On Weber, Law, and Universalism: Some Preliminary Considerations

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After a short lull in the late 70s and early 80s, the subject of modernity and modernization is once again a topic of considerable interest. This interest extends to all variety of social scientists and to artists, writers, and cultural critics. Frequently the word “modernity” is used simply to register a moral disclaimer for the tenor of contemporary life, and to suggest that things are not what they should be, much less what they used to be. But if the word “modernity” is used to evoke pathos for the present, it is rarely given any content: “modernity” is simply the present state of affairs, a state of being that is distinctively “new” rather than old or traditional.

In the present paper I want to suggest that there are indeed some distinctive traits of “modernity,” that these are basically “good” things, that they did originate in the West, and that they are both desirable and desired by the peoples of the developing world. On at least one level, these traits imply a form of “universalism,” which is to say that some of the traits of modernity are universally applicable and universally desirable—given the possibility of informed consent and freedom of choice. In addition, I want to suggest that one of the best approaches to the universalistic dimensions of modernity is through the comparative study of law. In short, I shall be arguing that there are some specifiable elements of modern social life which have universal implications for social, political, economic, and intellectual life in other parts of the world, and that contrary to some writers, these components of social life are neither “ethnocentric” nor “useless” to non-Western or developing peoples.

It is clear that Max Weber was the most powerful and articulate writer on the rise of the West, and the West’s consequent differences—economic, political, artistic and scientific—from the other great civilizations of the world. Put differently, Weber saw
the rise of modern capitalism as a wholesale transformation of the West which included not just the economic realm, but also the religious, legal, political, and scientific domains (cf. Weber 1958, 1961, 1978; and Little 1969; Trubek 1972a; and Sterling and Moore 1987). Moreover, my focus will be on the elucidation of what I shall call the forensic structure of modernity. By that term I intend to refer to the legal and argumentative structures of modern institutions which are embedded in law. I shall argue that these dimensions form the underpinnings of the formal and informal structures of conflict resolution in all the spheres of political, social, and intellectual action. In effect, I am suggesting that if we look at the problem of modernity in comparative perspective, there are some identifiable forensic structures which are indispensable for the preservation and support of certain highly desirable forms of social action and association, as well as indispensable for the resolution of many forms of social conflict. These structures pertain not just to criminal matters, but also to those of a political and ethnic sort, including intellectual battles over what is morally correct or incorrect, as well as what the fundamental structures of the natural world are. In short, these legal devices I should say are quintessentially "modern."

In this connection, Weber's "Sociology of Law"—chapter 8 of Economy and Society (1978)—still retains its aura of authority among sociologists as well as legal scholars. As a result, Weber's conception of what a "modern" and "rational" system of law is still prevails. Indeed, that group of legal scholars which calls itself the school of "Critical Legal Studies" claims Weber as one of its patron saints (See Trubek 1984, 1986). However, there are numerous reasons for re-examining Weber's concept of the ideal type of "formal legal rationality" which was modelled after the Civil Law tradition of Europe.

As we recall, Weber's scheme for classifying legal systems was based on two criteria: the degree of "rationality" of the system, and the degree of its "formality." These two terms are so inter-meshed, however, that it is virtually impossible to discuss one without the other. Nevertheless, it could be said that a legal system is "rational" to the degree that all of its duly recognized rules form a logically consistent whole, and that legal decisions are logically derived "applications" of those uniform and universalistic rules. Likewise, law-finding is "rational" to the degree that the process is
guided by the intellect, as opposed to the emotions or mystical impulses.

By the "formality" of the law Weber referred to the degree to which, "in both substantive and procedural matters, only unambiguous general characteristics of the facts of the case are taken into account" (Weber 1978:656). These legal rules and conceptions are presumed to be universal in their construction and application, and any rule, norm, or form of behavior which cannot be construed as an "application" or realization of these legal categories is said to be legally irrelevant. In effect this legal system presumes to be a "gapless," complete system, and includes all rules which can be said to be legally binding (Weber 1878:656-58). Although Weber does not actually articulate the thought, it can be said that since this legal formalism intentionally excludes "custom" as a source of law, and since it further disallows the use of past legal decisions as precedents, it can be seen as a somewhat authoritarian system. In any event, from Weber's vantage point, the highest development of such a modern rational legal system was that attained by the Civil Law tradition of Europe toward the end of the 19th century.

This ideal type of a "modern" legal system stands in stark contrast to the Common Law tradition, especially of England and the United States. Weber was aware of this and frequently noted that English common law represented a "different" and "lower" form of legal rationality (Weber 1978:890). From Weber's point of view, Common Law was clearly a system of substantive rationality, with a much lower level of "formal" rationality. This was the inevitable result of a "judge-made" legal system whereby legal rules were built up over the course of time as judges issued new rulings based on actual cases, and where no concerted effort was made to "codify" the law (which is what happened on the Continent, especially after the French Revolution).

It would be easy to criticize Weber's characterization of a "modern" legal system as "ethnocentric," not only from the point of view of the Third World (which is what Trubek [1972b:16f] did), but also from an Anglo-American point of view. Yet such criticism does not warrant abandoning Weber's rich set of scholarly perspectives on law and society. For to dismiss Weber's model on this account would result in omitting the fact that the development of the "modern" Civil Law—e.g. from the 18th century onward—
was a great historical experiment in which legal scholars deliberately set out to create a uniform legal code so that the particularities of place and person, as well as "metaphysics" and superstition, would not be factors in achieving justice. But what was not anticipated—and could not be foreseen—was that such a system often sacrificed legitimate legal causes—"legitimate legal interests"—to the absolute principle of uniformity of legal treatment (i.e., "universalism" in the narrow sense), and in so doing also introduced a source of authoritarianism. It did this by rejecting out of hand any cause which could not be inserted into the legal proceeding as either an application or realization of the legal code, and which must therefore be treated as an "infringement" upon it. In addition, authoritarianism is clearly a possibility when the legislative and judicial branches are rigidly separated and when legislative decree is thought to be above judicial review. This of course is another way of describing the "state absolutism" which arose with the modern Civil Code, and which, Hayek (1960:193-94) suggests, stems from the failure to place limits on the administrative apparatus of the State through the creation of a constitutional balance of powers. A leading constitutional scholar refers to the 19th-century fear in Civil Law countries of any attempt by the judiciary to impose "higher" or "constitutional" standards on ordinary legislation. The popular legislature was seen as the only source of law, and its statutes were to control all cases brought before the courts. When the Nazi-fascist era shook this faith in the legislature, people began to reconsider the judiciary as a check against legislative disregard of principles once considered immutable. (Cappelletti 1971:viii)

This led to a new wave of constitutionalism, an effort to create a written set of immutable higher principles in the form of a constitution. The constitution then had to be "rigidified" by establishing a stringent mechanism for its modification—such as a two thirds vote of the legislature—or by encapsulating it in a formal legal structure—such as a constitutional court.

Hence the framework of modern constitutionalism and judicial review synthesized the ineffective and abstract ideals of natural law with the concrete provisions of positive law. Through modern constitutionalism . . . natural law, put on an historical and realistic footing, has found a new place in legal thought. (Cappelletti 1971:viii-ix)
In short, the 19th century European effort to eliminate metaphysics and reference to “higher law” in the legal codes failed and the resultant march toward constitutionalism of the 20th century fundamentally altered the foundations of the Civil Law tradition.

Nevertheless, even if Weber’s characterization of a modern legal system represents a peculiar, historically-limited conception of a “modern legal system” with the defects noted above, it remains the case that “modern” law has in fact been an indispensable accompaniment of political (and economic) development in the West as well as in the developing world. Consequently a more fruitful approach to this difficulty in Weber’s conception is to attempt to reformulate the core ingredients of modern law, and to reformulate our conception of “universalism.” We can do this by restating some fundamental assumptions about the conditions of modernity.

**Modernity**

As I noted at the outset, there is a renewed interest in the subject of modernity and modernization. Among social scientists, however, there is a tendency to focus on either the rise of industrialism and the modern capitalist system (or the rise of “the liberal democratic state”). While I accept the view that these terms refer to important “modern” developments, for present purposes I shall take the concern with the development of democratic political structures as a more generic component of modernity than technological and economic development. This follows from Weber’s notion that the rise of capitalism was dependent upon the rise of a centralized bureaucratic state, and this in turn was dependent upon the creation of a stable legal order which guarantees a large degree of predictability for future economic action (Weber 1978, 1961).

In thinking about what those legal structures are which evolved and facilitated the rise of the modern political and economic order, it seems to me that there are both new conceptions of legal action and new conceptions of lawful association. In the first category we think of “freedom of contract” which Weber thought was indispensable for the rise of modern capitalism (Weber 1978:668ff). Likewise, all those political rights, referred to in the
American Bill of Rights (e.g., the freedom of assembly as well as speech, due process of law, freedom from self-incrimination, religious freedom, etc.) represent unique (Western) legal concepts of legitimate action which would have to be included in a "modern" legal order.

With regard to the second category—forms of association—we might think of the legal status of incorporation, a singular Western notion which grants rights, privileges, and duties to collective actors. Here again we find a uniquely Western legal conception—that of a corporation—which was decisive for the evolution of the West, but which was absent in other civilizations.

Although we think of "corporations" as unique economic actors, it is decisive to recall that universities and scientific institutions—as well as cities—are also corporations, and that without the legal autonomy which such a status implied, universities and scientific entities would have been very much weaker in the history of the West, and the modern scientific revolution might not have occurred.²

In brief, however we decide to evaluate the importance of legally autonomous cities, universities and scientific societies—entities which I would postulate as prototypic modern institutions—in the cultural history of the West, that status of legal autonomy was not available in medieval Islam nor in China. The important point to stress is that in Europe universities emerged as "autonomous corporate associations" and that their formation "coincided with the formation of guilds in industry and commerce, and of self-governing communities in the civic sphere" (Kibre and Sirasi 1978:120), and that none of these corporate statuses was legally available in the Islamic (or even Chinese) world (see Schacht 1964, 1974; Khadduri and Liebesny 1955; and Coulson 1964 among others on Islamic law; Lapidus 1967; and S. M. Stern 1970 on Muslim cities, and Needham 1969, chapter 8; Bodde 1963; Schwartz 1968; and Cohen 1968 on China).

From this point of view, a very strong case can be made for the fact that a variety of indispensable legal conceptions did evolve in Western law, and that these conceptions established a necessary if not sufficient legal foundation for modern political and intellectual life as well as for economic action. Accordingly, we may say that at the heart of the "structures of modernity" is a complex set...
of institutional arrangements which permit the more or less orderly and peaceful resolution of all sorts of conflicts—economic, political, social, intellectual, religious—following such principles as “the rule of law,” “due process,” new rationalized evidentiary standards, personal accountability, the presumption of innocence until proved guilty, the notion of the universal applicability of all laws, the publicity of fact finding and law-finding procedures, and a metaphysical commitment to the principle that the spheres of participation should be maximally democratic and egalitarian. These principles and legal devices did not evolve all at once, nor in a single place. Likewise, this list includes a disproportionate number of elements seemingly more fully developed in the Common Law tradition, and this raises additional questions regarding Weber's ideal type of a “modern legal system” modeled after the Civil Law tradition. Nevertheless, these items denote critical aspects of the “structures of modernity,” as I should call them, and they are both desirable and desired entities in the developing world. Accordingly, I want to go a step further and suggest that there is an intimate connection between these legal and moral principles and the idea of universalism (and universalization).

Universalism

There have been relatively few social scientists who have explored the idea that cultural life does indeed display differing levels of “development” and “universalization.” However, both Max Weber and Emile Durkheim (and his nephew Marcel Mauss) operated with the assumption that there are “cultural developments” which have “universal” implications. In the “Author’s Introduction” written for the Collected Essays in the Sociology of Religion, Weber clearly referred to “cultural phenomena (as we like to think)... which lie in a line of development having universal significance and value” (Weber 1958: 13). Likewise Durkheim and Mauss, in their neglected “Note on the Notion of Civilization” (1971 [1913]) speak of the convention which leads sociologists to think that “the national life” is the highest form of cultural phenomena which can be investigated. But they point out that cultural phenomena which “pass beyond the political frontiers” do exist and thus extend beyond the boundaries marked off by nation states (Durkheim and Mauss 1971: 811). Such phenomena,
they argue, have a "coefficient of expansion" which renders them international (p. 812), and we may say, universal in design. At the very least they constitute a level of social life that is supranational because they are shared by 2+n societies, and some might say, form the basis of "civilizations" (see Nelson 1981, chapter 5).

Thus the late Benjamin Nelson (who translated this piece by Durkheim and Mauss) repeatedly referred to the "universalization process" (Nelson 1981: 8, 112f), the move from "tribal brotherhood to universal otherhood" (Nelson 1969) whereby new symbolic forms—religious, linguistic, mathematical, fraternal and legal—evolve and result in the creation of translocal as well as transnational cultural institutions. But note: the spirit of this process is not one of legal imposition—it is, on the contrary, one of enablement. The creation of new and wider spheres of fraternization and discourse allow individuals to enter into new forms of dialogue and consociation freely and of their own accord. This applies equally to democratic political participation as well as to scientific participation in the universal discourse of science of which Robert Merton speaks in his description of the "ethos of science" (Merton 1968: chapter 18).

In short, although we may disagree with Max Weber's conceptual description of a "modern legal" system, it is the case that certain legal conceptions did uniquely evolve in the West, and these legal forms created new structures of human association, indeed new levels of universalism manifested by the structuring of new opportunities for intellectual discourse, as well as new levels of political and economic participation. This suggests the principle that once certain conceptions of reason, rationality, due process, and association are embedded in law, they have an inordinate power over the people they govern, possibly more powerful even than strictly religious conceptions. Moreover, these conceptions greatly broaden the spheres of discourse and participation, joining people together across religious, ethnic, and national boundaries. For once any set of originally religious (or ethnic) conceptions become restated as legal principles (in the Western conception of law) they have the potential for becoming universal, i.e., "non-denominational" principles applicable to men and women of all religious and ethnic persuasions (cf. Bohannan 1967). Hence, legal institutions (and legal systems) need to be studied from the point of view of the degree to which they move
in universal directions, and at the same time, crystalize the operative directive structures (cf. Nelson 1981) which must in fact be used for the resolution of social conflict. For when it actually comes down to the resolution of conflict in a society, the standard forensic modes of reasoning, argumentation, and evidentiary evaluation must be used on pain of physical coercion by the political system. To that degree it may also be said that legal systems shape a fundamental component of the “national character” of a people (to use an older term).

At this point I may clarify my thesis regarding universalism and restate it in contrast to the view of modernity which appears in the writings of Daniel Bell, who equates modernity (and “modernism”) to an “unyielding rage and adversary stance” (Bell 1978:46). First, we may think of the process of universalization as twofold. On the most basic level, men and women struggling to live together on the local level find new symbolisms which transcend their points of contention and at the same time bind them together on a new level of discourse and participation. Such new forms of association then become available for dissemination and use transnationally and transculturally—in effect, universally. Consequently, the universalizing process contains both an act of intellectual discovery and innovation—the forging of new conceptions of fraternization and consociation—and a political act of disseminating those forms to other groups of social actors living in other parts of the world.

Accordingly, the view of modernity as the creation of an “adversarial” culture has to be modified to accommodate the fact that people at almost all times and in all places are perpetually in a state of conflict. Globally considered, most of these conflicts come out very badly and devolve into physical confrontations, local wars and the like. Some of these conflicts are motivated by a desire to return to (an imagined) state of pristine purity, especially as religious ideals. Some are calls to a new religious order. Others are motivated by claims to power—social, political, and economic. Sometimes, and in some places, this conflict and disputation is more intense than at others, but it is always ongoing. Thus the “moral majority” in the United States just as eagerly seeks the realization of an earthly religious ideal as the Islamic fundamentalists of the developing world. Their alternative conceptions of how you achieve those ideal are obviously very different, as recent
events regarding artistic expression illustrate. From my point of view, if there is such a thing as the "structure of modernity," it would at the least have to be a set of institutional arrangements (not just or primarily a singular psychological attitude or cultural stance) which mediate those ongoing manifestations of social conflict.

No doubt Daniel Bell is right to speak of "the spirit of modernity—the spirit of perpetual innovation and the creation of new 'needs' on the installment plan" (1978:78). However, this and the adversarial culture of which he speaks seems less central to the "structure of modernity" as I conceive it. While the adversarial ("expressive") culture undoubtedly exists, the presence of a variety of outspoken religious, ecology and conservationist groups suggests that these points of view are simply thematic agendas in the ongoing dialogue which takes the structure of modernity (as I have described it) for granted—above all as a set of undisputed ground rules making peaceful dialogue possible.

Thus, if we begin with the assumption that collective social life everywhere and at all times is characterized by an endless set of religious, ethnic, and political conflicts—about what the "good life" is, about who should rule and how, about how economic and political resources should be apportioned, and how such debates should be resolved, etc.—then what is unique about modernity is the constellation of legal structures which have been crystallized in various institutional arrangements designed to deal with such ongoing sets of intellectual, social, and political debates. Of course, these institutional structures have embedded within them a variety of metaphysical assumptions, and it is precisely the nature and effect of these embedded assumptions that we seek to elucidate in order to get at the precise effect that forensic structures do and can have on social life generally. However, it is decisive from my point of view—to reiterate—that the legal structures to which I refer not be considered—as in the Civil Law tradition—as structures imposing "law and order" but rather as voluntaristic "structures of opportunity" for discourse and participation which serve primarily as facilitators of conflict resolution.

We must now ask, do the "structures of modernity" to which I have referred have this propensity to move in universalistic directions, and do they do so in a beneficial and non-coercive fashion?
Law and "Legal Development"

There are two issues that need to be addressed. One concerns the utility of the spread of the Civil Law tradition in non-Western societies and civilizations, and the other concerns the possibility that there are functionally different consequences of the imposition of Civil as opposed to Common Law traditions. In his critique of the "core conception" of modern law, David Trubek (1972b) deliberately slights the differences between the Civil Law and Common traditions by asserting that, despite the ideological contrasts between the two traditions, "functionally the Weberian model and the American or modern law model are similar in many respects" (p. 13 n.49). I think there are many reasons for disputing this claim, and I shall do so presently in the context of the "law and legal development" movement.

Begun in the early 60s, the Latin American Law and Development Program was an American foreign policy initiative designed to transfer American legal expertise to Latin American countries. Aspects of this program had been tried earlier in the 1950s in other parts of the world, especially in Asia (Merryman 1977; Gardner 1980). However, it should be kept in mind that all the Latin American legal systems belong to the Civil Law tradition, and that American legalists were none too familiar with its fundamentals at the outset. As a result, the peculiar American conception of lawyering applied to the Latin American setting was based on a "social engineering," "rule-skeptical" and instrumentalist legal orientation (Gardner 1980: 7). According to James Gardner, the underlying "philosophy" of the program is captured by the motto of the American legalist, Karl Llewellyn. He wrote:

The essence of our craftsmanship lies in skills, and wisdoms; in practical, effective, persuasive, inventive skills for getting things done, any kind of thing in any field; in wisdom and judgment in selecting the things to get done; in skills for moving men into desired action, any kind of man, in any field . . . we are the trouble shooters" (as cited in Gardner, p. 14).

In short, the law and development movement was inspired by a rather mundane legal pragmatism which promised the "know-how" to get things done despite the many obstacles—legal, cultural, and political—that might stand in the way. Furthermore, many Latin American countries at the time were experiencing a new burst of legislation that resulted in the promulgation of a host
of new economic policies and regulations which lawyers had to understand and apply, but which they had no hand in making. Thus, as we noted, in the Civil Law tradition there is a sharp separation of powers reflected "in the dogma of the absolute external and internal sovereignty of the State, [along with] a State monopoly on law making" (Merryman 1985:23). Moreover, due to the unique French context in which "modern" Civil Law evolved, there was a great deal of suspicion directed toward judges and a fear of their interference in administrative matters (Merryman 1985: 16f; von Mehren 1977: 1146ff). Subsequently the Civil Law tradition evolved mechanisms to isolate judges from the law making process and reduced their function to that of simply "applying" the law. This "State Positivism" proceeded under the notion that the "legislative and judicial powers of the government were different in kind; in order to prevent abuse, they had to be very sharply separated from each other. The legislative power is by definition the lawmaking power, and hence only the legislature could make law" (Merryman 1985:23). Furthermore, in the Civil Law tradition, every effort is made to shape the law into a "legal science" with a seamless set of laws, statutes, and regulations.

The picture of the judicial process that emerges is one of fairly routine activity. The judge becomes a kind of expert clerk. He is presented with a fact situation to which a legislative response will be readily found in all except the extraordinary case . . . The net image is of the judge as operator of a machine designed and built by legislators. His function is a mechanical one. The great names of Civil Law are not those of judges . . . but those of legislators and scholars . . . The Civil Law judge is not a culture hero or a father figure, as he often is with us. His image is that of a civil servant who performs an important but essentially uncreative function (Merryman 1985:37, 38)

Needless to say, this image of law, law-making, and the role and function of judges is not the one projected by the Common Law tradition of England and the United States—although it is very similar to the portrait of a "modern legal system" to be found in Weber which is modelled after the French Civil Code and the German "Pandectists" of the 19th century (see Weber 1978:657 and 865ff). Furthermore, there were many other significant differences between the two legal traditions concerning the nature of law, how it is arrived at and used, as well as how it is taught.
Furthermore, there were very notable differences regarding the nature and collection of evidence, the examination (and cross-examination of witnesses), and the principle of *stare decisis*—the doctrine that judicial precedents should be followed and not overturned. Yet all of these rather significant differences were overlooked in the law and development program, apparently swept away as "traditional" in favor of the currently pragmatic American view focused on issues and isolated problem-solving (Wiarda 1987:59). Given what is today seen as excessive human rights abuses and authoritarianism in Latin America, it seems ironic that the law and development program took with it none of the fundamental legal conceptions which we regard as essential to protecting individual liberty and human rights. While it is true that Civil Law systems have some provisions for protecting human rights, these do not appear to be very effective, and as Wiarda has pointed out, one needs to be aware that alongside the statements preserving human rights in Latin American constitutions, there are equally powerful cultural assumptions that the citizen's first duty is to obey corporate authorities, not to insist on exercising human rights (Wiarda 1981:140ff). The most vital link in all of this is the role of judge as independent interpreter of the law. But as we have seen, the role of judges in Civil Law countries is greatly diminished in actual fact, in judicial psychology, and in training for intellectual autonomy and independence (von Mehren 1977:1145-1150; and cf. Merryman 1985; chapter 6; and Jolowicz 1985:72). Beyond that, the institution of "judicial review" is a concept originally alien to the Civil Law tradition, and only now has its worldwide acceptance as a "legitimate" legal activity been acknowledged—even in France—by both Common Law and Civil Law students (see Jolowicz 1985; and Cappelletti 1980).

In any event, the law and development program never considered the possibility that the inalienable conception of human rights embodied in the American Constitution—or any of the other notions mentioned above—might be important to bring along (Gardner 1980: 13; cf Trubek and Galanter 1974), nor apparently did it deal at all with actual trial procedures, or the problem of the structural weakness created by the diminished role (and moral authority) of judges in Latin American countries. Instead, by attempting to offer a variety of new legal
courses based on the new pragmatism and rule-skepticism of American lawyers (including the “case method”), the hope was to teach Latin American lawyers the special American ability to deal with “banking, tax, and capital market laws” (Gardner 1980: 67), all under the assumption that the state itself was a benign liberal entity. But as Wiarda remarks, it “soon ran head-on into the authoritarian statism of Latin America” (1987, p. 59).

In view of these considerations, it seems ironic that Howard Wiarda’s assessment of the failures of the Latin American law and development program results in an indictment of social science and the effort to encourage “legal development” in Latin America and elsewhere. I should think that an objective observer of the Latin American scene would suggest that indeed Latin American countries need structural reform of their legal systems, and above all, new and increased protections for dissidents exercising civil rights as well as legal officials attempting to enforce the law. This perspective might also suggest that the Civil Law tradition there has been less than successful in its mission.

Instead, Wiarda claims that “the categories and understandings of extant political development are derived ethnocentrically from the EuroAmerican experience and have little or no relevance to the non-Western world” (Wiarda 1987: 55). These models of development, he continues, “are all derived from the Western experience, of a particular time and place, and therefore have no relevance to the non-Western world.” He further claims that the various political development models of the last two or three decades are “particularistic, parochial, Eurocentric, considerably less than universal and hopelessly biased” (1985: 59).

As I have suggested above, this perspective on the matter ignores the considerable weaknesses of the Latin American Civil Law tradition which center on the failure to protect human rights, the diminished role of judges in that process, and the nearly complete absence of a functioning mechanism of “judicial review.” Beyond that, it overlooks the pronounced trend (noted by students of comparative law) among Civil Law systems to move toward the Common Law model (cf. Merryman 1985: chapters 19 and 20, and passim; von Mehren, 1977; Jolowicz, 1985; and Glendon 1985, among others). In brief, there is a great deal more to the evaluation of the “law and development” program, and the

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question of the universalizability of "the structures of modernity" than Wiarda's discussion suggests.

Since here we are dealing with alternative Western conceptions of a "modern" legal system, the best strategy at this point is to consider some cases in the third world where either the Civil Law or the Common Law has been adopted. By taking this tack, we can simultaneously examine the relative virtues of Western and non-Western legal systems and the relative virtues of Civil Law and Common Law traditions in developing countries. By this means I hope to show that the process of "universalization" has indeed been going on, and that, despite the weakness of the Civil Law model, it is much too premature to say that all the Western legal structures of modernity are ethnocentric and useless to late developing countries. In fact, the situation is just the opposite.

Law and Development in the Middle East
A. Islam and the Sharia

The Islamic notion of law is an inherently religious one. The Sharia—or "sacred law" of Islam—is a set of rules and practices designed to lead one toward the right path and enable one to pass the reckoning on the day of Judgement (Schacht 1950: 11). Islamic law is based on the Quran and the Sunna—the "traditions" of the Prophet as revealed in hadith—and conceives of "law" as a set of religious and ethical prescriptions. This system of doctrines was thought to have been completed in the 10th century, with the result that no official changes in what are called the "roots" or sources of law were thought to be needed or permissible. According to Islamic legal doctrine, the "roots of law" (usul al fiqk) are four: the Quran, the Sunna (or traditions of the Prophet), the consensus of the scholars (ijma), and the mode of legal reasoning called qiyas, or "analogy" (see Rahman 1968, chapter 4; Coulson 1969; and Khadduri 1961 among others).

The effect of this coalescence of legal doctrine was to severely limit the use of "reason" (or in Western legal terminology, the use of "equity") on two fronts. First, the "analogue" reasoning that was mandated meant that a legal decision could only be made "on analogy" with religious/legal thought as expressed in the Quran, or in a hadith ("tradition") of the Prophet. Independent reason-
ing, "personal opinion" and above all "conscience" were strictly ruled out. Secondly, as students of Islamic law have pointed out, the recognition of \textit{ijma} (scholarly consensus) makes all the other foundations [of law], apart from [the] \textit{Koran} and \textit{sunna} superfluous, because all propositions based on \textit{qiya}s [analogy], individual opinion, custom, and so on are admitted into the system only through the intermediary of \textit{ijma} (S. Hurgronje as cited in Schacht and Bousquet 1957: 57).

As a result, Islamic law became exceedingly stagnant after this period, and what is more important, the idea of "positive" law, that is law intentionally made by man, was totally alien to Islamic thought. Law (the \textit{Sharia}) is the written word of God contained in the Quran, along with the \textit{Sunna} of the Prophet—not a set of enactments by men.

The inherently \textit{religious} nature of Islamic law resulted in a juridical system permeated by a religious classification scheme involving the following categories: "obligatory, recommended, indifferent, reprehensible, forbidden" (Schacht 1974:396). While this scheme gave a decidedly religious cast to everything, Schacht notes the fact that "the concepts allowed/forbidden and valid/invalid were to a great extent coextensive" made it possible to develop a system of \textit{religious duties} into a \textit{legal} system. On the other hand, the "formal character" of Islamic law is scarcely developed, so that "considerations of good faith, fairness, justice, truth and so on play only a subordinate part in the system" (pp. 396-7).

Equally significant from our point of view, is the fact that Islamic law did not develop the idea of a "juridic person:" "Public powers are, as a rule, reduced to private rights and duties, for instance the right to give a valid safe-conduct, the duty to pay the alms-tax, the rights and duties of the persons who appoint an individual as Imam or Caliph . . ." (Schacht 1974:398). Thus Islamic law has no provision for \textit{legally} autonomous groups: neither corporate "personalities" such as business corporations, guilds, cities, or universities existed in Islamic law (Schacht 1960, 1974). Nor were \textit{legally} autonomous professions such as lawyers recognized by Islamic law. Schacht observes that

The idea of a juridic person was on the point of breaking through but not quite realized in Islamic law, and this did not happen at the point where we should expect it, with regard to the charitable foundation or \textit{waqf}, but
with regard to the separate property of a slave who is being sold not as an individual but together with his business as a running concern. (Schacht 1974:398).\textsuperscript{10}

In the realm of penal law, Islamic law likewise failed to separate religious rights and duties from those obligations or privileges which might derive from membership in various entities—corporate or collective. It did not distinguish between offenses against God versus crimes against society (cf. Coulson 1969, chapter 5).

Only the rights of God have the character of a penal law proper, or a law which imposed penal sanctions on the guilty. Even here, in the centre of penal law, the idea of a claim on the part of God predominates, just as if it were a claim on the part of a human plaintiff. (Schacht 1974:398)

In the area belonging to “redress of torts” Islamic law did not distinguish between legal categories of fault, criminal responsibility, and just punishment:

Whatever liability is incurred here, be it retaliation or blood-money or damages, is subject of a private claim, pertaining to the rights of humans. In this field, the idea of criminal guilt is practically non-existent, and where it exists it has been introduced by considerations of religious responsibility. So there is no fixed penalty for any infringement of the rights of a human to the inviolability of his person and property, only exact reparation of the damage caused. This leads to retaliation for homicide and wounds on one hand, and to the absence of fines on the other. There are a few isolated doctrines in some schools of Islamic law which show that the idea of a penal law properly speaking was on the point of emerging in the minds of some Islamic scholars at least, but again, as was the case with the juristic person, it did not succeed in doing so. (Schacht 1974:399)

Finally, we may note that the whole realm of procedural law was greatly underdeveloped in Islamic law, with the consequence that there is no equivalent of “due process” as it came to be understood in the West (cf. Khadduri 1985:149ff).

In short, as a consequence of the inherently religious nature of Islamic law, over the centuries it gradually lost ground by becoming “divorced from the practical necessities of daily life,” and thereby lost control over both criminal and commercial law (Ziadeh 1968: 4; Schacht 1974:394-95; and Coulson 1969:71ff). In its place Western conceptions soon moved to fill the vacuum. In the early 19th century the Ottomans began reforming law and
administrative practice in order to cope with the new political and economic situation which was increasingly dominated by Europeans. Furthermore, Europeans working and living in the middle East felt the need to be protected by Western legal conceptions and this resulted in the granting of Western legal privileges in many countries composing the Ottoman empire (see Liebesny 1955; Anderson 1976:14-19).

B. Egypt

In Egypt this led to the development of the so-called "Mixed Courts" (in 1876), administered by European trained lawyers, and eventually a whole new westernized legal code in the 1940s and 50s. Moreover, prior to this, the Islamic legal scholars—the qadis—did not represent an autonomous profession, but rather an administrative cadre that was subject to the whim of the political rulers, often intimidated (or bribed) by political leaders as well as by local elites (cf Ziadeh 1968, chapter 1; and Tyan 1955, esp. 236ff).

In brief, all of the notions of due process, of legally autonomous enterprises and jurisdictions, legal representation in courts, civil liberties, etc., were notions imported from the West in the newly borrowed legal system. Without them, there could be nothing approximating a "modern democratic state" based on representative government, civil liberties, legal "rights" in the public sphere, due process of law, and all the other features that we associate with constitutional government. As one student of Egyptian legal development put it,

If any one factor were to be singled out as contributing the most to the modernization of Egypt, it would be the establishment in 1876 of the mixed courts, which represented a completely new solution to a chaotic situation. (Ziadeh 1968:24). . .

The first advantage of the new system was the unification of jurisdiction, with the result that for the first time litigants had some idea of the court which might have to adjudicate the issue between them and the laws and procedures applicable. Previously when the issue of litigation had arisen, each foreign party had hastened to get his hand on the property that was the subject of litigation so that the suit would be brought before his own consul. If the defendants were of different nationalities, suit had to be brought in as many forums as there were defendants. . . The uniformity of jurisdiction brought about by the mixed courts contributed
materially to the idea of a rule of law applicable to everybody. (Ziadeh, p. 26).

In short, the 19th century legal reforms in Egypt incorporated significant elements of the Western Civil Law tradition which created a new level of "universalism" in the form of a new system of law universally applicable. Moreover, by the 1950s, as the reforms continued into the twentieth century, the legal system of Egypt "probably seemed the most highly developed in the Middle East:"

Its courts, which had originally consisted of a heterogeneous assortment of specialized unrelated jurisdictions, now formed a single judicial structure to which all persons and cases were subject. In addition, a Council of State, patterned after the French model, existed to judge the legality of governmental actions. The country also enjoyed a body of modern codified law, particularly in the commercial area, and its 1948 civil code, drafted by the noted Abdal-Razzaq al-Sanhouri and drawn from both Western and Islamic sources, became the model or at least the inspiration for new civil codes throughout most of the Arab world. (Salacuse 1980:318).

Thus legal development and reform in Egypt resulted in the adoption of a completely new and—from a strictly Islamic point of view—alien notion of law derived from the Western Civil Law tradition. Yet in doing so, it contributed to the development of "the idea of a universally applicable law" (Ziadeh, 1968:150), something that was nonexistent hitherto. In doing so it created the idea of legal jurisdictions and gave autonomy to legal officials. As Ziadeh states the case,

the Shariah [legal system] had never developed the necessary procedures or writs that would bring the prince or executive power to account for actions committed outside the law. Throughout Islamic history the judiciary, composed of the ulama exercised its functions as a result of delegation by executive power and therefore was dependent on it. (1968:149)

To suggest that this legal development was simply the expression of the inordinate "power" of the Western colonial countries of this time (von Laue 1988) neglects two important points. The first is that legal experience since the middle of the 19th century had taught legists in all the Islamic societies of the Middle East that Islamic law—the Sharia—was not adequate in the areas of administrative, commercial, and penal law, and that above all, its
lack of codification, or legislation enactment, left social relations in far too much doubt and uncertainty. The first step toward remedying this situation was the unprecedented act of creating an Islamic code—the Majalla—in the 1860s (see Onar 1955; and Anderson 1976) modeled after the European civil code. Even after the break up of the Ottoman empire, many countries in the Middle East, for example, Iraq, Syria, Palestine, Jordan and Libya, elected to follow the Majalla (Khadduri 1985:206). On the other hand, Egypt, Lebanon, Tunisia, Algeria, and Morocco, elected to adopt the French Civil code, and followed Islamic law only in matters concerning personal status. After World War II a whole new effort was made to create new civil codes which incorporated the best of the Civil Law and what indigenous legal elites believed were the essential aspects of traditional Islamic law. In effect, the “Modernists” and the “Revivalists,” as Khadduri (1985:207) puts it, “had both come to the conclusion that neither one was adequate to the need of each.” In short, a reform of the traditional Islamic law was perceived to be necessary throughout virtually all of the Islamic countries.

Secondly, this legal reform was led by indigenous Islamic jurists who knew both the Sharia and the European legal codes. ‘Abd al-Razzaq al-Sanhouri, who was the architect of the Egyptian civil code after the war, was appointed to head an Iraqi commission whose mission was to create a new civil code which incorporated the best of the Islamic tradition. As a result, a new civil code was created and quickly adopted, first in Syria, then in Iraq, while the Egyptians were still revising their own new code. The upshot was a new standard of legal justice:

In the preparation of the draft of the civil codes of Iraq, Syria, and Egypt, Sanhouri pursued a practical approach by adopting a standard of justice consisting essentially of Western elements—French, Swiss, German, and others—which he considered compatible with Islamic principles. The blend of Western and Islamic principles became the basis of a new standard of legal justice for these countries as well as for others which were to adopt it. (Khadduri 1985:207)

In short, it seems ethnocentric to imagine that only Europeans and Americans would want to have a legal system that aspires to the highest ideal of justice, that provides for representative government, various civil liberties, and other legal conceptions and instruments adequate to what we call the modern era. While this
may not be a majority opinion in Egypt or elsewhere, the point of a legal system (as well as a political system more generally) is to create and protect the rights of minorities—ethnic, religious, or philosophic—as well majorities. While Egypt is far from having achieved the liberal ideal, the research by Ziadeh (1968:153ff) suggests that the new crop of lawyers in Egypt (in the late ’50s, as well as the 70s and 80s [see Ansari 1986]) conceived of their role as one of defending human rights, supporting freedom of thought, and advancing the cause of representative government.

Before commenting more on the Egyptian situation, however, we should consider the case of Turkey. It too may be seen as an illustration of the second level of universalization suggested earlier.

C. Turkey

Although Turkey even today is described as a country 99% Muslim (Ozbudan 1987), its cultural and administrative history as part of the Ottoman empire (from the 18th to the 20th century) brought it into more sustained direct contact with the West than many other Islamic countries. However that may be, it is apparent that Turkey began various experiments in constitutional and representative government (inspired by Western models) in the last quarter of the 19th century (see Ozbudan 1987; and Lewis 1968). From our point of view, the decisive step toward modernity was taken with the adoption of the Swiss Civil code in 1923, and the setting aside of the traditional Islamic law and Sharia courts (Lewis 1968, Inalcik 1974 among others). Perhaps more than in other countries this modernizing move was led by a single leader, namely Ataturk (Hodgson 1974, 3:259-271). But clearly he won the support of his countrymen and the setting aside of the Sharia courts was a necessary move in order to introduce modern legal conceptions requisite to democratic social life. However, it was not until 1946 that democratic and competitive elections took place (Ozbudan 1987:341). Furthermore, an additional election law was required (and put in place in 1950) which introduced the secret ballot, as well as open counting of ballots, along with “a system of judicial supervision of electoral administration” (Ozbudan 1987:342).

In short, an integral part of the modernizing of political life in
Turkey derives specifically from the law and democratic traditions of the West. Furthermore, it is to be noted that Turkey is—from an economic point of view (see Weiner and Özbudan 1987:5ff)—a “developing” country so that the received wisdom which suggests that democratic institutions are the product of economic development (among others, see Lipset 1959), might be reversed. Whether or not that is the case, it may be said that all those features which serve to guarantee freedom of expression and representative government are singular elements of what I should call “modernity” and their foundations are to be found in Western legal notions which indeed have a universal appeal and use. If anything, they serve to put curbs on parochialism and limit social action based solely on ethnic and particularistic conceptions. Hence, the general point remains that there are numerous legal conceptions (which I have identified under the heading of “the structures of modernity”) which found original if not unique expression in Western law and these conceptions have been eagerly sought by at least some of the people of the world whose native legal traditions lacked such conceptions. Thus universalizing legal developments which endeavored to uniformly adjudicate conflicts of all citizens have evolved and been extended to distant peoples through a process of universalization.

**Common Law vs Civil Law: Divergent Functional Consequences**

Recent students of comparative law have provided a fairly detailed list of the contrasting differences in the way the Common Law and the Civil Law traditions are structured. As noted earlier, these range from the differences in the role and authority of the judge, the use (or non-use) of lay juries, the nature of evidence gathering and trial procedures, use of past legal decisions as precedents, the incorporation and use of a “constitution” through the process of “judicial review,” and not least of all, the use of “custom,” that is, “customary practices” in reaching legal decisions. Because the ideology of the Civil Law tradition is one of “state positivism” (sometimes referred to as “state absolutism”), the presumption is that law is a seamless web of laws, statutes, and regulations which cover every conceivable situation, and that therefore, customs and customary practices are simply off limits and irrelevant (see Weber 1978; Merryman 1985 and sources...
cited earlier). A moment’s reflection reveals that this ideology is a very powerful antidote to “natural law” assumptions, or any other metaphysical or *extra legal* source of authority which might serve as a *restraint* on legally administered authoritarianism. Weber was aware of the greatly diminished role of natural law elements in modern law, but he attributed this to “both juridical rationalism and modern intellectual skepticism in general” (Weber 1978:875). Nevertheless, the implications of this situation for the development of (modern) state absolutism and authoritarianism remains.

As we saw earlier, the problem of dictatorship and totalitarianism in the 20th century brought back elements of natural law in tandem with constitutionalism. Secondly, the adoption of a legal code in a foreign land which is specifically designed to eliminate the influence of local practice and custom in legal proceedings (as the Code French Civil Code was) creates extreme difficulties for judges and other legal officials. This is so despite the fact that the creators of the French Civil Code believed that they had reached a sublime level of universalistic formulation transcending all extraneous reference to particularistic elements in the Code itself.

Consider the case of a Civil Law judge in an African country. There a cause might arise with legitimate basis for punitive legal action in the Civil Code *and* yet which conforms to customary practice and therefore stands above reproach from a traditional point of view. Since the judge in such a setting is charged with “applying” the law and not “interpreting” it, this situation is fraught with tension and potential injustice. Conversely, a Common Law judge would not have such difficulty, since he would be fully empowered to consider the cultural context—the “substantive” elements of the case—since customary practice as well as precedent are fully operative in Common Law.¹²

In short, this substantial list of the practical and theoretical differences between the Common Law and Civil Law traditions suggests to the sociologist that there ought to be very different *sociological consequences* where these systems are adopted. In pursuing this line of inquiry, it should be understood that we take for granted the distinction between the *efficiency* of a legal system in the maintenance of “law and order” and the (unanticipated) sociological consequences of such a system. A legal system might
be rated very highly with regard to the efficiency with which it pursues, apprehends, and punishes law-breakers and deviants, but it is not on that account alone to be regarded as highly desirable, since totalitarian systems are generally very efficient in this regard. The question hinges rather on a balanced harmony of individual liberty, high levels of legal justice, and political stability. Accordingly, the issues we raise are of a sociological nature which seek to explore the question of whether or not one legal tradition or another—the Civil Law or the Common Law—can be said to have differential sociological consequences of this sort. So far as I have been able to discover, there have been no systematic efforts in this direction (but see Evan 1968). But there is some evidence at hand which bears on these issues.

In the recent book by Myron Weiner and Ergun Özbudan, *Competitive Elections in Developing Countries* (1987), the contributors identified 19 democratic countries in the developing world as of 1983 (p. 6). Upon further inquiry one discovers that 52% of these are countries which either have adopted the Common Law tradition or have been strongly influenced by it (see Redden 1985; and Rhynes 1978). But the strongest evidence of the effect that I am suggesting has been isolated by Myron Weiner when he speaks of those post-colonial democratic (and developing) societies which have emerged since World War II:

*every country with a population of at least 1 million (and almost all the smaller countries as well) that has emerged from colonial rule since World War II and has had a continuous democratic experience is a former British colony (orig. emphasis.) Not a single newly independent country that lived under French, Dutch, American, or Portuguese rule has continuously remained democratic.* (p. 20).

What this means is that all these countries are ones which became *Common Law* countries (Redden 1985); and Rhynes 1978). Moreover, among the newly stable democratic countries, including both those with populations above 1 million and those with less than a million population, 11 out of 13 (or 86%) are Common Law countries.¹³

Weiner’s argument, however, is that this effect has been due to the “British tutelary” tradition of schooling colonial peoples in the various aspects of democratic process, the establishment of democratic institutions, the sharing of rulership, the creation of countervailing interest groups, and so on (Weiner 1987:31-32). While I
do not dispute this, I want to suggest that at the core of this tutelary system there is to be found a set of legal conceptions indigenous to the Common Law tradition, and they have played a crucial role in implanting the notions of due process, universalism, legal representation, publicity of decision-making, etc., which undergird the "British tutelary system." What is more, I believe that this underlying forensic structure has the unique effect of instilling an implicit trust in the honesty and rational right-guidedness of its citizenry that is not found in the Civil Law tradition—except where it has been modified to reflect the Common law precepts which I have stressed.¹⁴

Conclusion

The process of legal development and reform still goes on in Egypt, Turkey and the rest of the Middle East, but I think it is evident that a Western model of law—that of the Civil Law tradition—was intentionally adopted in Egypt (along with various modifications) precisely in order to achieve a universal legal framework which applied to all inhabitants independent of national origins and which allowed Egyptians to fashion legal concepts and institutions adequate to the new economic and social realities of the late 19th and early 20th centuries. The demands of modern economic exchange are inextricably tied to the legal order, and the Western models of modern law seem better suited to those demands. Although economic development per se is not the focus of this discussion, readers will doubtless remember that Islamic law prohibits usury, and thus frowns on loans granted at interest. This obviously creates difficulties for bankers as well as entrepreneurs.

Recently the Muslims of Pakistan have evolved the innovative idea of allowing banks to introduce (on a voluntary basis) non-interest bearing accounts by permitting individuals to buy "shares" in a bank on a "profit or loss" basis (Esposito 1986:353). The plan to fully implement such a system appears stalled, but it does not appear to deal with the problem of allowing a corporation (or an entrepreneur) to borrow money on which interest would normally be due. This again points up a problem of Islamic law in the modern world. Moreover, there were a variety of related economic conceptions regarding sale and exchange in traditional
Islamic law which needed to be reformed through the aid of Western conceptions (Khadduri 1985:207ff).

It seems doubtful that Egypt, Turkey, or any other developing nation in the future will exactly mirror (or even closely “mirror”) the United States in its economic arrangements and in its cultural values. There are today a variety of sources of discontent—religious, ethnic, and economic—in contemporary Egypt and Turkey (and elsewhere), but whatever the future is to be, the seeds of democratic liberalism and constitutionalism, borrowed from the West and embedded in the Egyptian and Turkish legal systems—among others—ought to be seen as part of the process of universalization. In this case it represents the universalization of such fundamental values as the universal rule of law, elements of due process in the adjudication of civil and criminal disputes, as well as political constitutionalism.

Religious fundamentalists may wish to see a greater role for Sharia derived laws, and socialists may wish to see more laws enhancing the economic status of the workers in the Egyptian constitution. When the “permanent constitution” was proposed by Sadat in 1971, the issue of whether the Sharia should be a source or the sole source of legislation was debated (see O’Kane 1972). The Referendum (in the same year) approved a constitution in which the Sharia would be a source of legislation. However, in 1980 that was amended to make “the principles of Islamic law the principal source of legislation” (Barton 1983:36). As a result some business contracts have been voided which had interest-bearing provisions in them on the grounds that they were unconstitutional (Barton, ibid.). This situation also points up the fact that the incorporation of “constitutionalism” involves far more than a written document, and that the substance of the law is as important as the actual legal structure and procedural mechanisms which maintain it.

Whatever the future of Egypt is to be (for some insights, see Ansari 1986), only in a society with universalistic legal institutions can one imagine the peaceful resolution of such social disputes while preserving a maximum of individual liberty. Neither Egypt nor Turkey are ideal models of the liberal democratic state, but their histories of adopting and modifying universal Western legal conceptions and democratic constitutionalism surely represents an advance over societies which neither value nor manage to
provide for due process and guarantees of individual liberty. From the point of view of the expansion of the realm of individual liberty and due process, the legal structures of both Egypt and the countries of Latin America could stand to be improved. I do not believe that it is ethnocentrism either to wish for such societies to "modernize" their legal structures in this fashion, nor is it ethnocentric to adopt foreign policies which help Third World countries to undergo "legal development" which further institutionalizes these universalistic values. Nor, finally, should we assume that the presence of such mediating structures is unimportant for economic development. Indeed, I would make the opposite case.

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NOTES

1. A shorter draft of this paper was presented to the 17th Annual Meeting of the International Society for the Comparative Study of Civilizations at Hampton University, Hampton, Virginia, May 26, 1988. An earlier version was presented to the Annual Meeting of the Eastern Sociological Society, Philadelphia, March 11th, and a longer presentation to the Theory Study Group at the Center for European Studies, Harvard University, April 22, 1988.

2. It is implicit in this discussion that "modern science" as we understand it is a vital—indeed central—component of the structures of modernity and obviously has universal implications (as well as demand). From my point of view, Western law and its conceptions were vital to the rise of modern science, and the absence of those legal conceptions is a major reason for the non-rise of modern science elsewhere, especially in Arabic/Islamic civilization, despite the very great heights which that civilization reached in the domain of science up until the 14th century. Elaborating these issues here would take us too far afield. But see T. E. Huff, "Reason and Rationality in Civilizational Perspectives: The Case of Arabic Science"; a paper presented to Comparative and Historical Sociology: A Colloquium in Memory of Benjamin Nelson, New School for Social Research, New York, October, 1985.

3. In this paper I have deliberately avoided discussing "reason" and "rationality" as part of "modernity." The issues are too historically complex for this context. They are vital, however, in the context of the rise of modern science. See note 2 above.

4. For a good discussion and illustration of the ongoing nature of
political, religious, and ethnic conflict in the contemporary Middle East and Asia, see the essays in Weiner and Banuazizi (1986).

5. There appear to be many technical points of difference between the Civil and Common traditions which need further study from a sociological point of view. For example, it should be noted that the Civil law tradition isolates the judge from the evidence gathering process by the practice of collecting evidence from witnesses in closed sessions (before the trial by a clerk or "instructing judge") and during which there is little of the "adversarial" cross-examination typical of the Anglo-American system. But even where the judge is present, the questions to be asked and the areas to be covered are known in advance by both the defendant and his attorney, so that spontaneous and unrehearsed answers are not possible, nor is a verbatim record keep. Instead a collective "summary" of the testimony is dictated to the clerk by the Judge (see Merryman 1985, chapters 16 and 17; Glendon 1985 chapter 4). Furthermore, "Latin American courts display a decided tendency to believe documents and to disbelieve people. The innate distrust of oral testimony is reflected in broad disqualifications of witnesses related to any of the parties" (Karst and Rosenn, 1975:53). Likewise the use of lay juries is virtually non-existent in civil law cases, and otherwise a three judge panel is generally substituted. On the prevalence of the citizen jury, see Kalven and Ziesel (1966). Of course Germany has reintroduced the mixed jury composed of laymen and judges who determine guilt as well as sentences (see Langbein 1985).

6. On the significant differences in trial procedure, proof, and evidence gathering, see Karst and Rosenn (1975:51-57) as well as Merryman (1985:120-1)

7. For example, there is currently a program at the Harvard Law School which is designed to enhance the morale as well as the social esteem of judges in Guatemala. The notion is that enhancing the role and authority of judges will likewise enhance the respect for law and the legal system which is not generally held in high regard.

8. This is a very subtle and complex set of issues about which there has been considerable debate and it centers on the forms of "reason" which are permissible in law finding. The most recent and probing discussion of these issues is Makdisi (1985) whose views appear to agree with those of Khadduri (1985, Chapter 6).

9. The qadis (individuals selected from the ulema—the religiously learned) were simply administrative personnel without legal "jurisdiction" (See Tyan 1955) and could be either overruled or replaced according to the dictates of the ruler who conceived of himself as the ultimate guardian of Islam as well as the state (Coulson 1969:68ff).

10. Likewise D. Santillana expressed the same view: "Muslim jurists do not know—and that is easy to understand if we think of the political and social differences between the Islamic state and those of the Roman type—neither the juridical personality of municipalities, nor of that of collectives of persons such as guilds" (Istituzioni di diritto musulmano malichita 1, 170-1, as cited in S. M. Stern 1970:49).
11. The development and evolution of the legal system of contemporary Egypt is discussed in some detail as a case study in John Barton et al. (1983).

12. This point was articulated for me in a public discussion by Joachim Savelsberg reflecting on his experiences in Camaroon, where some regions of the country follow the Common Law and some the (French) Civil Law.

13. These two groups of countries include the following: (>1 million:) India, Sri Lanka, Malaysia, Jamaica, Trinidad/Tobago, Papua New Guinea; (<1 million:) Bahama Islands, Barbados, Botswana, Fiji, Nauru, Gambia, Mauritius. (See Weiner 1967: 18-19). Botswana's legal system seems to be a mixture of Roman, Dutch, and British Common Law, while Mauritius is largely Islamic but modified by Civil Law additions.

14. In order to avoid being misunderstood, it should be pointed out that both the Common Law and the Civil Law traditions have undergone considerable change since World War II, and that both systems are in a state of flux. Although scholarly opinion suggests that the evolutionary movement (especially since WW II) has been toward the Common Law model, it seems likely that the Common Law tradition can also benefit from some of the changes of procedure that have emerged in Civil Law countries. Likewise, West Germany, which before the war was the epitome of the Civil Law model, has undergone very significant legal change, so that today one wonders how much it owes to the 19th century model of "formally legal rationality" and how much to a new spirit born out of the experience of the Holocaust. New survey research data collected by the International Social Survey Program (ISSP) may shed considerable light on this.

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