived from the English Common Law (Fig. 3). On an intramundane level, Natural Law enters the Common Law through human action in relation to actual cases at issue between actual persons. In this respect, the Common Law is intramundane (wordly) in that it is grounded in man's experience over many generations. This accumulated experience, case upon case, amounts for most points at issue to a description of practicability, but one that remains constantly open to the unlimited subtlety and nuances of historically unfolding, novel experience (Landes and Posner, 1976). Because the Common Law system evolves through human action, an histor-
Table I. A Geopolitical Classification of Legal Systems

I. The Occidental (Euro-American, Western) Group
   A. The Anglo-American Common Law Family (Human Action)
   B. The Romano-Germanic (Continental, Civil Law) family of legal systems (Human Design)
      1. Latin sub-family
      2. Latin American sub-family
      3. Germanic sub-family
      4. Nordic sub-family
   C. Mixed Jurisdictions

II. The Socialist (Communist) Group
   A. Soviet Law (and People's Democracies following the Soviet legal model) (Human Design)
   B. The Law of the Chinese People's Republic
   C. The family of legal systems of the People's Democracies not following the Soviet legal model.

    A. Islamic Law
    B. Other
Fig. 3 Common Law (including Mixed Jurisdictions)
ical approach is necessary for understanding the Natural Law ethic that inheres in the open system of the Common Law tradition.

As the geomorphologist must of necessity be versed in geology, so must the geographer interested in geojurisprudence be familiar with various aspects of jurisprudence and philosophy of law. It is necessary, in order to grasp a proper understanding of the English Common Law to engage in a serious, careful, and extensive review of its history. This approach is essential because of the evolutionary nature of the Common Law, which can only be described in an historical fashion.

The Character of the Common Law

The Common Law developed in the royal courts (such as King's Bench, Common Pleas, and Exchequer) and was administered through the rigid Common Law forms of legal action that prescribed the relief to be given when certain facts had been established. The emphasis of this accumulation is evident in the extensive concern with procedural law in the form of special writs: certiorari, habeas corpus, mandamus, prohibition, and quo warranto (Hayek, 1960, pp. 218-19). Dissatisfaction with the rigidity of Common Law remedies gave rise to equity, a separate body of law that was supposed to represent the king's conscience (Cribbet, 1975). As a general rule, equity and common law were subsequently merged in most Common Law systems. Because the creation of English courts was an immemorial prerogative of the crown and because all justice emanated from the king, the Common Law developed as an essentially public law formed primarily by judges in
resolving individual conflicts (Lyon, 1960). The legal rule is thus intended to provide a just settlement of an existing issue, rather than to formulate a prospective rule of conduct. "The chief concern of a common law judge must be the expectation which the parties in a transaction would have reasonably formed on the basis of the general practices that the ongoing order of action rests on" (Hayek, 1973, p. 86). From the case law, judges derived binding judicial precedents that were frequently applied according to the doctrine of stare decisis (particularly during the eighteenth and nineteenth centuries), the policy of courts to abide by precedents and not disturb a settled issue. The doctrine of precedents was based on the judgement of causes by principles reached inductively from the judicial experience of the past and not by the sovereign will (Pound, 1921). This doctrine was tempered by the use of legal fictions, special writs, and new judicial remedies. In the case of economic monopolies, for example, it was contended that "if a grant be made to any man, to have the sole making of cards, or the sole dealing with any trade, that grant is against the liberty and freedom of the subject, that before did, or lawfully might have used that trade" and, consequently, against the principles of liberty embraced in the Common Law tradition regarding commercial transactions (Coke, 1809, p. 47).

The Common Law emerges from looking to precedents of human experience, incorporated into the judicial process, that provide rules of universal significance that are applicable to new cases. Emphasis is placed on preserving a just civil order, rather than on designing
a moral basis for society. The civil order that is thus maintained is not a designed state of things, but the regularity of a process that rests on some of the expectations of the acting persons for whom the law provides protection from interference by others; that is, two parties argue the justice of some specific act or relationship between themselves. For this reason, it is a spontaneous order of action established on laws that articulate already observed practices or established rules. This spontaneous order of human action exists independently of the will of any particular human or of any central design, because it is grounded in a common cultural tradition formed by the similar responses of individuals to particular circumstances that give rise to common rules that delineate some expectable outcome of their behavior.

The Common Law, therefore, consists of purpose-independent rules that affect the conduct of individuals and may be applicable to any number of further actions (Hayek, 1973). By defining the protected domain of each individual or party, an order of actions arises within which individuals can make feasible plans. For the Common Law, as a result, civil order rests on a theory that makes the undesigned results of individual action the central concern, hence "the result of human action, but not of human design" (Hayek, 1969). In other words, the Common Law evolves out of centuries of judicial decisions formulated on the basis of what the people believed to be just. "The fountain of justice represents nature, but to draw rules gradually from that fountain takes a good deal of experience and art" (Wu, 1955).

On the basis of this past cultural experience, the Natural Law
ethic enters the Common Law on a metaphysical level no less than in
the empirical level inherent in the human action. One noted scho-
lar of the Common Law, John Wu, (1951, p. 40), has even gone so far
as to assert: "The spirit of the Common Law is the spirit of Chris-
tianity." Indeed, equivalents of Natural Law or implicit Natural
Law are found in the teachings of Christ (Voegelin, 1971; Wilder,
1946). "[W]hile the Roman Law was a death-bed convert to Christian-
ity, the Common Law was a cradle Christian" (Wu, 1954, p. 14). The
spirit of the Common Law is believed by some to be the spirit of
Christianity because Christian teaching and exegesis revealed a gen-
eral system of morality, the detailed application of which could be
separately discovered by use of reason in the context of human ac-
tion. The Common Law is a system whose deepest foundations and la-
tent principles includes many also found in the Christian philosophy
of the Natural Law. Either in origin or in essence, then, the Com-
mon Law is construed by some scholars to be a system of Christian
jurisprudence.

The Modern Emergence of the Common Law

During the rule of Henry III (1216-1272), the main outlines of
the Common Law were drawn. It was in this era that Henry de Bracton,
"Father of the Common Law," wrote the classic legal treatise De Legi-
bus Et Consuetudinibus Angliae, which has been described as "the
crown and flower of English medieval jurisprudence" (Pollock and
Maitland, 1923, p. 174). Bracton collected and studied the past de-
cisions of the King's Bench, and from them extracted the rules of law
that were therein reflected. From this case-law perspective, Bracton formulated a truly Christian philosophy of the Common Law. He argued that the function of the Common Law, acting in conformity with the principles of Natural Law, was to realize the goal of free men living in the Christian fellowship of a free community. As a consequence, the king, as God's vicar and minister on earth, has the responsibility of doing justice to all so that his subjects could live honestly, causing no injury to others, each receiving his due and making his reasonable contribution in return. Although the king was above the people, he was below God and under His Law. "There is no king where will, and not the law, wields dominion" (Bracton, 1268, p. 56). According to Bracton, judgement and counsel of justice were the essence of law, and not will or force. Therefore, the "prudence of law perceives, and justice renders to each what is his due. For justice is a virtue, and prudence of law is a science" (Bracton, 1268, p. 36). The will of man cannot alter the nature of things, nor can the rules of human law derogate from Natural Law. Bracton's definition of law and principles of sanction is a synthesis of what had gone on before his time in the development of the Common Law and in the growth of Christian thought.

Bracton's contribution to the doctrine of precedents and the doctrine of supremacy of law were, in themselves, influential in the development of the Natural Law ethic in the evolving Common Law. Both doctrines were based on an idea of law as a quest for the justice and truth of the Creator. The doctrine of precedents was based on
on the judgement of causes by principles reached inductively\textsuperscript{1} from the judicial experience of the past and not by the deduction from rules established arbitrarily by the sovereign will (Pound, 1921). The doctrine of supremacy of law bound the sovereign and his agents to act upon the principles of Natural Law and reason.

Between the thirteenth and fifteenth centuries, lawyers who had been organized in the Inns of Court, private associations of lawyers that had the exclusive privilege of calling men to the bar, and Chancery, collegiate bodies similar to those of Court, assimilated the essential doctrines of St. Thomas Aquinas into the course of legal study. While strengthening the tradition of the Common Law as a system of rules preserved in case decisions, the Inns also re-vitalized the Natural Law ethic, inherent in the Common Law (Wu, 1954).

With the fifteenth century, there came another high-water mark in the advance of the Natural Law ethic in the Common Law tradition. John Fortescue, who had been educated at the Inns of Court and was a declared desciple of Acquinas, stressed the supreme importance of the Natural Law as a fundamental law to which all other laws must conform. He rejected the old Roman precept that whatever pleases the sovereign has the force of law, because the Natural Law, as revealed in the Old Testament and the Gospel, was the supreme authoritative source of law. "For no edict or action of a king, even if it has arisen politickly,

\textsuperscript{1}The inductive used here denotes a summary and intuitive historical inference by a judge that in no wise run's afoul of Popper's (1957, 1961) strictures against induction in science.
hath ever escaped the vengence of divine punishment; if it hath pro­
ceed from him against the rule of Nature's Law" (Fortescue, quoted in Wu, 1954, p. 23). Making extensive use of the writings of St.
Thomas, Fortescue wrote the monumental De Natura Legis Naturae, in which he contends that, in the final analysis, Natural Law is the
fountain of justice and the source of all just human laws.

During the Tudor and Stuart eras began the struggle for the soul
of the Common Law. In the reign of Henry VIII (1509-1547), the growth
of Natural Law and Common Law were stunted. The Reformation Parlia­
ment, seeking to divest the Pope of authority over properties of the
Church in England, made the Crown the Supreme Head of the Anglican
Church, with the power to reform and redress all errors and heresies
in the kingdom. By statute, it was made a treasonable offense for
anyone to so much as challenge the civil and ecclesiastical privi­
leges of the king. It was under this enacted law, in derogation of
Common Law, that Thomas More (1478-1535) was indicted and convicted
of treason. In his defense, More condemned the act of Parliament as
contrary to the Natural Law ethic of Common Law. Acts of Parliament,
under the guise of the English Reformation, assumed a position of
authoritative supremacy and were thus set adrift from Natural Law.
The result is historically summarized by Maitland (1907, pp. 192-93):

In 1535, the year in which More was done to death,
the Year Books come to an end; in other words, the
great stream of Law Reports that has been flowing
for near two centuries and a half, ever since the
days of Edward I, becomes discontinuous and then runs
dry. The exact significance of this ominous event
has never yet been fully explored, but ominous it
surely is. Some words that fell from Edmund Burke
occur to us: "to put an end to the Reports is to
put an end to the law of England."
Even though the sixteenth century witnessed the near fatal blow to the presence of Natural Law in the Common Law in consequence of the Parliamentary assertion of law as an expression of sovereign will, the force of Richard Hooker (1554-1600) prepared the way for a renascence of Natural Law thought in the following centuries. From his classic treatise, *Of the Laws of Ecclesiastical Polity*, came a resounding pronouncement on Natural Law (1593, Vol. I, p. 6; III, p. 9):

This [Natural] law we may name Eternal, being that order which God, before all ages, has set down with Himself to do all things by. The [Natural] laws do bind men absolutely even as they are men, although they have never any settled fellowship, nor any solemn agreement among themselves what to do or not to do. Human laws are measures in respect of men whose motions they must direct. Such measures have also their higher rules to be measured by: which rules are two, the law of God and the Law of Nature. So that laws must be made according to the general law of nature.

The Renascence of Natural Law as an articulate Common Law tradition was largely embodied in the person of Lord Edward Coke, who reasserts the claim that Crown and Parliament are subject to and limited by the Natural Law. Furthermore, Common Law judges have both the power and the duty to control and annul acts of Parliament determined to be "against common right and reason" (Coke, 1610b). The dimension of Coke's influence in the revival of the supremacy of Natural Law over sovereign will justly earned for him the praise that "what Shakespeare has been to literature, Coke has been to the public and private law of England" (Holdsworth, 1938, p. 132). In Calvin's Case, Coke proclaims that "the law of nature is part of the law of England," "the law of nature was before any judicial or municipal
law," and "the law of nature is immutable" (Coke, 1610b). To Coke, the Natural Law is:

That which God at the time of creation of the nature of man infused into his heart, for his preservation; and this is lex aeterna, the moral law, called also the law of nature. And by this law written with the finger of God in the heart of man, were the people of God a long time governed, before the law was written by Moses, who was the first reporter or writer of law in the world.

In its practical application during the colonial era, the Natural Law emerged as the dominant aspect of the Common Law: "Conquered heathen countries at once lose their rights or laws by conquest, for that they be not only against Christianity but against the law of God and of nature contained in the Decalogue" (Coke, 1610b). This decision would have a far reaching effect in the global diffusion of the Common Law during the coming age of British imperialism.

From the view of the judge, Coke maintains, civil and criminal cases are to be determined in a court of justice according to the law and custom of the realm, including the inherent Natural Law ethic. In resolving individual conflicts, there was the recognition that Natural Law must be supplemented by human law, hence the need for a body of common law.

Arguing from a Thomistic position, Coke maintains that, while the underlying necessity of the general principles of Natural Law existed, remoter conclusions and the particular determinations of the Natural Law are a matter of human law, which depends upon the experience and study of human action embodied in the Common Law. For Coke, the Natural Law (law of reason) and the Common Law (law of the land) form a continuous series.
Greatly influenced by Coke, Lord Holt extended the Natural Law ethic inherent in the Common Law, in various decisions concerning colonial administration of English justice. Illustrative of Holt's approach is his distinction between application of English Common Law in settled colonies of British subjects from its application in conquered lands already settled by other people. In the settlement, "All laws in force in England are in force there" (Holt, 1694). In conquered territory, however, "the laws of England do not take place there, until declared so by the conqueror;" and, if pagan, "their laws by conquest do not entirely cease, but only such as are against the law of God; and in such cases, where their laws are rejected or silent, the conquered country shall be governed according to the rule of natural equity" (Holt, 1694). This consideration for the customs of a folk in an alien land is compatible with the British colonial policy of indirect rule and is one of the qualities of the Natural Law ethic that emphasizes the Common Law's tolerance for diversity among the laws of man not in derogation of Natural Law.

By the eighteenth century, the conception of Natural Law as rooted in the order of the universe and applicable to man as a component of that order was firmly entrenched in the form and substance of the Common Law. Identifying the *ius naturale* (Natural Law) with *ius gentium* (law of nations), Lord Mansfield (17-18), extended the customs and usages of the international merchants as Natural Law applicable in Common Law courts (Mansfield, 1759). Recognizing the actual constraints of the world in which the law performed, Mansfield acted in the spirit of the Natural Law when he incorporated usages of
international trade into the Common Law. After all, the Natural Law ethic holds that the Common Law should constantly adapt to the changing conditions of civilization. Lord Mansfield further articulated the Natural Law ethic of the Common Law in the area of quasi-contracts (Mansfield, 1769). The obligation arising from such a relation is invoked by a breach of Natural Law. Mansfield sought to extend the existing forms of action to new situations when appropriate on the basis of "natural justice and equity."

The eighteenth century was also the age of William Blackstone, Edmund Burke, and Adam Ferguson. Blackstone, Oxford's first professor of English law, wrote the leading text for Inns of Court, professors of law at Oxford and Cambridge, and learned judges, entitled *Commentaries on the Laws of England*. To Blackstone, the Common Law was the nearest approach, however imperfect, to Natural Law because it had grown out of the experience and observations of many generations of wise men.

The Scottish evolutionary rationalists (Ferguson and Thomas Reid, among others) and their English colleagues (Blackstone and Burke, among others) during the eighteenth century temporarily deflected the onslaught of Continental Gnosticism in legal thought; but the ominous rise of legal positivism during the nineteenth century resulted in a renewed struggle for the soul of the Common Law, a continuing struggle that often finds the Natural Law tradition at bay. The constructivist approach attained a certain measure of ascendency in the analytical jurisprudence of John Austin, to whom every rule of law must be derivable from a conscious act of legislation. Austin's analytical positiv-
ism partly derived from Bentham's utilitarianism of the early nineteenth century. During the twentieth century, legal positivism, sociological positivism, and policy science have greatly eroded the degree of Human Action present in the Anglo-American Common Law.

The Common Law Judge

The primary authoritative source of law rules in a Common Law system lies in judicial decisions that serve as precedents drawn from human experience. In that way, rules of just conduct emerge from the efforts of judges in deciding disputes. The constant practice of articulating rules in order to distinguish between the essential and the accidental in the precedents that guide him, produces in the Common Law judge a capacity for discovering general principles rarely acquired by a judge who operates in the Civil Law tradition with a supposedly complete catalogue of applicable rules before him (Hayek, 1973). Because he is called on to correct disturbances of order, the judge formulates rules as an institution of a spontaneous order. The judge, therefore, always finds such an order in existence as an aspect of a continuous flow of events in which the individuals are able to pursue their plans because they can form plausible expectations about the actions of their fellows. Judge-made law necessarily possesses certain attributes that the decrees of the legislator need not possess, except insofar as the legislator takes judge-made law for his model.

Through decisions in case after case, judges develop a body of rules of conduct that effects and nurtures an efficient order of ac-
tions. The judge articulates and preserves an undesigned order that is based on the expectations of its subjects, rather than the will of authority. These judges confront novel cases by the application of principles discerned from the ratio decidendi of previous judicial decisions. The judicial process thus helps to adapt the social order to circumstances upon which the spontaneous order grows. By upholding those rules that have worked in the past, judges render more certain the expectations of the members of that society. The outcome of judicial effort will be a characteristic instance of those "products of human action but not of human design" in which the collected experience gained by the unfettered experimentation of generations embodies greater knowledge than was possessed by any one person or coherent committee of persons at one sitting (Hayek, 1969). The judge is committed to upholding the principles on which the existing order is founded. "The trained intuition of the judge continuously leads him to right results for which he is puzzled to give unimpeachable legal reasons" (Pound, 1936, p. 52). In the words of the eminent American jurist, Oliver W. Holmes, Jr. (1963, p. 52):

> The life of law has not been logic, it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have a good deal more to do than syllogisms in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.

And, in terms of liberty, Roscoe Pound (1926, p. 97) had this astute observation concerning the judicial process and its relation to society:
The problem of law is to keep conscious free-willing beings from interference with each other. It is so to order them that each shall exercise his freedom in a way consistent with the freedom of all others, since all others are to be regarded equally as ends in themselves.

To recapitulate, the law that emerges from judicial decisions consists of a body of rules regulating the conduct of individuals towards each other, applicable to an indeterminate number of future cases and delimiting the boundary of the protected domain of each person. These rules derive from the conditions of a spontaneous order that no man made. They are discovered in that they articulate already established rules of order. They are independent of any particular human will, thus the result of human action.

Under this concept of civil order, statutes tend to vary old rules. Common Law statutory enactments are generally regarded as encroachments on the common law and, accordingly, seldom abrogate the preexisting law (Smith, 1975). As a result, the judge considers legislation along with the existing rules of common law, a technique that recognizes the principle of strict interpretation of statutory law, tempered by the idea that a statute is frequently only a declaration of a common law rule (Fordham, 1950). When the technique is placed together with the function of the doctrine of stare decisis, statutory law becomes immersed in the sea of common law with considerable loss of its identity as legislation (Bayitch, 1965).

Similarly, Common Law "codifications" are actually consolidations of law already in force rather than products of creative original legislation. Codes are in effect systematic compilations, or digests,
that perpetuate the existing common law. They usually originate from static considerations, such as the practical need for a reliable compilation of statutes in force, spot codifications of areas of law because of their practical importance, the recognition of uniformity in federally organized countries, of systematic ordering of unofficial but authoritative code-like statements of the law in force (Bayitch, 1965). The lack of radical, dynamic elements in the history of Common Law codifications results from the general ineffectiveness in England and the United States of radical ideological movements that exploded as dramatic socio-political upheavals. The built-in mechanism of case law adjusts the law to changed economic and political conditions, rendering the resort to original legislative action largely unnecessary.

The inherent adjusting mechanism of the Common Law appears vividly in the economic unity in Common Law systems (Posner, 1972). The character of Common Law litigation provides a forum for a confrontation on economic issues, because the judicial process relies primarily on individuals motivated by self-interest and practical considerations rather than on altruistic reasons or legislative or bureaucratic will. The adversary system is competitive by nature, further accentuating the function of the legal system in resource allocation. In deciding cases, the judge should first determine what outcome is dictated by principles of natural justice and of good common sense (Reid, 1814) and then justify the result in terms of precedent and settled legal policies. The judge thereby generally views the parties to the litigation as representatives of activities and aims to resolve
the context in terms of the comparative value of the competing activities. The Common Law system of resource allocation, thus described, is more effective in its results than comparable legislative systems of allocation (Posner, 1972).

The importance of custom--immemorial, local, and commercial--lies in its forming the bases for the expectations that guide people's actions. Those practices that individuals depend on being observed, and have thus become the condition for the success of most activities, will generally be regarded as binding, insofar as they do not conflict with fundamental notions of natural justice and equity. Again, the fulfillment of the expectations, which these customs secure is not the result of any human will (Carter, 1907, p. 331):

The great general rule governing human action at the beginning, namely that it must conform to fair expectations, is still the rule. All forms of conduct complying with this rule are consistent with each other and become the recognized customs. All those inconsistent with it are stigmatized as bad practices. The body of custom therefore tends to become a harmonious system.

The process by which experiences engender principles of Natural Law is institutionally preserved in the judicial process of the Common Law system. The judicial process is a logically open system, which provides a method for the resolution of legal questions rather than substantive rules to be applied in all circumstances.

The technique of English law is not one of interpreting legal rules; it consists, beginning with those legal rules already enunciated, in discovering the legal rule--perhaps a new legal rule--that must be applied in the instant case. This step is taken by paying very great attention to the facts of each case and by carefully studying the reasons for distinguishing the factual situation in the case at hand.
from those in previous cases. To a new factual situation, there corresponds--there must correspond in the English legal mentality--a new legal rule. The function of the judge is to render justice, not to formulate in general terms a series of rules the scope of which may well exceed the terms of the dispute before him (David and Brierley, 1978, p. 335; italics original).

The emphasis is on distinctions between litigants, rather than the interpretation of positive law rules. Or, in the words of Eric Voegelin (1979), "Law is discovered by the judge. Law exists at the point the judge applies the law; one cannot conceptualize an abstract law in advance of the concrete case." On the other hand, legal systems based on Human Design often tend to be closed systems in which the legal question is resolved by an interpretation of an existing positive rule of law.

The Romano-Germanic Civil Law

The Romano-Germanic (Romanesque) Civil Law family of legal systems (Fig. 4) derives from Roman law and developed as an essentially private law that purports to regulate the private relationships between individuals. The culture hearth of this family, Continental Europe, remains the center of the Civil Law world today. Through diffusion and reception, the Romano-Germanic Civil Law has spread throughout the modern world.

Within the Romano-Germanic family, it is possible to divide these Civil Law systems further by noting the relative importance of Roman or Germanic elements, thereby creating a Latin subfamily (with France the principal legal system, plus Belgium, Holland, Italy, and Spain), and a German subfamily (including West Germany, Switzerland, and Aus-
Fig. 4 Civil Law (excluding Mixed Jurisdictions and Soviet legal model)
tria). The legal systems of Latin America should generally be regarded as part of the Latin subfamily of the Romano-Germanic legal family. However, the Anglo-American Common Law (especially that of the United States) has so profoundly affected the development of the public law of the Latin American systems that they may be suggested as separate category in this geopolitical classification. Similarly, the legal systems of Scandinavia are closely related to the Germanic subfamily of the Romano-Germanic family, but important differences arising from cultural-historical circumstances justifies a separate subfamily of Nordic legal systems.

The Origins of the Modern Civil Law

The Romano-Germanic Civil Law is largely a confluence of four historical streams of thought: 1) the presence of the Natural Law as embodied in Roman Catholic doctrine and Enlightenment thought; 2) the cultural cataclysm of the French Revolution of 1789 as a political expression of Cartesian constructivism; 3) the modern codification movement as an adjunct to the rise of nationalism, and, 4) the ascendancy of legislative positivism as a dominant political ideology of the modern, nation-state.

The true Natural Law heritage of the Civil Law is embraced in the doctrine that surrounds the substantive, positive law. The ontological conception of the Natural Law refuses the distinction between the "is" and the "ought" on the ground that there exists a fundamental relation of being and oughtness. It postulates the idea of an "order of reality" of which human, positive laws are but a part and from which
alone they derive their validity (d'Entreves, 1972). Perhaps, the clearest form of doctrine expressing this perspective was associated with the tradition of Natural Law enunciated by St. Thomas Aquinas.

In the view of St. Thomas, Natural Law is the rational creature's participation in the Eternal Law, which is the divine reason and wisdom that directs all movements and actions in the universe. The Natural Law is thus really the divine reason, or Eternal Law, insofar as it applies to man and is knowable to him through exercise of his rational faculty. The most fundamental precept of this Natural Law is that good is to be done and evil to be avoided. According to St. Thomas, it is the voice of reason in man that enables him to glimpse the Eternal Law and thus make it possible to distinguish between morally good and bad actions.

In the Thomistic view, human laws are "an ordinance of reason for the common good, made by him who has the care of the community, and promulgated" (Aquinas, qu. 90, art. 4). However, in order for a legislative decree to possess the quality of law, it must conform to the Natural Law, otherwise it is but a perversion of the law. Laws that are repugnant to the Natural Law maintain no legitimacy as law.

Unfortunately, this Catholic view of Natural Law was secularized as it passed through the Enlightenment. The new school of natural law conceived of civil law as the law of Reason. Only the sovereign was capable of defining and reforming law; it was the sovereign who possessed the ostensible power to enunciate principles of natural law. As Cambaceres (1753-1824), the principal legal adviser to Napoleon, observed, it was easy to change this purpose, and legislators, outside
any consideration for Natural Law, were to use this power to transform the basis of society (David and Brierley, 1978, pp. 60-61).

This secularization of Natural Law received great impetus from the French Revolution of 1789 and from the prestige of Napoleonic expansion. Natural Law principles, which were articulated in the Roman Catholic doctrines and applied as customary law, were preserved only in so far as they served "Reason", the new god of the Enlightenment; and they were in any case severed from their Engendering Experiences by the excesses of the French Revolution and its aftermath of legal constructivism and other departures from the true order of experience. As Napoleon is reported to have remarked concerning the projet (draft) of the French Code civil (Napoleonic Code), "Who has the place of God on earth? The lawmaker." Accordingly, the same French parliament that drafted the Napoleonic Code also legislatively decreed that God did not exist (Scott, 1827, vol. 1, ch. 17). The English parliament, two centuries earlier, at least limited its urge to hubris to killing the legate of God (St. Thomas More) rather than disposing of God Himself.

The French Revolution was a time of creative tension, an intense cataclysm that swept the old order before it, so that those who had prepared patiently could build according to their own design (Camus, 1956, pp. 112-32). The Revolution of 1789 presumed the ideal of a rational social order, a necessary pre-condition for successful codification (David, 1972, p. 12). The intellectual force was that of secular natural law, reason and rationalism (Merryman, 1969, pp. 16-17). "Ideological passion displaced reason; Revolutionary ideas be-
came dogmas; the revolution became utopian" (Merryman, 1969, p. 19). As with subsequent democratic revolutions, the belief was fostered that the law was made by people aspiring to their designs and desires (Dietze, 1973, p. 162):

Only law made by the people was recognized as natural law, be it made through transmutation of higher law into positive norms or what happened more frequently, through the creation of such norms irrespective of higher law.

Positive law, therefore, approximated secularized natural law, to the extent that it deferred to Natural Law to all.

Relying on secular theories of natural law, leaders in the French Revolution sought to devise a logical code, the provisions of which were to embody rational rules of ideal justice. The Napoleonic Code captures in codified expression the concepts of the French Revolution. The Code relies on natural law conceptions of liberty and property, but the influence of the Enlightenment led to a reformulation of traditional Roman law elements, Christian ideas, and customary practices along individualistic lines. This transformation was accomplished with the aid of doctrinal contributions from the Renaissance and the Enlightenment (Cueta-Rua, 1976-77, p. 651).

The redactors (drafters) of the code perceived no inherent contradiction between positive law and natural law. "There was then and there is still today, a dialectical tension between Positive Law, the law enacted, posit, by the state, and the Natural Law, the law based on human reason, or in the nature of things, or revealed to men by God. That dialectical tension is to remain forever" (Cueta-Rua, 1976-77, p. 655). Article I of the projet of the Napoleonic Code affirmed
the existence of Natural Law, which, as natural reason, was considered the source of all positive law (Dietze, 1971, p. 149). This article was omitted from the final version of the code, a lapse that was, perhaps, no mere oversight. The opponents of Natural Law may have considered its absence to mean that a "higher" law than the positive law was no longer to be presumed to exist. The proponents, perhaps naively, assumed that the legislator could act in no other way but in conformity with Natural Law. Legislation, they believed, would constitute a transmutation of Natural Law.

If law is made by the people through their representatives, it could not, in Revolutionary theory, be contrary to Natural Law. Democratic legislation was thus left unchecked by consideration of a law beyond that of man. It is tellingly ironic in retrospect the French code, which was largely the product of the school of natural law in which principles were derived from human reason, later was so readily appropriated by the logical positivists.

The Civil Law and Legislation

> God needs time just as much as your or I
> To get things done, Reformers fail to see that.
> -- Robert Frost, Masque of Reason.

Although Civil Law legislation frequently reflects in its substance the law that preceded it, it is, nevertheless, in essence, a new departure. The idea of legislation as the supreme source of law was a basic precept of the Jacobins during the French Revolution and was articulated by them in five, successive, legislated codes. The Jacobins contended that egalitarian notions could be best promoted by
the exercise of legislative power at the expense of other sources of law that were thought to be founded on the idea of the inherent inequality of social classes (Yiannopoulos, 1971). For example, egalitarian spokesmen naturally sought to bring about a more nearly equal division of property, principally through the elimination of the customary feudal tenures of the ancien regime (which were believed to have prevented individuals from acquiring property) and through the legislative institution of forced heirship.

In the Civil Law, legislation is the "one and only authoritative source of [positive] law to which all others are subordinated" (Dainow, 1974, p. 7). Civilian legislation is liberally construed through analogy, doctrine, and jurisprudence (Dainow, 1974; Dietze, 1973). La doctrine is formulated by legal scholars for the purpose of working for the progress of legal science and the advancement of law (Dainow, 1974). What Civilians call "jurisprudence" is formulated in the course of the practical application and administration of the law, which is principally the province of the courts. Inasmuch as the courts are subordinate to the legislature in the Civilian system, it is an inevitable consequence that sometimes legislation becomes an important tool of centralized government. This utility of the Civil Law in centralized reform produces an ever-increasing bulk of legislation and ever more detailed penetration of that legislation into all facets of the subjects' lives. Such pervasive governmental intervention through legislation frequently is said to be justified in the name of equality and national security (Mises, 1969). The objectives of a collectivist government, such as a totalitarian-socialist or welfare state,
are only attainable through massive legislation. Allocation of re-
sources by legislation requires no acceptance of the guidance pro-
vided by the efficiency criterion that is characteristic of the ad-
versary system. As a result, legislative tools for redistributing
wealth are much more flexible and powerful than the judicial (Posner,
1972; Mises, 1977).

The Civil Law and the Codification Movement

In the late eighteenth and early nineteenth centuries, various
countries began to codify the Civil Law. By the end of the nineteenth
century, codification and nationalization of the law had become typi-
cal of Civil Law systems. Prior to the codification movement in Eur-
ope, the laws of any state commonly consisted of a multiplicity of
local and customary laws. From the eighteenth century on, there ap-
peared a decided and effective trend toward national unification of
diverse local laws through codification.

By contrast to the gradual growth of the Common Law, the Civil
Code was the product of the age of rationalism and constructivism.
The codes of this time, such as the French Civil Code (1804) and the
Austrian Civil Code (1811), were not digests or restatements of law,
but a means of innovation by which principles based in "reason" were
to form the basis of law. The result was a systematic and authorita-
tive code marking a new start for the legal life of an established
nation-state by giving effect to a particular philosophy.

The natural law doctrine merged in the nineteenth century with
the historical and programatic elements of the law in force in the
eighteenth century codifications. This is evident in the ability of
the Civil Law to absorb rational and ideological elements (Cueta-Rua,
Napoleonic Code animated and encouraged the modern codification move­
ment and an onslaught by legal positivism (Hayek, 1976). The Aus­
trian Civil Code of 1811 presented a formal expression of the linkage
of reason with legislative will (Cueta-Rua, 1976-77, pp. 651-52).
The legal positivists had prevailed.

An attempt was made to reconcile the natural law doctrine with
the German historical school of Friedrich Karl von Savigny (1779-1861).
The effort actually diminished the role of Natural Law because dir­
ecting natural law doctrine toward social aims differs little from
the direct use of positive law in realizing such aims. Savigny ar­
gued the dangers of legislation in his debate with Thibaut, a lead­
ing proponent for the codification of German law (Dietze, 1971, p.
157). That Savigny's historical school, with its belief that the law
of people was an historically determined product of a people's devel­
opment, was doomed to failure; a contemporary remarked, "A simple
stroke of the pen by the legislator, and whole volumes of learned com­
mentaries become obsolete" (Herman von Kirchman, quoted by Dietze,

The historically oriented German Civil Code of 1896, prompted by
the unification in 1871 of the Deutsches Reiches, reflected the influ­
ence of Savigny. The codification of the historical principles of
German law in an effort at legal unity, however, required legislative
supremacy. It is rather ironic that even in the year of actual pro-
mulgation of the German Code, it was legislation that required the monarch and legislature to act in conformity with principles of justice and natural law (Dietze, 1971, p. 150). By the time of the formation of the democratic Weimar Republic, however, logical positivism explicitly dominated German legal culture. Legislation was no longer restricted by Natural Law (Dietze, 1971, p. 151). Gesetz ueber Recht! ("Legislation above the Law!). The Rechtstaat had become the Staatrecht; the law no longer preceded the state, but the state came before the law. The "Lawful State" became the "State Law."

Codes and Modern Reform Movements

Civilian codes usually emerge from strongly ideological political movements and bear the imprint of these reform programs transposed into statutory language. Codification is one of the most potent weapons of law reformers. The French Civil Code, for example, was received in Belgium, the Netherlands, the Rhenish Provinces, Luxembourg, Baden, Poland, and Italy, just to name a few of the receiving countries in Europe. The law of these codes was, at least partly, derived from abstract, rationalistic deliberations made in times when new ideologies had erupted in revolutions that essayed to change the political and economic structure of the existing civil order by the imposition of the legislative will of the dominant political power (Bayitch, 1965). The rise of the secular religion associated with the Code civil has been described recently in eloquent terms by a Civilian:

If rationalism was the mother of the Code Napoleon, then
hubris was its father. By means of the Cartesian method, men might become masters and possessors of nature, but implicit in such an achievement was the potential usurpation of God's authority. Descartes' philosophy, because it stressed self-reliance, subjective certitude, and the untrustworthiness of the visible natural order, constituted a manual for revolutionaries. Men would become godlike as they generated nature from their own mental processes and forced it to change as they willed. For the French revolutionaries, this view of man's unlimited power implied the possibility of abolishing the complex feudal restraints of the Ancien Regime by means of a coherent body of legislation derived from the presumably immutable principles of human interaction. The Code Civil was the consequence of utopian vision (Herman, 1979, pp. 389-90).

Every considerable social revolution produces its crop of laws affecting, for example, land holdings. In the case of revolutions based on equalitarian ideology and a strong central government, such laws, whether calculated or not, break up or prevent the rise of large estates, restrict holdings to small acreage, and limit the agricultural occupancy to those modes in which small holdings pay (Whittlesey, 1935, p. 457; see also, Wittfogel, 1957). Indeed, the most impressive codifications (put forward as expressions of legislative design) emanate from authoritarian regimes that deny freedom of political and economic action, and taking instead the form of one, all-embracing, official doctrine, such totalism finds personification in an absolute ruler, an unbridled legislative body, the dominant (often, sole) political party, or the government's bureaucratic agencies (Bayitch, 1965).

Because Civilian codes are original and "break" with the past, they can serve as tools for the perfection of society through legislative design, as models for the reorganization of civil order. Be-
cause codes also function as symbols of sovereignty and of a new geopolitical alignment, codifications have also attended changes in the international status position of nations, such as the achievement of national independence; sharing a code gives tangible form to the sharing of an ideology. The legal positivism that often reposes in a code, betokens a change in which "law ceased to be identified with justice and was now associated with the legislative sovereignty of each nation" (David and Brierley, 1978, p. 63).

Legislation, therefore, is the primary, almost exclusive, source of law rules in the present day Civil Law. In their search for legal rules, Civilian jurists look first to legislation. The question is not, "Does the positive law apply?", but, "What law to apply?" "Their task seems to be essentially one of discerning, by means of varied methods of interpretation, the solution which in each case corresponds to the intention of the legislators" (David and Brierley, 1978, p. 94).

Supplements to Legislation Under the Civil Law

Legislation is not, however, despite its primacy, the exclusive Civilian source of the law. Custom is a secondary authoritative source of law rules. The positivists relegated custom to a low level. Custom may enter into a legal relation in two ways, 1) to indicate to the jurist a just solution in the interpretation of legislation and 2) to apply as the law rule when specific legislation is absent on the point in question. In the Civilian context, custom has been defined as the result of "a long series of actions constantly repeated, which have by such repetition, and by uninterrupted acquiescence,
acquired the force of a tacit and common consent" (La. Civil Code, Art. 3). Said differently, custom amounts for the Civilian to what might be called "pre-parliamentary legislation" and in that lies its legitimacy. In any case, the Civilian legal framework is a logically closed system in that it denies fundamental status to custom and polity. The code is viewed in a formal sense, as an act of legislative will; the law-giver may (at least, to the positivist) will anything that he likes within the code's territorial boundaries.

The two principal persuasive sources (as distinct from authoritative sources) of the law are judicial decisions and doctrine. Decided cases do not create rules of law; that is the exclusive province of the legislature. They are important in two respects: 1) they may be used to assist in the interpretation of legislation, and 2) they serve as an aid to maintaining a certain predictability in the positive law. Legislation is supplemented by the courts. Judges are permitted little discretion in interpreting laws. They must apply only the legislation. French judges are, indeed, required to cite the text of laws on which their decisions are based (David and DeVries, 1958, p. 15). The absence of judicial review (under which, laws can be nullified by the judge) leaves no test for a law's legitimacy in terms of constitutional or some other higher law. Jurisprudence is thus not a source of Civil Law rules, but rather a persuasive source, an influence on the judge in the interpretation and application of law rules. A continuous line of judicial decisions may, however, assume the binding quality of a judicial practice, a process identified as jurisprudence constante.
Doctrine is legal writing by scholars. It may influence the judge in much the same way as judicial decisions (David and DeVries, 1958, pp. 104-07). There seem also to be "supereminent principles" that help fill the gaps in legislation and, in exceptional cases, may reorient or otherwise modify the application of legislation so as to conform with the law's intended realization of social order and justice (David and DeVries, 1958, p. 117). They are, perhaps, evidence of the legal positivist's inability to escape Natural Law entirely.

In conclusion, in Civil Law systems, the authoritative sources of the law no longer derive from their engendering experiences. They have been reduced to a body of doctrine through legislation. The code only indirectly derives from the Engendering Experience of the people being governed by the code. There is, however another engendering experience, one that transpires in vitriolo, so to speak; that experience is the legislator's experience of his own hubris, and the code bears the mark of its father's lusts. When the Engineering Experience is separated from the sources of order by becoming doctrinalized, the legal process tends to be predisposed to ideological change. In the initial phase of doctrinalization, much of the engendering experience that unfolds the Natural Law (Human Action) may be preserved in the verbal content (substance) of the code, even though the connection has been broken by a turn to legal constructivism (Human Design). Afterwards, it is a comparatively easy step from an ideology that embraces a natural law doctrine to an ideology based on Marxism or most any other doctrine.
The Soviet Civil Law

The Soviet Civil Law family includes the legal systems of the Union of Soviet Socialist Republics and those people's republics that follow the Soviet legal model (Fig. 5). The Soviet legal system is established on the foundation of historical, dialectical materialism (Hayek, 1955; Popper, 1957). Under the collectivist ideology of Marxism, Soviet Law is viewed as an instrument for the reform of production and distribution and for the reform of man in the light of the Marxist prospective image of him. Within the Marxist legal structure, law functions to assist in the creation of norms of thought and action by providing an appropriate environment and by making enforcement of the law an occasion for instruction. This conditioning role of Soviet Law underscores the concern for the creation of a "Soviet morality." As a consequence, Soviet Law is focused, not on resolving conflict between individuals or competing interests, but on bringing people closer to an ostensibly classless, collectivist society.

As part of the doctrine of dialectical materialism, law is viewed by the Marxists as a reflection of economic conditions. Law is thus a form of class rule. Marx writes in his Communist Manifesto (1954, pt. II, p. 47), "Your jurisprudence is but the will of your class made into a law for all, a will whose essential character and direction are determined by the economic conditions of existence of your class." Friedrich Engels (1934, p. 63) observes, "If the State and public law are determined by economic relations, so too, of course, is private law, which indeed in essence sanctions only the existing economic re-
Fig. 5 Soviet Law (including jurisdictions with Soviet legal model)
lations between individuals which are normal in the given circumstanc-
es." That such views of law are still present in the Soviet mentality is evident in the words of contemporary writers, such as Stuchka and Vyschinsky. Stuchka asserts that law is "a system (or order) of social relations which corresponds to the interests of the dominant class and is safeguarded by the organized force of that class" (Hazard, 1951, p. 20). Similarly, Vyshinsky, who was once the Attorney-General of the U. S. S. R., sees law as a system of norms designed "to guard, secure and develop social relationships and social orders advantageous and agreeable to the dominant class" (1948, p. 50).

The socialist concept of law can be directly traced to the movement of legal positivism, which views law as an expression of legislative will (David and Brierley, 1978, p. 94). In this respect, it is not particularly surprising that both Karl Marx and Vladimir I. Lenin received their legal educations in countries of Romano-Germanic Civil Law. "The danger of rupture within the [Romano-Germanic] family is particularly great when a regime is established in one country which aspires to being truly revolutionary and which, not content with merely remodeling the country's institutions, may go so far as to repudiate our [Civilian] basic philosophical concept of law" (David and Brierley, 1978, p. 68). Before the Russian Revolution of 1917, Russian law was in the Romano-Germanic Civil Law family. To the Russian jurist, the legal rule was, essentially a rule of conduct prescribed for individuals and formulated by legislators, not by judges. Even though Russian law was incompletely codified, the seeds of legal positivism, and hence, of Human Design, had been sown. This prepared
the way for an ideological shift enhancing Marxist views of law.

"In appraising the world-wide influence of the Civil Law, it must be remembered, finally, that certain Civil Law elements remain alive in the legal systems of those nations which today belong to the communist orbit" (Schlesinger, 1970, p. 266). A Civilian technique used in a Soviet legal system, however, frequently undergoes a subtle change of purpose. Nevertheless, a lawyer trained in the Civil Law may disagree with the ideology, in lieu of substantive Natural Law, that permeates the text or with the implementation of these codes; but their structure, terms, and technique will be reasonably familiar to him (Schlesinger, 1970, p. 266). The forms of legal systems that articulate a civil order based on Human Design are predisposed to function in a new context when a change in the political ideology external to the legal process results in the introduction of any new legal system that is also based on human design.

Their legal philosophy of Human Design and legislative will predispose Civilian systems to follow the Soviet legal model when they come under Communist, or "Socialist", rule. This legal prevenience appears in the similarity of conception of legal codes in both the Civil Law and Soviet Law as models of social organization. Both systems aim at the civil organization of man and society through legislative design and central planning.

In the Soviet Union, the revolutionary transformation of society through legislation is presented as being imposed by the "natural laws" of historical materialism. The will to transform society is found at the very heart of Human Design. Communists of the Marxist-Leninist
persuasion will only qualify as law those rules of conduct laid down and sanctioned by the state. Such legislation is believed to be conditioned by the historic unfolding of law in its social or natural context. The Marxist theory of law is generally a variant of positivist doctrine that rejects Natural Law. But a clever semantic illusion is present. Even though in principle, Marxism appears to differ from a pure positivism in that it is willing to acknowledge the existence of historical limits to legislative power; in practice, it remains a truly positivistic conception of law and human design prevails as the underlying legal and political philosophy.

The only real source for Soviet Law is the Supreme Soviet, which is legislative in nature and which construes civil order as designed according to the current conception of "Soviet truth." The preeminence of legislation has been explicitly declared. This view is reflected in the Soviet attitude towards codification. Codes are conceived of as models of civil organization that aim at the perfection of society no less than individuals, through central planning and legislative design.

Judicial proceedings serve as opportunities to administer authoritative instruction in the interpretation and application of Soviet Law and its "utopian" purpose. The interpretation of statutes is in the light of its purpose as envisioned by the authors. Judicial decisions, in reality, have only an educational function.

Soviet-style legal systems may be divided on the basis of their pre-Communist legal heritage. Thus, there would be one sub-family based on a Western tradition similar to the Civil Law heritage of Ger-
many, Austria, and France, and including the legal systems of Hun­
gary, Poland, Czechoslovakia, Slovenia, and Croatia. The second
would be a Balkan sub-family with a legal heritage similar to Russia
in that they were at first subjected to Byzantine rather than a
Western European influence, thus rendering weaker the attachment to
principles of law. This group includes Albania, Bulgaria, Rumania,
and Yugoslavia.

The Non-Occidental Group

Because the focus of this study is directed at the diffusion and
global patterns of Occidental legal systems, we will not consider the
non-Occidental group apart from in text discussions as appropriate.
The global influence of Occidental legal systems—Common Law, Civil
Law and Soviet Law—reduces the significance of the non-Occidental
Law. The former included the law of the Chinese People's Republic
and those legal systems of the People's Democracies not following the
Soviet legal model, such as Albania and Cambodia (Fig. 5); the latter
group is virtually confined to Islamic Law (Fig. 6). As a true legal
system, Islamic Law is today the national style of only four juris-
dictions, Afghanistan, the Maldives, Saudi Arabia, and Yemen.
Fig. 6 Islamic Law (and submerged Islamic Law)
CHAPTER III
THE CULTURE HISTORY OF LEGAL SYSTEMS BASED ON HUMAN ACTION:
ANGLO-AMERICAN COMMON LAW

European, specifically Channel European, countries at the center of the land hemisphere, successfully implanted their laws in the whole world. Those countries are England, France, and Holland. The English Channel separates the Common Law realm of England from the Civil Law of Continental Europe. Civilian Europe approximates Whittlesey's Western Europe, less Britain (Whittlesey, 1958, p. 89, fig. 9), i.e., roughly the triangular area from Rome to Lisbon to Stockholm and back to Rome. Before the materialization of the advantage of North Sea location, Iberian Civil Law migrated to much of Latin America, preparing the way for later North Sea-focused French Civil Law. After the decline of the North Sea advantage, Soviet Law follows another Civilian trail to world influence.

The Anglo-American Common Law family of legal systems owes its existence to English law and to laws patterned after that of England (Roberts-Wray, 1966). Apart from England (the principal hearth of the Common Law family includes all the laws of English-speaking countries (including the Commonwealth with its 31 member states and 30 dependencies) and some of those countries that have been politically linked with England or the United States. Indeed, a brief review of the global patterns reflected on a map of the world's major legal systems reveals that areas of Common Law prevalence are usually either former territories that were principally settled by English-speaking ethnics or present or former territories that were either ceded to or conquered by Great Britain or the United States. Thus, the Common Law has extended from its place of origin to embrace areas geographically remote from England. This diffusion of the Common Law was accomplished by means of relocation settlement
(colonization in the classic sense of the term, where people of the same culture, language, and laws settled in an area separated by a considerable distance from a motherland) or civil colonization of an area inhabited by relatively numerous indigenous people of a "manifestly lower culture and civilization" than the motherland or whose populations had a culture and civilization as old as that of the motherland but "politically stagnant" (Kuennelt-Leddihn, 1974, pp. 341-343).

In the case of settled colonies, the reception of the Common Law by such areas as Canada and Australia takes the form of relocation diffusion in that the transplant results from the migration of ethnics. On the other hand, in the ceded and conquered colonies, the transfer of the Common Law from England or the United States to such places as Kenya or Liberia is by means of a variety of expansion diffusion that may be described as involuntary receptions. In these ways, the geographic extent of the Common Law has expanded to assume its global patterns.

**Volk Migrations**

The dispersal of Common Law traditions by means of relocation diffusion (migration) is largely the consequence of the settlement of a Common Law Volk into an area with ineffectual resistance to the legal traditions of the settlers. (Volk, in this context, designates a people who share a common mystical experience resulting from past cultural relations. This experience, in addition to being encouraged by rational consideration, is initiated by feelings and sentiments that develop the constituent individuals' belief that they are related or bound to others by a common ancestry (Mises, 1966, pp. 166-69; Newton, Newton, and Easterly, 1976). Laws are thus transmitted to previously vacant or sparsely settled frontiers occupied by indigenous peoples possessing a non-competitive legal system. Otherwise, if upon arrival, the settlers found
a land inhabited by a people having an "enlightened and sophisticated" legal system coupled with political power, then they would be only immigrants in a country whose laws applies to them as well. Even so, mere claim to title under international law of an area without effective occupation would present no bar to the effective occupation would present no bar to the effective reception of Common Law by means of migration and settlement. In Campbell v. Hall (1 Cow p. 204, 1774), for example, Jamaica was treated as a settled colony rather than one of cession, because the antecedent Spanish settlers had disappeared by the time of British acquisition.

Upon migration to a new land, British settlers carried English Common Law with them as part of their birthright as British subjects. Indeed, from a practical and pragmatic standpoint, there existed no viable alternative where no adequate system of law flourished in the land prior to their arrival. These English settlers carried as part of their cultural baggage the unwritten common law, the concept and body of equity, and the statutes of general application in force at the time of settlement. In a very real, almost tangible, way, English colonists "carried" the law. It was their personal possession by right and obligation as they left Britain, and they remained "under" another law. If no other law was encountered, they necessarily remained British subjects with their original rights and obligations as Englishmen. In so much as it could scarcely be otherwise, the law possessed a certain tangibility that necessarily had geographic consequences. Even so, the colonists carried with them "only so much of the English law as [was] applicable to their situation and the condition of an infant colony" (Blackstone, 1765, p. 106). Such was the situation with the settlement of British subjects in such places as Canada, Australia, and New Zealand.

Before reviewing a few concrete cases of Common Law transplant by relocation, a few words are in order concerning technical applications of law. In
the settled lands, common law applied unless it was demonstrated to be entirely unsuitable. An interesting example of such unsuitability as a consequence of geographic circumstances is provided in the application of law concerning water rights in the United States. The English Common Law doctrine of riparian water rights (based on rights inherent in lands contiguous to the water) was applied with little modification in the more humid parts of the eastern United States. When the same doctrine was applied to arid regions of the western part of the country, however it resulted in the prevention of widespread development of irrigated farming. In the San Joaquin Valley of California, litigation between landholders who wished to maintain riparian rights and those who desired to divert water for irrigation, retarded for decades the evolution of Mediterranean agriculture in California (Whittlesey, 1935, p. 97). Finding the riparian doctrine no longer useful, the settlers of the southwestern United States eventually abrogated parts of the inherited water-rights regime and developed the appropriation doctrine, which determined right by priority of diversion and use.

Another example from the legal history of the United States involved an owner's liability for the damage caused by his livestock to other persons or their property. In the eastern states, an individual was responsible for his cattle, as provided by the transplanted English common law of the colonial era. However, the method of handling cattle on the vast expanses of the Great Plains was different from that of farmsteads to the east. Open range and cattle drives characterized the "cattle culture" which spread north from Texas during the early and middle nineteenth century (Webb, 1936, pp. 245-47; Kniffen, 1953). The period between 1850 and 1875 was the heyday of the cattle-kings on the open range. Accordingly, in Wagner v. Bissell (3 Iowa 396, 1856), the common law rule imposing strict liability upon the owners of trespassing cattle was held not to extend to the plains states where vast ex-
panses of grassy land encouraged different practices in livestock agriculture. One can only speculate whether continued application of the Common Law liability against trespassing cattle would have retarded the growth of cattle drives and open range grazing. Speculation may also be directed to the question of the degree to which denial of the Common Law rule impeded the frontier expansion of farmsteads on the plains.

By contrast to the general acceptance of the common law, statutes (legislation) did not apply unless shown to be suitable (Unlacke v. Dickson, 2 N.S.R. 287, 1848; Wallace v. R., 20 N.S.R. 283, 1887). Even so, any rule of law, even statutes, should be considered applicable to local circumstances except on some solid ground that clearly established inconsistency (Leong v. Lim Beng Chye, A.C. 648, 1955). In this respect, even indigenous laws may at times, be viewed as "local circumstances" affecting application of the imported law (Nana Atta III v. Nana Bonsra II, A.C. 95, 1958). Of course, any law in force by reason only of the fact of settlement may be altered or superseded by the legislature of the colony or former colony, provided, of course, that such new laws do not centralize natural law and equity and that the colonial regime remains true to the Common Law. For example, the received common law practices of primogeniture and entail were abolished by statute in the several states of the United States: Georgia (1777), North Carolina (1784), Virginia (1785), Maryland (1786), New York (1786), South Carolina (1791), Rhode Island (1798), Massachusetts (1801), and Pennsylvania (1810) (Morris, 1930, p. 81). Explanations for the demise of these practices, which incidentally, were more prevalent in the southern colonies, have been given as 1) the abundance of land on the frontier, a consequence of the ratio of the number of men to share a large amount of land, and 2) the rise of fee simple possession as an expression of the idea that ordinarily men should be able to dispose of their land according to their desires (Webb, 1951, pp.
In such areas as received the Common Law by means of settlement, the
common Law will maintain continued acceptance in proportion to the degree
that certain criteria are satisfied. The migrating Volk must have a shared
heritage, including the same language (Kocourek, 1936). There is also an
eventual need for law books and the training of a legal profession in the
laws derived from the shared customs and ancient usages of the people (Wig-
more, 1928). The rise and perpetuation of the Common Law under such circum-
stances, depends on the development and survival of highly-trained, profes-
sional lawyers (Zajtay, 1975). If these criteria are satisfied, even where
changed conditions in the natural environment dictate a perceived need for in-
novation in the law, the migration of such a people will still result in the
diffusion of the pre-existing principles of law as developed in their common
cultural heritage.

The American Example

When the American colonies were first settled by our ancestors, it was held as well by the settlers, as by the judges and law-
yers of England, that they brought hither as their birthright
and inheritance, so much of the common law as was applicable
to their local situation and change of circumstances. (State v.
Campbell, 1808)

The reception of the English Common Law by the American colonies was large-
ly a consequence of the shared cultural heritage of the dominant English-speaking Volk. However, the continued growth and development of the Common Law was principally determined by external influences: 1) availability of case reports and law treatises, 2) legal training of the bar, and 3) common English language (Kocourek, 1932). These externalities not only resulted in the continued main-
tainance of the Common Law inheritance of the settlers, but provided the sub-
stance for resisting Benthamite codification efforts and the nourishment for
its transplanting to the American frontier.

To the colonists, tradition was in large part embodied in the common law, which was in essence a set of personal rights in the form of procedures that governed the exercise of sovereign power (McDonald, 1979, p. 310). It was this view of common law as tradition and custom, the inherent birthright of the English settlers, that became preserved in the form of judicial decisions and statutes. However, this enshrinement of the Common Law heritage would have perhaps, succumbed to external political movements favoring codification, but for the preserving influences of a professional bar and a body of legal literature that enunciated the Common Law tradition (David and Brierley, 1978, pp. 370-373).

Of course, the early colonial America had no regular school of law. Unless American lawyers were so fortunate as to study in England with its Inns of Court, professors of law at Oxford and Cambridge, and learned judges, they entered practice with little formal law education; i.e., they only "read" law. For their instruction, these colonial lawyers depended upon such literary sources as William Blackstone's *Commentaries on the Laws of England*. One cannot underestimate the influence of Blackstone's *Commentaries* on the early bar of the United States. From this work, American lawyers acquired knowledge of natural law, common law, equity, and "the charter rights of Englishmen." Indeed, the *Commentaries* were probably more influential in America than in the British Isles. As Edmund Burke once told the English House of Commons only a decade after the *Commentaries'* appearance in 1765, nearly as many copies of Blackstone were sold in the Thirteen Colonies as in England, despite disparity in population (Kirk, 1974, p. 368).

Through his writings, Blackstone, who was Oxford's first professor of English law and later a judge of Common Pleas, influence generations of American
lawyers during and after the American Revolution. Blackstone's Commentaries rendered possible the task of the American lawyer in discerning some order in the tremendous mass of precedents accumulated over the centuries of English Common Law history. And what was true for the lawyer was also true for "the gentleman and the scholar" (Blackstone's phrase). Blackstone's treatises remained the standard manual of law for Americans until the publication, in 1826-30, of Chancellor James Kent's Commentaries on American Law. Because Kent and the other principal writer on jurisprudence in the early Republic, Joseph Story, were both heavily influenced by Blackstone, a comment on the Commentaries is here indicated.

Blackstone's Commentaries began with an affirmation of the Natural Law, which confirmed Americans in their appeal to a justice beyond legislative decree. In Blackstone, two streams of Natural Law doctrine flow together: one of Cicero and Richard Hooker, and the other of the seventeenth century scholars Grotius and Pufendorf.

This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all of the globe, and in all countries, and at all times; no human laws are of any validity if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately from this original (Blackstone, 1765, pp. 27-28).

With Blackstone's view of law as grounded in Natural Law, the influential Commentaries "deprived colonial lawyers of the dangerous temptation of making their code" (Boorstin, 1958, p. 203). Blackstone was "a champion of ancient precedent and long-sanctioned usage; had the little-schooled American lawyers not been restrained by him, much of enduring value in the tested English rule of law might have been lost through ignorance or hasty improvisation" (Kirk, 1974, p. 370). Blackstone's Common Law was at once highly traditional, grounded in precedents of experience, and capable of growth and adaptation; thus,
there existed no perceived need for a comprehensive, written code. Even though there were repeated attempts at codification, all failed (except, of course, in Louisiana where a previous legal heritage prevailed before the entry of the Common Law; David and Brierley, 1978, pp. 369-373).

The view of Blackstone and his principal American disciples, Kent and Story, that the Common Law was the nearest approach (however imperfect) to the Natural Law arose from the belief that it had grown out of the experiences, observations, and consensus of many generations of wise men and had been tested repeatedly for its conformity to natural justice (Kirk, 1974, p. 371). This view was part of the legal experience and inheritance of American lawyers and judges, and by way of extension, the American people. If it had not been for the writings of these early philosophers of the Common Law, Blackstone, Kent, and Story,

American law might have lost its unity. Had it lost its unity, the movement for a premature Benthamite code might well have swept the country as the French codes swept Europe. If the flood of statutes which poured from our legislatures from the beginning had been turned upon a system of purely local rules, as the country became unified economically we should very likely be seeking relief in codes, if we had not done so long ago. (Pound, 1938, p. 153)

The lawyers and judges, heritors of Blackstone's defense of the Common Law, composed what Alexis de Tocqueville described as a "professional aristocracy of lawyers, respectful of precedent and long-established rights and customs, hostile toward rash democratic impulses at codification.

If you ask me where the American aristocracy is to be found, I have no hesitation in answering that it is no among the rich, who have no common link uniting them. It is at the bar or the bench that the American aristocracy is found. An American judge, armed with the right to declare laws unconstitutional, is constantly intervening in political affairs. He cannot compel the people to make laws, but at least he can constrain them to be faithful to their own laws and remain in harmony with themselves. (De Toqueville, 1969, pp. 268-69)
De Toqueville, well experienced in the Civil Laws of France, as well as the events of the French Revolution and the Napoleonic period seems quite impressed with the Common Law judge.

As Americans settled west of the original thirteen states of the young Republic, not only did they carry the Common Law with them, but they often found that it had preceded their arrival. The Northwest Ordinance of 1787, for example, provided for "judicial proceedings according to the course of the common law." Shortly thereafter, the governor and the judges of the Northwest Territory adopted the Virginia Act of Ratification (1788), which declared to be in force the common law of England and all English statutes of general application. Similarly, when the Mississippi Territory was established in 1798, its law embraced many of the provisions of the Northwest Ordinance as regards the Common Law.

That the frontier lawyers brought with them the Common Law, and did not, accordingly, make their law, is evident in the fact that "the earlier lawyers and judges were ... bookish people, in both the Northwest and Southwest" (Hamilton, 1968, p. 251). As Judge Thomas Rodney of the Mississippi Territory wrote (Hamilton, 1968, p. 253): "Special Pleading is adhered to in our Courts with as much Strictness Elegance and propriety as many of the States, so that Even the young Lawyers are obliged to read their books and be very attentive to their business or want bread."

In addition to the treatises and doctrinal writings of Blackstone, Kent, Story, and others, these frontier lawyers apparently had access to an abundance of both English and American case reports (Hamilton, 1968, pp. 250-251), evident in their frequent citation of English and early American case precedents. In that way, the English Common Law was transmitted westward across the American frontier to Oregon and Hawaii, places far removed from English colonial exper-
ience (Blume and Brown, 1962-1963). Similarly, the American Common Law was transplanted to Liberia largely by the immigration of emancipated American Negro slaves, who maintained close ties with the United States. Applicable law in the Liberian Republic includes the common law and usages of the courts of England and the United States "as set forth in case law and in Blackstone's and Kent's Commentaries and other authoritative treatise and digests" (Liberian Code of Laws, tit. 16, ch. 3, sec. 40, 1956). The principle of stare decisis has further resulted in the growth of a body of Liberian common law. As one scholar (Hamilton, 1968, p. 260) eloquently observes:

All this [the common law] came straight from the frontiers of the Palace of Westminster, the Thames flowed into the muddy waters of the majestic Mississippi and transformed them, engulfed them, Anglicized them forevermore. The evidence tends to show as a restrained judge might say, that the old, or cis-Mississippi frontier, if it fashioned anew with the wilderness, did not do so with such a pervasive, fundamental institution as the law. It imported it from England and the Atlantic coast on which English law had been deposited. In the early days, its law was continually refreshed by recourse to the English books, for they were all the frontiersmen had.

The English Common Law was conveyed through American migration westward, decades after the independence of the United States. In that way, the English Common Law became the basis of the American legal system.

The Australian Example

The general pattern of American experience in the reception of English Common Law describes as well that law's reception in other colonies settled by English-speaking Volk. Although the transfer of English law by relocation diffusion also occurred in Canada, New Zealand, and, to an extent, South Africa, we shall now confine ourselves to Australia. Because the Australian colonies were acquired by occupation and settlement, the English settlers brought with them as much of their Common Law heritage as was applicable under local condi-
Initially founded as a penal settlement, it was not until 1823 that there was established in Australia a Supreme Court having civil jurisdiction (Latham, 1960). Until that time, military authority prevailed and enforced law in the light of English law. In 1828, an English statute, the Australian Courts Act (9 G. 4, c. 83), assured the dominance of Common Law:

[All laws and statutes in force within the realm of England at the time of the passing of this Act . . . shall be applied in the administration of justice in the courts of New South Wales and Van Diemen's Land respectively, so far as the same can be applied within the said colonies.

Thus was the Common Law of England assured its status at the basic law of New South Wales, Tasmania (Van Diemen's Land), and also those provinces that were formed from parts of New South Wales subsequent to 1828: Victoria, Queensland, the Northern Territory, and the Australian Capital Territory.

No statutory provision for application of the Common Law existed, however, in areas that had never been part of New South Wales colony, i.e., in South Australia and Western Australia. There, the Common Law was applied on the basis that, in a colony acquired by settlement, the settlers took with them the law of England then in force, insofar as applicable. This position was reinforced through a series of judicial decisions (Roberts-Wray, 1966, pp. 873-79). On the question of the applicability of English statutes, the Colonial Laws Validity Act of 1865 provided that they not only applied, but even served as a basis for the voidance of colonial legislation, a status not revoked until 1931.

As in the United States, then, the basis of the law in Australia is the Common Law of England. The Common Law system is firmly implanted in Australia; and its legal doctrines and general principles thrive in a form almost indistinguishable from that of England.
The Laws of Indigenous Peoples

The laws of indigenous peoples who live in areas settled by English-speaking Volk deserve mention because they occupy a distinct place in the prevailing Common Law. Although the transplanting of the Common Law from England followed similar patterns in each of the settled colonies because of a shared common heritage in English law, treatment of indigenous peoples was marked by differences.

In the United States, federal policy towards the American Indian has been through various degrees of separation, protection, and assimilation. One special complication of the Indian problem resides in the relationship between state and federal government on such questions as reservations, tribal sovereignty, land titles, and water rights (Sutton, 1976). In formulating a basic national policy, the courts vacillated in their approach. In Worcester v. Georgia (31 U.S. 515 [1832]), the court viewed the relationship of tribes to the federal government as one of guardian to ward: "The Indians are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian." Viewing the Indians as wards of the United States, places the several tribes, at least in theory, under the purview of federal courts. Tribal self-government was thus subject to federal laws, especially as regards land and water rights.

The degree to which federal involvement affected tribal land and water is reflected in the Desert Land Act of 1877, which had the effect of severing the land and the water rights that had previously appertained in cases involving Indians. In this Act, the Common Law riparian doctrine was replaced by the appropriation doctrine, which placed water rights under the control of state and local laws (Miller, 1957).

In Australia, by contrast, Aborigines were declared at the time of settle-
ment to be "British subjects" and, hence, subject to the common law as it applied in the colony. The government policy of assimilation did not, however, always succeed in practice. "Attempts to make the black amenable to British law make a mockery of the pretension that he had the full status of a British subject. The question of the accessibility of legal remedies to him shows further absurdity" (Hasluck, 1970).

Recently, the natives unsuccessfully argued "the doctrine of communal native title" by contending that under the common law, native law and custom of indigenous communities to land within territory acquired by the Crown were actual rights that must be recognized by the colonists and subjects of England, until such time as those rights were validly terminated (Gove Land Rights Case, 1971). This case brought two notable innovations into Australian law. In formulating its judgement, the court relied on authorities from outside Australia, authorities from Canada and New Zealand. The court also recognized that evidence presented by anthropologists as admissible as either an exception to the hearsay rule or as expert opinion. In consequence, such matters as local and territorial organization now have a direct legal relevance in Australian courts.

In conclusion, there can be little doubt that the definition of status of indigenous peoples in a Common Law regime results in an inevitable feature of the legal landscape. If tribes are treated as having some type of sovereign capacity, as in the United States, tribal lands and reservation may be subject to laws differing from those of the settlers and their successors. On the other hand, if members of indigenous groups are assimilated as British subjects, ostensibly having full rights accorded under the Common Law, tribal lands may know no other rights than those accorded the settling folk.
Involuntary Receptions

"It was always a cardinal principle of British colonial policy to give explicit recognition to the claims of such immemorial customs and usages as bore the characteristics of rules of law, as understood and applied in the indigenous communities" (Elias, 1962, p. 184). Thus does the expansion of the Common Law in its interaction with the several bodies of religious jurisprudence and native customary law provide an excellent study of acculturation.

English Common Law applied to overseas dependencies of the several Common Law countries to the fullest possible extent allowing due recognition of local circumstances; this application includes not only colonies, but also protectorates and mandates. The distinction between ceded and conquered colonies and areas settled largely as a consequence of Volk migration is one of historic fact; the law in force in a land at the time of its cession or conquest remains in force, unless alienated or altered by authority of the acquiring sovereign (Campbell v. Hall, I Cow p. 204, 1774; Lyons [Mayor] v. E. India Co., 1836). Naturally, the extension of English law to the newly acquired territory necessarily affected the existing law (Ruding v. Smith, 1921); and native laws found to be repugnant to the fundamental principles of English Common Law were automatically abrogated (Fabrigas v. Mostyn, 1773-74; Picton's Case, 1804-12). In the family of Common Law systems, involuntary receptions often proved to be occasions marked by attempts to create new, national legal systems that used the procedures of Common Law and much of the substance of indigenous religious jurisprudence and local customary laws.

British Colonial Law

The involuntary reception of Common Law through colonization or other external political force took the form of the British colonial policy of indirect
rule, which encouraged the continuation of local indigenous law.

Adapting for the purposes of local government the institutions which the native peoples have evolved for themselves, so that they may develop in a constitutional manner from their own past, guided and restrained by the traditions and sanctions which they have inherited and by the procedures and control of British colonial administration. (Morris, 1972, p. 1)

The imposition of law through a colonial policy based upon indirect rule resulted in national legal systems that blend English law with indigenous law. These local blends are the direct consequence of the nature of the judicial Common Law, especially its tendency to incorporate as antecedent judicial findings much of the domestic, customary, and religious law into the cases of the new jurisdiction. The British system of indirect rule not only encouraged the practice and development of customary law through the local institutions (Elias, 1967), but also embodied the principle that "interference with native customary law, which may be relied on to adapt itself to changing circumstances, is much to be deprecated" (Lugard, 1965, p. 312).

As in the case of the settled colonies, the English law was applied to the fullest extent possible in the ceded or conquered colonies, but having regard for local circumstances. This English law, consisting of the common law of the realm, the doctrines of equity, and the statutes of general application as they existed at a specified date, was often considered the most enduring and valuable heritage of British colonial rule (Read, 1972). In the words of Sir Kenneth Roberts-Wray (1966, p.66), the Legal Adviser to the Secretary of State for the Colonies, "British administration in overseas countries has conferred no greater benefit that English law and justice."

Even though native courts were allowed to continue, their determinations often came under the influence of the common law through the appellate process in which disputes were decided by British judges. By the recurrent influence
of the appellate process, the common law guided the native courts toward a fuller implementation of the Common Law. In the Sudan, British colonial judges and Sudanese judges trained in the common law decided cases in terms of "justice, equity, and good conscious," a concept which soon became synonymous with "common law, principles of equity and English statutes of general applications" (Guttman, 1957).

Similarly, English doctrines of equity were introduced in the same degree and measure as the common law. Colonial courts often relied in the doctrine of equity in resolving cases where the native litigants argued their cases on the basis of tribal or personal law. This application of English law was particularly important in matters of family law, inheritance, and land tenure, concerning which the British courts generally applied the personal law of the parties. Native personal law was abrogated, generally, only where repugnant to natural justice.

There were three ways by which English acts applied to the colony. Statutes in force in England as of some date significant for each colony may have been carried to the ceded colony by English settlers as part of their personal law. The English statutes may have been introduced as statutes of general application that applied to all colonies and dependencies of Britain, no less than to Britain. Finally, individual acts of Parliament may have been locally adopted as the law of the colony.

**British Common Law and Religious Jurisprudence**

We shall consider those national legal systems of the Common Law family that have blended with indigenous systems of religious jurisprudence as a category separate and apart from those that have incorporated native customary law. Common Laws receptions that overlap native religious jurisprudence have sever-
al common features that set them apart. Upon establishing a British judicial system and transplanting the English Common Law system, the incorporation of religious jurisprudence began on a piecemeal basis in a manner characteristic of the English legal process of Human Action.

The selective application of religious rules of law had the effect of distorting the indigenous jurisprudence in that their reduction to case law necessarily separated the contents (substance) of those rules from their origins in holy writ or revelation. Further, because the native religious jurisprudence was generally available to the courts as only abstracted texts and treatises prepared by legal scholars, the religious rules were often superseded by the introduction of custom. Again, the distortion lay in large part in the fact that the abstracted text rules had been separated from their underlying bases of social obligation. For example, in Hirabae v. Sonabae (Ind. Dec. O.S. 4.100), the Supreme Court at Bombay upheld the application of Hindu customs in the case of Khoja and Cutchi Memons, who were Moslem who practiced Hindu customs of inheritance. Similarly, in Mussammat Sardar Biki v. Haq Nawar Khan (I.L.R. 15 Lah. 425, 1934), heirs contended that the estate was to be distributed according to Islamic law because the de cujus had declared in favor of Islamic law before his death, thereby abrogating the custom that would otherwise have applied. The court refused such a disposition in favor of a distribution at custom. Custom was thus given preference over the religious, positive law.

The application of English legal principles gave enhanced credence to the indigenous applications of religious law to the extent that those rules did not trangress repugnancy clauses. This differential acceptance of religious jurisprudence by common law courts had the additional effect of conforming the religious jurisprudence to natural justice and equity in so far as it
had at the pertinent time been discovered and expounded in British jurisprudence generally. In *Ma Kyn Mya v. Maung Sit Han* (R.L.R.103, 1937), for instance, the court in Burma rejected application of Chinese custom in determining the validity of a marriage between a Burmese Buddhist woman and a Chinese Confucian because to do so would attain a result contrary to justice, equity, and good conscious. The marriage was held to be valid under Burmese customary law, as the law of the forum.

In *Collector of Masulipatum v. Cavaly Vencata Narrainapah* (M.I.A. 529, 1861), the court applied English law in direct preference to Hindu law in a matter involving the landed property of a Brahmin. Similar cases involve preference of English law relating to testamentary bequests and the alienation of undivided interests in property (Derrett, 1968, pp. 311-12).

Finally, the incorporation of religious jurisprudence through its expression in case reports and statutes and as precedents of native judicial experience has preserved much of the form and substance of the native religious jurisprudence, despite the modern rise and prevalence of secular ideologies. The Common Law system with its precedents and basic principles has generally persisted after the end of the colonial period to serve as the legal system of the independent nation. Upon gaining independence, most of the formerly colonial countries, as they modernize their law in the interest of economic development, eliminate much of the customary and religious elements and strengthen the English or English-influence components of their legal systems (Schlesinger, 1970). In other words, independent natives move the law of their independent countries into even greater conformity to the law of England than their English masters had. They put down the White Man's Burden of reconciling native practice to natural decency.
"Jurisprudence in Islam is the whole process of intellectual activity which ascertains and discovers the terms of the divine will and transforms them into a system of legal, enforceable rights and duties (Coulson, 1969, p. 1). However, the Islamic jurisprudence in areas formerly under British dominion exists within the limits of an Anglo-Islamic Common Law system. Indeed, to some degree, most former British colonial possessions in Asia and Africa embrace part of the geographic expanse of Islam.

Anglo-Islamic law is a body of law formed by the Common Law processes and principles. It includes the classical sources of Islamic law (such as the Koran), the Shari'at, and the body of rules applied by the courts to Moslems as part of their personal law. To understand this process of legal acculturation, it is probably best to review on a regular basis the process by which the Common Law articulates with Islamic jurisprudence.

_Anglo-Islamic Law in India_

The Indian sub-continent proper provides the setting for the most complete development of Anglo-Islamic law. The early period of the English administration of India began with the founding of trading stations in Madras, Bombay, and Calcutta. During this time, the law was administered in a local and irregular basis. This early phase ended with the Charter of 1726, granted by George I to the East India Company. That charter set up a system of Mayor's Courts based upon the English municipal model and applying English law. Even so, the emphasis remained on avoiding involvement in local, religious affairs. In 1765, the East India Company was granted the Diwani of Bengal, Bihar, and Orissa, which were administered under the adalet system (Roberts-Wray, 1966; Kilbourne, 1973). Acting in the capacity of the Diwan, the
Company was responsible for the administration of law.

In accordance with that responsibility, Warren Hastings established in 1772, a system of courts that followed the principle:

In all suits regarding inheritance, marriage, caste and other religious usages and institutions, the laws of the Koran with respect to the Mohamodans and those of the Shaster with respect to the Gentoo shall invariably be adhered to. (Art. 27 of Regulation II, 1772)

This discretionary rule remained the fundamental principle throughout the colonial period. A second principle enunciated in the 1772 regulation establishing the colonial legal structure was that, in difficult cases, the judge was to act according to "justice, equity, and good conscience." These two principles guided the development of Anglo-Islamic law during the entire subsequent experience of colonial judicial administration.

In the view of the British courts, Islamic law in India was not "the absolute application of abstract precepts taken from the mouth of the Prophet" (Abul Fata v. Russomoy Dhur Chowdhury, 22 I.A. 196, 1894). The basic principle for determining the Islamic law to be applied was enunciated in Baker Ali Khan v. Anjuman Ara Begum (30 I.A. 94, 1903, at 111-12):

In Abul Fata v. Russomoy Dhur Chowdhury, in the judgment of this Committee delivered by Lord Hobhouse, the danger was pointed out of relying upon ancient texts of Mohomedan law and even precepts of the Prophet himself, of taking them literally, and deducing from them new rules of law, especially when such proposed rules do not conduce substantial justice. That danger is equally great whether reliance be placed upon fresh texts newly brought to light or upon logical inferences newly drawn from old and undisputed texts. Their Lordships think it would be extremely dangerous to accept as a general principle that new rules of law are to be introduced because they seem to lawyers of the present day to follow logically from ancient texts, however authoritative, when the ancient doctors of law have not themselves drawn those conclusions.

Similarly, in Veerankutty v. Kutty Umma (Mod. 1004, 1956; at 1009), the court held:

We have, therefore, to administer without in any way circumventing or deviating from the original texts, the law, as
promulgated by the Islamic Law-givers to suit the present-day conditions, and, in doing so, it has to be remembered that Courts are not at liberty to refuse to administer any portion of those tenets even though in certain respects they may not sound quite modern.

Whether the courts should apply Islamic law was a matter of the personal law of the litigants. If the parties to a suit were Moslems, then Islamic law (in the light of Common Law procedures and principles) was used in determining the outcome; after all, the reasonable expectations of the parties to an ongoing order of actions was most likely grounded in their personal law. In the view of the courts, any person professing the Islamic religion was a Moslem and could, therefore, appeal to Islamic law (Narantantakath v. Parakkal, 1922, 45 mad. 986).

Islamic law could also be applied as a customary law in certain instances, even when the claimant was not Moslem. For example, some communities were not subject to Islamic law as a matter of religious jurisprudence, but were governed by custom derived from Islamic law, e.g., the Khojas, Sunni Goharas of Gujarat, Moplahs of Madras and Malabar (Derrett, 1968a; Fyzee, 1963). The situation of the Khojas (an Ismaili Shi'as sect concentrated in Bombay) was particularly interesting in that, before 1937, they were governed by Hindu laws of inheritance, which they had retained by custom, and by Islamic law in all other matters. The question of custom in relation to Islamic law introduced the problem of a profuse number and variety of local customs and practices. Such a situation was finally addressed by the courts in Abdul Hussein v. Sona Dero (45 I.A. 10, 1917) in which it was established that, for a custom to be admitted, it must be ancient and invariable. The courts would not presume the existence of such a custom that had not been cited in previous decisions; newly introduced customs had only persuasive status.

In 1937, the Muslim Personal Law (Shariat) Act placed emphasis on the
Shari'at rather than custom, by abolishing local custom based on religious law (apart from that actually incorporated as part of the common law), except in the State of Jammu and Kashmir (XXVI of 1937). As a result, the presence of Islamic law greatly restricts custom. Nevertheless, in such places as Malaysia and Nigeria, local custom still takes precedence over Islamic laws of inheritance in order to prevent excessive subdivision of land.

Anglo-Islamic Law in Pakistan

Of all the Common Law systems, Islamic law is most prominent in Pakistan. After 1947, when Pakistan was established as an independent state, the shari'at was officially prescribed as determining the substance of both public and private law. Then, in 1948, Pakistan adopted the Shariat Act of the formerly British India (Fyzee, 1964, pp. 460-62). However, it must be remembered that Islamic law was applied within an Anglo-Islamic Common Law System.

The status of Islam and Islamic law in Pakistan was preserved in provisions of the Constitution of the emergent nation. One of the early provisions of constitutional law in Pakistan was the assertion that "sovereignty over the entire universe belongs to Allah Almighty alone" ("Objectives Resolution," 1949). Furthermore, the Constitutions of 1956 and 1962 contained such phrases as "Islamic principles of social justice" and "no law should be repugnant to Islam" (Art. 204: Ib). A 1964 constitutional amendment required all laws be in "conformity with the Holy Qur'ran and the Sunnah".

In post-independence Pakistan, the development of private law supplemented the dominance of the Shari'at. Yet, at the same time that Islamic ascendency rendered Islamic principles of law as primary, the national courts attempted a reinterpretation of Islamic law in the light of modern conditions. Simul-
taneously, there was also an effort on the part of the courts to try to make concepts of the modern world conform to the tenets of Islamic religion (Anderson, 1967; Binder, 1958).

The apparent supremacy of the Shari'at, however, is tempered by the continued application to Moslems of the Anglo-Islamic law, which subjected the authoritative texts of religious law to the doctrine of precedents and local legislation. Despite an expressed intention to operate within the traditional legal framework, the Muslim Family Laws Ordinance eliminated the detailed regulation of the Koran on matters of inheritance, partly in an effort to prevent excessive land subdivision and fragmentation (1961, Sec. 4). Additionally, judicial practice maintained the Anglo-Islamic Common Law tradition of prescribing the limits of legislation. Laws may be established in order to accommodate perceived needs of social justice, but such law must not transgress either the dicta of divine command or the English standard of "justice, equity, and good conscience." This is the basic process that determines the progress of Islamic law within the Pakistani Common Law system.

Anglo-Islamic Law in the Straits of Malacca

In the former colonies of the Straits Settlements (Singapore, and the states of Malacca and Penang in Malaysia), English law was introduced through the medium of Charters of Justice. These charters set up judicial systems, provided that English law was to be the law of the Settlements, and declared that English law applied to native peoples "so far as the several religions, manners and customs of the inhabitants will admit" (Braddell, 1931; Roberts-Wray, 1966).

In the Federated and Unfederated Malay States, the law to be applied as
the basic law of the colonies was English law that applied at the time of the assumption of British control. In the Federated States (Perak, Selangor, Negri Sembilan, and Pahang), local legislation was also passed in the form of Orders in Council and Enactments. In reference to Islamic law, however, this legislation was of little importance. In the Federated States, the position of Islamic law was essentially the same as that found throughout Malaysia, but with the added provision that it was subject to the authority of the judiciary to refuse its admission if found to be either "not reasonable" or "contrary to natural justice." After independence, the position of Islamic law in relation to the national Common Law system remained unchanged. Today, there exists some legislation on Islamic law regulation of family law and inheritance, but otherwise, the colonial applications endure (Bartholomew, 1964; 1968). The most important of these enactments affecting Islamic law was the Courts of Judicature Act (1964, Sec. 4), which called on secular courts to enforce provisions of Malay adat (custom), even where this departs from the strict rules of Islamic law, especially in matters of inheritance (Hooker, 1972, pp. 228-38; Hujah v. Fatimah M.L.J. 63).

In the Unfederated States (Perlis, Kedah, Kelantin, and Trengganu), each was governed by the irregular laws of State Council, in addition to the English common law; and, in Johore, English law was adopted on grounds of comity with the laws of the Straits Settlements and the Federated Malay States.

Anglo-Islamic Law in Africa

As for the place of Islamic law in former British Africa, a few generalizations will suffice to illustrate its place as either personal or customary law. Only in the Sultan's courts of Zanzibar and in the Aden Protectorate was Islamic law declared to be the fundamental law. It applied on the basis
of specific enactments in the British courts of Zanzibar, where Bombay Regulation IV of 1827 (Sec. 26) provided that the "usage of the country," including Islamic personal laws in their myriad local variations, should apply.

In the former protectorates of Uganda and Nyasaland and in the colony of Kenya; Islamic law was applied by the British courts as a "native law and custom". However, in Kenya, the 1934 case of Khamis v. Ahmed (1 E.A.C.A. 130) noted that Islamic law was not really a native law "merely because it is the law applicable to many or even all of the natives of the Kenya Protectorate." In this ruling, the assimilation of Islamic law to a variety of local conditions was recognized only as custom. "Native law and custom" thereby went beyond indigenous law to become that which has become established usage in any substantial portion of the population. In the words of the Privy Council, "It is the assent of the native community that gives a custom its validity, and, therefore, barbarous or mild, it must be shown to be recognized by the native community whose conduct it is supposed to regulate" (Eshugbayi v. Nigerian Government, A.C. 662, 1931). Further, specific ordinances required the application of the Shari'at among indigenous Moslems in family law disputes (Anderson, 1970).

True, the Moslem supplicant considers Islamic law as absolute by reason of divine command, rather than as either native law or custom, but our concern is with that law's application in the British-established courts. The idea does, however, precipitate consequences in conflict-of-laws situations. Territory in which Islamic law is treated as the fundamental law (such as Zanzibar) applies Islamic law as authoritative, not as native law and custom, except to the limited extent that the Shari'at allows custom. On the other hand, in areas where Islamic law is the personal law of the majority of the population (such as in parts of Nigeria and parts of former Tanganyika), but
regarded by the courts as native law and custom, local customs differing from the Shari'at are admitted (Anderson, 1970). Finally, in those places where Islamic law attaches only to Moslems as individuals (Gold Coast, Nyasaland, Uganda, and parts of Kenya, Nigeria, and Tanganyika), local customary law is dominant (Anderson, 1964; 1970). Throughout former British West Africa, Islamic law is viewed as an exclusively native or customary law.

Since independence, Islamic law pertaining to family and inheritance has generally continued in force. On account of modern, secular ideologies in the newly emerging nations, however, sometimes radical changes are attempted. An excellent example of this occurred in Ghana.

"In [some] regions, there are some communities whose customary law of succession is, in many respects, very similar to that under Mohammedan law, which it really is, and not as Islamic law qua Islamic law" (Ollennu, 1966, p. 238). That is to say, Islamic law is not actually a part of the law of Ghana and will be admitted only on the basis of custom or statute. For example, the Ghanaian view is that the family is "a special connotation depending upon tribe, and it is around this fundamental point that Islamic law must conform as just one of a number of particular customar laws" (Ollennu, 1966). The significance of the "special" connotation" becomes realized when one remembers that the indigenous unit for the ownership and possession of property in Ghana is the family.

Common Law and Hindu Law

As in the case of Islamic law, Hindu law is an ancient and complex body of religious jurisprudence, as well as a religion embracing a very old and widespread social system. The reception of English common law in areas where
Hindu law applied to a significant segment of the native population occurred mainly on the Indian sub-continent; but, also, in East Africa (Kenya, Uganda, and Tanganyika), the West Indies, Ceylon, Malaysia, and Singapore. Because, the primary place of interaction between English common law and Hindu law as a religious system of jurisprudence was India, we will confine our discussion to that country (with full realization that the principles applicable to the Indian sub-continent are similarly applicable to other areas where a portion of the population professes the Hindu religion).

Our concern, of course, is with the way in which Hindu jurisprudence articulated with the English colonial common law in such a way as to become a part of that law in forming a prevailing national legal system. In other words, we are here concerned with the characteristics of Hindu law as a servient system, applicable to Hindu people as their personal law before the common law judiciary.

Anglo-Hindu Law in India

Hindu law was never only a collection of religious rules of law, but also custom as well. For example, Punjab was ruled almost entirely by customary law; and only in the absence of customary law did their personal law apply. The personal law of adherents of Hinduism was Anglo-Hindu law: i.e., Hindu law as developed by the British courts and tempered with English common law principles and procedures. The Punjab Laws Act (1872, Sec. 5) established the rule of decision: "1) any custom applicable to the parties concerned, which is not contrary to justice, equity or good conscience, and has not been declared to be void by any competent authority; and 2) Hindu law in cases where the parties are Hindu" (Prenter, 1924). Hence the relationship between personal law and custom is variable.
Of course, in determining whether Hindu law constituted the personal law of an individual, the colonial courts had to first determine whether that individual should be classified as Hindu. A Hindu was one not a Moslem, Parsi, Christian, or Jew; thus, one to whom Anglo-Hindu law applied. Lack of belief and observance of religious rules did not preclude a person from being a Hindu; but, conversion to Christianity or Islam negated an applicant's appeal to Anglo-Hindu law. Even so, Hindu law was often applied to the extent that people had adopted it as their custom. This was true regardless of whether they could appeal to it as their personal law (Derrett, 1963a).

To determine what the Hindu law to be applied actually stated, the British colonial courts engaged in sastric study and appointed experts in the study of the sastras, to whom the courts might have recourse (Derrett, 1968a). The first digest of Hindu law, A Code of Gentoo Laws, was published in 1775.

The Act of Settlement (1781, Sec. 17) established that the Supreme Court in Calcutta had jurisdiction in determining the Hindu laws and practices to be applied between Hindus. This jurisdiction was also extended to Bombay and Madras. The Act of Settlement of 1781, in its use of the phrase "laws and usages" of Hindu law, also raised the question of the place of custom based on Hindu practices. This problem was addressed by the Supreme Court in Bombay, in the case of Hirabae v. Sonabae (cited supra), in which the court declared the act to be a political document to preserving existing law and usage and that the Act did not imply adoption of strict principles of any religion as law superceding authentic custom. Further,
In Deb v. Beerchunder (1868), it was found that custom, where proved, replaced the general religious law.

In the mid-nineteenth century, attempts to codify non-personal laws produced a Code of Civil Procedure in 1859, a Code of Criminal Procedure in 1860, and an Indian Penal Code in 1861. Although prepared, in part, to provide rules where existing law was silent, the codes did not include personal laws (such as those involving family law and inheritance or caste and religious practices) codes represent any attempt at fusion of English law and native personal law. Code influence on the substantive aspects of Hindu law as developed by the British courts was practically nil.

British colonial court proceedings resulted in the imposition of English law forms. As a consequence of the reliance on precedents, the history of Hindu law in British India is to be found in the form of judicial decisions. British judicial reorganization abolished the legal status of indigenous courts, which thereafter lacked governmental support and recognition (Galanter, 1963). The British reorganization of the judiciary precipitated a flood of litigation. The presence of courts with power to compel attendance and enforce decrees resulted in the "contagion of the English system of law" (Maine, 1895, p. 74). The adversary process thus embraced the Anglo-Hindu law.

Another consequence of the imposition of the common law forms of procedure through the British reorganization of courts, concerned the application of Hindu law. "The Hindu law on the subject which the Court should endeavor to ascertain is the existing living law which is to be sought not merely in ancient treatises and commentar-
ies, but in the consciousness of the people and the practice of
everyday life" (Mutty Vaduganadha Tevar v. Dora Singha Tevar, 3 mod.
309, 1879, p. 310). The Common Law assumption that any legal system
comprehended a determinable body of authoritative texts of Hindu law,
but the sastra and other indigenous, customary law left vast gaps
in the substantive law of India. In such cases, the court was not
obligated to apply English law, but in "justice, equity, and good
conscience," it ought to be governed by principles of English law
applicable in similar circumstances (Varden Seth Sam v. Luckpathy,
9 M.I.A. 303, 1862). In such circumstances, however, English law was
to be preferred to Hindu law (Collector of Masulipatam v. Cavaly Ven-
cata Narrainapah, cited supra).

The use of British law forms in the resolution of cases involv­
ing Anglo-Hindu law also brought about the general transformation of
the indigenous law.

At the touch of the Judge of the Supreme Court, who
had been trained in the English school of special
pleading, and had probably come to the East in the
maturity of life, the rule of native law dissolved
and, with or without his intention, was to a great
extent replaced by rules having their origin in Eng­
lish law books. Under the hand of the judges of the
Sudder courts, who had lived since their boyhood
among the people of the country, the native rules
hardened and contracted a rigidity which they never
had in real native practice. (Maine, 1895, p. 45)

As a consequence of the application of Hindu law in English Common
Law courts, the doctrine of stare decisis served to preserve the
native, religious jurisprudence in the form of precedents. In that
way, some of the flexibility of the native rulers were lost.

The imposition of English law forms certainly limited Hindu law
in certain very real respects; but legislation also played a key role
in abrogating parts of religious law that affected public order, such as criminal law and evidence (Vasdev, 1961). Legislation also superseded most of the Hindu law affecting contracts. Hindu law was preserved, however, in matters of religion where it was relevant to personal relations of legal importance.

The administration of Hindu law in English law forms, by British courts, and subject to Common Law principles, then formed the Anglo-Hindu law. This law developed on a gradual, piecemeal, and local basis. The Common Law technique is that of a system that proceeds on the basis of the particular case to its elaboration as a general principle and requires a close contact between the law in books and law in practice; such a state was approached by different judicial techniques at different places throughout British India (Maine, 1895).

The development of Hindu law in the English Common Law courts was not without distortion. Distortion of Hindu law principles occurred in the abstraction of Hindu law rules, in the forms required by the English Common Law, and by the use of the English language (Galanter, 1966; McCormack, 1965; Rudolph and Rudolph, 1965).

The Constitution of 1950 established a secular, federal republic in post-colonial India. Nevertheless, Hindu law survived as part of the national common law system and by legislation applying to specific subjects. The Hindu Succession Act of 1956 (Sec. 5), for instance, declared that all estates were to descent according to private law and be partible, despite statutory prohibition of excessive fragmentation of agricultural land. The Succession Act particularly affected land tenure and succession in the Punjab (Bansal, 1967, pp. 165-82). The practice of dividing landed property among heirs so as to give to
each a proportionate share of each item of the estate had rather dra-
matic consequences. Each succeeding generation not only inherits a
smaller portion of the total land, but also land broken into more
scattered plots. Such severe subdivision and fragmentation limits
the introduction of innovative methods of cultivation, due to the
small size of available tracts. In the Punjab, it has been estimated
that more than five per cent of the land that would usually be cul-
tivated lies useless as a result of excessive fragmentation (Liver-
sage, 1945, pp. 66-68).

During the post-colonial era, the Indian Parliament determined
to replace the system of personal laws prevalent in the colonial
times with a uniform private law. Apart from a few attempts at cod-
ification of Hindu law in 1955 and 1956 (prompted by secular motives
presumably aimed at unification and clarification of the law) and the
restriction of caste autonomy, however, the sentiment had little prac-
tical effect on the common law judiciary (Kothari and Maru, 1965-66).

Under the Constitution of 1950, the judiciary was cast as the
intermediary between the ideals of social justice expressed in the
organic charter and the actual circumstances of Indian society (Gal-
anter, 1963). The Constitution of 1950 did, however, eliminate caste
as anything other than social association coupled with identifying
religious aspects.

Little further development of Hindu law within the national sys-
tem can be expected because of the immense growth of Anglo-Hindu law
during the Common Law experience of the colonial period. Indeed, only
one in twenty cases is reported, becoming thereby part of the body of
precedent (Galanter, 1967).

Today, the national legal system of India is clearly a Common Law system. "So has been built up on a basis of the principles of English law the fabric of modern Indian law which notwithstanding its foreign roots and origin is unmistakably Indian in its outlook and operation" (Setalvad, 1960, p. 225).

Anglo-Hindu Law Outside India

Hindu law also functions as a customary law outside India, in Malaysia and Singapore, formerly British Africa, and the British West Indies (Guyana, Jamaica, and Trinidad). In those places, Hindu law is sometimes admitted by the courts as an exception to the generality of the common law, usually in matters of family law. In the West Indies, for instance, Hindu law is only recognized in cases of marriage and divorce. In former British Africa (Kenya, Tanganyika, and Uganda), Hindu law is only permitted as a local customary law through enabling statutes or by citation of precedents from various Indian jurisdictions, mostly Bombay (Derrett, 1963a). Hindu law has the status of customary law also in Malaysia; until 1961, it had that status in Singapore where it is admitted on the basis of equity and natural justice and the inherent reasonableness of a local Hindu custom (i.e., clear, definite, and reasonable in the view of the Hindu community) (Hooker, M.B., 1971a).

Common Law and Buddhist Law

Prophets are, indeed, often without honor in their own lands. The
Buddha gained more adherents outside India, notably in China, Japan, and Burma. Buddhist law was the traditional legal system of Burma. As religious jurisprudence, it was based on the Dhammathats (a collection of explanations, customs, manners, and mores) and the Vinaya (which concerned ecclesiastical matters), as well as local, religiously-grounded custom (Wigmore, 1928). The British Common Law courts selected various authoritative texts of Buddhist law to be applied as personal law in Burma and interpreted the indigenous law within the Common Law judicial process. In that way, and Anglo-Buddhist law came into being.

This Anglo-Buddhist law developed in phases as various wars resulted in British acquisition of different areas of Burma: Arakan and Tenasserim in 1824; Pegu, Rangoon, Bassein, and Prome in 1852; and the balance of Burma in 1886. The legal history of Burma as a Common Law jurisdiction is similar to that of India. The policy with respect to indigenous laws in Burma was expressed in the Burma Laws Act (1898, Sec. 13), which established that the courts would apply: a) the Buddhist law in cases where the parties are Buddhists, b) the Mohammedan law in cases where the parties are Mohammedans, and c) the Hindu law where the parties are Hindus shall form the rule of decision, except insofar as such law has by enactment been altered or abolished, or is opposed to custom having the force of law. The purpose of the Act was to preserve personal laws of individuals who were Buddhist, Moslem, or Hindu.

In the development of Anglo-Burmese law, the courts defined the Dhammathats as "the institutional Buddhist law" (U. Pe v. Maung Maung
The language in which the section is couched is unfortunate, for there is no law by which all Hindus or all Mohammedans are governed, and in a strict sense of the term no Buddhist Law at all. The system of law applicable to Sunni Mohammedans differs from that to which Shia Mohammedans are subject; Hindus who follow the Benares School are governed by the Mitakshara, those who follow the Bengal School by the Dayabhaga; while in the religious system known as Buddhism no rules of law concerning secular matters are laid down or prescribed. Bearing in mind the object that the legislation had in view, however, the meaning and the effect of the expressions "Buddhist Law", "Mohammedan Law" and "Hindu Law" in S. 13(1) must be construed as laying down that in "any question regarding succession, inheritance, marriage or caste, or any religious usage or institution" where the parties profess the Buddhist, Mohammedan or Hindu religion the rule of decision shall be the personal law that governs the community or religious denomination to which the parties belong, except in so far as their personal law in Burma has "by enactment been altered or abolished or is opposed to any custom having the force of law".

Therefore, where specific rules of Burmese law are found in the Dhammathats or in the decided cases, the courts are bound to determine the case in accordance with the modern Burmese customary law (Ma Hnin Zan v. Ma Myaing, RAn. 31, 1936). Also, where the customary, religious jurisprudence does not address an issue of contention, the courts are to decide according to "justice, equity, and good conscience," which has been interpreted to mean the English law if applicable to the circumstances (Dr. Tha Mya v. Ma Khin Pu, A.I.R. Ran. 81, 1941). In passing, it may be further noted that Burmese customary law may be applied as the lex fori, law of the forum, in such cases as marriage (Ma Kyin Mya v. Maung Sit Han, R.L.R. 103, 1937).

In post-colonial Burma, Burmese customary law has continued to
be the centerpiece of the national Common Law system. The law re­
mains virtually unchanged despite the revolution of 1962, which placed
a secular military government in power. Burmese Buddhist law contin­
ues to have the status and effect that it had during the British re­
gime; that is, an application that is limited to family matters and
property (Maung, 1961). The military government has made little
change in the private law because the very limitedly ideological char­
acter of the regime leaves its concerns principally in the area of
public law.

British Common Law and Native Customary Law

Within the realm of British colonial influence, three great assem­
blages of largely unwritten law rules were encountered, each forming
a separate category within a colonial system of law and a subsequent
national Common Law system. We shall consider each of these bodies
of customary law separately as African law, Malay adat law, and Chi­
nese customary law.

Judicial Policy Towards African Law

The general judicial policy of British colonial administration
towards African law is summarized as:

The policy of the British Government in this and in
other respects is to use for purposes of the adminis­
tration of the country the native laws and customs in
so far as possible and in so far as they have not been
varied or suspended by statutes. The courts which
have been established by the British Government have
the duty of enforcing these native laws and customs,
so far as they are not barbarous, as part of the law
of the land. (Oke Lanipekun Laoye and ors. v. Amao
Ojetunde, (A.C. 170, 1944)
British judicial policy in Africa embraces aspects of native customary law. First, the definition of customary law is essentially judicial concern (Allott, 1970, pp. 151-52). Second, the native customary law is generally to be admitted unless repugnant to "justice, morality, or good conscience" or "natural justice and morality" (Allott, 1970, pp. 158-75). Customs that breach natural justice and equity cause judges to invoke the repugnancy clause. The payment of a "bride price," a native practice in South Africa, is deemed repugnant as being conducive to the purchase of sex. Similarly, the practice in Africa of witchcraft as a legal procedure necessitated judicial recourse to the repugnancy clause. The enunciated criteria of repugnancy commonly amount to a judge's applying an English standard of morality; but, certain clear guidelines were available. If, for example, a customary law allows an action, such as slavery or witchcraft, that is clearly contrary to English substantive law, the custom would in all likelihood be considered repugnant. Similarly, if an indigenous rule of procedure was contrary to natural justice, such as a judgment by a native court against an individual without having previously informed that person of the charges held against him, that rule would be rejected. Also declared as repugnant would be any punishment or sanction determined to be cruel and usual, such as torture or disfigurement.

Beyond declarations of repugnancy, the courts tempered native law with equity. General, fundamental notions of fairness usually applied to alter customary rules in order justly to enforce customary right or affect lengthy possession of land (Allott, 1970). In these applications, English notions of equity sometimes applied to African
law remedies that assumed a condition not previously present in the native society. In that way, for instance, the English concept of easements was introduced to the tribal scheme of land tenure in Uganda.

Assuming that a native customary law has not been found contrary to natural justice and equity, we shall now consider the place of African law in the British and national Common Law courts. In the dual court systems that prevailed in colonial Africa, African law automatically applied as customary law in native courts, while it had to in the British courts, be specifically pleaded as a matter of fact. Even though the court would acknowledge the existence of a custom as fact, the matter of its application and effect remained within the discretion of the courts (Angu v. Attah, Privy Council Judgement, 1916).

As a question of law, the courts recognized African law by judicial notice (cognizance) or its embodiment in precedents (Angu v. Attah, 1916). Indeed, courts are required to take judicial notice of custom where it is "notorious"; i.e., where it has received prior judicial admission or constitutes a precedent. There exists, however, a departure from this general rule in post-colonial Ghana, Sierra Leone, Tanzania, Uganda, and part of Nigeria, where courts consider customary law on an equal basis with other law forms.

In matters of land law, the courts have recognized that different varieties of customary law maintain different levels of interest in land. For example, among the Ibo, lineage is paramount; while among the Yoruba, family interests are dominant. At another level of analysis, as the levels of interest vary, so do the forms of land inter-
ests. For instance, even though right to the use and fruit of the land usually reposes in an individual, his right does not end the title to the land itself vested in the tribe or community (Elias, 1962), but providing the interest holder with securities of tenure that may be passed to heirs and assignees.

Customary interests may persist in a fashion limited by the courts and by legislation. Land tenure is, however, usually grounded in English legal principles because of the use of English methods of conveyance and the introduction of written documents recording ownership and effecting real estate transactions (Allott, 1960, pp. 242-74). In Nigeria, a claim of title "in fee simple" (an English concept) was construed by the court in the context of its connotation regarding customary land tenure. Thus, a term unknow in customary law was used to reflect an equivalent idea in African law:

Now, in what better manner can intention to convey an absolute title be manifested than by the use of an expression which described in legal terms an absolute title? Therefore, where the totality of the interest of a family under Native Law and Custom is unlimited and unrestricted and where the totality of that interest is conveyed to a purchaser, there is conveyed, in my view, an interest or estate equivalent to a fee simple. (Alade v. Aborishade, W.N.L. R. 74, 1962)

In the same case, the court went on to assert that parties to a land transaction may also bind themselves by English common law.

English common law influences in matters of inheritance have also created changes in land tenure. In some communities of the Gold Coast, for example, many farmers attempting to avoid customary rules of matrilineal succession used English law forms to transfer ownership of their farms to their wives. In that way, their sons,
rather than their sister's sons, succeeded to the property (Meek, 1946, pp. 176-77).

Upon gaining independence, the several formerly British territories retained their Common Law systems together with such of native customary law as the common law had absorbed. The English Common Law had, however, been introduced with numerous exceptions in deference to indigenous populations, especially in family law and property. Nor was the introduction of English law been uniform among the colonies. In western Africa, the English law was received directly from the mother country. But, in eastern and central Africa, English law was of a type borrowed from British India.

Since independence, most of the former colonies have attempted internal legal unification. In 1961, Tanzania began such a plan through collection and standardization of customary laws based on traditional linguistic and social groupings. With the political aim of national unity through uniform family law and property law, a special commission in Kenya declared (1967):

> Whilst our Constitution permits differentiation in treatment of sections of the community in regard to legislation dealing with marriage, divorce, and other matters of personal law, that is not to say that such radical distinctions as exist at the present time in Kenya are desirable if we are to integrate the various communities in the interests of building one nation. (quoted in Allott, 1968b, p. 63)

Political motives often stand behind attempts to modernize the several African legal systems. It is generally believed that the demise of customary law with its inherent pluralism would result in economic progress through more effective land use (Allott, 1968b). Significantly, however, unification of law has largely been left to the
judiciary. Through the process of selection, a standard body of legal precedents emerges through a unified Common Law procedure. Such an approach tends strongly to avoid the aggravating tribal tensions commonly attendant or legislative reform.

**English Law and Malay Adat Law**

A romantic quality, which may stem from the influence of nineteenth historicism, often surrounds the study of Malay adat:

> When the westerner looks at the customary law of the east, he may see it blurred; the kathi, trained in the ways of religion and immersed in Arabic culture, may find it far too worldly for his sympathetic understanding; and one does not learn the rules of Naning games in London's Lincoln's Inn Fields. The only person who can be expected to have a clear understanding and a proper appraisal of customary law are the traditional leaders of the community. They are interested in maintaining the norms of their community and to them should be entrusted the administration of customary law. They will know how to reinterpret it to keep pace with social changes, changes which their own community has accepted as being relevant to it (Minattur, 1964, p. 352).

Such a view fails to acknowledge the actual demands of the Malayan legal culture. The tendencies toward reception of English Common Law are prompted by the desire to achieve modern social and economic conditions.

Malay adat, which served as the medium for a formalized judicial process, is of two kinds. The first is the autocratic adat temenggong, which embraced the ruler's decrees against acts that he construed as infringements of his domain. The adat temenggong was reduced to written, legal texts, the Malayan Legal Digests, dating from the seventeenth to the nineteenth centuries. These digest include both adat and Islamic provisions, plus attempts to reconcile the two. These
attempts to merge the two pre-European laws seem to constitute an attempted synthesis of native beliefs concerning the "good" and "just" and the doctrines of Islam (Hooker, M.B., 1972).

The adat perpateh are more important. They constitute a type of matrilineal customary law and had a particularly strong effect on colonial land administration. As written digests, they formed a body of rules mainly affecting land tenure and transfer in the context of a peasant society organized in matrilineal descent groups.

The matrilineal social structure was most pronounced in Malacca and Negri Sembilan. The adat are there often expressed in "customary sayings," or perbilangan (Caldecott, 1918). Most perbilangan concern marriage, divorce, kinship, inheritance, and land ownership. Under the widespread effect of the adat perpateh in the mentioned areas, the matrilineal holding serves as the basis for the primary land-tenure unit. Land is held only by women.

The social organization of the peninsular Malays is not subject to the adat perpateh. Because equal significance is given to relations on either the father's or mother's side, inheritance and ownership of land is generally divided equally as between male and female heirs. Here, the adat temenggong affects inheritance and land tenure with substantial Islamic influences. "Adat Temenggong [is] a form of patriarchal custom which has now assimilated itself almost entirely to Muhammadan law" (Moubray, 1931, p. 5). Because this relationship is reflected in the title register book in the form of land tenure and succession records, it may be possible to use this information as historic evidence concerning Malay migration (Wilkinson, 1908).
The relations between adat and Islamic law were recognized by the colonial administration in the early twentieth century. The Customary Tenure Enactment of 1926, for example, looked to the adat per-paceh principle regarding primacy of female land ownership, in calling for the registration of land held by female members of "tribes" as "customary land" in the Negri Sembilan. The act also limited further transfer of land to such person. The Small Estates Distribution Ordinance of 1955 gave further legislative expression to the 1926 act. Until the passage of that law, the courts had been confused as to whether the earlier act recognized as "customary lands" any land held by other than female members of tribes, as where there had been Islamic influence.

The imposition of English Common Law forms on the substantive law in the Malay Adat reduced much of the adat to a body of Malay common law. Considerable distortion of the Malay adat law occurred through use of English legal terms. English terms were often applied to express unwritten Malay concepts. For example, the adat made no distinction between law and equity as does the English law.

As a result of British judicial activity, the substantive law became fixed in the form of judicial decisions and precedents. Judges applied what the native legal order viewed as valid, which became precedents for use in deciding future cases. The Common Law doctrine of precedents caused some difficulty in Malaya because of the existence of different sets of courts maintaining jurisdiction over different bodies of customary law. This was especially apparent in cases involving land distribution.
Before all courts, however, cases concerning land distribution on either death or divorce were matters of classification to determine whether adat or Islamic law applied. This determination was made in the context of a hierarchy of courts. The lowest judicial officer was the District Officer who determined and applied the most appropriate adat. From this level, the State Appeal Committee took appeals on matters of Malay custom. At the lower two levels there was no attempt at establishing precedent. Beyond the Appeals Committee, there was the High Court, which was bound by earlier precedent (Taylor, 1929, p. 268). Outside cases originating in Negri Sembilan, judges of the High Court almost always cited Islamic law in cases of formal dispute, even though they frequently applied adat principles in achieving the settlement.

One of the consequences of the application of English legal concepts to adat was an attempt at distinguishing between equity and common law in adat. In one case, for instance, the judge precluded the applicability of adat rules in a matter involving the devolution of land, the title of which was not registered, as "customary land," thus rendering uncertain the status of the land. The judge then considered, but dismissed, an appeal to Islamic law because the de cujus (testator) had "intended some customary law to apply." Finally, the court decided that the law to be applied was the adat temmenggong operates to lessen the otherwise harshness of the adat perpateh (Shafi v. Lijak, M.L.J. 65, 1949). Thus, on the basis of English equity, the judge denied the applicability of adat perpateh.
Since independence, Malayan legal digests have attempted to classify adat material by describing the written adat temmenggong and reconciling it through a comparison with the adat perpateh. The deficiencies in the royal decrees have been generally viewed as the result of a corruption through Hindu influences on the once native Malay system. Nonetheless, the preparation and use of their digest has had a continuing influence on the adat temmenggong of the digests, such as to affect most the Malay peasant society that is not matrilineal. This gradual encroachment of Anglo-Malay digesting is all the more important because the adat perpateh, which is dominant in Negri Sembilan, lays a formidable obstacle in the way more economically efficient use of available land. The matrilineally oriented adat perpateh keeps title to land capital diffused in the many hands of a matrilineage. To the extent that the courts and the digest movement penetrate, however, land capital becomes freed of encumbrances and available for relative rapid reorganization in terms of new opportunity.

English Law and Chinese Customary Law

The legal basis for admitting Chinese customary law differed from place to place among the three territories where it was applied. The colonial courts in Malaysia, Singapore, and Hong Kong each had its own procedures for handling substantive Chinese law. Even so, Chinese customary law has generally been applied in consistent fashion. Such law was entirely developed by the colonial courts in each of the three territories in which it located.
In the Straits Settlements of Malacca, Penang, and Singapore, charters of justice issued by the Colonial Office in 1807, 1826, and 1855 provided the judicial framework by designating the courts that should be established. They also declared that the rule of decision was that English law was to be applied to Europeans and natives "so far as the several religions, manners, and customs of the inhabitants will admit" (Braddell, 1931).

Chinese law was recognized as a customary law in contexts involving natives of Chinese ancestry. Chinese law was also received by use of private international law principles in cases involving polygamous marriages, adoptions, and legitimations (Chulas v. Kolson, 1877). In an early case the principle was noted that "their own laws or usages must be applied to them on the same principles and with the same limitations as foreign law is applied by our courts to foreigners and foreign transactions" (Chulas v. Kolson, L.R., 1877, p. 462). The English common-law rule favoring monogamous marriage was thus set aside in the case of Chinese in the Straits Settlements because it was lawful for a Chinese domiciled in China to practice polygamy (at least until 1931, when the Chinese Civil Code attempted to prohibit the practice). In some matters, the courts in the Straits Settlements also admitted Chinese customary law on grounds of natural justice (Cheng Ee Mun v. Look Chun Heng, M.L.J.411, 1962). Chinese law no longer has any effect in Singapore, but these common law accommodations of Chinese law in the Straits Settlements remain unchanged in Malacca and Penang.

In the Federated and Unfederated Malay States, Chinese customary
law was admitted and given effect by courts through using cases de­
cided in the Straits Settlements as precedents (Motor Emporium v. Arumugam, M.L.J. 276, 1933). Chinese law as a personal law remains as it is embodied in case decisions. In Sabah, Sarawak, and Brunei, the sources of law have been judicially described as applying English law in so far as it is applicable and, then, "certain law and custom of races indigenous . . . including the Chinese." "Whether or not Chi­nese law is to be admitted is a question which must be determined according to the rules of English law" (Kho Leng Guan v. Kho Eng Guan, S.C.R.60, 1928-41). The courts have also indicated that they would apply Chinese custom "where the custom is recognized expressly or im­pliedly in a Sarawak Ordinance" (Chan Bee New and ors v. Ee Siok Choo, S.C.R.1, 1947).

As for Hong Kong, Chinese Law and Custom in Hong Kong, a report of a committee appointed by the governor in 1948, delineated the legal basis for admitting Chinese customary law. First, it was recognized that English law, as of 1843, was the general law of the colony, ex­cept when inapplicable to local circumstances or to the customs of the inhabitants. English law is also to be limited if it would cause injustice. Chinese law may be applied when done in a way so as not to conflict with any fundamental doctrine English jurisprudence (Ho Tsz Tsun v. Ho Au Shi & ors., 10 H.K.L.R. 69, 1915; Chan Shun Cho v. Chak Hok Ping, 20 H.K.L.R. 1, 1928).

Chinese customary law having been abolished in Singapore (Freed­man, 1968) and restricted in Hong Kong in matters of divorce and in­heritance (Evans, 1973), it seems that the English Common Law, with
its Anglicized Chinese Law judicial precedents, will increasingly prevail in those areas. Similarly, Chinese customary law is not likely to exert much influence in Malaysian courts. In this reduction of Chinese customary law influence, like the adulteration of Malay adat law, in evidence of the decided trend toward full reception of English Common Law as the basis for modern legal systems.

Mixed Jurisdictions (Common and Civil Law)

Although all legal systems are at least partly "hybrid" in that every legal system consists of several layers, each layer being attributable to a different period of its history, the mixed character of systems resulting from the reception of Common Law through external political means is particularly pronounced. The factors involved in such a reception are best observed within the context of systems containing both Common Law and Romano-Germanic Civil Law, which are hereinafter called "mixed jurisdictions." Mixed jurisdictions are usually formed by the absorption of a Civil Law system by a Common Law system (Smith, T.B., 1965). With only two exceptions, Ethiopia and Scotland, these systems have resulted from colonization by a state with a Civil Law system (such as France, The Netherlands, or Spain) of an area that was subsequently acquired by a sovereign with a Common Law system (such as Great Britain or the United States).

When an area with a Civil Law system is thus brought under the rule of a Common Law state, the influence of the Common Law is generally implemented by establishing an appellate court jurisdiction, controlling legislation, introducing English as the official language
(which facilitates use of the voluminous case reports and commentaries used in the Common Law), and by investing judges with that special prestige that so impressed de Toqueville (Smith, T.B., 1975). Accordingly, procedure and style of administration basically follow the Common Law pattern, while much of the private, substantive law of the former Civil Law regime survives by its incorporation into the judicial law of the newly imposed system. As the role of judges and judge-made law gain dominance, the significance of jurists and legal-law school doctrine decline. The ongoing trend is then to reduce the substantive private law of the earlier Civil Law to a form partially preserved in the case law and judicial precedents of the Common Law.

This gradual absorption is not possible, however, where the Common Law sovereign does not have the opportunity to apply its legal principles through the courts. As an example of this, one may observe that British legal thought has had relatively little influence in Egypt, despite the long occupation of the country by Great Britain. The lack of British Common Law courts and a bench and bar trained in the Common Law allowed the continuation of the earlier French law with little modification. Further, those mixed systems that have a codified private law or a language other than English tend to preserve more of their Civilian Law.

The Civil Law in mixed jurisdictions is usually confined to the area of substantive private law. Civilian traditions (as distinguished from substantive law rules) are preserved through legal education and legal literature. The importance of doctrine as a secondary source of law in Civil Law systems arises logically from this role.
The persistence of a Civilian tradition in a mixed jurisdiction is often associated with an emergence of cultural consciousness and nationalistic fervor among the antecedent people. The assertion of the Civilian legal tradition is an aspect of the assertion of cultural tradition (Smith, T.B., 1965). Such an attitude is obvious in such mixed jurisdictions as Quebec (Canada), Scotland (Great Britain), and Puerto Rico (United States territory).

Conversely, legal education and legal literature may also play a central role in undermining the Civilian tradition by the Common Law. "It will never be found that an adequate citation of authority is made unless the authority finds its place in the private library of the practicing lawyer" (Smith, T.B. 1965). The books in the practicing lawyer's library will certainly reflect the legal outlook received by him when he was a law student. As a result, the availability of the Common Law casebooks, reports, and commentaries has influenced the practitioner from law school to bar to bench. More important than the availability of law books is the training of lawyers which usually determines their attitudes towards the sources of law. Indeed, the authorities cited in court will usually be those that the legal training of the judge predisposes him to recognize with familiarity.

In those mixed jurisdictions where English is successfully established as the language of the courts, Civilian traditions and doctrines are further subverted by the use of technical terms of the Common Lawyers as equivalents of Civil Law concepts. "A torrent of alien jurisprudence can pour through the breaches thus made" (Smith,
This is especially true of the situation in mixed jurisdictions (such as Guyana, Scotland, and South Africa) where the Civil Law was uncodified (usually Roman-Dutch or Scottish). There is a strong tendency of Common Law appellate courts to transpose a Civil Law problem into Common Law legal terms and then to solve it according to their own Common Law background. The lack of a code exposes the substantive Civil Law to continuing absorption by the Common Law of the dominant political power (Smith, T.B., 1965). To illustrate this concept, we shall briefly review the formation of mixed jurisdiction in Louisiana, an area that received a Civil Code after having received the Common Law, in an effort to preserve its Civilian heritage; in South Africa, an area where the Civil Law was never codified; and in the Phillipines, an area where the Civil Law had been codified prior to the introduction of the Common Law.

The Louisiana Experience

"The Kulturkampf between the ancienne population and the Anglo-Americans for supremacy in Lower Louisiana manifested itself most sharply as a conflict of legal traditions" (Dargo, 1975, p. 11). As one Civilian stated, the introduction of the English Common Law into Louisiana was "more fatal to us than the invasion of Goths and Vandals was to the Roman Empire" (Instructions, 1805, p. 5). For more than a century prior to United States acquisition of the Louisiana Territory, the land was under the governance of either French or Spanish Civil Law. By the charters of Crozat in 1712 and John Law's Western Company in 1717 the customs of Paris and the ordinances of
the kingdom of France were extended to the French colony.

By the Treaty of Fountainbleau, Louisiana was ceded to Spain in 1762. Upon actual occupation of Louisiana by the Spanish under Alejandro O'Reilly, the governor by proclamation abolished the authority of the previous French laws and replaced them with the laws of Spain. This 1769 proclamation did not constitute a revolution in legal tradition because of the substantial similarity between the laws of France and Spain on account of their shared Roman Law heritage. Even though Louisiana was retroceded to France in 1801, the law of Louisiana remained unchanged. Effective French occupation lasted no longer than the twenty days between November 30 and December 20, 1803, at which time the Louisiana Purchase brought the area under the dominion of the United States. By a Congressional Act of March 26, 1804, the "laws in force" at the time of transfer of Louisiana to the United States were retained.

One of the early acts by the American territorial governor, W. C. C. Claiborne, was the establishing of Common Law courts in the Louisiana Territory. The problem now emerged as to what law was to be applied, Civil or Common Law. Claiborne wrote to President Thomas Jefferson in 1805, that he was fearful of sudden innovation and thus encouraged "the gradual introduction of the American system of jurisprudence" (Carter, 1934-62, vol. IX, p. 366). As a consequence, a Congressional Act of March 2, 1805, extended the common law provisions of the Northwest Ordinance to apply to the Territory of Orleans but with exceptions. The common law application was not to cover matters regarding the succession of property, and local substantive laws were
to remain in force until specifically altered. The Common Law courts of Louisiana judicially recognized the Civil Law, thereby providing a second avenue for the fusion of the two systems into a mixed jurisdiction. Finally, the Louisiana Constitution of 1812 prohibited the legislative reception by general reference of any "alien" system of law, thus precluding the possibility of the complete introduction of the American common law at one time.

To prevent the complete introduction of the Common Law, the Civilians of Louisiana sought a code to preserve their legal tradition: "Now, what is the first law, the most important law in the present situation of this country; what is the fundamental basis of the great edifice of its future legislation? It cannot be denied that it is the matter of giving to it a civil code" (Carter, 1934-62, vol. IX, p. 653). On March 31, 1808, the territorial legislature of Orleans adopted a "code" drafted by Louis Moreau Lislet and James Brown, the Digest of the Civil Laws Now in Force in the Territory of Orleans. Printed in both English and French, and modeled after the projet of the Code Napoleon, the 1808 compilation was actually a digest: i.e., a compilation of existing law, rather than a definitive and final statement of the law, a code. Unlike the French code upon which it was patterned, the Digest of 1808 was not enacted in revolutionary times, nor was it intended to effect a national legal unification or extensive social transformations. It was not a break with the past in that it did not abrogate the preceding law. Many of the radical motives that prompted the redactors of the French code were among the objects Louisianas sought to prevent. "Louisiana's first digest, the precursor of its
famous codes, was the product of a confrontation between competing cultures as much as it was the resolution of the particular problem of legal confusion" (Dargo, 1975, p. 173).

The act promulgating the Digest of 1808, further stipulated that "whatever in the ancient civil laws of this territory . . . is contrary to the dispositions contained in the said digest, or irreconcilable with them, is hereby abrogated." In this clause, it is evident that the earlier law was not necessarily abrogated. As the Superior Court of Louisiana observed in 1812: "What we call the Civil Code, is but a digest of the civil law which regulated this country under the French and Spanish monarchs" (Hayes v. Berwick, 2 Martin [O.S.] 138, at 140). Moreover, unlike the legislative positivism associated with Civilian codification movements at the time, the Louisiana "code" gave legal effect to custom. Spanish law survived in Louisiana as custom. (The Spanish had previously abrogated by code virtually all of the former French law.) The two major sources of Spanish law in Louisiana had been the Recopilacion de Indias and the Siete Partidas. Indeed, the digest of 1808 was largely a digest of Spanish law.

Annotated editions of the digest-the de la Vergne manuscript and another in the hand of Moreau Lislet-reveal the predominance of Spanish law in Louisiana's Civilian heritage. As one scholar concluded: "Both documents . . . help demonstrate that the redactors of the Digest of 1808 did indeed consider it a digest of the Spanish laws then in force in Louisiana even though they cast it in the mold of the new French Code Civil" (Pascal, 1965, pp. 25-27). Another legal schol-
ar claimed that the 1808 legislation was 85 percent French, with 70 percent of this total coming from the French projet of 1800 and the Napoleonic Code (Batiza, 1971-72). Although the latter study has been properly criticized on the basis of linguistic errors and statistical fallacies that led to apparently incorrect conclusions regarding the place of French law, the analysis is helpful in supporting the speculation that much of the substantive law of France and Spain was so similar as to permit substantial interchangeability.

Although not a proper code, the Digest of 1808 did serve the purpose of preventing the erosion of Civilian law during the early high tide of the Common Law in Louisiana. It remained for Edward Livingston, sometimes called the "Bentham of American jurisprudence," to awaken in Louisiana a zeal for true codification. Livingston, with Moreau Lislet and Pierre Derbigny, drafted a civil code that was enacted by the state legislature by an act of March 25, 1828, and that repealed all civil laws dating from before the promulgation of the Louisiana Civil Code of 1825. It was asserted that "in the Napoleon code we have a system approaching nearer than any to perfection." Even so, some Spanish laws maintained persuasive significance by being recognized by the courts as doctrine and custom.

Thus, the Civil Law was preserved in Louisiana as a mixed jurisdiction in the midst of a largely Common Law judiciary and in the face of reception of Anglo-American public law. Among the sources of law rules, legislation remains primary (La. Civil Code, Art. 1). Custom may be applied where the legislation is silent (La. Civil Code, Art. 3). And, perhaps in deference to the Common Law, "In all civil
matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent". (La. Civil Code, Art. 21)

By way of conclusion, we can briefly compare the legal situation in other states, most notably Texas, where an uncodified Civil Law prevailed prior to the reception of the Common Law. In Texas, much of the substantive Spanish law gained from Spanish and Mexican rule has survived through incorporation into the judicial common law and by judicial recognition. No concerted attempt to preserve the Civil Law tradition occurred in Texas. Although, for instance, Texas water law drive from Spanish sources (Dobkins, 1958; Glick, 1972), it was administered through the Common Law courts. Also, land law was of primary importance to the incoming American settlers; thus, Common Law doctrines of property rights generally prevailed (Williams, 1949). The exception to Common Law land rights exists in areas where land titles derive from Spanish or Mexican grants (such as are found principally in the vicinities of San Antonio, Goliad, and Nacogdoches, and along the lower Rio Grande). The persistence of Civilian institutions in such cases has been described by the courts, as follows: 

Lands in Texas have been granted by four different governments, namely, the Kingdom of Spain, the Republic of Mexico, the Republic of Texas, and the State of Texas. Many millions of acres of land were granted by Spain, Mexico, and Republic of Texas prior to the adoption by the latter of the common law of England as the rule of decision in 1840. . . . the validity and legal effect of contracts and of grants of land before the adoption of the common law must determined according to the civil law in effect at the time of the grants, it is plain, we think, that whatever
title, rights, and privileges the inhabitants of Texas received by virtue of land grants from the Spanish and Mexican government, which were a part of the realty itself or were easements or servitudes in connection therewith, remained intact, notwithstanding the change in sovereignty and the subsequent adoption of the common law as the rule of decision. (Miller v. Letzerich, 121 Tex. 248 [1932])

Thus, although the common law is clearly the rule of decision in terms of Texas land law, an exception is made to recognize certain aspects of previous Spanish or Mexican grants. This result was consistent with the general nature of the Common Law tradition to recognize preexisting law.

Similarly, the survival of Civilian institutions in isolation may be found in other states of former Spanish or French dominion. For instance, the Civil Law matrimonial regime of community property prevailed in Arkansas, Florida, Iowa, Mississippi, and Missouri, before it was abolished by statute. This wide-spread presence indicates the former effective jurisdiction of France and Spain in areas currently part of the Common world.

The Example of the Philippines

The Philippines were under Spanish jurisdiction from 1565 to 1898. During this time, the governor attempted to enforce the laws of Spain. Spanish colonial administration, however, occasionally tolerated local laws as custom, as long as they did not violate Spanish-Christian precepts of morality. The basic law was that of the Nueva Recopilacion of 1567, the Recopilacion de Indias of 1680 and the Novisima Recopilacion of 1805. After, 1889, the Spanish Codigo civil applied.
By the Treaty of Paris of 1898, the Philippines was ceded to the United States. However, effective American occupation did not commence until 1901. At that time, the United States court system was established, and Spanish civil procedures were repealed. Nevertheless, Spanish laws and codes largely continued to be the law applied. The further judicial introduction of common law rules assured the mixed character of the legal system of the Philippines. The introduction of the common law was expressed by the courts in *Alzua v. Johnson* (21 Phil. 308, 1912):

> [M]any of the rules, principles, and doctrines of the common law have, to all intents and purposes, been imported into this jurisdiction, as a result of the enactment of new laws and the organization and establishment of new institutions by the Congress of the United States or under its authority; for it will be found that many of these laws can only be construed and applied through the aid of the common law from which they are derived, and that, to be had to the rules, principles, and doctrines of the common law under whose protecting aegis the prototypes of these institutions had their birth.

In another case, *In Re Shoop* (41 Phil. 213, 1920), the court noted the reliance upon American judicial precedent, which mixed with the Spanish substantive law to form a "Philippine common law", which in turn complimented the persistent Spanish Civil Code. On account of American political supremacy, the Common Law prevailed in matters of procedure (Francisco, 1951; Gamboa, 1969), interpretation of statutes (Lobingier, 1905; 1908; *U. S. v. Cuna*, 12 Phil. 242, 1908), and certain principles of substantive law (*In Re Shoop*, 1920).

After independence in 1946, a new codification process was instigated that resulted in a *Philippine Civil Code* in 1949. This code com-
prised provisions taken from the civil codes of Spain, France, Germany, Switzerland, Italy, Mexico, Argentina, and Louisiana, as well as the substantive law of the United States. Matters of civil procedure remained like that of the United States.

By contrast, the French experience in India is instructive. The principal French settlement of Pondicherry was founded as early as 1674. The then uncodified French civil law applied in this settlement. With the promulgation of the French *Code civil* of 1804, the codified French Civil Law applied to those opting for French rather than Hindu law until the French territory was transferred to India in 1956. However, because of its limited application, the former French civil law survives only as it has been incorporated into the Anglo-Hindu Common Law of India through the judicial precedents that relied upon French cases (*The Collector of Madura v. Mootoo Ramalinga Sathupathy* (12 M.I.A. 397, 1868).

**The South African Development**

The mixed jurisdiction of South Africa illustrates the outcome of a reception of an uncodified Civil Law by *Volk* migration and its subsequent submersion in a sea of Common Law resulting also from *Volk* migration. The written history of South Africa began in 1652 with the arrival of the First Dutch settlers. These early colonists brought with them the Roman-Dutch Civil Law, which other Dutchmen had also carried to Ceylon, Indonesia, Surinam, Guyana, and their other colonies. Roman-Dutch civil law was a system developed in Holland from the fifteenth to the early nineteenth centuries, consisting of a fu-
ion of Germanic custom with Roman law. Holland was annexed in 1433 to the Duchy of Burgundy and thereby to Spain. Roman-Dutch law in the Netherlands was superceded by the reception of the Napoleonic Code in 1809. The old, Roman-Dutch law generally persisted, however, as the law of the colonies.

Even if the Dutch colonial administration had extended their codified Civil Law to their colonies and territorial possessions, the Roman-Dutch law of South Africa would have remained unaffected. The British had taken the colony from Holland by force during the Napoleonic wars when the Dutch were active allies of France. Thus, by 1806, three years before the new code in the Netherlands, the Cape Colony was under British rule and the English Common Law. Roman-Dutch law continued as the personal law of the descendents of the early Dutch and of the French and German settlers. Forty years later, in an effort to escape British rule, nearly twelve thousand Dutch-descended Africaners marched northward in the Great Trek, and that resulted in the diffusion of Roman-Dutch law to Natal, Zululand, Bechuanaland, the Republic of Transvaal, the Orange Free State, and Swaziland. Afrikaner fortunes reached a low ebb in the Boer War of 1899-1902. It was a war for independence that failed, with the consequence that recently settled Dutch territories were united in the South Africa Act of 1909 (9 Edw. VII, c. 9) as the Union of South Africa and the subsequent independence to the present (Lee, R.W., 1953). English law was imported, and courts applied English precedents, principles, and doctrines. Roman-Dutch law generally prevailed in matters of family law, and English law in commercial relations. Generally, a
fusion resulted from the English recognition and judicial incorporation of the previous Roman-Dutch law. Jurisprudential allegiance and political orientation allowed the Afrikaans lawyers to remain essentially Civilian, in the presence of English-speaking South African Common Law lawyers (Smith, T.B., 1965, p. 35). This South African "Common Law" generally extends to the newly independent Bantustans of southern Africa: Transkei, KwaZulu, and Bophuthatswana (Butler, 1977).

SUMMARY

Mixed jurisdictions can be divided, we now see, on the basis of the nature of their antecedent Civilian heritages. With this breakdown, two primary categories emerge: Those with Roman-Dutch Civil Law influences, which tend to be uncodified (such as the Republic of South Africa, Rhodesia, Lesotho, Botswana, and Ceylon), and those with Latin Civil Law influences, which tend to be codified (such as the Philippines and Seychelles).
CHAPTER IV
THE CULTURE HISTORY OF LEGAL SYSTEMS BASED ON HUMAN DESIGN:
ROMANO-GERMANIC CIVIL LAW

The Romano-Germanic Law family of legal systems consists of those national legal systems formed in Continental Europe, together with those patterned after these Continental systems. Continental Europe, the culture hearth of Romano-Germanic Civil Law, remains the center of the Civil Law world. However, colonization and overseas settlement by such Continental countries as France, Belgium, Spain, Portugal, Germany, Italy, and The Netherlands expanded the global extent of the Civil Law beyond Europe. "The technique of codification adopted in the nineteenth and twentieth centuries also favored its establishment in many other countries" (David and Brierley, 1978, p. 69).

The Civil Law is found today, besides in Continental Europe, in Latin America (where it was received primarily from Spain and Portugal); the former French colonies in Africa, Southeast Asia, Oceania, and the Americas; the former Belgian and Spanish colonies in Africa; the former Dutch colony of Indonesia; and places of voluntary reception, such as Turkey, Iran, much of the Middle East, Israel, Thailand, and Japan. In a form mixed with the Common Law, it is also found in Guyana, Louisiana, Quebec, South Africa, Rhodesia, Scotland, and elsewhere in areas initially under the Civil Law, but subsequently in a Common Law jurisdiction. In Ethiopia, the Civil Law was imported simultaneously with Common Law.
**Volk Migrations**

The diffusion of Romano-Germanic Civil Law through volk migration was primarily a consequence of overseas imperial expansions. In that way, for example, the Civil Law of Spain and Portugal was transplanted throughout Latin America. In such areas where only poorly organized or otherwise non-competitive indigenous law resided, the law of the mother countries naturally prevailed. "At no time was there ever any suggestion of rejecting this tradition" (David and Brierley, 1978, p. 70). Similarly, Dutch settlement in southern Africa resulted in the relocation diffusion of the Civil Law to that area, complete and alone until the advent of British rule.

Of considerably less significance to the diffusion of the Civil Law was massive immigration without the color of some imperial power. The most notable example being that of Israel, whose recent legal history illustrates a drastic change of legal structure because of extensive immigration.

**Imperial Expansions**

Although the transfer of Romano-Germanic Civil Law by means of relocation diffusion occurred through French settlement in Algeria and Dutch settlement in South Africa, the most notable examples of imperial expansion of Civil Law resulted from Spanish and Portuguese colonization of Latin America. In Latin America, the settlers found little competition in the native, indigenous laws. At the same time, Spanish and Portuguese colonial policies treated the newly settled territories as though they were parts of metropolitan Spain or Por-
The laws of the Spanish settlers included the numerous Fueros of Spain, as well as the Siete Partidas and the principal bodies of Spanish legislation. The Nueva Recopilacion of 1567, the Recopilacion de Indias, and the Novisima Recopilacion of 1805. In Brazil, various Portuguese legislation composed the bulk of the imported law. Until the 1917 codification, the Ordenacoes Filipinas (published in 1603, confirmed in 1643) served as the general law of Brazil. This legislation was applied together with the Lei da Boa Razao (Law of Good Sense) of 1769. This law required the judge to apply Roman Law to fill the legislative gaps, when consistent with "good human sense." The effect was an approximation of natural law: i.e., "the essential, intrinsic and unalterable truths which Roman ethics had established, and which were given formal recognition by divine and human laws to serve as moral or legal rules of Christianity" (Gomes, 1959, p. 332).

The mixture of legislation and custom imported from the mother country remained the basic law of the several colonies until the advent of the codification movement during the nineteenth century. At that time, most of the newly independent countries of Latin America adopted some form of the French Code civil, which was basically consistent with the Roman, Spanish, and Portuguese legal heritage of the people.
ception of the Civil Law; but the nature of the Civilian transplant differs from that of the Common Law in several crucial respects. Complete application of Civil Law to a colony, rather than a judicial matter as under Common Law, was an administrative fiat subject to the political policy of the mother country. The implantation of Civil Law also failed to blend European and indigenous laws in the formation of new national legal systems that are characteristic of Common Law as a unitary legal system grounded in precedent and applying to individuals on the basis of their personal law, which was determined on the basis of domicile and religious affiliation. By contrast, the Civil Law was established on a territorial principle, wherein the civil code applied as an act of the state. Nationality, the territorial connection, was a matter of place where public law as to political status determined private law jurisdiction. The Civil Law prevailed as received from the mother country, even though substantive provisions may vary somewhat from place to place. A colonial mistress, having gained overbearing and effective control of a colony, the common law power asked what the existing laws were, whereas a civil law metropolitan announced what—by writ of might—the law was henceforth to be.

As in the Common Law countries, involuntary reception was usually the consequence of acquisition of territories by conquest or colonization in the civil sense of the term. The laws of France, Spain, Portugal, Germany, Italy, and, to a lesser extent, the Netherlands, were introduced, in totality, to their respective dependencies, excluding explicit, legislative recognition of customs and usage of the people
whom they ruled. If the natives could be overawed, the Civilian, code-based law of the donor countries could be imposed on recipients with relative ease. Such a code containing specific rules, rather than principles derived from case law, could fulfill an immediate assurance of security in legal relations because they "constitute an expose of law sufficient in itself, which is the point of departure for a new development of juridicial rules" (David, 1963). The influence of Cartesian constructivist rationalism in viewing legislation as the dominant source of law and the Civilian conception of the code as a model for the organization of civil society makes large-scale imposition and reception of a legal transplant by the force of external political power comparatively easy, even across stark cultural and linguistic barriers. Upon gaining independence, the former Continental European territories retained the law and legal systems of their colonial mistresses, except, of course, those that fell under communist rule.

**French Colonial Law**

There are no viable principles of reception that distinguish among the several Civilian legal systems formed from the French colonial law. Where, in the Common Law countries, differences in reception may be explained in terms of the religious and customary laws that articulated with English colonial law to form new national Common Law systems, different legal positions among the former French colonies resulted from modifications of political policy, rather than from juridical events.
The French system of direct rule strongly asserted the authority of the Parisian imperium, an integral aspect of the French colonial policy of assimilation, which had little tolerance for native, customary domestic law. "Egalitarianism and empire are characterized by a growing acceptance of positive law and a belief in the state as the ultimate source of all value and law" (Marina, 1975). The colonial policy of assimilation, which culminated in the metropolitan centralization of the post-revolutionary period, required legal and administrative conformity with the French Code Napoleon, such as the civil codes of Algeria and Cochin-China. The policy of assimilation abated, somewhat, only by the early twentieth century when it was generally replaced by the colonial policy of association.

Under the association plan, the French conceived their duty as one to develop colonial institutions so as to secure the general welfare of the inhabitants. Such a view allowed both colonial and metropolitan perspectives on local government. This was the first real allowance for local, indigenous custom. In the environment of the French colonial policy of association, the civil codes of Tonkin and West Africa were promulgated.

Throughout French colonial policies of both assimilation and association, the French system of direct rule prevailed. Under direct rule, law was considered a branch of native policy, its administration a matter of political policy, and its goal to evolve indigenous peoples toward the higher standards of French civilization. "Colonial peoples were to absorb French culture so that they might become Frenchmen and French citizens; the colonies were to become overseas parts
The French system was therefore, characterized by a high degree of centralization in its administration. The fundamental principle of French legislation was the supremacy of Parliament. French Parliamentary legislation applied to all colonies. Even when colonial legislation was specifically permitted, the French Parliament retained a veto power.

Upon gaining independence, most of the former French colonies and territories adopted the Napoleonic Code and readily embraced the French Civil Law system completely as the particular local circumstances allowed (Salacuse, 1969). The "ex-French territories, almost without exception, have adopted not only the text but also the machinery and the procedures of the Code Napoleon and other French laws" (Elias, 1965, p. 192).

French and Islamic Legal Pluralism in North Africa

The French use of law and the legal process as a means of implementing political policy was particularly pronounced in the Islamic realm of northern Africa (Algeria, Tunisia, and Morocco). The general colonial policy of direct rule underscored significant juridical differences between French civil law and Islamic jurisprudence. This difference is especially evident in the French classification and administration of land. The French civil law considers the origin of any property right in order to establish that right's existence in both fact and its relationship with the sovereignty of France. By contrast, Islamic law emphasized local custom concerning occupation,
possession, and use in determining such land rights.

Many of the problems encountered in the initial clash of French and Islamic laws resulted from the contact of entirely different cultures. Misunderstandings were many, because the French-trained lawyers failed to comprehend the influence of custom in the variations of Shari'at application. However, it was in the area of land administration that French and Islamic law were fully reconciled as dominant and servient systems, respectively.

The transfer of land from the public domain to incoming settlers was of paramount political importance to the colonial government during the nineteenth century. The land had been acquired by France through its powers of sequestration and expropriation. This is not to imply that expropriation occurred only in territories under Civil Law jurisdiction; it also happened in the Common Law realm and elsewhere. This political process of land acquisition, however, failed to realize problems of land classification in Algeria and elsewhere in French northern Africa, where different areas had for long had different Islamic and customary laws (Ruedy, 1967, pp. 4-12). In its attempt to reconcile French and Islamic law in the land transfer process, France erred in assuming that all Moslems adhered to Islamic law as their personal law. A survey of the different land classifications in Algeria clarifies the issues of contention.

The First classification of land was that of milk land. This was land, the rights to which an individual has the inalienable right of disposition. Land classified as milk land resulted from a sale or grant made by the local ruler. In French law, recordation of land
transfer is formal and explicit. However, the law practice in the rural Maghrib, for example, required no judicial or administrative documentation to effect valid transfer. Evidence of ownership depended upon the mere possession of a deed, upon which there may be found inscribed transmissions extending back in time for generations. Obviously, problems emerged when the French tried to reconcile the two legal systems as regards the valid transfer of such land.

The French authorities could only attempt land administration under such circumstances after asserting that the ultimate sovereignty over milk land was vested in the state and that such land was subject to the collective ownership of its inhabitants. After settling upon that political resolution of the difficulty, the French could then effect the sequestration and transfer of milk land to the European colonists.

Lands that had belonged to the Bey of Algiers and to the Beys of Constantine and Oran fell to the public domain in as much as the French state became by right of conquest the heir and successor to the defeated Beys. These were termed as "Beylik land." These lands originated from dynastic inheritances and forfeitures to the pre-French ruler. Before the arrival of the French, the rural beylik was sub-divided and classified according to use; for instance, some land was granted to trives in return for the regular payment of a tax; some land was leased to tenant farmers. Because it was part of the public domain of the Beys, this land transferred to the public domain to the colonial government on the assumption of power by the French.
A third class of land, arsh lands, were actually tribal lands. Inasmuch as there existed neither right of alienation nor written land titles, French administrators viewed these lands as a reserve that the government was free to dispose of at will.

The various means of sequestering these several types of land all reflected attempts by French jurists to apply French legal concepts to Islamic customary practices; yet these French law concepts did not actually apply. In that way, the government at Algiers secured lands for French settlement, thereby fulfilling domestic political policy. In the case of milk lands, customary forms of land transfer did not meet with the specifications of French law and were thus susceptible to government acquisition. Beylik lands were already in the public domain to which the French colonial government succeeded. Arsh lands were interpreted as public reserve lands because they belonged to no individuals.

Apart from land matters, the French generally allowed the old Kathi's tribunals to persist and to apply Islamic law among Moslems. This concession was subject, however, to control by the colonial authorities; and decisions could be appealed to the civil courts wherein French law would be applied. An exception to this nominal administration of Islamic law in Algeria was an area called the Grande Kaybylie. In this area, the colonial government permitted for a time the exercise of local customary law, which was nonetheless administered by a French magistrate.

Despite the doctrines of the Civil Law, several laws did in fact exist in Algeria, and it is in the manner of dealing with antecedent
laws that some of the specia character of the Civil Law becomes manifest. The fact of legal pluralism emerges in that, except for land matters, persons of the Moslem faith might appeal to Islamic law as their personal law. Unlike Common Law realms where successful appeals to personal law incorporate that law into the general common law, the French Civil Law recognizes only those Moslem rules that have been adopted by the French Parliament for French Moslems of particular territory. This introduces another difference between the two European law families. Under the Common Law, an individual enjoys personal law as a consequence of membership in some community or as a consequence of religious adherence; in the Civilian context, personal law may only be invoked by an individual by virtue of his identification with some territory for which the legislator has expressly stated that the customary law applies.

In Tunisia and Morocco, French Civil Law administration was little different from that of Algeria. Although Islamic law was legislatively permitted to continue in its religious aspects, land law was brought exclusively under French civil law. The application of Islamic law, where permitted, was subject to the influence of French doctrine and jurisprudence. Finally, even the legislation derived from Islamic law was administered by secular courts, after the French model.

In conclusion, the French Civil Law, with its distinction between public law and private law, finds territorial expression in that a civil code, promulgated as an act of state, applies only within certain areas. Therefore, it is possible in French North Africa, for the
civil codes to differ as to what private law shall be applied, even in different parts of the same colony. This territorial principle has been retained in the various national codes that serve as the bases for the modern, post-colonial jurisdictions. Thus, certain colonial laws, especially family law, continue to be territorially based.

**French Law in West Africa**

In French West Africa, certain aspects of French colonial policy and, by way of extension, French colonial law are presented in their most pronounced form. The justification for applying the French Civil Law to these colonies was grounded in the prerogative of a territorial sovereign. Indeed, the failure to impose the Civil Law would have been construed as a derogation of that sovereignty (Delavignette, 1968). In cases where the public order was not affected, customary law was often allowed to persist in the interest of continuity in native life as regards such matters as marriage and land tenure. Codification of customary law was not even attempted, as it had been in the case of Islamic law in French North Africa. Indeed, in matters of private law the French colonial authorities did not recognize the presence of antecedent customary law. "We prefer to create artificial jurisdictions which are native only in name" (Delavignette, 1968, p. 89).

Because the Civil Law system is a basically closed system, there exists no tolerance for native, customary law when it conflicts with French legislation. The Civil Code is an expression of sovereign,
legislative will. As such, it applies as the will of the state in any and all territory where it is sovereign (Smith, T.B., 1965).


Reception of French Civil Law usually began with the enactment of a status applying the laws of France as the laws of the colony. In only a single instance, French civil law was received on less than a complete and comprehensive basis. The first of the French African territories, Senegal, received its French law through a series of statutes enacted at several dates (Salacuse, 1969). When the other colonies of French West Africa were formed in the latter part of the nineteenth century, the French law as it applied in Senegal was legislatively received. As an example, the provision that established the colonial courts in French Guinea declared, "In any matter, the courts of French Guinea shall conform to the civil, commercial, and criminal legislation of Senegal, insofar as it is not contrary to the present decree: (quoted in Salacuse, 1969, p. 23). In 1901, enactment of a single reception statute standardized the Senegal law in force in Dahomey, the Ivory Coast, and Senegal (Salacuse, 1969). The legislation as it applied to Senegal was also applied to the colonies of French Equatorial Africa prior to its formation in 1910. Later, French
legislation was either promulgated for a particular colonial federation or received as French law of general application.

Although the laws and legal systems of the French African colonies were those of the French Civil Law system and the metropolitan substantive law of France, customary law was sometimes permitted to stand when the French legislation was silent on the point in question. Indeed, French legislation was often inapplicable to a large part of the population. Although as early as 1830, the declaration was promulgated that "any individual born free and inhabiting Senegal or its dependencies will enjoy in the colony the rights accorded by the Civil Code to French citizens," customary law could be preserved for natives through special French legislation, so long as no French law applied (Salacuse, 1969, p. 45).

Customary law was recognized as early as 1857 by legislation pertaining to Senegal. The enactment declared the right of Senegalese Moslems to be governed by Islamic law only in matters concerning marriage, succession, and donation. The law was also extended to the other territories of West Africa and Equatorial Africa with special cognisance taken of the fact that African Islam differed from place to place according to local custom. Of course, custom could never be applied if it was determined to be "contrary to the principles of French civilization."

Since independence, the general relationship between civil and customary law has remained virtually unchanged, but for a few notable exceptions where the new nations have succumbed to such political religions as nationalism and socialism (Salacuse, 1969; Bedie, 1961;
Farnsworth, 1964; Farnsworth, 1969; and Opoku, 1970). In those jurisdic-
tions drifting toward leftist ideologies, customary law has
generally been rejected. Mali, for example, has declared this rela-
tion to exist (Hazard, 1967).

Elsewhere in French Africa, in Mauritania, an uncertain relation-
ship persists between the Civil Law and Islamic law (Salacuse, 1969).
However, the inherent nature of the Civil Law and codification efforts
have assured the higemony of the European system.

French Law in Indo-China

The Union Indochinese comprised the territories of Annam, Cam-
bodia, Cochin-China, Laos, and Tonkin. Cambodia and Laos were actu-
ally only protectorates with French-recognized sovereigns. Annam and
Tonkin were protectorates of Vietnam (Cochin-China). Only Cochin-
China was a full colony of France. With the exception of Cochin-
China, the French Colonial policy of direct rule was noticeably ab-
sent.

In Cochin-China, by legislative decree of 1883, some of the ar-
ticles of the French Civil Code were applied to the general population
and a precis of Vietnamese provisions pertaining to marriage, divorce,
and inheritance was enunciated. In 1931, the legal pluralism of
French and Vietnamese law characteristic of Cochin-China was legisla-
tively declared in Tonkin in the form of a civil code. Civil code was
promulgated for Annam in the period, 1936-39. The applicability of
these codes was confined only to natives of the region. Despite the
codes that embraced both French and Vietnamese substantive law, an
individual could still resort to the law of the French Civil Code.

The several Vietnamese civil codes were prepared in the French manner, with the substantive law of the natives serving as part of a servient system. As could be expected in a population of mostly peasants, most court disputes arising under the codes were either family law matters or land disputes. Vietnamese rules of land ownership and occupation usually persisted (Adams and Hancock, 1970). This was a natural consequence of serious interest on the part of the colonial government concerning an extensive cadastral survey. Still, the French Civil Code generally applied to such land transactions as mortgages and alienations. Where conflict resulted between the Vietnamese Law and the French, the French civil law rule prevailed. In the Civilian tradition, attempts were made to draft a civil code composed of native laws for the Bahnar, one of the highland peoples of the Kontum province of central and south Vietnam (Lebar and Hickey, 1964). The object was to codify the legal custom of the Bahnar. This effort at setting forth native law in the forms of the French Civil Law was never successfully implemented.

The French Civil Law was received in all French territories as a matter of legislative will. This system regarded French law as the rule of law and native law as an exception. This arrangement was thought to be the best way to assimilate indigenous peoples into the mainstream of French civilization (Kollweijn, 1929).

Dutch Colonial Law

Dutch colonial law differed from French colonial law just as
Dutch colonial policy differed from French colonial policy. Indonesia provided the ground in which the Dutch colonial law intertwined with indigenous systems and flowered into a colorful legal pluralism. For that reason, the legal systems of Indonesia will be used to explain the diffusion of Dutch law.

The transplanting of Dutch law in Indonesia resulted in plural legal administrations and application of separate bodies of law on a racial basis. For the first century of Dutch East India Company's rule in Java (i.e., until 1798), the colony was administered partly through an indigenous elite. The plural judicial system provided separate law courts for Europeans and natives. In the European courts, Dutch law was applied; in the native courts, native law held sway in so far as it was not inherently offensive to European ideas of justice. At the end of the eighteenth century, the colonial administration was transferred from the East India Company to the Netherlands (van der Kroef, 1951). Although some administrative reform transpired, the dual system of courts remained. As a consequence of the Napoleonic Wars, Java came temporarily British control in 1811. The only significance of the brief British rule was the classification of land as state property so as to form the basis of a native judicial system that centered on native villages and land systems.

After the Napoleonic wars, Java was returned to the Dutch Crown. The Dutch retained the British-introduced land system and reintroduced their basic colonial policy of racial separation. By 1848, colonial administration had settled on a native land classification and village system and a dual administration of law that would remain
for the balance of the colonial period.

The next important event in the early legal history of Indonesia, was the enactment of the Agraian Law of 1870, which guaranteed existing customary rights over land. By Crown Ordinance in 1875, natives were forbidden to alienate land to foreigners. It was not until 1885 that it was possible to convert native land tenure into private ownership under the Dutch civil law.

By the turn of the twentieth century, Dutch colonial policy toward Indonesia began to take true Civilian form. Unlike the French, the Dutch did not have a policy of either assimilation or direct rule. Unlike the British, the Dutch did not actually have a policy of indirect rule. Dutch colonial policy prior to the twentieth century alternated between either colonial exploitation or benign neglect. But now, the Dutch formulated a colonial policy of substantial dimensions, the "Ethical Policy." This policy resulted from a perceived moral obligation to native welfare. The introduction of the Ethical Policy occurred simultaneously with the rise of nationalist sentiments, much of which was inspired by European ideas on the matter, but formulated in Islamic phrases. These two events were significant for the future development of legal pluralism. As a consequence, a codified Dutch Civil Law system was introduced, and the native, village legal system developed an ascertainable body of adat, whose gradual social evolution accompanied the growth of stable adat communities in the Outer Provinces (Bisschop, 1934; Ter Haar, 1948). The result of these developments was the formation of a new school of jurisprudence whose underlying philosophy posited a distinction between the laws of
various races and whose principle concern lay in elaborating an approach to the inevitable conflict of "racial law".

It is important that the jurist-formulated theory of conflict of laws, which is now a widely recognized aspect of jurisprudence, is based on Dutch civil law principles of procedure. Even the native courts adopted Dutch procedure, as well as many Dutch legal concepts of a substantive nature.

In all cases where—owing to the presence of the Dutch group of the population in the Indies and as result of the administration of the government over the Indonesians by Dutchmen—ready-made Western law institutions or juridical interdictions and injunctions appear to have been included in the law of the native population in such a manner that the adat law would not have arrived at that stage by independent development, in all those cases we can speak of Western influence on the adat law (Ter Haar, 1929, p. 165).

Dutch law influenced native law in five ways: 1) The influence of formal administrative procedures affects adat rules or principles by reducing the adat to writing; 2) the casting of adat rules in terms imported from the Dutch civil law; 3) Dutch legal advice and the use of formal documents requiring an interpretation in the light of the imported law; 4) missionary influences in the breakdown of traditional attitudes of which adat forms a part, especially as concerns the abolition of polygamy; and 5) imitation of Dutch law forms in commercial and family transactions by the educated natives particularly in urban areas (Ter Haar, 1929).

Early classifications of the inhabitants of the Dutch Indies had grouped individuals into four classes: Europeans, those assimilated to Europeans, foreign orientals (Arabs and Chinese), and natives. Af-
ter 1898, these classifications persisted with the exception that the first two categories were combined and included not only Europeans; but also Japanese and persons whose family law was essentially the same as the European. Foreign Orientals continued to be governed by their own personal laws until the early twentieth century, when they, too, were simulated to the European group. These classifications were the basis for the multiracial legal system that prevailed in Dutch East Indies.

Preference for one racial law rather than another, was determined by what was the proper law of each case. There was no overriding view in favor of any particular system (Kollewijin, 1951). The doctrine of lex fori could not provide a plausible solution to the problem of the choice of law because all laws were equally valid. It was thus left to the judiciary to resolve the question of choice of law. The courts determined, for example, that as to succession, the testator governs inheritance. Therefore, immovable property classified as European land but left by a native, was inherited under the rules of the adat. Native land left by a Chinese was inherited according to European law. In the case of immovable property the law applicable to the land as classified "European" or "Native", remained the same regardless of the racial group of the owner (Schiller, 1942-43).

Concerning the roles of adat in such legal plurality, Ter Haar argued against the unification of the systems of law and the uncritical adoption of Dutch law. Such leading jurists as van Vollenhoven and Ter Haar prevailed. They advocated a "judge-made law for the Indonesian firmly based on folk law" (Ter Haar, 1948). But, the prob-
lem of inter-racial law persisted, Schiller (1942-43, p. 40) provided a summary of the position of such a law in the Dutch East Indies:

Interracial law is not founded upon a limited number of general maxims, but is formed of as great number of sharply defined rules which specify what is to be the legal rule in particular circumstances. The source of the rules of interracial law is varied, many of them are to be found in legislative enactments. Further, interracial character is given to statute by judicial interpretation, attributing to the legislator an intention of providing for situations involving more than one racial group. Then there is the occasional drawing upon rules of private international law by way of analogy, more often reference to customary law, and in a few cases the recognition of juristic science as to the source. But, above all, interracial law rules flow from judicial decision, the ultimate source thereof not being mentioned. There is a danger of "judge-made" law herein, but it cannot be disputed that in recent years decisions of the courts—and the reliance upon precedent that accompanies such activity—play a major role in the forming of principles of inter-racial law.

A somewhat different conflict existed between adat and Islamic law. Generally, adat law would prevail over any religious law unless legislation specifically set out the preference for one of them on some point. The conflict is here significant because most of the inhabitants of Indonesia are Moslems. The strongest center of Islam in the country is the coastal trading area of north Sumatra. By contrast, the inland agricultural communities tend not to be Islamic. This patterning has an obvious effect on the distribution of personal laws. Although the boundaries between adat and Islamic law have never been accurately determined, a continued dual legal pluralism persists between the two. Islamic law is administered by a collegiate tribunal called the priesterraaden, that has jurisdiction only over matters of marriage, divorce, and inheritance (Lev, 1972).
As concerned the administration of the adat, the general competence of adat as a viable legal system in any area is determined by constitutional provisions. In the area of direct judicial administration, the general rule was that substantive adat law remain valid for natives in so far as it is not replaced by statute or by European law; ordinances regulating adat enacted prior to January 1, 1920, must be declared applicable to natives; ordinances made after January 1, 1920, may depart from adat law if the public interest or social needs of the natives so require; and, the adat rule may be applied even if in conflict with a generally recognized rule of equity or justice. In native administration, Adat civil procedural rules apply in so far as they have not been replaced by general ordinances; the ordinance on native justice in directly governed lands determines the extent of the validity of adat law; and, adat law alone applies in the village administration of justice. Finally, in the area of native administration of justice in self-governing territory, adat civil and procedural law applies in so far as it is not replaced by ordinances rendered effective by treaty or agreement (Ter Haar, 1948, p. 32).

Maintenance of adat and the continuation of the policy of legal pluralism were perogatives of constitutional authority. However, the scope of adat was greatly reduced by the promulgation in 19 of Civil and Commercial Codes. In addition, legislation derived from European models and made directly applicable to the natives imported additional Dutch legal concepts.

After 1945, Dutch colonial law yielded to the formation of a
national law in the newly independent state of Indonesia. Shortly after independence, indigenous justice in the several territories was replaced by government administration, except at the village level. In addition, both adat judges and religious judges were recognized (Schiller, 1955).

Among the problems facing those hoping to guide the growth of the emerging national legal system was the conflict between unification and pluralism. Indonesians viewed codification and unification as necessary to achieve a unified nation (Lev. 1965). Reform efforts at eliminating the old colonial law were set in motion. One of the objects of this reform was the abolition of law groups based on race or areas. The Agrarian Act of 1960, for example, replaced the Dutch land systems with rights to property based in "social function" and on "national interest and national unity." The ideology of nationalism also eliminated many of the adat property rights by favoring individual right to ownership and disposition. The intention of these reforms was to create a uniform land law throughout Indonesia.

In the setting of partly constructivist nationalism, the Dutch Civil Code was declared by the Supreme Court no longer to be in force after 1963. The reason was enunciated as follows:

From the beginning it has been felt strange that in Indonesia, even though now independent, many laws still apply which in character and object . . . cannot be freed from the thinking of the colonialists . . . who sought to satisfy Dutch interest . . . In view of the fact that the Dutch colonialists drafted the civil code wholly in imitation of the Dutch civil code, and, moreover, that it was applied only to Dutchmen (and those assimilated to them) in Indonesia, therefore the question arose whether in independent Indonesia . . . it was proper to regard the civil code as formally valid . . . Thus the idea occurred
to consider the civil code not as a law, but rather only as a document describing a part of the unwritten laws. . . [on the basis of this view] the authorities, particularly judges, are freer to disregard various articles that are no longer in harmony with this period of Indonesian independence. (Lev. 1965, p. 239n)

Although judges continued to rely upon Dutch-made legislation, the colonial law with its civil code was relegated approximately to the level of a customary law (Damian and Hornick, 1972). Even though the official, constructivist doctrine of the independent State rejected the idea of separate legal systems had existed in colonial times and embraced the notion of legal unification through codification, the government substantially nullified the Dutch civil code and provided judges with a cloak of authority vaguely resembling that found in the Common Law. Interesting enough, codification has been enthusiastically carried forth; the move towards development of a national law has proceeded on an eclectic and piecemeal basis.

Together, the Supreme Court decision of 1963 and the earlier Agrarian Act of 1960, removed the primary points of contact that had determined the choice of law when conflicts arose in the colonial context; i.e., a) that the population group of the parties was not the same; b) where, if land matters were in issue, the land had been classified in various ways; c) where the choice of law in an internal relationship was in point, as in a contract between two natives, and it was declared that Dutch law is to apply; and d) the position of the lex fori in procedure, the presence of different systems of courts for different population groups in the same area. A contact at any one of these points, products of juristic energy, introduced a conflict-of-laws question as concerned inter-racial law (Gouwigioksiong, 1965).
Once the question of inter-racial law was answered, the courts then considered the secondary point of contact, the actual choice of law. Although the courts tended to follow this colonial arrangement as late as the 1950s, the nationalistic reforms of the early 1960s effectively ascribed to all citizens of Indonesia a common status.

A consequence of change finds expression in land law. Indeed, significant attack on the Civil Law system with its legal pluralism actually began with the enactment of the agrarian law. The basic premise of the assault held that the colonial dualism in the field of land ownership should be ended (Wirjono, 1959). The ultimate aim of the legislation was stated to be the redistribution of land through law reform. Indeed, the whole program of land reform in Indonesia was often discussed in terms of communism (van der Kroef, 1963).

In primary points of contact from colonial times were thus eliminated, the population was viewed on a unitary basis, and land underwent a rapid unification as to ethnic classification. The Agrarian Act of 1960 had created new land rights applicable to all ethnic groups, subject only to restrictions imposed by "social function." Although the land reform was supposed to be grounded in adat, the effect of the custom was restricted in that the adat was required to be free from "feudal and capitalistic principles."

Apart from the specific reforms of the Agrarian Act, adat continued to play the central role in the formulation of a national law. The development of a uniform law based on adat did not lend itself to codification. It has therefore taken place by means of judicial applications and doctrinal writings. According to Ter Haar, law was any adat
that occurred in the decision of a judge (Ter Haar, 1948). This view, however, has been opposed by another leading jurist:

Individualistic and liberalistic views do not live in the minds of Indonesians. We are socio- and tradition-bound people; everyone of us has to be common biasa (Javenese lumrah). Being different from others is being strange, astonishing, wicked, condemnable. In this course of ideas an individualistic state of mind and an individualistic pattern of behavior and action will arouse opposition, disapproval and condemnation. Freedom of contracting and competition is out of place, as are definite actions in law, containing definite claims. (Djojodigoeno, 1952, p. 13)

Under such a view, law, if not written, is adat when its source of authority is the government. An inherent contradiction emerges in that adat is so varied and local that, without being rendered static in the form of code or statute or precedent, adat can scarcely be conceived of as forming a uniform national law applicable to all. Its local character may not be capable of satisfying the requirements of a multi-ethnic legal culture. Only time will tell whether adat can be adapted to fit a uniform Indonesian conception of legal obligation (Damian and Hornick, 1972).

Belgian, German, Spanish and Portuguese Colonial Law

The colonial policies of the several Civilian Continental powers generally varied little as to legal outcome from the French policy of assimilation. They treated colonial territories as integral portions of the metropolitan mother country, regardless of whether those lands were settled by nationals or gained by cession. The laws of these countries were introduced, in totality, to their respective dependencies, excluding explicit recognition of the customs and usage of the
people whom they ruled. Like the former French colonies, the Belgian, Portuguese, and Spanish territories retained the law and legal systems of their mother countries.

The most notable Belgian Civil Law transplant occurred in central Africa, in the Congo (Kinshasa). From the former International Association of the Congo controlled by Leopold I of Belgium, the Congo Free State was erected and placed under the sovereignty of Leopold by the Berlin Conference of 1885. By decree in 1891, the Congo Free State received the "general principles of Belgian law" and retained "local custom insofar as these customs are not contrary to the higher principles of order and civilization" (Salacuse, 1969; Crabb, 1970). Further, the ruling power of the Congo Free State began the process of developing a distinct civil code based in part on the Napoleonic Code.

The Congo Free State was annexed to Belgium and became the Belgian Congo in 1908. Under Belgian administration, civil codification was completed. The distinct Congo Code civil continued the laws of the Congo Free State. There was further reception of Belgian legislation by application of enactments in Belgium for the Congo and by importation of Belgian law by local legislation. Native custom was frequently allowed to continue where it did not conflict with legislation and was not construed as contrary to the ordre public. All unoccupied lands reverted to the state and thus came under the direct jurisdiction of Belgian law. Occupied, tribal lands were generally permitted to remain subject to local customs.

In Ruanda-Urundi, the Germans annexed territory to German East
Africa at the end of the nineteenth century (Kjellen, 1916). There was, however, no effective occupation or introduction of German law. The area was occupied by the Belgians in 1916, and received by Belgium as a mandate in 1923. Legal administration of the territories was unified with the Belgian Congo and made subject to the laws of the Belgian Congo after 1925.

After gaining independence in 1962, the Republic of Ruanda retained the Belgian law together with local legislation. A policy was established to abolish customary law and to codify all law, with the special exemption to allow persistence of custom in land law where legislation was absent. Similarly, the Kingdom of Burundi (formed in 1962), subsequently the Republic of Burundi (in 1967), retained the received Belgian law and local legislation, including the Congo Code civil. Burundi started a program to codify all custom. In 1966, all land law was placed under the Congo Code civil.

German Africa was but a brief encounter by Germany with overseas empire. German colonial efforts were confined to the late nineteenth century and ended by forced renunciation at the end of World War I. Colonial administration was never effective by introduced German law. The few influences that survive are the result of subsequent incorporation into English common law of elements of the several formerly German jurisdictions. In 1884, Kamerun was established as a German protectorate. It so remained until 1922, at which time the western territory reverted to a League of Nations mandate. The northern portion was administered by Nigeria (a Common Law jurisdiction). The southern portion passed to United Nations control in 1946. This part
was formally united with the earlier French trust territories of the Cameroons in 1961, and fell under French Law. In eastern Africa, the Germans established a protectorate over Zanzibar in 1885 and exercised claims over Tanganyika. However, these areas too were soon lost to the British (1887-1890). There was also minimal German influence in South West Africa, which absorbed the South African common law.

Elsewhere, the Germans established a colony in New Guinea and held it until it was captured by the British in 1914. After World War I, the territory was transferred to the British and administered by the Australians. The area received no German law that survived the introduction of the Common Law, except, perhaps, as precedent.

The Civil Law of Spain was received in Spanish Sahara and other areas along the east coast of Africa. Similarly, the Civil Law of Portugal was received in its entirety in Angola, Mozambique, and to lesser extent in Goa and other parts of Portuguese India. The law received in these places was essentially the same as that transplanted to the settled colonies by Volk migrations, with the further reception of the civil codes after the mother countries underwent the process of codification in the late nineteenth century.

Voluntary Receptions

Large-scale, voluntary reception likewise results in the diffusion of Civilian legal systems. A codified system can be easily transplanted to the recipient country and granted its effective legitimacy as the legislative will of the sovereign. The Civilian conception of a code clearly prevails in the face of existing law. For these Civilian
codes to be effective, they need only be: 1) the work of an "enlightened" sovereign, one unhampered by the past and willing to establish new principles of "justice;" and 2) established in a country having a government powerful enough to exercise an inescapable influence over its subjects (David and Brierley, 1968). Such extensive voluntary reception of Civil Law is usually prompted by a desire for rapid modernization of religious systems of law (for example, Turkey or Iran). Substantive domestic law which is not easily codifiable or otherwise reducible to legislation, generally has little chance of effectively resisting a Civil Law transplant, unless special, legislative exemption as to subject matter.

Voluntary reception of Civil Law need not be complete where the transplant is restricted to substantive law. However, if the Civilian view as to the authoritative supremacy of legislation is imported, a complete Civil Law system will emerge. An excellent example of sweeping reception restricted to substantive Civil law is presented in the legal experience of Ethiopia, which, in the 1950s, imported a mixed Civil and Common Law jurisdiction (Sedler, 1867). Much of the private substantive law of Ethiopia was structured in the form of Continental Civilian codes, but the procedural law was patterned after the judicial Common Law.

Civilian Codification and Reform Movements

Intellectuals and jurisconsults may in any place or time desire codification either in the hope of a national, rational system of law or because they see in a code the superlative manner of establishing
proper order. Nevertheless, effective reception of the code depends upon plausible political force. The political impetus for codification and legal reform differs from place to place. Whatever the reason, almost all resultant receptions import a law based on some version of the Napoleonic Code and the French Civil Law system. In that way, the constructivist plan of order became manifest in the legal systems of Turkey, Iran, and the Middle East, and to a lesser extent, Ethiopia. The actual receptions reveal something of the underlying causes of social and economic reforms.

The "Enlightened" Sovereign and Central Government Power

We are not here interested in the legal history of those systems that for whatever reason imported the Civil Law. Rather, we are concerned with the actual reception. Characteristic geojurisprudential structures surround the moments of actual reception, and these typical conditions further enlighten us as to the significance of form, per se, in the culture history of laws. The form of the law is a factor in its own opportunity to be imported. As an example, we examine the case of Turkey where an importation by the central government related to its involvement in a fundamental social political revolution.

Although some codification on French principles had been introduced into Turkey during the late nineteenth century, the events surrounding large-scale voluntary reception occurred after World War I (Hamson, 1957). About that time, a Turkish military officer, Mustafa Kemal, later called the Ataturk, came to power by force of arms and shortly thereafter abolished the sultanate and the caliphate and set
about to "modernize" the country (Kuehnelt-Leddihn, 1979). By procla-
mination in 1924, Islamic law was abolished for matters of personal
status. In 1926, Islamic law was replaced by the importation of the
Swiss Civil Code and Code of obligations. The purpose of this revo-
lutionary reception was to use the law as a vehicle for modernization
and reform (Velidedeoglu, 1957).

The law applicable to civil disputes became the law derived from
the Swiss codes. The place of Islamic law and customary law was clear-
ly indicated in Article 1 of the imported codes:

Where no provisions [in written law] are applicable,
the judge should decide according to existing cust-
omary law and in default thereof, according to the
Rules which he would lay down if he had himself to
act as legislator. In this he must be guided by
approved legal doctrine and case law.

Thus, three Civilian attributes were thereby introduced into the form-
erly religious-based law of Turkey: 1) written law (i.e., legislation
was the supreme, authoritative source of the law), 2) the use of cus-
tom only in the absence of legislation on the matter, by judicial recog-
nition, and 3) an equal footing for legal doctrine and case law and
their relegation to the status of persuasive sources of law. Under such
a conception of law, the civil and religious forms are separated, and
only the civil has any legal authority.

After 1926, a tension existed at the village level between Islamic
law and various articles and provisions of the Civil Code. Peasant
land tenure and inheritance remained largely under the control of local
custom (which only in some situations embraced Islamic tenets) was a
relationship between the central bureaucracy of the state and local
village practice (Stirling, 1957). The received civil law provided a collection of absolute rules and did not accept any deviation not specifically allowed in its own terms.

The frequent irrelevance of the civil code in the peasant villages is underscored by the absence of an adequate land registration system. Registration is necessary to support rights in land under the code. Accurate and registerable descriptions of land holdings, together with proper surveys, were not yet available as late as 1957 (Velidedeoglu, 1957). In time, it is believed by some, the new legal system through technical efficiency and administrative ruthlessness will prevail in land tenure over village practice thus assuring reform in yet another area of the secularized society of Turkey (Kubali, 1957; Lipstein, 1957; Ulken, 1957).

That this process of land reform is well under way is evidenced in legislation promulgated since the imposition of the Civil Code. For example, the constitution of 1961 requires the state to supervise the productive utilization of all land and in default to expropriate (Szyliowicz, 1963). This provision was implemented using previous legislation as its instrument of reform. A 1929 law called for distribution to landless peasants of land expropriated for political reasons, and another law of 1934 provided for the resettlement of landless peoples. These laws account for the redistribution of an estimated more than one million hectares of land during the first fifteen years of the Republic (Aktan, 1966).

From 1947 to 1962, the government had distributed another 1.8 million hectares of land to some 360,000 families (an average of 12
acres per family) under the color of a piece of paper of 1945 legis-
lation entitled the "Law Making the Farmer a Landowner" (Atkan, 1966).
That law established the procedures by which land was transferred to
the landless peasant. All of these land reforms were minimized in
their effect, however, because cadastral surveys for land registration
were inadequate; various local forms of land tenure practice contin-
ued on a customary, informal basis. Excessive fragmentation of prop-
erties further exacerbates the difficulties surrounding land reform,
because, perhaps as many as a third of all farms in Turkey include
thirteen or more separate plots (Aktan, 1966).

It has been estimated that in excess of half or the 4,000,000
cases that come before the courts each year involve problems emerging
from the government's attempts at land reform under the Civil Code
and various legislation (Aktan, 1966). Most of these disputes result
from the lack of adequate cadastral surveys and the inadequacey of
the registers of title (Aktan, 1966). On the one hand, the Civil Code
provides that a right in immovable property is dependent upon regis-
tration, in default of which, a bona fide purchaser for value may take
the title (Arts. 633 and 910). Opposite the codal provisions, local
practice has encouraged a state of affairs in which many lands either
have no registered title or inaccuracies as to location and boundaries.

Despite the persistence of customary and religious law in limited
instances where the technical efficiency of the state is insufficient
to enforce the will of the sovereign, Islamic law as religious law had
been almost completely eliminated from the legal systems of Turkey and
many of the former Islamic countries in favor of a secular, Civilian
code of laws. What has been said of Turkey could also apply to the other countries of the Middle East that have imported the Civil Law in an attempt to secularize their formerly Islamic law and to modernize their legal systems so as to facilitate various social and economic reforms. Civilian, code-based systems have also been voluntarily received by Egypt, Iran, Iraq, and, partly through French colonial rule, Algeria, Morocco, and Tunisia (Anderson, 1958a; 1958b; 1959b; 1963a; 1970; Liebesny, 1953).

Creation of a New Society on Existing Obligation Systems

The Ethiopian Empire embraced a variety of diverse peoples, especially in terms of language and religion. From the 1930s onward, it has been a primary objective of the central sovereign to unify and modernize the country. Not having been subjected to any colonial rule by a European power, the country had not involuntarily received any Western legal system. Prior to 1930, the only authoritative legal document was the Fetha Nagust, a compilation of various laws taken from Moslem and other sources. Its effectiveness was very limited in that most law remained local and customary (Perham, 1969). This situation was especially true of land tenure, where the law that applied depended upon place and form of ownership, i.e., individual, kindred, or village (Nadel, 1946). In 1930, the Fetha Nagust was supplemented by a number of Imperial Edicts aimed at land reform, but these remained largely ineffectual.

In an effort to remedy the confused state of the law and to provide some uniformity in the legal applications of Ethiopia, the Ethi-
opian Constitution of 1955 established a national system of courts patterned after the Common Law and called for the reception of codified laws based on the Civil Law tradition of modern codes. (Markakis and Beyenne, 1967). By 1957, a number of legal codes patterned after European models had been drafted. The Ethiopian Parliament promulgated a Civil Code in 1960 (David, 1967b). This code was to operate in areas outside of the towns only to the extent local administration allowed. Nevertheless, Ethiopia had a modern Civil Code, derived primarily from French sources. Under the new Code, personal laws were superceded by the laws pertaining to domicile (place of residence).

The new Civil Code met national requirements for legal unification, and according to the eminent scholar of comparative law who drafted the code, Rene David, the government's desire was also satisfied by receiving a Civilian code-based body of substantive law to counteract Anglo-American influence in the country's affairs (David, 1963). The code consisted of 3,367 articles; the length was thought necessary in that the lack of Western legal experience required legislation to detail.

As for the relation between custom and the Civil Code, David (1963, p. 193) explained:

While safeguarding certain traditional values to which she remains profoundly attached, Ethiopia wishes to modify her structure completely, even to the way of life of her people. Consequently, Ethiopians do not expect the new code to be a work of consolidation, the methodical and clear statement of actual customary rules. They wish it to be a programme envisaging a total transformation of society and they demand that for the most part, it set out new rules appropriate
for the society they wish to create.
Accordingly, the code expressly provides that unless otherwise stated, all previous rules concerning matters covered in the code were repealed. The major exception to the general application of the code was in the matter of land tenure. It was legislatively provided that until adequate registration of the land was accomplished, customary law relating to alienation and limitations on ownership were to remain in force (Schiller, 1969).

Custom survived in other areas of law as well. Sanctioned customs, for example, which were not contrary to public policy and economic progress were allowed to persist in the central highlands (Krzecuzunowicz, 1963). Also, customs was permitted by express incorporation into the code, especially certain points of personal and family law. There were also specific references to custom in the Civil Code. For instance, local custom was explicitly determined to be the controlling law in matters involving rights of way, predial servitudes, and the communal exploitation of land; also, customary practice prevailed concerning transfers of property rights in lands not yet registered. Where the code was silent, custom was the authoritative source of law to fill the legislative lacunae. Finally, the courts were commanded to assign customary meanings in the process of interpreting the code's provisions (Krzecuzunowicz, 1965). In almost every instance, however, custom survives by virtue of legislation and only until legislation addresses the subject covered by the custom.

The implementation of the Civil Code of Ethiopia thus represents an introduction of Western legal principles in an effort to provide
a minimal security in legal relations. This object was accomplished through the resultant legal unification of a country previously fragmented by diverse customary laws.

Voluntary Receptions in the Far East

Varying degrees of voluntary reception of Civil Law characterizes a number of legal systems in eastern Asia. Such receptions were prompted by the desire for land reform (Thailand), because of foreign influences (Japan), and because of political revolution (Nationalist China). Although the "Westernization" of the Thai legal system dates to the Bowring Treaty of 1855, which resulted in reorganization of administration of law and process of national unification of law, the much more important reception of Civil Law probably began with land reforms in the early twentieth century. The actual beginning of modern land law in Thailand was associated with the establishment of a Land Registration Office in 1901, which had the responsibility of registration of land ownership, the issuance of land titles, and the cadastral survey of selected areas.

During the early years of this century, codification commissions were set up to draft various codes along French lines. The projets of the several prepared codes generally gave effect to the traditional laws of Siam, especially as they concerned land tenure and the retention of Islamic law in family matters among the Moslems of southern Thailand (Darling, 1970).

In 1935, a Civil and Commercial Code was promulgated with the stated intention of replacing the preexisting laws and former code
formulations with their retention of traditional law features. This new code was drafted on the French Civil Code model. Its provisions were especially directed at land reform. Public policy sought a land law that encouraged the economic development of rural land. After all, more than 75 percent of the population was engaged in some form of agriculture. In the northeastern and southern portions of the country, most land was owner-cultivated. In the central plains, most land was farmed by cash or share tenants; 61 percent of all farm-land in this central region is cultivated by full or part-time tenant farmers. These various forms of land tenure presented different legal problems arising out of the occupation and land use. Traditional land law concepts were found inadequate to regulate the different types of land tenure that might result in a legal title of actual ownership. Thus, the 1936 Civil and Commercial Code provided the process for alienation and transfer of rights to land.

Provisions of the 1936 legislation were replaced by a Land Code in 1954. The Land Code provided for land allotment for the people, the delimitation of rights in land, and cadastral survey. The requirements of the Land Code as to title of ownership, registration of title, and actual survey were particularly important in view of the increasing fragmentation of agricultural land as a consequence of the practice of inheritance in equal shares.

The legal situation in China offers a different conclusion concerning the voluntary reception of the Civil Law. In Thailand, the increasing Civilian influence has resulted in the complete reception of a Civil Law system. In China, the early reception of Romano-Ger-
manic law proved abortive. From 1644 to 1911, a legal tradition blending indigenous concepts of law and morality developed and prevailed under Ch'ing (Manchu) Dynasty. After the revolution of 1911, the new government set about to draft a series of codes modeled after the Civil Codes of Germany and Japan. Though briefly involved with Romano-Germanic Civil Law, China was only superficially and ineffectually influenced by Civilian legal science, and that largely restricted to the area of foreign trade (Schlesinger, 1970). Before the advent of communism, Civilian influences were not well established. However, the Civil Code promulgated in 1929-1931, the Code of Civil Procedure of 1932, and the land Code of 1930 survived the forced migration to Formosa to form the basic law of the Republic of China. In a way, the Civil Law went to Taiwan as a Volk migration, but the intensity and completeness of the codification was enhanced by the military character of the migration experience.

Japan enjoyed a partial reception of Civil Law after the Meiji Restoration on 1868, which preconditioned the country to further reception by the end of the nineteenth century. During the 1880s, law students pursued studies of French and German Civil Law. Many of Japan's leading jurists and law teachers had received their degrees from continental European law schools. Under the leadership of the French jurist, G. Boissonade, a series of draft codes had been prepared by 1872, along with the 1869 translation of the various French codes. These forces of influence, legal education and early codification efforts, played a key role in the final reception of the Civil Law.
In 1898, the Japanese promulgated a Civil Code based on that of Germany. In many respects, the new code was an adaptation of Boissonade's code of 1891, though recast in contents better adapted to Japanese institutions of family law and successions. The purpose of the new Civil Code was not to create a new legal system, but to revise an existing one (Wigmore, 1928). The traditional law was therefore largely restated in the language and after the pattern of French and German Civil Law.

SUMMARY

Viewing the whole culture history of the Civil Law, diffusion occurred through migration, involuntary reception as a consequence of conquest or colonization, or voluntary reception on either a large-scale or an eclectic basis. Volk-migration diffused Civil Law as a result of the imperial expansion of a Civilian power. Involuntary reception was usually the result of acquisition of territories by Civilian powers, with subsequent civil colonization. The French system of "direct rule," for example, strongly asserted the authority of the Parisian imperium, an integral aspect of French colonial policy. Likewise, Portuguese and Spanish colonies were usually treated as integral parts of metropolitan Portugal and Spain, respectively. The influence of constructivist attitudes toward legislation and the Civilian conception of the code as a model for the organization of civil society made reception comparatively easy, even across severe cultural and linguistic barriers. Similarly, voluntary reception was encouraged by the relative ease by which a codified legal system can be transplanted
to a recipient country and granted its legitimacy as the legislative will of the sovereign. The former colonial possessions of the several Civil Law countries of Europe have generally retained the law and legal systems of their colonial mistresses, except those that fell under Communist rule upon independence.
CHAPTER V
CULTURE HISTORY OF LEGAL SYSTEMS BASED ON HUMAN DESIGN:
SOVIET CIVIL LAW

The realm of Soviet Law came into existence with the October Revolution of 1917. Shortly, thereafter, the newly formed Soviet Union assumed both the territory of the former Russian Empire and, in many respects, the forms of the previous Russian Civil Law system. The earlier Russian legal system, of course, was substantially modified to serve Marxist-Leninist ideology. Although many of the law forms were civilian in origin, the content of the law rules was socialist.

After World War II, the Soviet Law orbit was extended to include the newly established Soviet "satellite countries" in Eastern and Southeastern Europe. In more recent years, Soviet Law has been received in Cuba, parts of former French and Portuguese Africa, and the former French Indochina.

Diffusion of Soviet Law is primarily the result of large-scale, involuntary reception prompted by efforts at unification or "Sovietization" of "peoples' democracies" and of voluntary reception motivated by expression of geopolitical alignment due to common ideological commitment. "Law has become a key weapon in the Soviet arsenal with which the Communists of the U. S. S. R. hope to influence the future of the world" (Hazard, 1964). Accordingly, the European satellite countries were made to submit to the absolute dictates of the Stalinist regime and to conform their legal systems to uniform patterns (Slapnicka, 1963). Even though the legal systems of the peoples' democracies of
eastern and southeastern Europe reflect the force of Soviet influence and of communist ideology, they retain much of the traditional Civilian code structure and techniques of the pre-Communist systems. It should be remembered, however, that a Civilian technique used in a Soviet legal system frequently undergoes a subtle change of purpose. Nevertheless, a lawyer trained in the Civil Law may disagree with the ideology that permeates the text, in lieu of substantive Natural Law, or with the implementation of these codes, but their structure, terminology, and technique will be reasonably familiar to him (Schlesinger, 1970, p. 267). The Soviet law systems have a "grammar" inspired by the Civilian systems, but are distinctive in that they have been imbued with the Soviet ideology of socialism (Hazard, 1968). Similarly, totalitarian socialists in Asia, Africa, and Latin America have accepted the Soviet legal model to emphasize their geopolitical alignment with the Soviet Union and the ideology that it represents (Hazard, 1964; Hazard, 1968).

In a negative way, the experience of Communist China evidences this trend. When China became a people's republic on October 1, 1949, its rulers embraced the Marxist-Lenist ideology. Until 1957, China appeared to be patterning its legal system after the Soviet model. At that time, however, Chinese communists terminated the work of their codification commission and rejected the Soviet ideas of socialist legality and humanistic socialism as contrary to the Chinese interpretation of true Marxist doctrine. Judges were then subordinated to the local soviets, rather than to the positive law. Decisions were thereby made on the basis of expediency instead of legislated principles.
This is compatible with the traditional Chinese concepts of conciliation and lack of rigidity in law (Voegelin, 1940; Voegelin, 1974). The present legal regime in China is to this extent not a departure from the past but rather a continuation of earlier legal traditions (Marina, 1975).

Except for some local modifications, reception of Soviet Law is almost always complete. Only where the ideological commitment is weak or only the result of short term expression of geopolitical alignment, or where there remain plausible countervailing force, will reception not be complete. Effective reception of the Soviet legal model evidences not only the diffusion of Soviet Law through complete reception, but also the extension abroad of Soviet political influence or domination (hegemony). No state that has taken the Soviet model fails in unswerving support of Soviet foreign policy.

**Involuntary Receptions**

The greatest expansions of Soviet Law occurred as a consequence of either unification of the formerly Czarist empire, in which Soviet-socialist law was introduced into central Asia, or sovietization of the people's democracies of eastern Europe. All of these involuntary receptions resulted from territorial march of Soviet empire through conquest. In 1920, the Soviets extended their domination over the foreign peoples of Caucasus and the Ukraine. The Soviet conquest of the "Far Eastern Republic" and of Turkestan occurred in 1922; and Soviet influence in Outer Mongolia in 1924. In 1940, the Baltic states fell to the Soviet Russians; and by 1945, parts of Germany, Poland,
Finland, as well as much of eastern and southeastern Europe were added to the Soviet "outer empire." With political expansion, Soviet law extended its frontiers. After all, law was considered an instrument to discipline new societies; an instrument of the "continuing revolution" by enforcing the aims of Marxist-Leninism and suppressing the old order.

Soviet-socialist law in central Asia was both a means and a result of the subjection of part of the Islamic realm to Soviet Russian rule. This area included the Moslem S. S. R. of Turkmenistan, Uzbekistan, Tadzhikistan, Kirgiziya, and Kazakhstan, as well as Mongolia.

The pre-Soviet Moslem society was patriarchal in character. Settled populations generally followed Islamic law, which nomadic peoples adhered to customary law principally derived from the tenets of the Islamic jural relations. Islam was proclaimed by the Soviet power to be an "instrument in the hands of the exploiting classes." Thus, the Soviets effected a forced unification of laws through the introduction of Soviet legislation using the medium of comprehensive codes. Islamic law, the Shari'at, which regulated the private lives of Moslems, was abolished, together with religious tribunals and other institutions that supported Islamic life. The Soviets also eliminated the traditional court structures previously recognized under the Czarist "colonial" approach of dual legal cultures. Some survivals of Islamic and customary law were allowed for a brief time. For example, Islamic courts were not actually abolished, but severely limited, in Turkestan until the late 1920s. Customary law was also largely eliminated through the forcible denomadization of the Kazakhs, which reduced their number by
more than a third. After World War II, Stalin's policies of deporting from the Caucasus the Kalmyks, Crimean Tartars, and other Moslem peoples had the same effect.

The involuntary reception of Soviet Law in central Asia was particularly strong in the subject areas of land and water reforms. The core of Marxist ideology is state ownership of the means of production. Therefore, the inherent position of property law is at the center of Soviet substantive law. In 1917, Lenin sought the expropriation of property belonging to landlords only; Peasant plots were allowed. Then, in 1918, landownership was denied the peasants. The principle of state ownership was extended to the Mongolian People's Republic in 1924.

Outer Mongolia was the first area under Soviet dominance beyond the bounds of the old Russian empire. Since its formation as a people's republic on July 11, 1921, this former part of China followed the Soviet pattern of law and political organization. The presence of Soviet Russian legal advisers assured the successful reception of the Soviet legal model. The Soviet formula of state ownership and allocation of use in perpetuity to herdsmen for their privately owned herds of cattle became the prevailing policy in Outer Mongolia.

In central Asia, the Soviets effected a redistribution of plowing rights and the confiscation of cattle. In Usbekistan, for instance, laws introduced in 1925 limited landholdings to a maximum of 40 hectares (98.8 acres) in irrigated districts. In the 1930s land and water rights were removed from landlords and kulaks, with the resulting disappearance of individual initiative.
Another trend induced by Soviet law and political influence was that of collectivization of agricultural lands. The Soviets claimed title to all lands and allocated them to individuals and the kolkhozes in perpetual use. Priority in allocation of lands was given to peasants organized in cooperatives. In 1929, the policy of forced collectivization of farms was enforced. The perpetual-use farms were inherited lands placed in the possession of an extended family. They could not be alienated and have persisted to the present. However, in certain instances this process tended to preserve the effect of Islamic and customary law rather than achieve its abrogation. The continuing influence of Islam is rooted in the traditional law of family life. Although religion was suppressed and many religious practices persecuted, the establishment of collectives, known as rodovy kolkhoz, based on kinship tended to preserve lineage and clan groups which retained traditional familial customary law.

The "Socialist cultural transformation" was in large part due to the dissolution of the older feudal bey and the diffusion of a new status condition, that of the Kolkhoz. Soviet law defined the Kolkhoz as the basic legal unit in place of the family. In addition, this collectivization participated with the extension of Russian society to ethnics by serving as the basis of application of the Soviet codes designed to eradicate undesirable national traits that retarded the formation of the new socialist man. Like the archaic serfs, the member of a kolkhoz "belongs" to the land. The ultimate success of the kolkhoz has rested on the maintenance of agrarian capitalism, which serves as a major precondition for the survival of Soviet socialism. Thus, "private farming"
by peasants of plots restricted by legislation to between .25 and .5 hectares (0.6 to 1.3 acres) are the most productive sector (Possony, 1974, pp. 221-23). Although comprising less than 5 per cent of the total cultivated acreage, these "private plots" within the kolkhoz produce 21 percent of the wool, 39 percent of the vegetables, 60 percent of the potatoes, 74 percent of the eggs. Further, these peasants maintain 41% of the cows, produce 43 percent of the milk and provide 42 percent of the Soviet meat; then, thus provide nearly two thirds of the total protein of the Soviet diet (Possony, 1974, p. 224).

The pattern of land use in central Asia was not repeated in eastern Europe. There, extensive codification was effected after the Communists came to power in Poland, Czechoslovakia, Yugoslavia, and elsewhere. This codification was aimed at the unification of law on a national scale after the Soviet model. The movement had decided results concerning the matter of land use. Generally, only large estates were nationalized, with peasant holdings remaining exempt. The Yugoslavs, for example, declared that "land belongs to those who cultivate it" (Hazard, 1968). Individuals could retain 25 to 35 hectares (61.7 to 86.4 acres; Hazard, 1968). This allocation was reduced to 10 hectares, in 1953, on lands derived from the public domain. By law in 1957, land users were required to cultivate their land in the same manner as other lands in the general area. Cultivable land not tilled within one year of the last harvest was to be distributed to other farmers, with "cooperatives" being given priority. In 1959, every land user was commanded to use his land for agricultural purposes in accordance with an approved plan. Failure to comply resulted in forfeiture of
The situation in Poland was similar to that of Yugoslavia. In 1944, a limit on private holdings was set at 50 hectares (123.5 acres) in fertile lands in central and eastern Poland, and 100 hectares in less fertile western parts of the country. All surplus lands "reverted" to the state. Emphasis was placed on individualistic agricultural production rather than the collectivistic cooperatives. By 1961, for instance, the total area under cultivation by individuals accounted for 86.8 percent of the land and nearly 90 percent of the total production (Hazard, 1968). In order to prevent the fragmentation of farmland, in 1964 a legislative requirement dictated a minimum limit to the size of farms distributed in successions such that the resulting land was not to be less than 2 hectares in southern Poland, 3 hectares in central Poland, and 4 or 4 hectares elsewhere. Beyond that, heirs had to qualify as experienced farmers according to the Civil code (1964, Arts. 160-167).

In Rumania by contrast, the state appropriated all land and re-allocated it to those who actually tilled the land, with ownership often vested in a cooperative. Peasants were generally exempted from this appropriation, but were forced into collectivization a process completed by 1958. In East Germany, peasant land remained private. From 1952 to 1960, peasants were brought under cooperatives, but individuals retained ownership of their respective plots. "On completion of the land reform the peasants are guaranteed the private ownership of their land" (Constitution of the German Democratic Republic, Article 24, as quoted in Hazard, 1968).
Voluntary Receptions

To term the reception of Soviet Law in any instance "voluntary" is to strain that labored term. The reception of Soviet Law in all areas has and does involve a totalitarian dictatorship that imposes that law on the land by brute force. It is, nonetheless, customary to designate it "voluntary" insofar as no foreign power imposed it. Voluntary reception of Soviet Law is usually a consequence of geopolitical alignment, as in Cuba and Vietnam, or ideological commitment, as in Mali, Senegal, and Guinea.

In Mali, independent since 1960, it was the stated intent of the government "to organize the conditions necessary to the harmonious evolution of the individual and the family within the bosom of modern society and with respect for the African personality" (Hazard, 1967). To realize this goal, Mali turned to the Soviet model and received the Soviet Law and related legal institutions. Again, law relating to land formed the basis for socialist reform. By decree of acquisition and registration, all customary lands became the property of the state. Similarly, all abandoned land, even though properly registered reverted to the state. Furthermore, all subsoil (mineral) rights belonged to the state. In the 1960s, programs were initiated to encourage the formation of cooperatives. In 1966, it was declared that agricultural land must be transferred from archaic individual and family production to large collective farms. The Civil Code continued as it had been received from France, with some modifications as to family law. Thus, the land laws of France were still applied, but the light of Soviet socialist principles. Collectives, for instance, were treated as individuals
under the code. The result was a curious blend of French Civil Law with Soviet legal institutions and socialist political policy. The style of procedure remained essentially that of France. As in most other Soviet countries, a formerly Civilian jurisdictions has been remolded to achieve the objectives of a Soviet society.

SUMMARY

Taken as a whole, the diffusion of Soviet Law is almost always complete. Only where the ideological commitment is weak or only the result of short term expression of geopolitical alignment, or where there remains plausible countervailing force, will the reception not be complete. Effective reception of the Soviet legal model evidences not only the diffusion of Soviet Law through complete reception, but also the extension of Soviet political influence abroad.
Having reviewed the spread of laws around the world, we can re-
capitulate the general shape of this historical consideration by de-
lineating certain general principles of geojurisprudence. Ideally,
these general principles should accord with the findings of at least
some other studies so that an increasingly comprehensive view of man-
land relations can eventually emerge. Simultaneously, where they are
reasonably clear, we shall not shy away from normative statements
that seem to at least some reasonable men to be supported by factual
material gathered here.

Lawfulness and Geojurisprudence

When any scientific endeavor discovers a regularity in pattern,
place, or process, we willingly entertain discussion of possible
"laws" -- in the sense of scientific laws. We are not content, how­
ever, with regularities alone; correlation constitutes no proof of
anything. We must insist, instead, that some further conditions be
met before we believe that a casual relation exists behind the regular­
ities, behind the correlations. One means of assuring us that a cas­
ual relationship has been found is to present a mechanism (process) by
which one element of the regularity relates to the other element. Once
identified, the process must work (that is, have demonstrable effect)
in all contexts where its conditions are met. For the geographer,
this test takes the form: Where C, there E; that is, where we find the
supposed cause, there we must find the expected effect, provided that the description of the cause includes a statement of the process by which the cause brings about the effect.

If the primary, active elements postulated in a theory, no matter what the origin of the idea of these elements (Popper, 1928, pp. 131-41), do in fact recur as expected according to the process that is coupled with the descriptions of the elements, then we have to give that theory attentive consideration. Certainly, we would avoid the positivist pitfall of presuming that even a perfect correlation constitutes "proof" in the sense of giving us positive knowledge (Popper, 1928). Lacking competent "disconfirming" tests, however, reasonable men may form a presumption in favor of the as-yet-not-disconfirmed theory.

We certainly also recognized, that, in geojurisprudence and culture history, no less than physics, any one law operates in conjunction with others (Popper, 1957, pp. 131-32; Newton and Pulliam-DiNapoli, 1977, pp. 366-68). Any law or law-like statement may have greater or less effect, depending upon whether it is supplemented or opposed by processes described under other laws. In other words, several cause-process-effect relations may impinge in different degrees upon different places. Certainly, when dealing with elements of cultural geography, involving quite often beliefs of variable intensity and purity, the greatest care must be given to tracing process, because it is upon that mechanism that the truth of any postulated connection (influence) depends. Despite the possible involvement of yet unknown casual factors and as long as the postulated cause-process-relation
recur in each (or nearly all) place where it is predicted, we will accept the postulated relation until some new account uncovers other, more critical casual relations.

In a different mood, these cause-process-effect relationships are called "terrestrial localization" (Sauer, 1941) and, for our special purpose, "the impress of central authority" (Whittlesey, 1935). For the geographer, one important task shall always be to account for why things are where they are in the world, the project of accounting for areal association (Sauer, 1925). Simultaneously, but secondarily, there may result as well an account of areal differentiation (Hartshorne, 1939), an explanation of why some places are different from others. It is the cause-process-effect relation that is identified and traced in the effort to describe areal association that necessarily also produces an areal differentiation.

The differentiations of the earth into two camps, one of Human Action and one of Human Design, arose in fact in the world on account of the operation of two fundamentally opposed views of what constituted the "true order" of man's world. The areal association of various phenomena with Human Action, while others associate in areas of Human Design is what actually cause the secondary, derivative differentiation. This differentiation transpired during the extension of the influence and hegemony of North Sea countries progressively, and systematically, and in nearly perfect conformity with the process implied in the description of the elements.

The severity of the early differentiation of the world into Action and Design areas was diminished by additional causitive factors.
The most important of these was the subscription of both the English and the French and their respective co-legalists to the doctrines of Natural Law, Christianity, and other once-settled understandings of European civilization. These joint subscriptions, indeed, kept European Action and Design regimes more alike that unalike.

It remained for subsequent events to ferret out the implications of the fundamental difference, implications that, sad to say, ultimately require normative treatment. Inasmuch as the two systems react differently under certain circumstances, there is again credance for the original definitions of the two systems. The nature of this reaction is best described as legal prevenience, a term that designates a certain advance preparedness to accept an innovation.

Legal Prevenience: From Civil Law to Civil Code

Cultural preadaptation explains the success of certain legal systems or legal institutions in becoming established in a new country. In cultural preadaptation, the preadapted "feature" is some cultural form or structure. Some geographers may prefer the term prevenience, which denotes coming before or antecedence, rather than the term preadaptation when referring to the place of reception rather than the feature received. Because numerous examples of cultural preadaptation are provided elsewhere (Newton, 1974; Newton, Newton, and Easterly, 1976), our concern can be restricted to what may be called "legal prevenience."

Preadaptation is a universal aspect of evolution (Bock and Wah-ler, 1965). It has been biologically defined as follows:
A structure is said to be preadapted for a new function if its present form which enables it to discharge its original function also enables it to assume the new functions whenever need for this function arises. (Bock, 1959, p. 201)

Laws, or legal systems, can be said to be preadapted when their present forms allow one of their faculties (form-function complex) to acquire a new role, thereby establishing a new link with some place in the world when there appears at that place a selective force for that faculty's adoption. Legal forms that function in that context may prepare the way for an easy reception of new legal systems. Under such condition, those old forms assume new functions, perhaps with new roles. When the traits possessed by a particular legal system give it a competitive advantage in a new area, then that legal system is preadapted to be a successful legal transplant. The potential for reception of foreign law is further enhanced if there is no need to destroy many of the existing forms or the introduction of new ones. When the existing forms provide a hospitable opportunity to incoming foreign forms, the receiving system is in a condition of legal prevenience.

A condition of legal prevenience exists when either a legal system or other conditions of a country make that country especially hospitable to some law or law system to enter the country. For the attribution of legal prevenience to have any scientifically significant importance, we must list specific conditions that by some knowable mechanism enable the received law successfully to enter the jurisdiction. Most commonly, it is the form of the antecedent law that provides the mechanism by matching in several important regards the forms of the received law. It further increases the degree of prevenience if the
fundamental conception of the nature of law is largely alike in both the antecedent and received law systems. This advanced degree of prevenience allows, then, the antecedent forms to function as before and for similar reasons. Certainly, the received system is different from the antecedent, or there would have been little opportunity for innovation; in the difference lies the effect of the new system. The prevenient attributes of the old law become apparent and tangible as it adjusts to the new law by taking on new functions. How a form functions now does not explain how it came into being in the first place; a faculty may arise in one situation, but function in another.

Underlying the mechanics of legal prevenience is the prevailing philosophy among those who form public opinion. That the educated men, especially those concerned with the law, believe that human institutions result from designing will, or Human Design, accounts for the willingness to seek a new legal system, or law form, based upon the same presumption. This philosophical presupposition, together with the antecedent forms, especially in a land of diverse language, custom, and religion, creates an optimal condition of prevenience.

We can best see the operation of legal prevenience by bringing together various details of legal reception and placing them in an historical flow.

**Legal Prevenience and the Napoleonic Code**

The historic diffusion of the French *Code civil* (the Napoleonic Code) throughout Latin America during the nineteenth century can be explained in terms of legal prevenience. All Latin America countries
had the Civil Law, in its earlier, uncodified form before the French Revolution of 1789 and before the Napoleonic Code of 1804. The Civilian systems of the several Latin American countries were preveniently adapted to the reception of the French code or indeed any code that carried the additional warrant of an ascendent, "wave-of-the-future" power. Before focusing attention on Latin America, however, the earlier expansion of the Napoleonic Code in Europe reveals the processes that enabled diffusion of law to transpire.

The Napoleonic Code, first promulgated in France (1804), was received in three principal ways (Limpens, 1956): 1) by conquest, 2) through persuasion, and 3) by inspiration. By conquest, the code was extended to all those areas under French control at the time of French promulgation. Thus was the code received by Belgium, Luxembourg, German territories west of the Rhine, the Palatine, the Rhenish provinces of Prussia, Hesse-Darmstadt, Geneva, Savoie, the duchies of Parma and Plaisance, Blemont, and Monaco. The prestige of the Napoleonic expansion, supported by the armies of Napoleon, resulted in the reception through conquest in Italy (1805-1820), the Hanseatic territory (1810), the Netherlands (1811) (which did not necessarily extend the code to her colonial possessions), and the Duchy of Berg (1811).

By means of persuasion, the Napoleonic Code was adopted in Westphalia (1808), Hanover (1810), and shortly thereafter, in the duchies of Baden, Frankfort, and Nassau, and in Danzig, Warsaw, certain Swiss cantons, and the Illyrian Provinces. Through inspiration, the code was received by much of the remainder of Europe, even though direct expansion had come to a halt in 1814. In 1827, there was a brief at-
tempt to reception in Greece. In 1841, the code was adopted in the Ionian Islands. A Dutch Code was promulgated in 1838 patterned after the Napoleonic Code. The codes of the Italian states derived from the French code: the Two Sicilies (1812), Parma (1820), Modena (1842), and the Albertine code of Sardinia (1837). After Italian unification in 1861, a national Civil Code based on the Napoleonic Code was adopted in 1865. In the same year the Italian national civil code was promulgated, Rumania adopted a translation of the Napoleonic Code. The principal colonial powers over Latin America, did not receive the French based civil code until relatively late in the nineteenth century, Portugal in 1867 and Spain in 1889.

Among the characteristics that define an historic situation in which preadaptation played a role is the spectacle of a sudden and extensive spread of a phenomenon. When a new law is seen to have spread suddenly and widely, especially when that spread was by voluntary reception, there is a strong presumption that a preadapted new law was spreading through a region of prevenience. Recognizing that such conditions obtained provides analytical light for discovering some of the cause-process-effect relations of the actual historic situation. The Code Napoleon spread by voluntary reception in just 60 years over the three million square miles of Europe; in the next 40 years, it was embraced by much of the rest of the world.

The rapid expansion of the Napoleonic Code throughout much of Europe in the nineteenth century was largely preconditioned by the prevailing Zeitgeist, a curious blend of legal positivism and legal nationalism that sought expression as a "national law" through codifi-
cation. The code, with its attitude of legislative positivism embodied the legal framework of the emergent nation-states. "Law ceased to be identified with justice and was now associated with the legislative sovereignty of each nation" (David and Brierley, 1978, p.63).

The expansion of the code in Europe was favored by the very technique of codification, legislative positivism, and the emergent nationalism of countries voluntarily receiving the Napoleonic Code.

Another reason for the acceptability of the code was the compromise of substantive law inherent from its very inception. The French Code civil of 1804 was a compromise between a Romanized body of civil law and the prevailing customary law of the region.

This aura of compromise was exactly what gave the Code its strength. For the northern neighbors, the Belgians, the Dutch, the Rhenish, recognized in it their own customs; conversely, the southern countries of Italy, Spain, Portugal, and Roumania recognized it their own laws so far as these were derived from Roman law (Limpens, 1952, p. 104).

Of course, upon reception by a colonial power, the Code was almost by definition received in that country's colonies and territorial possessions.

France seems to have been especially, albeit fortuitously, qualified to promulgate the modernist reorganization to Europe. Situated upon the North Sea focus of modern Europe, embracing Latin and Teutonic heritages, and partaking in nearly equal degrees of sea and land power, France indeed could serve as the great compromiser of the several strands of Western heritage. Having brought Catholicism, Protestantism, and Secularism into expedient resolution for public purposes, France provided a means for the then emerging nation-states to surmount the
difficulties inherent in the emergent industrial order. In any event, once the French solution was on the map, all other states must survive or fail in that special context.

As in Europe, the primary Roman elements in the civil codes of Latin America (Fig. 7) facilitated reception. Apart from individual substantive law rules, the faculties that were common to the French and the Latin American codes included the aspects of universality (the codes applied to all persons, not merely to various classes or localities), a preoccupation with movement and change (transactions, rather than status), a division as to types of action, and an "institutional, literate quality" (Lawson, 1953).

In Latin America, as in other countries of Romano-Germanic Civil Law, the very essence of private law is expressed in the civil code. The codification model used by those jurists charged with drafting the various Latin American codes during the nineteenth century was almost invariably the French Code civil of 1804.

The revolutions against Spanish rule in Latin America began in 1810, only six years after the promulgation of the Napoleonic Code in France. That code was in many respects symbolic of the French Revolution of 1789. It was also emblematic of the emergence of a new, secular order grounded in Human Design. The novelty of the code, its rationality and clarity of style, and the geopolitical ascendency of France, encouraged reception in the Latin American countries. As one scholar has noted:

All the original codes have been in countries which have just undergone a revolution and wish to recast their law quickly from top to bottom, or in countries which had in the past suffered from a diversity of legal systems or had just found themselves in that
THE CODIFICATION MOVEMENT IN THE AMERICAS

- French model
- German model
- Direct from Metropolitan
- (date) prior effort

Fig. 7
position because they had incorporated new territories governed by different laws . . . In the Republic of Latin America, the civil codes are the effects of revolution. Revolution not only marked the successful revolutionaries wish to secure and consecrate their victory by giving it dogmatic form in a code, not only are the forces of resistance weakened, but the lawyers themselves may find it less troublesome, and even more convenient, to accept a new and rational system than to pick up again the broken threads of their traditional law (Lawson, 1953, pp. 49-51).

The Latin American codes reflected the rationalist, utopian, and humanistic values of the Enlightenment and the French Revolution that prevailed at the time of their promulgation (Rodriguez, 1978).

Despite the overbearing influence, in private law, of France in her Napoleonic ascendancy, that influence was not unalloyed. The other revolution, that of the United States, also heralded a newly emergent power that contributed to the Zeitgeist of reform in Latin America. North American influence, which spread mainly during the nineteenth century, was for geojurisprudence limited mainly to laws of public administration and to substantive content of new constitutions. Inasmuch as our concern is with private law, we defer consideration of public law to another occasion.

The reception of the French Civil Code in Latin America (Fig. 7) occurred after the independence of the respective nations and was often associated with the spirit of revolution and a corresponding rise of nationalistic fervor. The first country to accept the Napoleonic Code was the former French colony of Haiti. This was accomplished by simple means of adoption in 1825. Then, in the 1830s, Guatemala began the process of codification as part of a national reform effort directed at legislative unification of laws; one of the objects of
which, was to prevent the fragmentation of the Central American Republic. For guidance, Guatemala looked to the Louisiana Civil Code of 1825, which had been modelled after the Napoleonic Code (Rodriguez, 1955). Upon gaining its independence in 1844, the Dominican Republic, which had been forcibly annexed to Haiti in 1822, retained the French-Haitian Civil Code. This code was not even translated into Spanish until 1884. Bolivia adopted a translation of the Napoleonic Code in 1831. The Chilean Civil Code was promulgated in 1865. It was essentially borrowed from the French, with a few inserted provisions from the Siete Partidas. In turn, the French-based Chilean code was received in Ecuador in 1861 (based upon Andres Bello's projet of 1846-1855), in Columbia (1873), and, with some modification, in El Salvador, Nicaragua, and Panama (until 1917). The Chilean Civil Code also served as the model for the Civil Code of Uruguay (1867) and Velez Sarsfield's projet for the Argentine Civil Code (1863-1869). The Argentine Civil Code came into force in Paraguay in 1876.

Also having its roots in the French Civil Code, the German Civil Code was adopted by most Latin American jurisdictions where a Continental European code was received in the twentieth century. Brazil received in 1916 (actually adopted in 1917) a civil code that reflected the influence of German and Swiss codes. (Teixeira de Freitas had previously drafted a civil code for Brazil during the years 1856-1865, based on the Napoleonic Code, but it was never adopted). Similarly, after a profound social revolution, Mexico promulgated another German-modelled civil code in 1936. Of all the Latin American countries, only Cuba (which did not gain actual independence until 1902) and Puerto
Rico received the Spanish Civil Code of 1889. Cuba and Puerto Rico had remained attached to their colonial mistress long enough to experience Spain's adoption of a new civil code based on the Napoleonic Code.

The fact that the French Civil Code was heavily influenced by Roman laws and legal institutions, which had formed the basis of the Spanish and Portuguese law received by the Latin American countries as colonies, recommended its adoption in that it did not require a complete break with the pre-existing legal structure. The antecedent, imperial metropolitan forms of the colonial law served new functions in newly independent republican states; their presence made Latin America preveniently hospitable to the French and German codes.

Elsewhere, the German version of the civil code was partially received in Japan in 1898. Japan had been much influenced by the French Civil Law during the years 1880 to 1896. China also received parts of the German civil code in the period of 1929 to 1931. This influence was uprooted by subsequent events in part because the transplant occurred in infertile legal ground. The reception of the Napoleonic Code by the then recently secularized legal culture of the Middle East further evidences the role of legal prevenience. Turkey adopted the Swiss Civil Code in 1925, having previously been influenced by a civil code of 1869 that was similar to the Napoleonic Code. Egypt, too, had received in 1876 and 1883 civil codes patterned after the Napoleonic Code. In 1948, Egypt adopted a modern code related to the French code. Syria adopted a 1949 civil code essentially borrowed from that of Egypt. In 1934, Lebanon promulgated the Napoleonic Code as the core of its private
law. All totaled, the Napoleonic Code was introduced in thirty-five
nation-states and adapted as the civil code of another thirty-five
(Limpens, 1956). Apparently, Napoleon was prophetically correct when
he told Montholon at St. Helena: "My true glory is not to have won
forty battles . . . . Waterloo will erase the memory of so many vic-
tories . . . . But what nothing will destroy, what will live forever,
is my Civil Code."
CHAPTER VII

TOWARD A NEW GEOJURISPRUDENCE:
GLOBAL PATTERNS OF CULTURAL ORDER

Take up the White Man's burden—
Have done with childish days—
The lightly proffered laurel,
The easy, ungrudged praise.
Comes now, to search your manhood
Through all the thankless years,
Cold-edged with dear-bought wisdom
The judgement of your peers!

---Rudyard Kipling, The White Man's Burden, 1899

The ordering forces of Human Action and Human Design manifest themselves in the legal rules governing the behavior of the individuals who form the orders. The Anglo-American Common Law family of legal systems and the Romano-Germanic Civil Law family of legal systems reflect the ordering forces of Human Action and Human Design, respectively. Nonetheless, both of these systems share a cultural heritage of Natural Law which largely determines the substance of the law, and both of these families have been influenced in varying degrees by the ideology of legal positivism. The Soviet Civil Law is probably the most violent expression of a legal system captive to a Gnostic ideology. These three Western families of legal systems today cover very nearly all of the earth's surface. Their global expansion constitutes a significant part of what Russell and Kniffen (1951) term the "New World Revolution."

The New World Revolution is a process that took place beginning about the sixteenth century, as Europeans embarked on waves of domina-
tion, conquest, and colonization, and continues to the present. The "New World" comprises those parts of the earth's surface that had experienced the infusion of European cultures at the expense of native or indigenous cultures. As each culture tends to assume its own landscape characteristics, the general effect of the New World Revolution was that of modifying the earth's regions into forms characteristic of European culture (Russell and Kniffen, 1951).

The perspective of legal receptions offers new insight into the recurring pattern of the New World Revolution. In its initial stages, the introduction of European commercial law becomes important among Europeans and between Europeans and natives. The introduction of the idea of permanent possession encourages investment of capital sufficient to engage in the exploitation of natural resources and in the form of commercial agriculture. In this way, areas develop more potent commercial and economic landscapes, despite any destruction or disappearance of antecedent, native groups and cultures. Acquisition and permanent possession of land are usually direct consequences of the legal effects of land tenure transplanted by the colonial mistress. Colonization through settlement or administration further advances the expansion of the European systems of law.

From the vantage point of geojurisprudence, the New World Revolution is generally completed when mere colonial political and economic relationships cease. By this time, there has been a thorough establishment of European institutions. The New World Revolution has run its course when the newly independent country has reaffirmed its assumption of the European culture pattern. In terms of law, this reaffirmation
translates to more than mere retention of the colonial or received law; it commonly means the eradication of surviving native customary and religious jurisprudence in favor of a unitary national system modelled after that of its former European sovereign.

Landscape transformations (land parcelizations and divisions) as a result of the impress of sovereign legal authority often characterize the variety of received law. This is especially clear when one considers the uniformity generally imposed by a national system of law. In the Common Law world, the transplanted law has generally introduced a concept of private ownership of land which has resulted in the encouragement of landed estates. From the eleventh century, English gentry had incorporated as an estate, thereby laying the groundwork for the perpetuation of their lands by entail and primogeniture. Although there was an abandonment of entail and primogeniture in the late eighteenth and early nineteenth centuries due in part to the influence of independent rural farming, other Common Law influences in land tenure linger in patterns of inheritance where the Common Law prevails. The Common Law tradition of land inheritance is rooted in individualism, where the mature adult is considered the principal legal unit. It is thus not surprising that one can inherit or dispose of "interests" and "estates" in real property according to one's desires. This practice frequently encourages the survival of landed estates. A consequence of the concept of private land ownership is the necessity for terrestrial localization through surveys, such as British metes and bounds (Hilliard, 1973), or long possession evidenced by actual landscape features, such as bounding fences or the planting of permanent trees.
British colonial law reception also gave rise to absentee landlordism. In India as of 1950, for example, "about 80 percent of the land was in the hands of absentee landlords, or in other words, four-fifths of the land was cultivated by people who do not own it" (Wittfogel, 1957, p. 433). Land alienation also followed Common Law procedures, with its emphasis on actual occupancy. This requirement necessitated the use of cadastral plans and land registration often describing "general boundaries," i.e., boundaries described in terms of topographic features.

Similarly, the reception and transplanting of Civil Law affected the landscape of the countries involved. The introduction of the Civil Law in Algeria, for example, provided the vehicle for the expropriation of native land for use in encouraging French settlement. A consequence was an increased concern with the importance of surveys and private property divisions not present under the previous Islamic and customary law period. The introduction elsewhere of land survey systems was also a result of legal transplant. The Civilian reception also frequently resulted in the alienation of native lands, which resulted in shifts in the native populations. Large land grants in French Equatorial Africa and the Belgian Congo enhanced the possibilities for plantation agriculture.

Another significant introduction of the Civil Law was the idea of forced heirship, a limited testamentary freedom. The Civilian view of the family as the primary legal unit for land ownership supported this institution. Forced heirship was considered to be a "pillar of
family relationships." Civilian concepts of property favored commercialism, thus reference was often made to "ownership" and "complete title" to land. But, forced heirship manifested itself in the landscape through the fragmentation of large landholdings. In Islamic regions, the previous system of "Koranic heirs," which encouraged equal division of property, was preconditioned to be recast in terms of Civil Law terminology. Inheritance law which prescribed the periodic division of private property had landscape effects: one of which, was even smaller farms. Under the principle of forced heirship, time itself becomes a strong disintegrative force in landholding. A related effect of forced heirship is the decline of landed wealth as an effective counterbalance to central political power. In Roman-Dutch Civil Law jurisdictions, such as South Africa, the fragmenting of Kafir farms resulted in the growth of a landless rural folk who eventually drifted into the cities as part of the unskilled labor force.

The transfer of the Spanish legal pattern to the Americas had the further effect of replacing labor-intensive irrigation farming with labor-extensive cattle-breeding (Wittfogel, 1957, p. 218). The promulgation of the Leyes de Toro effected the "subjection of agriculture to large scale pasturage." A direct side-result was a great reduction in native farming populations in many instances (Wittfogel, 1957, p. 218).

The reception of Soviet Law, too, had its landscape effects. The dissolution of private property and the forced collectivization of peasants are among the most characteristic. The nationalization of
agriculture through agrarian socialist reforms is evidenced by the collectivization of villages into kolkhozes and the formation of sovkhozes.

These examples of landscape manifestation of law are direct consequences of the expansion of European culture through legal transplants. The distribution of laws and legal systems and the processes by which they interrelate with the land are proper subjects of concern for the specialized area of political geography, which is here called "geo-jurisprudence."

In Goethe's Faust (Part I, Scene IV), an instructive dialogue is held between the student and Mephistopheles. The student remarks, "I do not take any fancy to jurisprudence." To which Mephistopheles replies: "I do not blame you for that. I know what kind of a science it has become. All rights and laws are transmitted like an eternal disease from generation to generation and carried from place to place. Reason becomes nonsense, and welfare is turned into a plague. A miserable lot is yours to find yourself heir to all this! As for the law which is born with us, nobody, alas! ever inquires after it."

Naturally, Goethe's rendering employs an artistic exaggeration. What is true, however, is the relation between Natural Law and positive law that serves as a measure for true order. In having even Mephistopheles point out that "law . . . is born with us," Geothe recognizes with Socrates that true law is an extension of man's nature amidst the natures of all surrounding things. If true law is part of man's nature, as geometry was part of Socrates' slave-pupil's nature, then it exists without being captured or fixed in a code. Indeed, a project to fix law in a code must in justice be preceded by a showing that all of
man's nature in relation to all possible contingencies has been revealed. That no such showing has been made is manifest to proponents of both Common and Civil Law; they both make allowance for continued revelation of additional aspects of Natural Law. Between these two Natural Law heirs, however, a difference in form -- based upon a difference in fundamental concept (philosophy) -- conduces to further change in the geojurisprudential landscape. The near homology between the form of the Civil laws and the Code Napoleon led to that Code's sudden spread around the world; a similar homology between legislated codes and Soviet law form led to a similarly sudden and far flung diffusion. "Reason becomes nonsense, and welfare is turned into a plague. A miserable lot is yours to find yourself heir to all this!" Thus spoke Goethe sometimes between 1798 and 1833. As embraced in legal systems, the transfer of these relations from "generation to generation" and from "place to place" constitutes the basis for a new geo-jurisprudence.
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Many authoritative and secondary sources were consulted in deter­mining the types of legal system to be found in the respective nations and territories. These determinations as to type of legal system were then compared with similar evaluations on the part of the Central Intelligence Agency of the United States, in order to achieve additional verification (National Basic Factbook. January, 1979. Office of Geographic and Cartographic Research, Central Intelligence Agency. Washington, D. C.).

R = Relocation Diffusion (Volk Migration)
E = Expansion Diffusion (Involuntary Reception)
S = Stimulus Diffusion (Voluntary Reception)

### The Common Family

<table>
<thead>
<tr>
<th>Political Jurisdiction</th>
<th>National Source of Common Law</th>
<th>Type of Reception</th>
<th>Principal Servient System</th>
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<td>Eng.</td>
<td>R</td>
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<td>R</td>
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<tr>
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<td>Eng.</td>
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<td>Brunei</td>
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<td>Hong Kong</td>
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<td>E</td>
<td>Chinese</td>
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<td>Eng.</td>
<td>E</td>
<td>Hindu, Islamic</td>
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<td>Eng.</td>
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<td>Islamic</td>
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<td>Adat, Islamic</td>
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<td>United States</td>
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<td>(except Louisiana and Puerto Rico)</td>
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**Other Systems**

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<th>Country</th>
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</table>
Ernest St. Clair Easterly, III, was born on December 3, 1952, in Denham Springs, Louisiana. He gained his early educational advantages in the schools of Livingston Parish, graduating from Denham Springs High School in May, 1970. At Louisiana State University, he received his B.A. degree in December, 1973, and his J.D. degree in May, 1977.

Having been admitted to the bar as an Attorney and Counselor at Law, Mr. Easterly presently practices in Louisiana, where he also serves as Special Counsel for the State of Louisiana. He is a member of the Louisiana State Bar Association, the American Bar Association, and the International Bar Association, as well as the Association of American Geographers.

Mr. Easterly has previously co-authored one book, Louisiana Parish Boundaries Through Lakes, Bays and Sounds. He has published in such professional journals as the Geographical Review, the Annals of the Association of American Geographers, and Geoscience and Man.
EXAMINATION AND THESIS REPORT

Candidate: Ernest St. C. Easterly, III

Major Field: Geography

Title of Thesis: GEOJURISPRUDENCE: STUDIES IN LAW, LIBERTY, AND LANDSCAPES

Approved:

[Signatures]

Dean of the Graduate School

EXAMINING COMMITTEE:

[Signatures]

Date of Examination:

December 12, 1979