Abstract

This research explores the institutional and procedural architecture that enables or limits access to formal and informal dispute settlement mechanisms to resolve simple disputes among individuals in developing countries.

The central argument is that the urban poor (including newly arrived migrant peasants and members of indigenous communities) in developing countries, are unable to keep their traditions and ancestral dispute settlement mechanisms alive in big cities, while they are also unable to understand and utilize what to them are abstruse legal procedures of the formal courts. A proposal is made at the end of the dissertation, which includes a novel conceptual framework to analyze the problem of deficient delivery of justice (formal and customary) to the urban poor, and a methodology to quantify the multiple dimensions of the same problem in low and middle-income countries throughout the world.

The contribution of this work is: first, a new conceptual framework for the comparative analysis of formal and informal justice in developed and developing countries. Second, to expand knowledge on the uneasy interaction among legal traditions, legal transplants and customary justice in the multicultural world of the XXI century. Third, a descriptive analysis of a chronic problem which affects billions of people, i.e., the lack of effective access to justice (formal or customary) for the urban poor in low and middle-income countries. Fourth, a novel account of the operation of justice among the Kogi Indians of Colombia. Fifth, a novel quantitative analysis of formal justice delivery around the world. Sixth, some practical policy recommendations
for judicial reform, related to the institutional and procedural architecture that enables or limits access to justice by the urban poor in developing countries.

A multi-method approach was utilized in this dissertation, including: first, an extensive literature review of comparative law sources dealing with the various dimensions of the delivery of formal and informal justice around the world. Second, a new quantitative analysis of new data on the operation of formal dispute resolution mechanisms in 66 countries. Third, in-depth interviews with customary justice authorities in Colombia and Liberia, and meetings with formal and customary justice operators in a dozen countries. Conclusions draw on traditional legal research methods, as well as on qualitative and quantitative methods from the social sciences.

**Keyword searching terms:** Comparative Law; Customary Justice; Access to Justice; Multicultural Law; Legal Transplants.
I am grateful to my dissertation advisor, professor Sherman Cohn, for extensive guidance, challenging discussions and invaluable advice over five years, and to professors Charles Abernathy, Carl F. Goodman, and Robert Dalton for their helpful comments and suggestions.

To Angela Maria, Maria, Helena and Sofia.
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1 Full citation of works cited in this dissertation is included in the References section, at page 263.
**INTRODUCTION**

Ordinary people in low and middle-income countries\(^1\) generally know two faces of justice, the “Wig and Gown” and the “Sassy-Wood,” faces of justice, which belong to the formal and customary systems of dispute resolution (e.g., pictures below). These two faces of justice are increasingly misaligned with the changing reality of a globalized yet multicultural world. A third face of justice appears to be needed.

The multiple notions of justice

There are profound differences among societies on fundamental social values, which have impacted the role assigned to law and justice in them.\(^2\) One of the natural

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1 A generally accepted classification of countries according to per-capita income was developed by the World Bank, available at: [http://data.worldbank.org/about/country-classifications](http://data.worldbank.org/about/country-classifications). Last visited, May 25, 2013.

2 Professor Huntington describes these differences between two cultures (China and the USA), as follows: “At the broadest level the Confucian ethos pervading many Asian societies stressed the values of authority, hierarchy, the subordination of individual rights and interests, the importance of consensus, the avoidance of confrontation, ‘saving face,’ and, in general, the supremacy of the state over society and of society over the individual. In addition, Asians tended to think of the evolution of their societies in terms of centuries and millennia and to give priority to maximizing long-term gains. These attitudes contrasted with the
consequences of the recognition of these differences is that certain balance in the allocation of power and responsibilities between the state, the community, and the individual that may be perfectly suited to a particular society in a particular time, may not fit another society or a different time.

Professor Goodman’s account of his first visit to the Japanese Supreme Court provides a colorful illustration of the multiple representations of justice: as most American lawyers, he was expecting to see the image of Lady Justice, the Roman Goddess of Justice who for centuries has been represented as an austere and impartial (blindfolded) woman, holding a sword in one hand and scales in the other. Much to his surprise, instead of the traditional Lady Justice, Professor Goodman found that the representation of justice in the Supreme Court of Japan was without a blindfold and had the mask of the Buddha of Compassion. Justice certainly means different things in Japan and the USA, as it does in other corners of the planet. The ideal of justice in Sub-Saharan Africa bears no resemblance with the previous two. Justice there is symbolized by a tree—for thousands of years people have sat under the cover of a tree to discuss their disagreements and resolve their disputes. The following images represent three very

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3 Goodman, Carl – Adjunct Professor of comparative law at Georgetown Law Center. Oral presentation in class, Japan – U.S. Comparative Law Seminar, fall of 2008.
4 For a wide collection of representations of Lady Justice, including the statute at the Japanese Supreme Court, see Resnik and Curtis, Representing Justice.
5 The ‘African Tree’ justice is essentially a conversation which may last for a few minutes or several months. It is a dialogue between the contending parties and the chief or mediator, whose overall objective is not only (or even mainly) to resolve a specific dispute among two parties—as it is among the conflict-solving understanding of justice—but more broadly to harmonize the broken bonds within the community. In some instances the whole village gets involved in the healing process. The African Tree
different ideals of justice: the blindfolded woman with a sword and the scales of the western world; the Buddha of Compassion; and the African tree.

Yet, regardless of these cultural differences about the notion of justice, the underlying truth is that all peoples need accessible and effective dispute settlement systems.

In times gone by for most of us, people used customary justice systems to resolve their disputes, ranging from the Cheyenne ‘conference of tribal chiefs,’\(^7\) to the Afghan *Jirgäs*, to the Liberian chiefdoms, to the Amazonian shamans. While many of these systems continue to operate today, the European colonization process of the past few centuries brought with it a new dispute resolution system to all corners of the planet. In some places the old forms were completely abandoned while in others a dual arrangement emerged. Parallel systems of dispute resolution coexisted and interacted in most countries. In some places, customary justice was formally and hierarchically

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6 Source: Google images.
7 Llewellyn and Hoebel, *The Cheyenne Way*. 

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notion of justice is not exclusive of the African continent. Dispute resolution among indigenous communities in other latitudes show similar characteristics. The community-harmonizing justice of the African Tree is explained in detail in Parts 4 and 5 of this dissertation. I am grateful to Murtaza Jaffar from the International Criminal Tribunal for Rwanda, for insightful comments about the nature of dispute resolution in Sub-Saharan Africa.

integrated into the formal (European) courts, while in others they remained in operation de facto, mostly ignored or tolerated by the state. The formal courts were perceived mostly as instruments for resolving disputes among the descendants of European colonizers, the global and local business community, and the local elites. By design, in most colonies and pseudo-colonies around the world, formal courts were understood to be mostly inaccessible to ordinary folk. Formal courts were not seen and embraced by the masses as their cherished property, as “a progressive force on the side of the individual against the abuse of power by the ruler.”

Several new factors have emerged in the last few decades, starting with the end of the Cold War, which pose a serious challenge to the existing arrangements. These factors include, among others, increasing globalization and integration of markets; growing migration and urbanization; exponential expansion of access to communication technologies; unprecedented universal access to information for all segments of the population; growing cultural self-assertiveness, and growing awareness among marginalized populations about their own rights (and decreasing tolerance to abuses and exclusion). The Arab Spring is the most graphic example of the powerful impact of the

8 Throughout this dissertation I refer mostly to ‘formal courts’ and ‘customary justice’ as the two main mechanisms of justice in low and middle-income countries. The difference between them is sometimes blurred, as in some countries both systems are integrated (see infra ch. 6 of pt. 4). I use the term ‘formal court’ to include the civil and criminal court system inherited from Europe throughout the world, as well as any other formal, state-governed dispute resolution institution. The term ‘customary justice’ is employed here to include traditional justice, indigenous and ethnic dispute resolution, community-based dispute resolution, and in some cases also religious courts. The dividing line is often blurred, as it is explained in Parts 3 and 4 of this dissertation.

9 “In the United States and England […] there was a different kind of judicial tradition, one in which judges had often been a progressive force on the side of the individual against the abuse of power by the ruler.” Merryman, *The Civil Law Tradition*, at 16. In contrast, in colonies throughout the world “the indigenous communities’ views about legal institutions bear little resemblance to liberal views about law. Instead of seeing them as friendly institutions that empower and liberate individuals, they regard them as
combination of these factors. In addition, with the fall of the Berlin Wall and the ascendance of more open and democratic governments, we are witnessing a revival of deeply-rooted cultural traditions in various parts of the world. For instance, “Shamanism is becoming more popular in South Korea in recent years, after being dismissed as ‘superstition’ and ‘delusion’ by past military governments.”

The impact of these changes for the machinery of justice is clear: the “Wig and Gown” justice of the colonizers does not answer to the needs of an increasingly culturally assertive and well-informed population, at the same time that the “Sassy-wood” justice of the local chiefs is no longer effective in a globalized world. The system is broken.

**Goal and central argument**

This research explores the institutional and procedural architecture that enables or limits access to formal and informal dispute settlement mechanisms to resolve simple disputes among individuals in developing countries. The goal is to investigate and document how the courts and procedures inherited or copied from Europe accommodate the basic dispute-resolution needs of the population, as compared to

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the cause and symbol of their longstanding economic and political oppression.” Faundez, *Access to Justice and Indigenous Communities in Latin America*, at 83; also at 93-94.

10 Huntington, *The Clash of Civilizations*.


12 Trial by ordeal by poisoning in contemporary Liberia, Gambia, and other Sub-Saharan African countries. For a detailed description, see Chapter 4 of Part 4.

13 This dissertation focuses mostly on access to civil justice to resolve simple disputes between individuals. This analysis does not consider the high-end of the litigation spectrum, i.e., disputes arising out of antitrust law, sophisticated international trade; financial derivatives, and other complex contracts and transactions. The analysis and conclusions refer mostly to lower civil and commercial trial courts and they may or may not apply to litigation at higher courts and sophisticated commercial arbitration. Similarly, criminal law litigation and administrative, labor and other specialized courts are mostly outside of the scope of this paper.
customary justice systems and other less formal mechanisms. Particular attention is given to Afghanistan, Bolivia, Colombia, Ghana, Kenya, Liberia, Malawi, Nigeria, Pakistan and South Africa, which are countries from different cultural traditions, legal families,\textsuperscript{14} and levels of development.\textsuperscript{15}

The central argument of this dissertation is that the urban poor (including newly arrived migrant peasants and members of indigenous communities) in developing countries, are unable to keep their traditions and ancestral dispute settlement mechanisms alive in big cities, while they are also unable to understand and utilize what to them are abstruse legal procedures of the formal courts. A proposal is made at the end of the dissertation, which includes a novel conceptual framework to analyze this problem,\textsuperscript{16} and a methodology to quantify the multiple dimensions of the same problem in low and middle-income countries throughout the world.

Deficient delivery of justice to resolve simple disputes affects all segments of society, but its impact is particularly negative for the urban poor.\textsuperscript{17} The poor constitute the vast majority of the population in developing countries, and they are particularly affected by the inefficiency of the judiciary.\textsuperscript{18} For instance, in Tanzania “delays in

\textsuperscript{14} See, e.g., David and Brierley, \textit{Major Legal Systems in the World Today}; Dawson, \textit{The Oracles of the Law}; Schlesinger et.al., \textit{Comparative Law}; Zweigert and Kotz, \textit{Introduction to Comparative Law}; Merryman, \textit{The Civil Law Tradition} (presenting various characterizations of the legal families existing in the world today. Regardless of variations across authors about these characterizations, the aforementioned list of countries represent a sample wide enough to cover a variety of legal families).

\textsuperscript{15} See, e.g., United Nations geoscheme - UN Statistics Division (\url{http://mdgs.un.org/unsd/mdg/Default.aspx}) (Last visited, June 11, 2013); The World Bank (\url{http://data.worldbank.org/}) (Last visited, June 11, 2013), (presenting socio-economic data about all countries in the world, including information about levels of economic development of all countries).

\textsuperscript{16} Lack of access to justice (formal and customary) for the urban poor in developing countries.

\textsuperscript{17} See, e.g., Rhode, \textit{Access to Justice}, at 3; UNDP, \textit{Report of the Commission on Legal Empowerment of the Poor}, at 1.

\textsuperscript{18} See, e.g., UNDP, \textit{Report of the Commission on Legal Empowerment of the Poor}, at 1-2; Coller, \textit{The Bottom Billion}, at 3 (explaining the notion of the ‘bottom billion’ of poor people), and 69-71 (explaining how poor governance affects the poor).
handling land disputes could impose special hardship in a world where most ordinary people continued to subsist, in part, on what they could grow on their garden plots. Access to land directly affected the ability to put food on the table. Delays in hearing land cases could deny a family a livelihood.  

Contents

This dissertation is divided into five parts. The first part provides a conceptual model to examine the delivery of justice in a comparative perspective. It introduces the intrinsic tension between efficiency and access to justice, and procedural fairness (the “judicial equilibrium”).

The second part deals with Legal Traditions and is divided into four chapters. The first chapter offers some highlights of the evolution of procedure in the two main legal families of the world—civil-law and common-law. Chapter two proposes two models of adjudication, which correspond to these two main legal families. Chapter three considers these legal traditions in light of the conceptual model presented in part one (the “judicial equilibrium”). The last chapter presents a cross-sectional quantitative analysis of the delivery of formal justice across legal families, which provides some empirical confirmation of the enduring impact of legal traditions in day-to-day dispute resolution among high income countries.

19 Widner, Building the Rule of Law, at 255.
20 The concepts of Legal Family and Legal Tradition are used here interchangeably. “A legal tradition, as the term implies, is not a set of rules of law about contracts, corporations, and crimes, although such rules will almost always be in some sense a reflection of that tradition. Rather it is a set of deeply rooted, historically conditioned attitudes about the nature of the law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective.” Merryman, The Civil Law Tradition, at 2. See also, e.g., Zweigert and Kortz, Introduction to Comparative Law (presenting the most widely used division of legal families); David and Brierley, Major Legal Systems in the World Today.
The third part deals with **Legal Transplants**, *i.e.*, the “Wig and Gown” face of justice, and is divided into four chapters. The first chapter presents a cross-sectional quantitative analysis of the delivery of justice across legal families; the analysis suggests that, while the civil-law and common-law traditions may have reached significantly different judicial equilibriums in high income countries, those features of the legal system have not effectively migrated from “mother” to “transplant” countries. The second chapter proposes the notion that the “transplantation” process may have contributed to create a fundamental disconnect between complex law and everyday reality in low and middle-income countries, which leads to an abstruse and hostile judicial system for vast segments of the population of these countries. The third chapter considers the reasons why procedural complexity may be justified and necessary in low and middle-income countries. Chapter four explores the possibility that those reasons to justify procedural complexity may also mask less benevolent goals; it suggests that legal elites in developing countries, deliberately or inadvertently, use the legacy of ‘legal traditions’ to justify structural inefficiencies and inequities of the legal process.

Part four deals with **Customary Justice**, *i.e.*, the “Sassy-Wood” face of justice, and it includes seven chapters. The first one describes a variety of customary justice

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*21 See, e.g., Watson, *Legal Transplants: An approach to Comparative Law* (introducing the notion of ‘legal transplants’). Michele Graziadei argues that the term “legal transplant” is “ill-adapted to capturing the gradual diffusion of the law or the continuous nature of the process that sometimes leads to legal change through the appropriation of foreign ideas” (Graziadei, *Comparative Law as the Study of Transplants and Receptions*, at 443). She mentions alternative terms that she considers more appropriate, such as ‘circulation of legal models’, ‘reception’, ‘transfer’, ‘influence’, ‘inspiration’, and ‘cross-fertilization’. I think these are different concepts. Sometimes countries adopt their own laws under the ‘influence’ or ‘inspiration’ of other countries, sometimes the laws are just foreign ‘transplants’, as is discussed in detail in the third chapter of this paper.*
systems from different latitudes, from the perspective of ordinary folk knowledge in the western world; we call it “the BBC News perspective.” The second chapter describes customary justice from the perspective of the users of these systems. Chapter three proposes two models of customary justice. Chapter four presents a revised account of the sassy-wood justice based on in-depth interviews held with customary justice chiefs in Liberia. The fifth chapter provides a detailed account of the justice system of the Kogi indigenous community of Sierra Nevada de Santa Marta, Colombia. Chapter six present alternatives for the state-customary justice interface (and the shortcomings of these alternatives). The final chapter discusses the operation of customary justice among the urban poor in low and middle-income countries today.

The fifth part of the dissertation proposes a **Third (Multicultural) Face of Justice**. It is divided into five chapters. Chapter one explores some of the not-so-obvious assumptions in which this paper’s search is based. Chapter two proposes a revised version of Damaška’s framework of justice and state authority, expanding it beyond the narrow view of Western dispute resolution in order to incorporate within the model the holistic understanding of Justice in other latitudes. Chapter three discusses well-established principles of procedure and analyzes some underlying assumptions of formal and customary justice systems in light of these principles of procedure. Chapter four revisits the shortcomings of the ‘judicial equilibrium’ model introduced in the first part of the dissertation, and proposes a revised theoretical model that may be used to

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assess dispute resolution systems for the urban poor in low and middle-income countries. Chapter five concludes.

The contribution of this work is: first, a new conceptual framework for the comparative analysis of formal and informal justice in developed and developing countries. Second, to expand knowledge on the uneasy interaction among legal traditions, legal transplants and customary justice in the multicultural world of the XXI century. Third, a descriptive analysis of a chronic problem which affects billions of people, i.e., the lack of effective access to justice (formal or customary) for the urban poor in low and middle-income countries. Fourth, a novel account of the operation of justice among the Kogi Indians of Colombia. Fifth, a novel quantitative analysis of formal justice delivery around the world. Sixth, some practical policy recommendations for judicial reform, related to the institutional and procedural architecture that enables or limits access to justice by the urban poor in developing countries.

Methods

This dissertation examines the interaction among legal traditions, legal transplants and customary justice in developing countries today. In order to understand the various aspects of this complex problem, it must be considered from different angles.

Surveyors and sailors measure distances between objects by making observations from multiple positions. By observing something from different angles or viewpoints, they get a fix on its true location. This process, called triangulation, is used also by quantitative and qualitative social researchers. Applied to social research, it means it is better to look at something from several angles than to look at it in only one way.  

23 Neuman, Social Research Methods, at 149.
Therefore, a multi-method approach was utilized in this dissertation, including:

first, an extensive literature review of comparative law sources dealing with the various dimensions of the delivery of formal and informal justice around the world.\(^{24}\) Second, a new quantitative analysis of new data on the operation of formal dispute resolution mechanisms in 66 countries.\(^{25}\) Third, in-depth interviews with customary justice authorities in Colombia and Liberia, and meetings with formal and customary justice operators in a dozen countries. The triangulation of different viewpoints, theories, research methods, and sources of data is more likely to convey a clear picture of the interplay between formal and customary justice in developing countries in comparative perspective.\(^ {26} \) Conclusions draw on traditional legal research methods, as well as on qualitative and quantitative methods from the social sciences.

Throughout the dissertation, all quotes from texts originally in Spanish have been translated by the author.

**Caveats**

Finally, three caveats: First, this dissertation cannot escape some level of overgeneralization in the discussion. The topics covered are exceedingly broad, ranging from legal anthropology to economic analysis of law, and spanning two thousand years of history. This approach is justified on the need to consider the core problem from

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\(^{24}\) Comparative law sources dealing with legal traditions, legal transplants, history of judicial procedure, and formal and informal justice institutions and procedures around the world.

\(^{25}\) This new analysis is based on existing data, which was assembled by the World Justice Project (www.worldjusticeproject.org) (Last visited, June 11, 2013).

\(^{26}\) Neuman, *Social Research Methods*, at 149 – 150, and 177 (explaining how the triangulation of theories, methods and sources of data, increases the likelihood of research leading to accurate understanding of social phenomena).
different perspectives, in order to identify the central tendencies and examine them from a viewpoint broader than the narrow focus of any one discipline.

Secondly, I would kindly ask the reader to bear in mind that this account of the many failures of judicial systems in developing countries does not imply that the judicial systems in high-income countries are faultless. For example, in several developed countries, including the United States, access to civil justice for the poor appears to be severely limited.27

The third caveat is that by highlighting some of the problematic consequences of legal transplantation in developing countries, this dissertation runs the risk of assigning insufficient weight to other positive outcomes of legal transplantation. Nothing in this dissertation shall be construed as denying these ‘benign’ aspects of legal transplantation, which are succinctly discussed in Chapter 3 of Part 3.

27 For a comprehensive account of current restrictions to access to justice for the poor in the United States see, Rhode, Access to Justice. See also, Sandefur and Smyth, Access Across America. For a comparison of delivery of access to justice to marginalized populations, between the United States and other developed nations, see Mathews and Botero, Access to Justice in the USA.
PART ONE
THEORETICAL MODEL - THE “JUDICIAL EQUILIBRIUM”

Rule 1 of the U.S. Federal Rules of Civil Procedure states that the rules of procedure “should be construed and administered to secure the *just, speedy, and inexpensive* determination of every action and proceeding.”¹ These characteristics relate to the broader concepts of Fairness, Efficiency and Accessibility of dispute resolution systems.²

From the point of view of the ordinary user, the overall effectiveness of a judicial system encompasses three dimensions:³

a. **Fairness** (independent and impartial adjudication)

b. **Efficiency** (enforceable results within reasonable time)

c. **Access** (absence of procedural, financial and other hurdles)⁴

Procedures in all countries aim at balancing these dimensions of judicial effectiveness. There is no magic formula to achieve the right balance among them. Just as with any other service—such as telephone communication or financial services—there is an inescapable compromise amongst the various dimensions of the service, such as speed, cost, accessibility, and quality. Judicial procedures everywhere face the challenge of guaranteeing the widest possible access to justice, maintaining speed and

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² While “just” is a synonym of “fair,” “speedy” refers to only one of the critical dimensions of efficiency, and “inexpensive” speaks only about one of the key component of access. *See,* Botero, et. al., *Judicial Reform,* at 61-9. J. A. Jolowicz proposes a variation of this formulation: The first goal of procedural law is “the provision of the institutions and rules of procedure best fitted to the fair, economical and expeditious adjudication, in accordance with law, of those disputes which the parties choose to submit to the courts.” *Jolowicz, On Civil Procedure,* at 70.

³ Botero, et. al., *Judicial Reform,* at 75. *See also,* Jolowicz, *On Civil Procedure,* at 71.

cost of litigation within reasonable limits, ensuring a fair and enforceable outcome of the procedures, while simultaneously preserving effective alternatives to litigation.5

There are multiple definitions of these concepts (fairness, efficiency and access). As we shall see in the following chapters, different types of process deliver different types of justice. But regardless of these variations, “justice” is—or at least it is supposed to be—the outcome of the judicial process.

Rules of procedure are the safeguard of fairness.6 Procedures are established to guarantee the litigant’s right to have her case decided in accordance with the law. Without due process of law, litigants would be subject to the unfettered discretion of the judge. Therefore, rules of procedure may rightfully impose some restrictions on the efficiency of proceedings and the access of citizens to courts, in order to guarantee fairness (accuracy) of judicial decisions. In the words of Professor Gandasubrata, “in connection with the nature of the judicial process itself and considering the formal, punctual and rather complicated manners and usages upheld by the courts according to the Law on Procedure, it could be said that correct judgment cannot be performed in a short time.”7 This is the basic compromise of the adjudicative process.

While there is no magic formula to achieve a perfect balance among these elements (efficiency, access and fairness), and societies may reach different equilibriums

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5 The public service provided by the judicial system may be subject to the same efficiency-quality-access analysis as any other service, such as the telephone or water supply. Perfect telephone communication, 100% pure water, and immaculate judicial decisions, which are available only at prohibitive costs or after unbearable delay, are all examples of poor quality services.


at various points in time, there are some boundaries within which these equilibriums may be considered “reasonable.”

This idea may be presented graphically as follows:

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The chart illustrates a trade-off between efficiency and fairness of judicial systems, i.e., that “correct judgment cannot be performed in a short time.” Other combinations are equally relevant: efficiency and access, and access and fairness.

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8 E.g., Common-law countries use the “reasonable prudent person” standard in torts and contracts. Civil law countries have a similar standard, inherited from Rome: the good pater familias (head of household).

9 The interaction between efficiency and access has been analyzed extensively in the academic literature and it has not been found to be univocal. The relation seems to be generally positive (increased efficiency carries increased access) when associated with long-term, structural or fundamental changes to the system. For instance, measures aimed at broadening access at lower-level courts, such as simplification of legal requirements of the complaint and limitations to lawyer’s involvement at certain levels of litigation, have been generally associated with increased efficiency (reduction in per-case time-to-disposition). The reduction of legal requirements of the complaint has been associated with reductions in per-case time-to-disposition in Japan. See, e.g., Yukiko Hasebe, Civil Justice Reform: Access, Cost, and Expedition. The Japanese Perspective, in Zuckerman, Civil Justice in Crisis, at 235. Conversely, the relation between judicial efficiency and access to justice is generally negative in the short-run or in the case of merely cosmetic modifications to the judicial system. For instance, increases in access may hamper efficiency temporarily due to increased
These three dimensions (efficiency, access, and fairness) may be examined with respect to the judicial system as a whole, or to a certain court or specific procedure or pathway to justice\textsuperscript{11}—such as the eviction of a tenant. The following chart depicts the efficiency, accessibility and fairness of two hypothetical procedures:

The overall effectiveness of the judicial system in delivering fair, efficient and accessible justice is depicted by the area of the triangles in the chart. By way of example,

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\textsuperscript{10} The interaction between access to justice and substantive quality of judicial decisions is even more complex and debated, because it relates to the elusive concept of fairness adopted by each nation and the political and social choices by means of which this concept is implemented in practice. Moreover, an increase in judicial efficiency or access to justice may increase or decrease litigant’s perceived fairness. \textit{See}, Rennig, \textit{Subjective Procedural Justice and Civil Procedure}, at 225. Relaxation of procedural hurdles may increase access to justice but it also may lead to judicial abuses and thus to reduced perceived fairness. Yet, increased efficiency of the judicial system also improves the overall quality of the service, thus increasing litigant’s perceived fairness. \textit{See}, Botero et. al., \textit{ Judicial Reform}, at 72.

\textsuperscript{11} \textit{See}, Gramatikov et. al., \textit{Measuring the Costs and Quality of Paths to Justice}, at 349.
these two triangles may be interpreted to describe the eviction of a residential tenant in Japan (Procedure 1) and New Zealand (Procedure 2).

In Japan the eviction of a residential tenant is subject to significant substantive and procedural hurdles, specifically designed to protect the tenant. The leasehold contract has “judicially defined ‘good faith’ obligations that protect the ‘weaker’ party to a continuing relationship… the courts have developed a line of cases that limit the authority of the landlord… under the good faith obligation of Article 1 of the Civil Code.” When confronted with a situation of unequal power between the parties, the law intervenes to level the playing field. The judicial system is used as a mechanism to implement the state policy of protecting comparatively “weak” tenants in the “dry” housing market of Japan; if the tenant is evicted, she faces severe hardship, so the judge intervenes, softening the tenant’s contractual obligations and making eviction litigation a less appealing option for landlords. Procedural barriers are equally important to achieve this goal. The system is designed to favor mediation of landlord-tenant disputes and to discourage litigation against tenants. “In Japan the resort to the legal system is considered as a last resort. Prior to litigation the parties will have made sincere efforts to

12 Goodman, The Rule of Law in Japan, at 316.
13 According to Japanese experts consulted, the Land Lease & House Lease Law of Japan prevents the landlord from canceling a lease agreement and evicting a tenant without due cause, which shall be interpreted in light of the “good faith” obligation of the Civil Code. Even if a tenant fails to pay the rental fee for one or two months, it may not be regarded as due cause. Similarly, The Civil Execution Law limits the assets and property subject to execution and prevents the creditor from executing against all assets of the tenant to protect his minimum standard of living level.
14 “A landlord in Tokyo enters into a lease of residential apartment with a tenant… The lease contains a one-year term and requires the student to give up the apartment at the end of the year. The landlord points to the contract term. But the courts will not enforce the contract even though in Japan the concept of freedom of contract and freedom of will in making contracts is well accepted.” Goodman, The Rule of Law in Japan, at 497.
resolve their differences short of litigation.” 15 Expensive court-fees and other barriers to access16 deter the landlord from abusing her position of comparative strength. Litigation is expensive and time-consuming,17 and attorney fees further increase litigation costs. These barriers create an incentive for the landlord to seek an amicable solution outside of the court system, and provide some degree of shelter to the tenant.18 As in the first triangle in the above chart (Procedure 1), there is a compromise among efficiency, accessibility, and fairness. In Japan eviction proceedings favor procedural and substantive “fairness” over unfettered access to litigation and speedy and efficient proceedings; by these means the courts implement a state policy of protecting the weak. This equilibrium among efficiency, access, and fairness is culturally-acceptable in Japan, where “the function of the Japanese civil and criminal litigation system [is] to restore harmony.”19

In New Zealand the situation is diametrically different. Protection of tenants has been deemed to be better served through facilitating a liquid housing market, which may improve “efficiency, [provide] greater choice, [and] keep costs down,”20 in order to keep the price of leases low and provide inexpensive housing for all. This policy choice is partially achieved through a landlord-friendly court system. Litigation for landlord-tenant

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15 Id. at 333.
16 Id. at 338 - 340.
17 The duration of the proceedings for evicting a residential tenant in Japan is calculated in 363 days, from the time of filing of the claim until actual enforcement of judgment. Djankov et.al., Courts., Table V.
18 “The restrictions on access to the courts in Japan have an effect of limiting the number of cases brought each year. This effect is surely a burden for the number of people who might otherwise wish to institute litigation” Goodman, The Rule of Law in Japan, at 340.
19 Id. at 501.
20 Objectives of the 1991 reforms, in Lankin, New Zealand Housing Policy in the 1990s, at 20. See also, Murphy, To the Market and Back: Housing policy and state housing in New Zealand, at 119.
disputes is extremely efficient, inexpensive and accessible. Tenancy Tribunals “provide landlords and tenants of residential properties with: a free mediation service; and (if that fails), a quick and inexpensive means of resolving disputes. The Tribunal can hear any tenancy dispute… with a maximum of $12,000. The Tribunal conducts proceedings with minimal formality and technicality. It decides disputes according to the general principles of relevant law and the merits and justice of the case, but is not bound by strict legalities. Tenancy Tribunal hearings are heard by Tenancy Adjudicators. Adjudicators are impartial and independent judicial officers.”

Indeed, the eviction of a residential tenant in New Zealand is among the speediest and most accessible in the world. Evidently this comes at a price in terms of the procedural and substantive guarantees for the individual tenant who is summoned as a defendant before a court of law. The system is organized around the idea that the protection of tenants comes from ensuring a fluid housing market and from reducing transaction costs. This implies comparatively lower procedural protections for the defendant-tenant, and translates into a landlord-friendly court system. As in the second triangle in the above chart (Procedure 2), landlord-tenant

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21 In New Zealand, the eviction of a non-paying tenant is handled by a specialized housing court called the Tenancy Tribunal, which is a limited jurisdiction court. The cases are decided by lay judges called “adjudicators,” some of whom do not even hold law degrees, and the overwhelming majority of cases are handled without the assistance of a lawyer. The proceedings are mostly conducted in oral form, and most cases are decided in a single hearing. The judgment is normally announced in court, at the end of the hearing. The complaint is an informal document that briefly describes the facts and controversy in layperson’s language. Legal reasoning and justification in specific articles of the law is neither required nor expected. Evidence is scarcely regulated; it need not be on oath, it can be oral or written, and it is not bound by strict rules on administration and evaluation. Appeal of first instance judgments is available, but only a tiny fraction of the decisions are appealed and appeal does not automatically suspend the enforcement of judgment. Interlocutory appeals are prohibited. Notifications are normally by mail, without formalities or mandatory intervention of judicial officers. Djankov et al. Courts.


23 The duration of the proceedings for evicting a residential tenant in New Zealand is calculated in 80 days, from the time of filing of the claim until actual enforcement of judgment. Djankov et.al, Courts, Table V.
litigation in New Zealand—as in many states of the United States—shows a very different equilibrium among efficiency, access and fairness; one that is culturally acceptable in New Zealand.

The above discussion may be presented graphically as follows:

Eviction of a residential tenant

Tenants in Japan enjoy a number of procedural and substantive legal safeguards aimed at enhancing “fairness,” which are not available to tenants in New Zealand. At the same time, landlords in New Zealand enjoy unfettered and inexpensive access to speedy courts, which make the eviction of tenants among the most efficient proceedings in the world. These two cases respond to different policy choices, and reflect two extremes of the spectrum of “reasonable” outcomes of the efficiency-access-fairness compromise discussed above. These policy choices respond to both deeply-rooted
cultural preferences, and situational factors, such as land availability and other economic determinants of the housing market.

The above charts provide only a snapshot, a very simplified description of the situation at one point in time. In reality the judicial equilibrium is constantly changing. In microeconomic theory the “market equilibrium” of “supply” and “demand” is in constant flux. Similarly, this “judicial equilibrium” constantly fluctuates—at a much lower rate—pursuant to the historical and cultural developments in society, including the adoption of substantive and procedural legal reforms. For instance, let us consider the hypothetical case of a country where access to courts is free of charge and the system is clogged with a myriad of both frivolous and meritorious cases; cases take over 500 days from filing to disposition and there is a growing backlog. In this situation (represented in the following graph as Time 1), the equilibrium between access to justice and efficiency of the judicial system seems to be out of balance. While barriers to access are apparently low, the overall effectiveness of the system is poor because litigation faces extreme delays. This scenario is reminiscent of the current situation in most Latin American countries. Now, let us assume that a reform is introduced in this hypothetical country to raise the court fees to $10,000. As a result of this reform, all cases below certain amount ($10,000 plus transaction costs) are renounced or settled outside of the court

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24 Goodman, *The Rule of Law in Japan*, at 497 to 518.
26 Filing fees vary widely across countries; “filing fees in the United States are relatively low. It makes no difference whether a plaintiff in Federal District Court is seeking USD 10,000 or USD 10 million in damages, the filing fee will be approximately USD 150. In Japan, on the other hand, for most cases the filing fee is based on the amount of damages sought. This has two effects – first, it may cause an otherwise worthy, but not very wealthy, plaintiff to decide to forego suit because the ‘entry fee’ is simply too high and second, it may cause plaintiffs to reduce the damages claimed because the fee to sue for more damages is simply too high.” Goodman, *The Rule of Law in Japan*, at 340.
Eventually the number of filings decreases, and—assuming resources are kept constant—duration of cases drops to, say, 50 days (Time 2 in the following graph).

The external (red colored) arrows in the graph represent the decrease in access and the increase in efficiency brought about by the reform. In this hypothetical case the efficiency of the system may have improved with the reform (the same case takes much less time to be resolved), but perhaps not its effectiveness. Access to justice has been severely restricted by prohibitively high court fees, so the new judicial equilibrium may be just as unbalanced as before the reform. Both situations may be examples of poor quality service—one is very accessible, yet ineffective, and the other is very effective, but less accessible due to prohibitively high costs.

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27 Perhaps not all, since not all plaintiffs behave according to economic rationality and some suits are based on pride and other reasons. Yet, while some plaintiffs will file cases whose expected outcome is lower
Legal families and countries around the world have reached different equilibriums regarding the interaction of the various dimensions of judicial effectiveness (efficiency, access, and accuracy). The most salient differences are those between the civil-law and the common-law traditions which are discussed in the next chapter. In civil-law countries procedural and substantive safeguards tend to restrict judicial efficiency to protect the defendant and enhance procedural and substantive fairness. In common-law countries, conversely, the guarantee of procedural fairness heavily relies on judicial discretion. As we shall see in the following chapters, a number of practical consequences flow from this basic conceptual difference.

than court fees and transaction costs, most will be deterred by an artificially high barrier to access.

Merryman, The Civil Law Tradition, at 123.
PART TWO
LEGAL TRADITIONS

The second part of this dissertation is divided in four chapters. The first chapter offers some highlights of the evolution of procedure in the two main legal families of the world—civil-law and common-law. Chapter two proposes two models of adjudication, which correspond to these two main legal families. Chapter three considers these legal traditions in light of the conceptual model presented in part one (the “judicial equilibrium”). The last chapter presents a cross-sectional quantitative analysis of the delivery of formal justice across legal families, which provides some empirical confirmation of the enduring impact of legal traditions in day-to-day dispute resolution in high income countries.

CHAPTER 1. ROME, ENGLAND AND FRANCE

The shape and character of the laws and institutions of all countries are closely tied to their history. To some extent, they respond to the cultural, philosophical and religious foundation of society. However, in many countries a number laws and institutions do not stem from local culture; they are simply legal “transplants” copied or received from “mother” countries.

Comparativists have long proposed the idea that the laws of all countries may be aggregated into a handful of legal families. Similar institutional designs within these families have been said to stem from shared legal traditions. As the late Professor Merryman defined it:

1 See generally, e.g., Kelsen, *What is Justice?*
2 See generally, e.g., Watson, *Legal Transplants: An approach to Comparative Law*; Graziadei, *Comparative Law as the Study of Transplants and Receptions*; supra, note 21, at 8.
3 Supra, note 20, at 7.
A legal tradition, as the term implies, is not a set of rules of law about contracts, corporations, and crimes, although such rules will almost always be in some sense a reflection of that tradition. Rather it is a set of deeply rooted, historically conditioned attitudes about the nature of the law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective.4

This chapter briefly traces selected historical developments of procedure in the two most important of these traditions, the civil-law and the common-law,5 in order to put the very notion of ‘legal tradition’ into perspective. It does not intend to provide a comprehensive historical account of the evolution of law in the western world.

The Roman Heritage

Most of the judicial institutions that we know today can trace back their origins in one way or another to Rome.6 The Roman Empire enjoyed a highly developed legal system where written law evolved over centuries and was codified into systematic and comprehensive bodies of law. There was a centralized and hierarchical apparatus of courts that contributed to unify the system. The application of the law was guided by sophisticated legal principles developed by professional judges.

With the fall of the Roman Empire, the early Middle Ages were characterized by the complete fractionalization of the Roman legal system into multiple local jurisdictions. Justice was largely a matter of basic rules mixed with superstition and religion, which

5 “There are three highly influential legal traditions in the contemporary world: civil law, common-law, and socialist law,” Id. at 1. With the fall of the Soviet Union the third one lost significance.
6 “It is no exaggeration to say that, next to the Bible, no book has left a deeper mark upon the history of mankind than the Corpus Iuris Civilis.” Kolbert, “General Introduction” in Justinian, The Digest of Roman Law, at 8.
were erratically created and enforced by local lords. During the late Middle Ages the old
customs of the Germanic tribes clashed with the rediscovered Roman law, and this
uneasy mix evolved over the centuries into the various modern legal families. Italy
remained closely attached to the Roman law. The French legal system resulted from the
Napoleonic combination of Roman and Germanic customary law, where the later
element predominated. Germany rediscovered and adopted the Roman law in the
process called The Reception. In England the Roman influence was largely diluted over
time and the law developed mainly from Germanic and feudal customs; from the twelfth
century, the Common-law was created by English royal courts and evolved gradually
until present times.8

The history of procedure in Rome is generally divided in two periods.9 The first
period, until the third century a.d., is that of the ordo iudiciorum privatorum and the legis
actiones. In the second period, from C. III onwards, the extraordinaria cognitio took center
stage. Some authors add an intermediate phase, from C II to III a.d., characterized by
the procedure per formulam.10

The Roman procedure of the early period (ordo iudiciorum) was generally divided
into two stages. In the first one the magistrate guided the fact-finding process to set the
limits of the dispute. In the second stage the case was brought before the private

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7 See generally, e.g., Gibson, On some Ancient Modes of Trial, especially the Ordeals of Water, Fire and other Judicia Dei.
8 Although some Roman elements continued to influence procedure well into the 19th century. E.g., Caenegem, History of European Civil Procedure, at 15. See also, Glendon et. al., Comparative Legal Traditions; Caenegem, European Law in the Past and the Future.
10 De La Plaza, Derecho Procesal Civil Español, at 40-46; Riggsby, Roman Law and the Legal World of the Romans, at 111-18.
individual or jury that made the decision. Civil cases were decided by the *index* (arbiter or lay-judge), and criminal cases by the *index* and the *inrati* (juries). There was a separation between the offices of the magistrate and the Judex (arbiter or lay-judge); “the Magistrate’s duty consisted in granting a formula or process, and in appointing the Judex, or rather in sanctioning the choice of Judex, made by the contending parties.”\(^{11}\) Originally this magistrate was not even a judge—as we see this office today—since the *jurisdiction* only became an specific function with the *Praetors*.\(^{12}\) The procedure in this early period was simple in one aspect and complex in another. It was simple because it was essentially an arbitration procedure before a lay judge. Therefore, proceedings were oral, the criteria for the decision were embedded in common sense, and there was no room for appeal (since judgment was not a technical exercise).\(^{13}\) As Metzger describes it:

> Roman litigation in the classic period combined private initiative with modest public oversight. Most of the initiative was the plaintiff’s: he brought his opponent to the court, informed him of the action he intended to bring, showed him the evidence he intended to rely on at trial, questioned him about facts affecting the action, determined the amount of bail, if any, to demand, and eventually selected an action from the choices the magistrate gave him. Some of the initiative was the defendant’s: he raised his own defences, he disclosed the evidence to support those defences, and his participation in the final act before the magistrate, ‘joinder of issue’ (litis contestatio), was voluntary. The magistrate’s oversight was small by modern standards. He usually involved himself in the specific facts of a case only to the extent of determining whether the requested actions and defences ought to be allowed or denied, and even here the extent of his involvement is controversial. He sometimes himself posed a question to the defendant to establish a fact, and sometimes undertook a more extended enquiry of a controverted matter. His main job was to see to it that, when an action was granted, the parties went away with a written formula: a statement of the action and any defences, to be used by the judge at trial.\(^{14}\)

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\(^{11}\) Abdy, *A historical sketch of Civil Procedure among the Romans*, at 12.


\(^{14}\) Metzger, *Litigation in Roman Law*, at 3.
The procedure of the *ordo iudiciorum* was also complex, in a different way, inasmuch as the right to bring the case before trial was dependent upon the correct formulation of very strict *legis actiones* (forms of action). In this procedure there was no room for appeal. Judgment was final in both civil and criminal matters, save in extraordinary cases where the *restitutio in integrum* could be exercised.

The intermediate period of the Roman history of adjudication (procedure *per formulam*), from C II to III a.d., share the fundamental elements of the *ordo iudiciorum*. In both periods procedure was divided into two stages, the first of which aimed at limiting the boundaries of the controversy, and the second at deciding the case. This separation was gradually lost from C. III onwards, when the procedure became an act of the Sovereign. Yet, the procedure *per formulam* also had a fundamental difference with the *ordo iudiciorum* of the early period. In the *formulam* the parties needed not bring the case pursuant to one of the forms of action. Instead, the magistrate set the terms of the legal dispute after a brief discussion between the parties. Moreover, the magistrate was entitled to add new forms of action or deny the recognition of the old ones, based upon equitable considerations. This transition reminds us of the evolution of the common-law in England, where the courts progressively expanded the restrictive list of “original writs” and ultimately the forms of action were eliminated altogether. Similarly, the

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15 Abdy, *A historical sketch of Civil Procedure among the Romans*, at 5. Some of these actions were declaratory, including the *legis actio sacramentum*, *legis actio per judicis arbitrivie postulationem*, and *legis actio per conditionem*. Others were executive actions, including the *legis actio per manus iniectionem* and the *legis actio per pignorem*. De La Plaza, *Derecho Procesal Civil Espanol*, at 40-46; Riggsby, *Roman Law and the Legal World of the Romans*, at 111-18.


Roman praetor expanded the *formulae* based on equitable considerations,\(^{18}\) and by this means enhanced access to justice.

This shift of the Roman procedure, with the gradual elimination of the forms of action in the hands of equitable judges, is similar (both in terms of the causes and the consequences) to the transformation of the English procedure in the hands of the Equitable Courts of the nineteenth century.\(^ {19}\)

The final period of the Roman procedure, from C III onwards, was characterized by the ascendancy of the *extra ordinem* procedure and the institutionalization or “bureaucratization” of justice.\(^ {20}\) In this late period the Roman procedure experienced a fundamental shift, from private to public and official; from adversarial to inquisitorial; from oral to written; from public to secret; from a regime of immediateness to mediateness; from concentrated into desconcentrated; from single-layered into multi-layered; from direct and free examination of evidence into a system of legal tariff.\(^ {21}\) This Roman law and procedure of the late period was systematically codified by the Byzantine Emperor Justinian the Great in the 6\(^{th}\) century in the *Corpus Juris Civilis*, which was rediscovered in continental Europe several centuries later and shaped the most fundamental features of the Romano-canonical procedure of the Middle Ages. Its long-lasting legacy was the driving force in the development of procedure in modern civil-law countries.

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\(^{19}\) E.g., Id.


In terms of the “judicial equilibrium” discussed in the previous chapter, this very simplified Roman history of procedure may be represented graphically as follows:

![Civil Procedure in Rome Diagram]

The red arrows represent the critical changes described above. First, the progressive abolition of the forms of action meant a reduction of procedural safeguards (restrictions), which increased access. Second, the growing institutionalization and bureaucratization of adjudication in Rome progressively increased the scope and reach of procedural safeguards, and reduced both efficiency and access to justice. This is evidently an extremely simplified description of a process that took several centuries to develop, but one that—hopefully—provides a useful point of reference to consider current reality in a different light.

*Procedure in England*

Romans had a dominant presence in England for centuries but their influence did not last. Neither the Roman law nor the primitive Celtic tribal legal institutions had
much impact in the evolution of the common-law. Following the Norman conquest of England in 1066, the common-law began a thousand years of remarkably independent evolution. Legal historians generally attribute little importance to the legal institutions prior to the centralized system established by William the Conqueror. The main institutions of the early Norman court system were the three common-law courts of King’s Bench, Common Pleas and Exchequer, the circuits of the royal courts, and the Ecclesiastical court. At the bottom of the system, basic disputes were resolved by the manorial courts of the local lords. The judges of assize were itinerant adjudicators reporting directly to the Crown. There was no chancery court or other courts exercising jurisdiction in equity, other than the King/Queen him/herself.22

The evolution of the Common-law is deeply marked by the peculiar political struggles in which it originates:

The conquest of England by the French Duke of Normandy in 1066 at the Battle of Hastings led to a fundamental difference between the rulers of France (to whom the Duke was supposed to owe fealty under the rules of the feudal legal system) and the new rulers of England who, while claiming their ancestral rights in France declared themselves rulers in their own right in England. This schism brought about a further schism when the rulers in England began the process of creating their own legal system for their newly acquired kingdom. Unable to rule through armed occupation in such a large territory, the early English kings used the legal system to further the king’s rule. To assure that the king’s writ ran throughout the kingdom, the traveling judges of the king’s court used local custom and communication between themselves to establish a common-law throughout the kingdom. To know what this law was, decisions were written down and future judges referred back to these decisions in deciding cases later brought to the courts for decision. Few ‘statutes’ were enacted in the early days…[and] the judges were assisted by the parties to the case who marshaled the evidence and arguments (including prior precedents) and presented them to the judge.23

This evolution is also marked by a struggle for power and preeminence between the royal courts and the local courts of the manorial system. In the violent times of medieval England (and throughout Europe), the basic system of dispute resolution was not subject to the central authority but rather decentralized at the hands of the local lord. The local court resolved civil disputes among peasants; administered justice for crimes committed on the manor; and collected rents, fines and fees. In this rudimentary system, Justice was not always consistent, fair and impartial but often obscured by the whims and self-interest of the powerful local lords. This gave royal courts an opportunity to compete for the favor of the people by delivering a better service, i.e., more consistent and impartial justice.

Because the King of England utilized the legal system and his Royal Courts and traveling judges to extend his rule throughout England it was important that the populous view the Royal Courts as fair and honest. Consistency of decision-making was one method of demonstrating honesty. Rules applied in earlier cases were applied again in later cases demonstrating that the rules had not changed simply to aid a particular party to the litigation. Moreover, the king welcomed the rise of professionals who created forms (writs) to be used by litigants and who provided advice on how to deal with litigation. These early professionals tended to come from the local inns that catered to litigants who had traveled to the site of the court in order to be heard (hence the English Bar’s relationship to the Inns of the Court). The resulting system came to be viewed with favor and litigants lined up to have disputes resolved by the king’s judges who traveled on circuit throughout England.

This process of law making may be viewed as a ‘bottom-up system where the law is created (or ‘found’) as a consequence of lawsuits brought by individuals… One effect of this type of system is to remove from public officials and place in the hands of the litigants the ability to determine the agenda for the development of law.”

Eventually the royal courts alone ruled the land and the manorial courts disappeared altogether. However, as a consequence of this struggling search for consistency during the early times, the evolution of the legal system in England in later

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24 Id. at 9 and 10.
centuries was such that in Common-law courts the “relations between adjective and substantive law could not be closer. The forms of process dominated the law and made the great legal textbooks look like treatises on procedure… Substantive law was discussed in terms of procedure and the rights of the parties were expressed in the form of writs and pleading.”

In that sense, procedure in England was complex in the same way that the Roman *legis actiones* had been; nonetheless, in another way it was simple, because the institution of the jury kept proceedings in close contact with the lay citizen. “In the English courts… the jury of ordinary people from the neighborhood was, and remained, an essential and on points of fact, decisive element of Common law process; it was an antidote for growing technicality and pleading in esoteric French law.”

It is important to bear in mind that “the reason why the Common-law was dominated by the forms of action is to be found in its origins. The Common-law courts were not consciously created at one particular moment and granted a competence in general terms, such as for all civil cases above a certain value, or concerning certain classes of people or coming from certain areas. Far from being created as an ordinary court, the *curia regis* was not even a real law court and access to it for law suits was exceptional, being reserved for limited classes of people and cases and for those to whom the king happened to grant the privilege of a hearing; the ordinary courts of the country were the local courts” of the manorial system. Access to common-law courts

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26 *Id.* at 24. “The student of the English forms of action is naturally struck by their similarity with the Roman formulary system of classical times… both English and classical Roman jurists received a practical training, without theoretical grounding or state examinations… English common-law and classical Roman law were based on experience, [while] medieval Roman law [Byzantine law, which influenced continental civil law] was based on books” *Id.* at 31.

27 *Id.* at 25.
was restricted to certain specific wrongs, through the “original writs.” These original
writs were progressively expanded in the hands of the common-law courts, in order to
enhance access to justice, just as the limited Roman *formulae* had been expanded by the
praetors one thousand years earlier.  

In addition, there was the Ecclesiastical Court, which had derived its authority
and powers from the usage of the church. The Ecclesiastical Court and procedure are
the historical link between the procedures of the common-law and the continental
system. The evolution of the procedure in the Court of Chancery, which during the
nineteenth century led to the complete transformation of the old English procedure, is
largely indebted to the ecclesiastical procedure. Similarly, the mode of pleading of the
High Court in the nineteenth century was modeled on that in use in the Admiralty Court,
which itself was derived from the ecclesiastical courts.

Ecclesiastical courts persisted as rivals to the Royal Courts longer than the
rural courts. The ecclesiastical courts applied canon law, the roots of which were firmly
in the Roman law. The church vigorously defended its right to try ‘religious’ offenses,
including adultery, incest and less distinct offenses against morality. It also assumed
jurisdiction over family issues, principally marriage and succession, as well as criminal
jurisdiction over clergy. Although the church largely forfeited its judicial role,
ecclesiastical jurisdiction over family and succession issues persisted until the mid-19th
century, when it merged with other civil matters before the Royal Courts. But the
imprint of canon law remains to this day on English family and inheritance law.

In the period between the fifteen and the eighteen centuries the English courts
experienced a progressive centralization, formalization and bureaucratization. The most

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28 Id. at 31.
30 The Ecclesiastical Court had significant influence in the development of the procedure during the
Norman period in England. Its powers derived from the usage of the church but they had expanded from
the spiritual realm to other areas. “The Ecclesiastical Court had a large share in the administration of
justice in the Norman period (as in the earliest times), especially in criminal cases.” *Id.* at 25.
31 Glendon et. al., *Comparative Legal Traditions*. 
significant development of this period in England was the establishment of the equitable courts, procedure and remedies, which originated in part in response to the suffocating technicalities and limitations of the common-law courts. A new legal tradition started by the 16th century in England, having as origin the power of the Chancellor. At first, the Chancellor was attempting to make softer the application of the common-law, when he received a difficult case to analyze. At that time, the Chancellor was seen as the operation of the King’s “conscience” and he had broad and discretionary attributions.

Equity and the common-law courts evolved until late nineteenth century with a separate set of principles and remedies, and for centuries the growing body of judge-made law, that is, case law based on binding precedent, gradually evolved and the judges began to use the principles of the common-law. The late period in the English history of procedure is equivalent to the changes that took place in Rome seventeen hundred years earlier. In the words of R.C. van Caenegem, “in England in the nineteenth century… the ancient Common-law procedure was changed in its very nature and the forms of action, which had been the cradle of the Common-law and the most important characteristic of English medieval law, were abolished. Just as in the late Roman Empire the procedure extra ordimen had taken the place of the legis actiones and the formulary process, so, in nineteenth century England, the hallowed forms of action were replaced by a uniform, simplified and streamlined procedure, dominated by general rules and

32 In 1349, an Order of Council referrals the difficult cases to the Chancellor.
33 The most usual common-law remedy is damages; in contrast, equitable remedies include injunctions and specific performance of contracts.
concepts; English procedure, which had been among the first to modernize in the twelfth century, was among the slowest to adapt and to break away from the past.34

Finally, there is another dimension of this historical evolution which is often overlooked, i.e., the fight between the Justicia Dei of the old ages (trial by ordeal), and the enlightened legal process of the rational modern world. This is the struggle between ‘darkness’ and ‘light’ which was at the core of the debate one thousand years ago and which remained highly relevant until about the seventeen hundreds. This piece of the puzzle is often ignored probably because it seems to have little practical relevance to the understanding of modern legal system in high income countries, at least from today’s perspective. However, the scars of this epic battle, I contend, have shaped the way we see customary justice today; they have either blinded us to consider more creative options for harmonic integration between formal and informal justice, or they have provided a convenient justification to perpetrate inefficiencies and exclusion in low and middle-income countries.35 The trial by ordeal in medieval Europe is explained below at the end of this chapter.

**Procedure in France**

From early medieval times and until the adoption of the Civil Code of 1804, France was divided in two clearly differentiated legal systems. In the south, the basic principles of the Roman law were maintained. This land was known as the country of the written law (*pais des droit écrit*), because the sources of law were written in the Justinian

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35 Parts IV and V of this dissertation explain the impact of the European notion of the trial by ordeal, on the lack of understanding and acceptance of customary justice systems in middle and low-income countries today.
codification of Roman law and the works of glossators and post-glossators.\textsuperscript{36} The north was known as the country of the customary law (\textit{pais de droit coutumier}), because the legal system in northern France was based on Germanic and feudal oral customs. From the XIII century, and all the way until the XIX century, “[t]he law of Rome stood for reason, organization, and administrative efficiency under central control. Embodied in the superb bodies of the \textit{Corpus Juris Civilis}, it was rediscovered and studied as a revelation, the lawyer’s \textit{ultima ratio}. The universities were born and with them a newfound passion for theory”\textsuperscript{37} dominated the life of the law in continental Europe. Roman law stood for reason in the context of the obscure ordeals of ancient times. But this Roman law was not the law of the lay judge of the classic period, but the Byzantine codification of the Roman law of the late period, when procedure had experienced a fundamental shift from private to public and official; from adversarial to inquisitorial; from oral to written; from public to secret; from single-layered into multi-layered; from simple (understandable by lay people) to sophisticated (the realm of professional experts).

Roman law also stood for imperial power. The great diversity of substantive and procedural law across various regions of France posed a challenge to the unification of power under one King, and Romano-canonic law became a vehicle for the unification process. The same imperial needs for systematization, centralization, and political control, which led to the highly sophisticated procedure of the Roman Empire, served European monarchs well in their quest for bringing order and consistency to the law—

\textsuperscript{36} Id. at 33. \textit{See also}, David, R. \textit{French Law}, at 14-16.

\textsuperscript{37} Caenegem, \textit{History of European Civil Procedure}, at 11.
from the XIII century French Kings to Napoleon.\textsuperscript{38} However, “the king [Luis IX (1226 – 1270)] did not impose a complete reception of Roman Law process, but worked out a national variant, either because of his aversion from slavish imitation of the Church courts and the traditional wariness of French kings of appearing to accept imperial laws or because of a wise desire to adapt the alien forms of process to existing usages and feelings.”\textsuperscript{39}

From the fifteenth century on, the practice of the courts in France was a combination of Germanic and Roman procedures; “the French procedure did not become so systematic as its more learned counterpart in Germany… Thus, of the two most important members of the ‘Romano Germanic family’, the French procedure and the German \textit{gemeiner Prozess}, the former was surprisingly the more Germanic.”\textsuperscript{40} There were significant variations among European countries but over time a general trend consolidated:

\textit{The period under review [XVI – XVIII century] witnessed the greatest triumph of the Romano-Canonical model: an elaborate, secret and written procedure was being developed all over Europe by learned authors, who formed one international brotherhood. It continued to flourish in those countries where it had already obtained a solid foothold; and made new and important conquests in central, eastern, and northern Europe, most remarkably in Germany with the ‘reception of Roman Law’.}\textsuperscript{41}

The French \textit{Ordonnance} of 1667 codified existing rules of civil procedure in a methodical attempt to unify the civil procedure for all France in a clear, systematic and concise way.\textsuperscript{42}

\textsuperscript{38} Id.  
\textsuperscript{39} Caenegem, \textit{History of European Civil Procedure}, at 33.  
\textsuperscript{40} Id. at 60.  
\textsuperscript{41} Id. at 54 and 55.  
\textsuperscript{42} Id. at 61.
The French procedure consisted of a first, written phase, i.e., the mutual presentation in writing by the plaintiff and the defendant, or rather their procurators, of their main points and arguments – with the possibility for the plaintiff of a written réplique and for the defendant of a duplique; then there was a second, oral phase, consisting of pleadings directed towards persuading the court, normally held by advocates (plaidoyés, as opposed to the conduct of the rest of the case, being only allowed to procurators in special cases, the provisaires d'instruction, and in summary proceedings). Finally, in a third phase there could be, according to the decision of the court, a judgment given forthwith in open session (d'audience) or a judicial decree directing that the parties should proceed in writing (appointement en droit or appointement).

History of Procedure in France—and to some extent, all over the world—was marked by the need to control the power of the judge. The “Tribunal de Cassation” was created in the XVII century to ensure that French judges were kept in check; it seemed more a legislative than a judicial organ, because its duty was to prevent the “deviation” of the courts from the text of the laws. By the early XIX century Napoleon renamed the Tribunal de Cassation to “Cour de Cassation” and it remained doing the job of quashing the judgments of lower courts which had failed to understand or apply the law. In 1773 the Ordinance Civile of 1667 was abrogated, with the aim of reducing formality and complexity of procedures and to enhance the leeway of the judge. Yet, a few years later came the French Revolution which reversed the status of procedures to the previous era. In 1800 the Ordinance Civile of 1667 was reintroduced, and in 1806 the Napoleonic Code of Civil

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43 Id. at 62.
45 The Ordinance of 1667 was also the direct origin of the procedure of cassation. It declared that judgments of sovereign courts, i.e., Parliaments, pronounced against the royal ordinances, edicts and declarations were null and void. The judges empowered to pronounce this nullity were members of the King’s Council and the term “cassation,” not mentioned in 1667, appears in a decree of 1684. The King’s Council rendered no judgment and, in case of cassation for error of law, remanded the cause for decision in a law court. This was the birth of modern cassation. Caenegem, History of European Civil Procedure, at 63.
46 “Tribunal de Cassation” was the original title. See Zweigert and Kotz, Introduction to Comparative Law, at 124.
Procedure was enacted; this Code “was really an improved version of the Ordinance of 1667.”

Once again, the same imperial needs for systematization, centralization, and political control which led to the highly sophisticated procedure of the Roman Empire, and underlined the evolution of Romano-Canonical procedure in continental Europe since the XII century, moved Napoleon to enact new comprehensive codes. The Napoleonic Codes were meant to become a “common law” for its new empire, “substituting a fully rational and logical law for France’s historical and traditional law.”

This process clearly reflects political struggles that are very different from those at the root of the common-law: “Unlike the common-law system, the civil-law system that was developed on the continent of Europe was a system based on an entirely different philosophy. Here was no ‘bottom-up’ system but rather a ‘top-down’ system of law making.” Mirjam Damaška characterizes these differences as follows: in terms of the organization of authority the Common-law would respond more closely to an ideal notion of authority in which the exercise thereof is coordinated among peers, while the Civil-law would reflect a hierarchical ideal of authority. Secondly, in terms of the ends of the legal process, the Common-law would reflect more closely an ideal of conflict-solving justice (bottom-up), while the Civil-law would reflect more a policy-implementing type of justice (top down).

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47 Caenegem, *History of European Civil Procedure*, at 89. It also introduced a number of important innovations, such as a preliminary conciliation procedure aimed at avoiding litigation; the creation of justices of the peace; the duty to justify judicial decisions expressly; and the abolition of secret examination of witnesses.


50 Damaška, *The Faces of Justice and State Authority*, at 29-47 and 181-239.
Through the Napoleonic Code of Civil Procedure, French practice and doctrine produced a deep mark in European litigation.

The international influence of the Code of 1806 was considerable. Substantially and formally suited to the needs and the temper of the nineteenth century, it also embodied much of the common European inheritance. Although it was introduced in many countries in the wake of the French armies and was, therefore, resented in many quarters at the end of the Napoleonic era, it held its own to a varying extent, as did the Civil Code. The gradation in influence of the Code of Civil Procedure on France's neighbors is considerable. It stretches from the minimal influence in conservative Spain to complete adoption: the Code of 1806 was automatically introduced in Belgium, which was already part of France, and became law in Holland in 1811, after that country had become part of France in 1810...

A middle position between the Spanish and the Belgo-Dutch situations was occupied in France's three other neighbors, Germany, Italy and Switzerland. All underwent the influence of the French codes during the Napoleonic era but took their own way after 1815 and adopted solutions which, while being influenced by France, differed from country to country.

The Code of 1806 also exercised a considerable influence in more distant countries bent on modernization, such as Russia where its influence was profound, and the United States where it inspired the apostles of procedural codification. Its influence was, of course, felt directly in overseas possessions of France throughout the world. In Canada, for example, the Custom of Paris had remained in force in Quebec or Lower Canada even after the English conquest of 1763, but in the nineteenth century the desire for codification gained ground and, on the basis of the Napoleonic Codes, led to the Civil Code of 1866 and the Code of Civil Procedure of 1867.51

The development of French law throughout the 19th and 20th centuries, through an increasing body of “doctrine,” produced a dynamic legal system capable of adapting to the ever-changing needs of society.52

**Trial by Ordeal in Europe**

We now turn to a more obscure and frequently ignored aspect of the history of procedure in Europe. According to William Gibson “[a] most extraordinary feature of the judicial code of ancient times was the practice of Ordeal Trials, in which the

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solemnities of religion were united with the administration of secular justice, and a mode of divination resorted to for the discovery of hidden truth… those modes of trial were for many ages a part of English law and usage in the trial of criminal cases, though now (perhaps happily) they are matter of history alone.”53 By 1848, when Gibson’s book was published, ordeals had ceased to be used in Western Europe. But they had been present and widely used for over a thousand years. Ordeals by water and fire and ordeals by combat were essential methods of Justice until the XII century; with the growing development of formal courts around the XIII century ordeals began to fade away, until finally disappearing entirely around the seventeenth or eighteen century: “The last-mentioned method of ordeal, viz. that by cold water, was resorted to in England for the detection of witches, until the beginning of the last [i.e., the 18th] century.”54

According to Gilchrist (1821): “Ordeal was an appeal to the immediate interposition of Divine Power, and was peculiarly distinguished by the appellation of ‘Judicum Dei,’ the Judgment of God; and sometimes ‘Vulgaris Purgatio,’ the Common Purgation; to distinguish it from the Canonical Purgation, which was by the oath of the party. There were in Europe two kinds of ordeals more common than the rest; namely Fire Ordeal and Water Ordeal. The former was confined to persons of higher rank; the latter to common people.”55

Interestingly enough, ordeals were subject to very meticulous procedures: According to an old English law from the X century, “[s]uch who are tried by ordeal,

52 For a description of the evolution of French law in the 19th and 20th centuries, see, Marryman, The French Deviation; Marryman, The Civil Law Tradition; Caenegem, European Law in the Past and the Future; Caenegem, History of European Civil Procedure; Caenegem, An Historical Introduction to Private Law.
53 Gibson, On some Ancient Modes of Trial, especially the Ordeals of Water, Fire and other Judicia Dei, at 2.
54 Id. at 15.
shall be ceremoniously prepared thereunto, with the solemn manner of that trial,” which included detailed preparations and prescribed actions for the various people involved.56

It is difficult to map these ordeals in the “judicial equilibrium” chart presented in the first part of this dissertation. On the one hand, they were subject to very precise and demanding procedures. On the other hand, they imply a fundamental denial of the current Western ideal of the due process of law. Our current understanding of a fair trial, as per the UN Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, is based on fundamental assumptions which are incompatible with the trial by ordeal or other forms of adjudication which were common a few centuries ago.57 For instance, in 1612 in Lancashire, England, the testimony of nine-year-old Jennet Device led to the execution of 10 people accused of witchcraft, including her mother and all of her own family.58

What is important here is to acknowledge that trials by ordeal and witch hunts were deeply rooted millenary traditions of the Western world, and they left a deep imprint on the evolution of the civil-law and common-law traditions. The trial by ordeal of the old age is the backdrop against which we see our enlightened (modern) institutions of justice—like deep darkness enables our eyes to see the light and to tell the difference between the two. In daily life we define coldness as the opposite of warmth, and darkness as the opposite of light. In the same way, the western world has come to

56 Gibson, On some Ancient Modes of Trial, especially the Ordeals of Water, Fire and other Judicia Dei, at 11.
58 See, e.g., Cronin, Frances, The witch trial that made legal history; Poole, The Lancashire Witches (describing the trial and execution of Jennet Device’s family, 226 pages).
define the concepts of ‘justice’, ‘law’ and ‘reason’, as the opposite of trial by ordeal, which represent ‘darkness’, ‘arbitrariness’ and ‘madness’.

Around the 13th century, Europe experienced a fundamental transformation about the understanding of the world, and this philosophical revolution left a profound impact on the European notions of law and justice. Roman law was rediscovered and embraced wholeheartedly. Lady Justice—the Roman Goddess of Justice represented as an austere and impartial (blindfolded) woman, holding a sword in one hand and the scales in the other—slowly came to replace the Christian cross as the prevailing image of justice in the community. Most saliently, the law of procedure became the scales of justice, the tool through which Justice with capital J materializes in the world. And the instrument of this transformation was the rediscovered Roman law. This process which started around the 13th century had its climax at the Enlightenment, when reason finally triumphed, the last remnants of the ordeal were abolished, and the law of the ‘civilized world’ (through the parallel systems of the common-law and the civil-law) achieved its final shape.

It is not my intention to deny the many and great advances that these transformations meant in terms of human evolution. My only intention is to show that in this great process, something else was lost in translation. This ‘something’ is precisely the

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59 “The law of Rome stood for reason, organization, and administrative efficiency under central control. Embodied in the superb bodies of the Corpus Juris Civilis, it was rediscovered and studied as a revelation, the lawyer’s ultima ratio.” Caenegem, History of European Civil Procedure, at 11.

60 “The last-mentioned method of ordeal, viz. that by cold water, was resorted to in England for the detection of witches, until the beginning of the last [18th] century” Gibson, On some Ancient Modes of Trial, especially the Ordeals of Water, Fire and other Judicia Dei, at 15.
African tree\textsuperscript{61}. The idea that justice is not a sword used by a powerful judge to cut and remove the transgressors of the law, but rather a friendly meeting place around which the community may unite once again, to heal and reestablish the bonds that were broken. This idea is explored in Part Five of this dissertation.

\begin{figure}[h]
\centering
\includegraphics[width=0.5\textwidth]{AfricanTree.png}
\caption{African Justice Tree}
\end{figure}

\textsuperscript{61} The notion of justice as the “African tree” is introduced at supra note 5, at 2, and developed in detail in Parts 4 and 5 of this dissertation.

\textsuperscript{62} Source: Google images.
CHAPTER 2. TWO MODELS: LEGISLATIVE CONTROL (CIVIL-LAW) VS. JUDICIAL DISCRETION (COMMON-LAW)

This brief historical account of the evolution of procedure in civil-law and common-law countries allows us to delineate two models of adjudication. In civil-law countries procedural and substantive safeguards tend to restrict judicial efficiency to protect the defendant and enhance procedural and substantive fairness. In common-law countries, conversely, the guarantee of procedural and substantive fairness heavily relies on judicial discretion. Renowned comparativists—Caenegem, Damaška, David, Dawson, Glendon, Merryman, Schlesinger, Zweigert and Kotz—differ on a number of issues related to the divide between civil-law and common-law, but they all tend to agree on the fact that specific historical developments led to a rather distinct view of the role of the judge in society. As it has been described by Merryman in *The Civil-law Tradition*,

> The system of checks and balances that has emerged in the United States places no special emphasis on isolating the judiciary, and it proceeds from a philosophy different from that which produced the sharp separation of powers customarily encountered in the civil-law world. It is important to emphasize this point and to understand why this was the case.

In France, the judicial aristocracy were targets of the Revolution not only because of their tendency to identify with the landed aristocracy, but also because of their failure to distinguish very clearly between applying law and making law. As a result of these failings, efforts by the Crown to unify the kingdom and to enforce relatively enlightened and progressive legislative reforms had frequently been frustrated. The courts refused to apply the new laws, interpreted them contrary to their intent, or hindered the attempts of officials to administer them. Montesquieu and others developed the theory that the only sure way of preventing abuses of this kind was first to separate the legislative and executive from the judicial power, and then to regulate the judiciary carefully to ensure that it restricted itself to applying the law made by the legislature and did not interfere with public officials performing their administrative functions.

In the United States and England, on the contrary, there was a different kind of judicial tradition, one in which judges had often been a progressive force on the side of the individual against the abuse of power by the ruler, and had played an

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1 Merryman, *The Civil Law Tradition*, at 123.
important part in the centralization of governmental power and the destruction of feudalism. The fear of judicial lawmaking and of judicial interference in administration did not exist. On the contrary, the power of the judges to shape the development of the common-law was a familiar and welcome institution. It was accepted that the courts had the powers of mandamus (to compel an official to perform his legal duty) and quo warranto (to question the legality of an act performed by a public official). The judiciary was not a target of the American Revolution in the way that it was in France.2

These diverging attitudes, which may be traced back to the XII century3, largely stem from the revolutionary France’s deeply rooted concern with the “tyranny of justice”—it is noteworthy that none of the thirty one books, and none of the six hundred and fourteen chapters that compose the seminal work of Montesquieu, De l’esprit des lois, even mentions the word “justice.” For the revolutionary France, “justice” is the tool of the tyrant, a mechanism of oppression. In the eighteen-century’s France the judge shall be “no more than the mouth that pronounces the words of the law.”4 True justice can only be achieved through strict adherence to the “words of the law.”

This fundamental difference in the character of the judicial officer has had an everlasting impact on a variety of aspects of the procedure, including the nature, duration, and logistics of the proceedings, and the admissibility of evidence.5

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2 Merryman, The Civil Law Tradition, at 15 and 16 (emphasis added).
3 See detailed historical account in the previous chapter. See also, generally, Caenegem, European Law in the Past and the Future; Caenegem, History of European Civil Procedure; Damaška, The Faces of Justice and State Authority; Caenegem, An Historical Introduction to Private Law; Caenegem, Judges, Legislators and Professors.
4 Montesquieu, The Spirit of Laws, Book XI, ch. 6. (“But as we have already observed, the national judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigor.”)
5 “There are two fundamental differences between the German and Anglo-American civil procedure, and these differences lead in turn to many others. First, the court rather than the parties’ lawyers takes the main responsibility for gathering and sifting evidence, although the lawyers exercise a watchful eye over the court’s work. Second, there is no distinction between pretrial and trial, between discovering evidence and presenting it. Trial is not a single continuous event. Rather, the court gathers and evaluates evidence over a series of hearings, as many as the circumstance require.” Langbein, The German Advantage in Civil Procedure, at 828.
The existence of a jury has profoundly affected the form of civil proceedings in the common-law tradition. The necessity to bring together a number of ordinary citizens to hear the testimony of witnesses and observe the evidence, to find the facts, and to apply the facts to the law under instructions from a judge, has pushed the trial into the shape of an event. The lay jury cannot easily be convened, adjourned, and reconvened several times in the course of a single action without causing a great deal of inconvenience and expense. It seems much more natural and efficient for the parties, their counsel, the judge, and the jury to be brought together at a certain time and place in order to perform, once and for all, that part of the civil proceeding that requires their joint participation. Such event is a trial as we know it. In the civil-law nations, where there is no tradition of civil trial by jury, an entirely different approach has developed. There is no such thing as a trial in our sense; there is no single, concentrated event. The typical civil proceeding in a civil-law country is actually a series of isolated meetings of and written communications between counsel and the judge, in which evidence is introduced, testimony is given, procedural motions and rulings are made and, so on. Matters of the sort that would ordinarily be concentrated into a single event in a common-law jurisdiction will be spread over a large number of discrete appearances and written acts before the judge who is taking the evidence. Comparative lawyers, in remarking on this phenomenon, speak of the “concentration” of the trial in common-law countries and the lack of such concentration in civil-law countries...

Lack of concentration has some interesting secondary consequences. For one thing, pleading is very general, and the issues are defined as the proceeding goes on; this practice differs considerably from that found in common-law jurisdictions, where precise formulation of the issues in pleading and pretrial proceedings is seen as necessary preparation for an appearance before the court during the evidence-taking part of the civil proceeding... The lack of concentration also explains the lesser importance of discovery (advance information about the opponents witnesses and evidence) and pretrial procedures (preliminary discussions with opposing counsel and the judge to reach agreement on matters at issue and so on). Discovery is less necessary because there is little, if any tactical or strategic advantage to be gained from the element of surprise. There is no necessity for pretrial proceedings because there is no trial; in a sense every appearance in the first two stages of a civil-law proceeding has both trial and pretrial characteristics.

A second characteristic of the traditional civil-law proceeding is that evidence is received and the summary record prepared by someone other than the judge who will decide the case... The familiar pattern of immediate, oral, rapid examination and cross-examination of witnesses in a common-law trial is not present in the civil-law proceeding.6

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The different character of the judicial officer also explains the civil-law’s comparatively stronger reliance on written evidence, the absence of complex exclusionary rules of evidence, the statutory duty to express reasons for the judge’s decisions and to justify the judgment pursuant to specific articles of the law, and the generally accepted principle of two instances, pursuant to which appeal normally encompasses a trial de novo, rather than a simple review of issues of law:

As a general rule there is a right to an appeal in civil-law jurisdiction. Appeal has a special meaning here that is unfamiliar in the United States, where it is thought of as primarily a method of correcting mistakes of law made by the trial court. In the civil-law tradition, the right of appeal includes the right to reconsideration of factual, as well as legal issues. Although, the tendency commonly is to rely on the record prepared below as the factual basis for reconsideration of the case, in many jurisdictions the parties have the right to introduce new evidence at the appellate level. The appellate bench is expected to consider all of the evidence itself and to arrive at an independent determination of what the facts are and what their significance is. It is also required to prepare its own fully reasoned opinion, in which it discusses both factual and legal issues.

The use of a jury in civil action at the common law obviously forestalls review of the factual issues by an appellate court. The jury does not make specific findings of fact; it may, and often does, consider demeanor and other circumstantial factors; it need not justify (i.e. explain) its verdict; and its proceedings are not written. If the appellate court could independently decide factual questions, the jury’s role would, in effect, be nullified. As long as there is some factual basis in the record to support the jury’s (or the trial judge’s) verdict, the appellate court in a common law jurisdiction will honor it.10

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7 “There is in France, as in most civil law countries, a heavy reliance upon the written word: therefore, the majority of evidence tends to take the form of contract documents, letters, written testimony, etc.” Platto, Trial and Court Procedures Worldwide, at 140.

8 “A number of factors explain the substantial differences in the law of evidence between the civil law and the common-law tradition. One of the most important of these, again, is the matter of the jury. In civil actions in common-law jurisdictions, a variety of exclusionary rules, rules determining the admissibility or inadmissibility of offered evidence, have as their prime historical explanation the desire to prevent the jury from being misled by untrustworthy evidence. An alternative policy, one providing that the common-law jury be warned of the unreliability of the evidence but then be allowed to evaluate it on the basis of the warning, has uniformly been rejected. The evidence is totally excluded” Merryman, The Civil Law Tradition, at 116.

9 See, Katz, Legal Traditions and Systems, at 108. As opposed to the common-law, where “no such legal obligation to motivate their decisions attaches to the superior courts,” Jolowicz, On Civil Procedure, at 280.
The different understanding of the role of the judge also manifests in the different character of the profession: “The distinguishing attribute of the bench in Germany (and virtually everywhere else in Europe) is that the profession of judging is separate from the profession of lawyering. Save in exceptional circumstances, the judge is not an ex-lawyer like his Anglo-American counterpart. Rather, he begins his professional career as a judge.”\(^\text{11}\) The professional character of the civil-law judge has long historical roots, closely tied to the relatively minor role of lay juries in continental Europe.\(^\text{12}\) Judges in civil-law countries are, to some extent, regular administrative officers in charge of implementing policies defined by the legislator.\(^\text{13}\)

The appointment, discipline and removal of judges in civil-law and common-law countries also vary significantly. Judges in Canada, Australia and the USA are normally appointed after 20 or 30 years of the practice of law, whereas in many civil-law countries judges are appointed very young, \(e.g.,\) at twenty three years of age in Turkey. The removal and discipline of judges follow very different patterns. It takes a resolution of both houses of parliament to remove a Canadian judge, and there are no intermediate sanctions like those applied in civil-law countries. US federal judges are appointed for life, and their removal requires impeachment by Congress. Removal of Australian judges

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\(^{10}\) Merryman, \textit{The Civil Law Tradition}, at 120 (first emphasis added) (second emphasis in the original).
\(^{11}\) Langbein, \textit{The German Advantage in Civil Procedure}, at 848.
\(^{12}\) “The lack of a trial by jury did not fail to leave its traces in the organization framework of the judiciary, which is very similar in all of the civil law legal systems… The similarities of the court's organizational structure in civil law countries are not limited to the external appearance of the judiciary. They can also be found in the internal structure of the court... The number of professional judges [in civil law countries] is extremely high. Germany has more than 17,000 judges. In France the number is about 10,000.” Platto, \textit{Trial and Court Procedures Worldwide}, at 88.
\(^{13}\) See, \(e.g.,\) Merryman, \textit{The French Deviation}, at 116 (discussing how French judges have been portrayed as clerks); Damaška, \textit{The Faces of Justice and State Authority}, at 181-205 (explaining the policy-implementing notion of justice in continental Europe in historical perspective); Goodman, \textit{The Rule of Law in Japan}, at 162-92 (explaining the role of the judge in Japan, in comparison with the United States).
is equally difficult. Judicial ethics in common-law countries is normally governed by non-statutory guidelines developed by the judges themselves. All these measures aim at guarantying judicial independence and impartiality of the Common Law judge. Conversely, under the bureaucratic, policy-implementing ideal of the Civil Law judge, judicial activism is discouraged and State control over the judicial enforcement of public policy is tightly controlled not only through the mechanisms of appointment, discipline and removal of judges, but also through the narrower scope of work of the judicial office per se. For instance, in Civil Law countries the various stages of the procedure are often handled by different officers.

Finally, this different view of the place of the judge in society also explains the different format and function of statutory codifications of the law. In civil-law countries codes are autonomous, comprehensive and often all-inclusive statements of the law. To

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14 E.g., Canadian Judicial Council, *Ethical Principles for Judges*; The Australasian Institute of Judicial Administration Incorporated, *Guide of Judicial Conduct*. The Bangalore Principles are largely developed based on these pre-existing guidelines. There are no such “codes” of ethics in Germany or France, or throughout Latin America.

15 Damaška, *The Faces of Justice and State Authority*, at 147.

16 “Those under the influence of the French tradition have what the French call ‘la phase de l'instruction’. This is an investigatory phase conducted only by one of the subsequent decision-makers and not accessible to the public, should it include oral elements,” Platto, *Trial and Court Procedures Worldwide*, at 78; “‘L'instruction’ or, as it is called of late, ‘la mise en état’ and ‘la trattazione’ are much more than just the taking of evidence… In France [the investigatory judges] even belong to a special category of judges appointed as ‘judges de la mise en état’. They are expected to handle 200 to 250 cases every year. They have to do everything needed for a full clarification of the factual issues in dispute including, so to speak, if it is unavoidable, the taking of evidence. The judge has to set deadlines for procedural acts to be committed, particularly for completing factual allegations, submitting evidentiary materials and requesting that evidence be taken. Only after his conclusion that everything is clarified or that no further clarification is obtainable, may he return the case to the deciding body.” *Id.* at 80. See also, Devis Echandia, *Compendio de Derecho Procesal*, at 55.

17 “In the vast majority of civil-law countries, the bulk of private, penal and procedural law is enshrined in codes. For the historical reasons explained on previous pages, the codes were intended to be authoritative, systematic and comprehensive statements of the law on each of these subjects. The feature of comprehensiveness is particularly striking in the procedural codes. In the area of substantive private law, the codifiers provided for flexibility and future growth by incorporating certain number of broad, elastic formulations into the codes themselves. The adjective [procedural] codes, however, are meant to be essentially all-inclusive statements of judicial powers, remedies and procedural devices. In common-law
apply the law in civil-law countries means first and foremost, to ‘navigate the Codes.’\textsuperscript{18}

Common-law judges on the contrary, “created” the common-law.\textsuperscript{19} The different understanding of the role of “actions” as means to initiate judicial cases also stems from this basic difference in the role of judges in society; wider access may be afforded by a system populated by large numbers of young professional judges than one that relies on comparatively less numerous senior judges.\textsuperscript{20}

The evolution of the judicial system in France and other European civil-law countries during the 20\textsuperscript{th} century progressively departed from the 18\textsuperscript{th} century revolutionary perspective and largely expanded the discretion of the judge in the application of the law. Nonetheless, the original idea of strict control of the judge continued to permeate the system in several ways. This is particularly true in countries that adopted (by colonization or choice) the civil-law tradition in shaping the role of the judge during the 19\textsuperscript{th} century and the beginning of the 20\textsuperscript{th}, including most Latin American countries.\textsuperscript{21} Today the judicial systems in many civil-law countries in Europe exhibit several features that resemble those that seem to be more easily associated with

\textsuperscript{18} Cf. Shlesinger et. al., \textit{Comparative Law}, at 291, and Goodman, Carl, \textit{The Rule of Law in Japan}, at 10-11 (explaining the role of codes in the civil law tradition).

\textsuperscript{19} See, e.g., Shlesinger et. al., \textit{Comparative Law}.

\textsuperscript{20} See, e.g. Damaså“å“ka, \textit{The Faces of Justice and State Authority}, at 32 (explaining the 13\textsuperscript{th} century development of the “stratified corps of professional officials” in France, “to assert and extend royal power”), and generally, at 16 to 46 (for a description of diverging ideals of officialdom for the judicial officer in historical perspective).
the common-law tradition. The procedures before lay judges at the Tribunal de Commerce\textsuperscript{22} and the speed and simplicity of the small claims courts or procedures in various countries\textsuperscript{23} are recent examples of this mix. Outside of Europe the judicial systems of civil-law countries continue to exhibit some features of the old Romano-Canonic tradition, and in many cases they bear a stronger resemblance to the 19\textsuperscript{th} century European procedure—particularly, with regard to the role of the judge.\textsuperscript{24}

Nonetheless, despite all the variations and exceptions, the work of comparativists enables us to see two distinct models or ways of dealing with the problem of justice, which correspond to the civil-law and the common-law traditions.

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\textsuperscript{21} Merryman, \textit{The French Deviation}, at 116.
\textsuperscript{22} "For the members of the bar, the most interesting particularity of some of the civil law countries are certainly the commercial courts in France, Belgium and Zurich. In France, only business people not educated in the law serve as commercial law judges. Their judgments, however, are subject to normal appeal, to be disposed of by professional judges. In Belgium, a professional presiding judge works together with two lay assessors. Zurich has adopted the same system but no appeal can be made against the judgment of the commercial court, except on a point of law. In such a case, the appeal is to be lodged with the Federal Court. Hence the extraordinary authority and reputation of the Zurich Commercial Court." Platto, \textit{Trial and Court Procedures Worldwide}, at 87.
\textsuperscript{23} E.g., Whelan, \textit{Small Claims Courts: A comparative Study}.
\textsuperscript{24} "The most powerful consequence of the French doctrine of separation of powers may have been to demean judges and the judicial function. The attempt to depict the judicial function as something narrow, mechanical and uncreative and to portray judges as clerks, as we have noted, has had a self-fulfilling effect. Judges are at the bottom of the scale of prestige among the legal professions in France and in the many nations that adopted the French Revolutionary reforms, and the best people in those nations accordingly seek other legal careers. One result has been to cripple the judicial systems in a number of developing countries. In France, where everyone knows how to do what needs to be done behind the separation of powers facade, misrepresentation of the judicial function does not have severe consequences. But when the French exported their system they did not include the information that it really does not work that way, and they failed to include a blueprint of how it actually does work. That has created, and continues to create, problems in nations with limited legal infrastructures and fragile legal systems whose histories included nothing resembling the conflict between the French King and the provincial parliaments.” Merryman, \textit{The French Deviation}, at 116.
CHAPTER 3. LEGAL TRADITIONS AND JUDICIAL EQUILIBRIUM

This chapter revisits the legal traditions, civil-law and common-law, in light of the basic “judicial equilibrium” presented in the first part of this dissertation. As we saw above, in the revolutionary France the judge shall be “no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigor.”¹ To deliver “justice” means to follow the steps defined in the law; the system is built to follow steps one by one.² This translates into normally more detailed and longer proceedings.³ The available comparative empirical research on the steps and duration of litigation around the world tends to confirm this view. Everyday civil procedures, such as collecting a check or evicting a tenant, are of longer duration and take more steps in French legal origin countries than in common-law countries.⁴ Moreover, these findings⁵ seem to hold across time.⁶ Evidently there are variations

¹ Montesquieu, *The Spirit of Laws*, Book XI, ch. 6, supra note 4, at 47.
² In French origin countries procedure is formally divided into clear stages. This contrasts with the relative lack of formal sequence in common-law countries. “In Spain the formalized intermediate period of the proceedings is called ‘el periodo de la prueba’, or, the evidentiary phase of the proceedings… It is conducted by the ultimate decision-makers and it becomes obsolete if no proof of facts is to be taken… In France and Italy the distinct character of this particular period is much more emphasized.” Platto, *Trial and Court Procedures Worldwide*, at 80. This is also present in Germany: "By contrast, the episodic character of German fact-gathering largely eliminates the danger of surprise; if the case takes an unexpected turn, the disadvantaged litigant can count on developing his response in another hearing at a later time. Because there is no pre trial discovery phase, fact gathering occurs only once; and because the court establishes the sequence of fact gathering according to criteria of relevance, unnecessary investigation is minimized." Langbein, *The German Advantage in Civil Procedure*, at 831. See also Merryman’s quote at supra note 24 at 53. The concept of litigation step by step is present in article 2 of the New Code of Civil Procedure in France. But see, "[v]ery little of a formal sequence or other order regarding how the proceedings should be conducted is provided by law. In Germany, civil litigation amounts to a varying sequence of written communications, oral conferences, further briefs, particular acts of evidence-taking and a final oral hearing." Platto, *Trial and Court Procedures Worldwide*, at 82.
³ Djankov et.al, *Courts*.
⁴ Id.
⁵ The findings of comparatively longer duration of cases and more steps required to resolve a dispute in French legal origin countries, in Djankov et.al, *Courts*.
among individual countries—each one has its own history—but the trends seem clear and they help to understand the particular situation of each country in a broader perspective.

However, as we saw above, the increased procedural rigidity of the civil-law tradition, which has been found to be associated with increased burden and cost of litigation,7 arguably reflects a comparatively higher and perhaps fully-justified desire to ensure substantive justice. In other words, it may simply reflect a different, and possibly better, compromise between judicial efficiency, access to justice, and procedural guarantees. Professor Langbein convincingly argues that the governing role of the judge and the inquest procedures of the civil-law system, adequately address the fundamental inequality problem of the adversarial common-law, i.e., the “inequality of weapons.” In his words:

_The German system gives us a good perspective on another great defect of adversary theory, the problem that the Germans call “Waffenungleichheit”—literally, inequality of weapons, or in this instance, inequality of counsel. In a fair fight the pugilists must be well matched. You cannot send me into a ring with Muhammed Ali if you expect a fair fight. The simple truth is that very little in our adversary system is designed to match combatants of comparable prowess, even though adversarial prowess is a main factor affecting the outcome of litigation. Adversary theory thus presupposes a condition that adversary practice achieves only indifferently… Disparity in the inequality of legal representation can make a difference in Germany, too, but the active role of the judge places major limits on the extent of the injury that bad lawyering can work on a litigant. In German procedure both parties get the same fact-gatherer—the judge._8

Indeed, when the outcome of litigation depends so much on the parties, as it does in adversarial systems, the most affluent party—who can afford the best lawyer—is

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8 Langbein, _The German Advantage in Civil Procedure_, at 843.
more likely to win. Thus, the German judge intervenes, to protect the weak. In sharp contrast, let us consider the role of the judge according to the US Supreme Court (Ginsburg, J.):

In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present... as a general rule, “[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.” [Castro v. United States, 540 U. S. 375, 386 (2003)] (SCALIA, J., concurring in part and concurring in judgment). As cogently explained: “[Courts] do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide only questions presented by the parties...” United States v. Samuels, 808 F. 2d 1298, 1301 (CA8 1987) (R. Arnold, J., concurring in denial of reb’g en bane).9

In sum, while the U.S. judge is an impartial umpire, the blindfolded Lady Justice with the scales, the civil-law judge emerges as the protector of the weak (or the Buddha of Compassion in the Japanese variant), and this fact alone may fully justify allowing for comparatively more lengthy and cumbersome procedures.10 In terms of the basic “judicial equilibrium” of the first chapter, the two situations described above may be graphically presented as follows:

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10 In his seminal paper, professor Langbein goes one step further; he argues that German civil procedure is not only better than its American counterpart in terms of substantive fairness, but it is also more efficient: “Our lawyer-dominated system of civil procedure has often been criticized both for its incentives to distort evidence and for the expense and complexity of its modes of discovery and trial... My theme is that, by assigning judges rather than lawyers to investigate the facts, The Germans avoid the most troublesome aspects of our practice... The primary reason that German courts do less fact-gathering than American lawyers is that the Germans eliminate the waste.” Langbein, The German Advantage in Civil Procedure, at 823 and 846. In light of the most recent empirical evidence discussed above, the opposite view seems more likely to be true—at least with respect to French-legal-origin countries.
Efficiency and access to justice

Civil-law and common-law traditions seem to have achieved different equilibriums. In civil-law countries procedural and substantive safeguards tend to restrict judicial efficiency to protect the weak party to the dispute and enhance procedural and substantive fairness. In common-law countries, conversely, the guarantee of procedural fairness relies heavily on judicial discretion (and substantive fairness partly relies on efficient markets\textsuperscript{11}). This may explain why common-law countries have been found empirically to have more efficient proceedings than civil-law countries, at least for simple litigation. In other words, civil-law tends to be more protective of the weaker party in the dispute, which is commonly the defendant.

The next question is whether these variations among civil-law and common-law countries are by design—i.e., they reflect slightly different cultural notions of what is “fair” or “just” in England, France and Germany over the centuries—or simply a product of historical chance or political compromise. The author of this paper tends to

\textsuperscript{11} See, e.g., landlord-tenant disputes in New Zealand, discussed above.
think that in the case of “mother” countries it may be both. The different judicial equilibrium among civil-law and common-law countries reflects a slightly different understanding of what is “fair,” which in turn is deeply rooted in history and long-forgotten political compromises.\(^{12}\)

In the United States “justice” means “fair play,” the judicial process is a contest, and the judge is an umpire. The function of the American judge is to guarantee an **efficient and fair process**. In contrast, in civil-law countries the judge is the good old Roman *pater familias*, who has a say and becomes involved in every dispute within the family. The function of the civil-law judge is to ensure a **fair outcome**.\(^ {13}\) Moreover, in other civil-law countries that have millenary autochthonous traditions, justice is represented by the Buddha of Compassion; “the Japanese criminal law system has harmony as its goal.”\(^ {14}\) In this civil-law variant, the function of the judge is to restore social harmony.

Now let us pause to consider whether these two different judicial equilibriums of the Civil-law and the Common-law traditions which are found in the comparative law literature, actually reflect the way that justice delivery operates in practice, as revealed by extensive polling of the general public (users of the system) and legal practitioners (agents of the system) in a large sample of countries today.

\(^{12}\) *I.e.*, a different power balance between the Crown and the feudal lords. *See*, e.g., Damaška, *The Faces of Justice and State Authority*, at 32.

\(^{13}\) *See*, e.g., Kaplan, *Civil Procedure—Reflections on the Comparison of Systems*, at 431 (U. S. system “exploits the free-wheeling energies of counsel and places them in adversary confrontation before a detached judge”; “German system puts its trust in a judge of paternalistic bent acting in cooperation with counsel of somewhat muted adversary zeal”).

\(^{14}\) Goodman, *The Rule of Law in Japan*, at 504.
CHAPTER 4. EMPIRICAL CONFIRMATION: QUANTITATIVE ANALYSIS OF JUSTICE
DELIVERY IN HIGH-INCOME COUNTRIES.

This chapter summarizes the outcome of a statistical analysis of cross-sectional
data on the delivery of formal justice, which provides some empirical confirmation of
the enduring impact of legal traditions in day-to-day dispute resolution in high income
countries. This analysis compares the overall effectiveness of the judicial system in
delivering *impartial, efficient and accessible* justice (the “judicial equilibrium”) across
legal families for a sample of 66 countries. The data used for the analysis includes some
150 variables which measure the accessibility, impartiality and efficiency of civil and
criminal justice and private arbitration, from the perspective of the ordinary user of the
system—the lay citizen.

This analysis was originally developed for this SJD dissertation. It was
subsequently presented by the author at the *Conference on Law and Development of Middle-
Income Countries* at The University of Chicago Law School (April 20-21, 2012). This
analysis was also accepted for publication by Cambridge University Press as a separate
paper entitled “The Delivery of Justice in Middle-Income Countries,” as Chapter 10 of
the volume entitled *Law and Development of Middle Income Countries*, edited by Randall
Peerenboom and Tom Ginsburg.

The purpose of this analysis is to explore whether in practice: (i) The overall
effectiveness of the judicial system is determined by policy choices inherent to the legal
architecture of the main legal traditions of the world—the civil-law and the common-

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15 The paper presented at the conference as well as an audio recording of the presentation are available
from the web page of the University of Chicago Law School, at:
law. (ii) These policy choices have effectively migrated from “mother” to “transplant” countries within legal families both in the Global North and the Global South. (iii) Other factors beyond the legal architecture or the level of resources—such as the prevalence of corruption—explain the overall effectiveness of civil and criminal justice across countries. The data sources, methods, and statistical results of the analysis are presented as Appendix 1.17

Legal traditions

The following table shows the country scores obtained by the 23 high-income countries18 included in the sample, grouped by legal tradition. Scores range from 0 to 1, where 1 signifies higher degree of access, impartiality or efficiency of justice, as compared to a global sample of countries.

17 Methods are described in full in Appendix 1, at the end of this dissertation. This footnote summarizes these methods: eight new indicators (civil access, civil efficient, civil impartial, criminal efficient, criminal impartial, ADR access, ADR efficient, ADR impartial) are produced based on over 150 variables which aggregate into the various components of the WJP Rule of Law Index 2011 that measure justice. These new indicators measure the “judicial equilibrium” presented in the first chapter of this dissertation. Independent variables employed are legal origin, GDP per capita, and absence of corruption. First, bi-variate analyses are conducted by legal origin and income-level group. Secondly, multi-variate analyses are conducted for civil and criminal justice indicators by legal origin, controlling by per-capita income and prevalence of corruption. For each variable of civil or criminal justice effectiveness, three models are analyzed for a sub-sample of all high and middle-income countries. In the first model only legal origin is included; common law is used as comparison category against French and German legal origin. In the second model GDP per capita is introduced in the analysis, under the rationale that the overall level of resources available in society may determine the effectiveness of justice delivery across countries, regardless of legal architectures derived from policy choices of the civil-law and common-law traditions. In the third model absence of corruption is included. Corruption is included as a proxy for other variables. The rationale is that other characteristics of the judicial system, which are independent of the design of the system per-se, such as the prevalence of corruption, may determine the effectiveness of the delivery of justice beyond the policy choices of the legal families and the level of resources available in society.
18 The table includes 22 countries (listed in the table below) and one jurisdiction, Hong Kong SAR China. Income groups are classified according to the World Bank’s standard classification, among high, middle and low-income countries, based on their per capita gross domestic product, supra note 1, at 1.
<table>
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<th>Country</th>
<th>CIVIL ACCESS</th>
<th>CIVIL IMPARTIAL</th>
<th>CIVIL EFFICIENT</th>
<th>CRIMINAL IMPARTIAL</th>
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<td><strong>0.66</strong></td>
<td><strong>0.88</strong></td>
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The bivariate analyses among high-income countries presented in Appendix 1 suggest that the civil-law and common-law traditions have developed different judicial equilibriums. Among high-income countries in both traditions, justice appears to be equally impartial. However, there are statistically significant differences between
common-law and civil-law countries in terms of the trade-off between access and efficiency of justice. The delivery of civil justice in common-law countries appears to be more efficient (T-stat 2.62*), and less accessible (T-stat -3.98**) than in civil-law countries. Scandinavian countries, on the other hand, outperform both civil and common-law countries in terms of judicial efficiency, while also providing as much access to civil justice as the French and German origin countries. They also obtain significantly higher scores in terms of the impartiality of the civil justice system.

In terms of the “Judicial Equilibrium” outlined in the first section of this paper, these differences may be presented graphically as follows:

![The Judicial Equilibrium in high-income countries, by legal family](image)

In terms of criminal justice, the numbers suggest that both civil and common-law countries deliver equally impartial justice. However, criminal justice is statistically significantly more efficient in common-law countries (t-stat 2.33*). Unfortunately, no measure of access to criminal justice is available. Finally, there appears to be no significant difference in the efficiency, accessibility and impartiality of alternative dispute resolution mechanisms available in civil and common-law countries.
The multi-variate analyses presented in Appendix 1 of this dissertation generally confirm all the above findings.

**Legal families** and policy choices

The data supports the notion that at least in high-income countries the civil-law and common-law traditions have developed significantly different “judicial equilibriums.” These results confirm empirically our expectations from the comparative law literature and other qualitative and anecdotal evidence presented in the first and second sections of this dissertation.

Indeed, the civil-law and common-law traditions have achieved significantly different balances among accessibility, efficiency and impartiality of justice. Consistent with the comparative law literature, procedural and substantive safeguards in civil-law countries appear to restrict judicial efficiency to protect the weak party and to enhance procedural and substantive fairness. Similarly, access to justice in civil-law countries is enhanced by a comparatively larger cadre of young professional judges tasked with the duty to implement the law (rather than creating it or adapting it to the particular circumstances of the case). In common-law countries, conversely, the guarantee of

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19 The concepts of “legal family” and “legal tradition” are used here interchangeably; *infra* note 20, at 7.

20 While Jean-Ethienne-Marie Portalis expressly refers to judges as those who adapt the inflexible words of the law to the fluid circumstances of the particular case (*Discours Preliminaire du Premier Project de Code Civil*), the revolutionary movement largely limited the role of the judge to specific instances of legal interpretation, which were themselves governed by statute. This represents a significant departure from the Germanic role of the judge in the *pais de droit coutumier*. The Napoleonic Civil Code and the Code of Civil Procedure had a long lasting legacy in civil law countries around the world, including a more limited role of the judge. German civil law countries arrived to an intermediate position between the common-law and the French family; by adopting through *The Reception* the Roman law of the late (Justinian) period, they inherited a somewhat limited role of the judge, as the final period of Roman procedure was characterized by the “bureaucratization” of justice. *See, e.g.,* Caenegem, *History of European Civil Procedure*; Véscovi, *Teoria General del Proceso*, at 25-39; Wenger, *Institutes of the Roman Law of Civil Procedure*, at 255-61; Kolbert, “General Introduction” in Justinian, *The Digest of Roman Law*, at 12-19.
procedural fairness heavily relies on a body of comparatively more selective, less numerous, less accessible, more senior, and more autonomous judges.

Comparative deficiencies in judicial outcomes across legal traditions appear to be the result of different policy choices made by the legal families with regard to the inescapable trade-off among efficiency, impartiality and accessibility of justice. Common-law chose comparatively more efficient and independent justice, while civil-law opted for more accessible and protective or “equalizing” justice. In other words, the most recent comparative dataset about dispute resolution available in the world tend to confirm the notion that the tenant-friendly procedure of France, Germany and Japan discussed in the first chapter of this paper largely reflects a different (not necessarily better or worse) notion of “fairness” than the plaintiff-friendly procedure of the USA, Australia and New Zealand. In sum, among high-income countries, the overall effectiveness of the judicial system in delivering impartial, efficient and accessible justice (the judicial equilibrium), is determined by policy choices inherent to the legal architecture of the main legal traditions of the world - the civil law and the common-law.

21 See detailed description of landlord-tenant disputes in civil law and common-law countries in the first chapter of this paper.
PART THREE
LEGAL TRANSPLANTS

Since most countries in the world belong to the civil-law and the common-law traditions, and since these legal traditions reflect “a set of deeply rooted, historically conditioned attitudes about the nature of the law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught,” one would expect that the different ‘judicial equilibriums’ found in these two legal families—which are clearly documented in the comparative law literature and confirmed empirically—must have migrated to transplant countries in low and middle-income countries together with the laws and institutions that embody them. We shall see.

The third part is divided into four chapters. The first chapter presents a cross-sectional quantitative analysis of the delivery of justice across legal families; the analysis suggests that while the civil-law and common-law traditions may have reached significantly different judicial equilibriums in high income countries, those features of the legal system have not effectively migrated from “mother” to “transplant” countries in low and middle-income countries. The second chapter proposes the notion that the “transplantation” process may have contributed to create a fundamental disconnect between complex law and everyday reality in low and middle-income countries, which

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2 [repeated footnote, supra, note 20, at 7] See, e.g., Watson, Legal Transplants: An approach to Comparative Law. Michele Graziadei argues that the term “legal transplant” is “ill-adapted to capturing the gradual diffusion of the law or the continuous nature of the process that sometimes leads to legal change through the appropriation of foreign ideas” (Graziadei, Comparative Law as the Study of Transplants and Receptions, at 443). She mentions alternative terms that she considers more appropriate, such as ‘circulation of legal models’, ‘reception’, ‘transfer’, ‘influence’, ‘inspiration’, and ‘cross-fertilization’. I think that these are different concepts. Sometimes countries adopt their own laws under the ‘influence’ or ‘inspiration’ of other
leads to an abstruse and hostile judicial system for vast segments of the population of these countries. The third chapter considers the reasons why such procedural complexity may be justified and necessary in low and middle-income countries. Chapter four explores the possibility that those reasons to justify procedural complexity may also mask less benevolent goals; it suggests that legal elites in developing countries, deliberately or inadvertently, use the legacy of ‘legal traditions’ to justify structural inefficiencies and inequities of the legal process.

countries, sometimes the laws are just foreign ‘transplants’, as is discussed in detail in the third chapter of this paper.
CHAPTER 1. EMPIRICAL CONFIRMATION: QUANTITATIVE ANALYSIS OF JUSTICE DELIVERY IN LOW AND MIDDLE-INCOME COUNTRIES

This chapter summarizes the outcome of a statistical analysis of cross-sectional data on the delivery of formal justice in low and middle-income countries. The analysis (presented in Appendix 1) compares the overall effectiveness of the judicial system in delivering impartial, efficient and accessible justice (the “judicial equilibrium”) across legal families for a sample of 66 countries.

Legal traditions among “transplant countries”

When the accessibility, impartiality and efficiency of justice are compared across legal families in middle-income countries, results are very different from those obtained in high-income countries. The following table shows the country scores obtained by 35 middle-income countries included in the sample, grouped by legal tradition.

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<tr>
<th>Country</th>
<th>CIVIL ACCESS</th>
<th>CIVIL IMPARTIAL</th>
<th>CIVIL EFFICIENT</th>
<th>CRIMINAL IMPARTIAL</th>
<th>CRIMINAL EFFICIENT</th>
<th>ADR ACCESS</th>
<th>ADR IMPARTIAL</th>
<th>ADR EFFICIENT</th>
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<td>0.50</td>
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<td>0.48</td>
<td>0.32</td>
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</tbody>
</table>

1 Income groups are classified according to the World Bank’s standard classification, among high, middle and low-income countries, based on their per capita gross domestic product, supra note 1, at 1.

2 Scores range from 0 to 1, where 1 signifies higher degree of access, impartiality or efficiency of justice, as compared to a global sample of countries.
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<th>Dominican Rep.</th>
<th>El Salvador</th>
<th>Guatemala</th>
<th>Indonesia</th>
<th>Iran</th>
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<th>Lebanon</th>
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</table>

Results among middle-income countries (presented in Appendix 1), are very interesting. When only middle-income countries are taken into account, the differences across legal families observed among high-income countries disappear. There are no statistically significant differences between civil-law and common-law countries in terms of the efficiency and impartiality of civil and criminal justice, or in the accessibility, efficiency and impartiality of private arbitration. Only a statistical trend is noted in the case of accessibility of civil justice, where civil-law countries appear to be more accessible...
than their common-law counterparts (t-stat -2.00†). This stands in sharp contrast to the strongly significant variations across legal families found among high-income countries.

**Income groups - 66 countries**

When all 66 countries are grouped by income level (see Appendix 1), income appears to be a defining factor for all justice effectiveness variables, except one. The delivery of justice in high-income countries significantly outperforms middle and low income countries in all dimensions, with the only exception of the accessibility of private arbitration.

Middle-income countries significantly outperform low-income countries in the delivery of accessible and impartial civil justice, and impartial private arbitration. Interestingly, the justice gap between high and middle-income countries appears to be wider than that between middle and low-income countries, particularly with regard to criminal justice outcomes. The efficiency of civil justice, as well as the efficiency and impartiality of criminal justice in middle-income countries, are not higher than in low-income countries.

**Legal origin, income level, and corruption**

The following paragraphs summarize the outcome of a series of linear regression analyses of the five variables of civil and criminal justice effectiveness, among 23 high-income and 35 middle-income countries.

**Access to civil justice:**

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3 Upper and lower middle-income countries are grouped together in this analysis. While there are some variations among these two sub-groups of countries, they are comparatively smaller than those between high, middle and low-income countries.
Among high-income countries both French and German civil-law countries deliver more accessible justice than their common-law peers. These results hold after introducing GDP per capita and absence of corruption in models 2 and 3 of the analysis. Among middle-income countries, however, results are different. When GDP per capita is taken into account, civil-law countries do not deliver more accessible justice than their common-law peers.

**Efficiency of civil justice:**

Among high-income countries, common-law countries deliver more efficient justice than their civil-law (French and German) peers. These results hold after introducing GDP per capita. However, when absence of corruption is taken into account, differences across legal families disappear. Among middle-income countries there are no statistically significant differences across legal families in the efficiency of civil justice.

**Impartiality of civil justice:**

Legal origin and GDP per capita are not significant predictors of impartiality of civil justice among high-income countries or middle-income countries. As expected, absence of corruption is a strong predictor of impartiality of civil justice among both income groups.

**Impartiality of criminal justice:**

Among high-income countries, legal origin and GDP per capita are not significant predictors of impartiality of criminal justice. Among middle-income countries, legal origin is not significant when taken alone (model 1), but it becomes significant
when GDP per capita is introduced (model 2). As expected, absence of corruption is a strong predictor of impartiality of criminal justice among both income groups.

**Efficiency of criminal justice:**

Legal origin is a significant predictor of criminal efficiency among high-income countries when taken alone and when GDP per capita is considered (models 1 and 2), but it loses significance when absence of corruption is introduced in model 3; it only remains as a trend for French origin countries. Among middle-income countries legal origin and income per capita are not significant predictors of criminal efficiency. Absence of corruption is significantly associated with criminal efficiency in both income groups.

**Legal “transplants” and the broken “judicial equilibrium” in low and middle-income countries**

This analysis suggests that the judicial equilibrium developed by “mother” countries does not appear to have effectively migrated to “transplant” countries; there seems to be a fundamental disconnect between the architectural design of judicial institutions and the practical delivery of justice in low and middle-income countries.

Justice outcomes among low and middle-income countries do not appear to reflect policy choices of the legal families. In other words, comparative deficiencies in judicial outcomes are not the result of implicit policy choices documented in the comparative law literature. Overall, the characteristics of the delivery of justice in middle-income countries in practice does not mirror those of high-income members of their respective legal families, despite the fact that a number of the actual codes, statutes and
procedures applicable in transplant countries are remarkably similar to those of their legal “mothers.” The “judicial equilibrium” appears to be broken.

**The declining influence of legal families**

Legal origin fails to explain judicial outcomes in transplant countries in all dimensions of judicial effectiveness analyzed here, with the possible exceptions of access to civil justice and impartiality of criminal justice. Overall, the data shows a significant decline in influence of the legal traditions in the delivery of justice outcomes.

Legal origin partially explains differences among middle-income countries in accessibility of civil justice, *i.e.*, the comparatively less accessible justice delivered by middle-income countries that belong to the common-law family, as compared to their civil-law income-level peers, may be an expression of a deliberate compromise for a relatively more independent and senior judiciary. Thus, less accessible civil justice in common-law middle-income countries does not necessarily mean worse justice; it probably reflects more independent justice. Yet, more independence does not necessarily translate into more impartiality. According to the evidence presented above, there are no statistically significant differences between legal families in terms of impartiality of civil justice. Nonetheless, when GDP per capita is taken into account, middle-income countries of the common-law tradition seem to deliver more impartial criminal justice than their civil-law (French and German) income-level peers. These appear to be remnants of an old compromise between accessibility of justice and judicial independence, which was probably driven by legal tradition.
The justice/income gap

The main finding of this study is to provide empirical confirmation to the justice gap between high and middle-income countries. People and companies in middle-income countries face statistically significantly bigger restrictions to access courts than people and companies in high-income countries. Moreover, the quality of justice in middle-income countries is also statistically significantly lower. Both civil and criminal courts and ADRs are less efficient and less impartial in middle-income countries than among high-income countries. In other words, there is a significant justice gap in all dimensions of judicial effectiveness between high and middle-income countries. These findings confirm empirically the expectations from very extensive qualitative and anecdotal evidence from the development literature.4

Among middle-income countries we find a complex amalgam of “mixed systems,” i.e., systems that do not entirely follow either the civil-law or the common-law traditions. The distinction between French and German legal origin countries is blurred among middle-income countries. More importantly, all these mixed systems deliver sub-optimal outcomes: civil and criminal justice in middle-income countries is significantly less accessible, impartial and efficient than in high-income countries. ADRs are also less impartial and efficient. None of these findings appear to reflect deliberate policy choices of the legal families. This suggests that the determinants of justice effectiveness in high-income countries may not be the same as those in middle-income countries (MICs).

4 See generally, e.g., UNDP, Report of the Commission on Legal Empowerment of the Poor; Coller, The Bottom Billion; Anderson, Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs.
Finally, our basic bi-variate analyses of low-income countries (LICs) suggest another big gap in the delivery of justice between middle and low-income countries. Just as the determinants of justice effectiveness among high and middle-income countries are not uniform, those determinants among middle and low-income countries appear to vary. This fact has interesting policy implications for those working on judicial reform in developing countries. Nonetheless, results must be taken with a grain of salt, given the small size of our sample of LICs.

Corruption

Consistent with extensive economic development literature, the overall level of corruption emerges as an important determinant of justice outcomes among middle-income countries in all dimensions of judicial effectiveness analyzed in this study. Corruption is considered here as a proxy for other unobserved variables.

In sum:

- In high income countries, the overall effectiveness of the judicial system in delivering impartial, efficient and accessible justice (the “judicial equilibrium”), is determined by policy choices inherent to the legal architecture of the main legal traditions of the world—the civil-law and the common-law.\(^5\)
- These policy choices have not effectively migrated from “mother” to “transplant” countries within legal families in low and middle-income countries.

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\(^5\) As it is explained in Chapter 4 of Part 2, above, comparative deficiencies in judicial outcomes across legal traditions appear to be the result of different policy choices made by the legal families with regard to the inescapable trade-off among efficiency, impartiality and accessibility of justice. Common-law chose comparatively more efficient and independent justice, while civil-law opted for more accessible and protective or “equalizing” justice.
• Other factors beyond the legal architecture or the level of resources—such as the prevalence of corruption—explain the overall effectiveness of civil and criminal justice in low and middle-income countries.

**Implications for this dissertation**

What are the implications of these findings for this dissertation? The main implication is that data appears to question the validity of the claim by legal elites in low and middle-income countries that structural inefficiencies and restrictions of access in the legal system are justified—or justifiable—as safeguards of Justice (with capital J) derived from the legal traditions. While one may reasonably argue that the less efficient landlord-tenant procedure of the civil-law tradition reflects a more protective and perhaps more fair judicial equilibrium in France or Japan, one may not argue that the less efficient, less accessible and less impartial justice delivered by civil and common-law countries in low and middle-income countries is a reflection of reasonable policy choices under a different judicial equilibrium. In other words, the data suggests that legal and procedural restrictions in developing countries are as much safeguards of Justice (with capital J) as they are instruments of monopoly power and exclusion.
CHAPTER 2. LEGAL “TRANSPLANTS” AND ACCESS TO JUSTICE

Professor Merryman instructs us that “[t]he legal tradition relates the legal system [of a particular country] to the culture of which it is a partial expression. It puts the legal system into cultural perspective.” Or does it?

The Chief Justice of Ghana is highlighted here precisely because this progressive country is a model for the world. Ghana judicial system is remarkably effective, ranking first among low-income countries, and second among Sub-Saharan African countries, in delivering accessible, efficient and impartial civil and criminal justice, according to the WJP Rule of Law Index 2011. Arguably, adherence to the rule of law in Ghana is about as

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1 Merryman, The Civil Law Tradition, at 2 (emphasis added).
2 Regional and income-level rankings are available at Agrast et.al., WJP Rule of Law Index 2011, at 113 and 115.
high as it is in Greece and other developed countries. Yet, Ghana’s formal courts are as nicely adapted to the needs of ordinary citizens, as the wig and gown of Madam Chief Justice (in the picture), are adapted to the weather conditions of this beautiful tropical country. There is fundamental disconnect between the elegant wig and gown of Madam Chief Justice and the hot, humid, tropical weather of Ghana. The laws that go with the wig are no different.

Most European legal institutions have been “transplanted” from the “mother” countries into their colonies and other territories. However, procedures have not been adopted by recipient countries upon a reasoned finding—after careful examination—that these procedures would fit the culture and needs of these particular societies. Quite to the contrary, laws and procedures have been largely copied and adopted in “transplant” countries because the adoption was either forcefully imposed by the colonizers, or voluntarily adopted by local elites as instruments to perpetrate existing power allocation arrangements. The extent to which these foreign laws and procedures adapt to the idiosyncratic needs of the broader population varies from country to country and it largely depends on the process of transplantation. In the United States, for instance, subsequent waves of immigrants from Sweden, Germany, Ireland, Poland, Italy and many other countries during the past two centuries have generally integrated into the

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3 Ghana’s scores in the WJP Rule of Law Index, which measures adherence to the rule of law worldwide, are higher than those of Greece in the dimensions of Limited Government Powers (checks and balances on the government power), and Open Government. Scores are lower in Ghana in the areas of Absence of Corruption, Order and Security, and delivery of Criminal Justice. Scores for all countries are available at: [http://worldjusticeproject.org/rule-of-law-index](http://worldjusticeproject.org/rule-of-law-index).

4 But see, supra note 21, at 9.
broader community by the second or third generation,\(^5\) while other immigrants, such as the Chinese in San Francisco or New York, have maintained their separate sub-culture and dispute resolution methods for generations.

The most tenacious defense of traditional practices came from Chinese and Jewish immigrants. Despite their evident cultural differences, they shared certain attributes which differentiated them from the overwhelming majority of voluntary immigrants to the United States. Both were, of course, outsiders to Western Christianity; indeed, both had been deeply wounded by it. Anglo-Saxon legal institutions not only were foreign, but often overtly hostile. Chinese and Jewish newcomers, fiercely determined to preserve distinctive cultural identities, retained institutions of conflict resolution that antedated Anglo-American common-law by centuries.

Chinese mediation and Jewish arbitration were the most enduring forms of indigenous immigrant dispute settlement. The Chinese experiment was enclosed within Chinatowns and has remained largely inaccessible to Western outsiders. But it provides fragmentary evidence of sustained resistance to acculturation while the Chinese preserved an insulated enclave within American society. Jewish arbitration, by contrast, suggests the complexities of immigrant dispute settlement not only as a form of cultural resistance but as a process of cultural adaptation. Accommodation, after all, was an integral part of Jewish history and pervasive theme of the American Jewish experience.\(^6\)

In the same vein, for most native-Americans in the United States—the original indigenous communities—the European institutions of law and justice have generally been perceived for centuries as a foreign imposition.\(^7\) The attitudes of native-Americans with European law in the United States are similar to those of vast segments of the

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\(^{6}\) Auerbach, Justice Without Law?, at 73.

\(^{7}\) See, Banner, How the Indians Lost Their Lands, at 1. (“The Indians were really conquered by force..., but Americans and their British colonial predecessors papered over their conquest with these documents [treaties] to make the process look proper and legal”); Robertson, Conquest by Law, at Preface, page IX (“Over a succession of generations, Europeans devised rules intended to justify the dispossession and subjugation of the native peoples of the Western Hemisphere”); Duthu, American Indians and the Law, at xxii (“on June 9, 1855, Kamiakin rose last among his fellow tribal leaders, made his mark on the treaty and returned to his seat with his lips ‘covered with blood, having bitten them with suppressed rage’”); Breyer, For their Own Good, at 30 (“In 1836, the United States and the State of Georgia forced the Cherokee Indian tribe to leave its home in Georgia and to move to the West. The Tribe did not want to move. It believed it..."
population in most countries in Africa, Asia and Latin America, where European laws and institutions were transplanted by the colonizers. As Hannah Irfan tells us, in Pakistan “one of the major reasons that women victims are reluctant to take action against violence through the courts is that they fear the system of which they have no knowledge. The inadequacy of knowledge and information about the legal processes made the thought of even going to court frightening.”

More often than not, from the point of view of the common citizen, legal institutions in low and middle-income countries throughout the world feel like a foreign intrusion. Transplant institutions, laws and procedures were often kept for decades or centuries after independence because they helped to maintain stability during tumultuous times. Elites in those countries tended to support the foreign transplants as they contributed to sustain the status quo which favored the interests of the heirs of the original colonizers once formal colonization ended—for instance, those of white creoles in Latin America, Afrikaans in South Africa, and Americo-Liberians in Liberia. But it shall not escape the reader that for the vast majority of the population in most low and middle-income countries, transplant institutions may not reflect the idiosyncratic aspirations and needs of the people. For instance, what is the use of the right to file an

had a legal right to stay… [The outcome of this engagement is a] tragic story in the history of the Cherokee Tribe”.

8 Faundez, Access to Justice and Indigenous Communities in Latin America, at 83, (“the indigenous communities’ views about legal institutions bear little resemblance to liberal views about law. Instead of seeing them as friendly institutions that empower and liberate individuals, they regard them as the cause and symbol of their longstanding economic and political oppression.”); also at 93-94.
9 Irfan, Honor Related Violence Against Women in Pakistan, at 19 (emphasis added).
10 French, Spanish and Portuguese descendants (Encyclopaedia Britannica on-line, at http://global.britannica.com/EBchecked/topic/142548/Creole “Creole, Spanish Criollo, French Créole, originally, any person of European (mostly French or Spanish) or African descent born in the West Indies or parts of French or Spanish America (and thus naturalized in those regions rather than in the parents’ home country).” Last visited: June 12, 2013).
appeal—an example of an European transplant legal institution—if, as in a Liberian village today, there are no judges outside of Monrovia and those in the city are completely out of reach? For the average person in Liberia, the basic service of the police is unavailable—outside of Monrovia, the closest police officer may be hundreds of miles away. Thus, when services as basic as those of police assistance are a luxury (generally unavailable to the vast majority of the population), the recourse to an appellate judge—the Anglo-American transplant—becomes entirely meaningless for virtually everybody in the country, except for the local elites who control the transplant laws and institutions (in Liberia, the Americo-Liberians). When court and attorney fees are worth several times the amount of the claim—for everyday folks in developing countries around the world—and there are no effective functional equivalents to the American or Japanese small-claims courts, the judicial system may be perceived by the common folks as a charade.11

Skeptics may argue that access to justice is equally restrictive in the United States and other developed countries. Indeed, as Deborah Rhode reminds us, “‘Equal justice under the law’ is one of America’s most proudly proclaimed and widely violated legal principles… Millions of Americans lack any access to justice, let alone equal access… Fewer than 1 percent of lawyers are in legal aid practice, which works out to about one lawyer for every 1,400 poor or near-poor person in the United States.”12 Nonetheless, while it is true that access to justice is limited in developed countries, it is much more

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11 In Japan “there are over 400 Summary Courts [whose] jurisdiction is limited to small claim cases. These courts are similar to United States Small Claims Courts.” Goodman, The Rule of Law in Japan, at 338. There are no functional equivalents to these institutions in most developing countries or, when present, they face procedural and other barriers that severely restrict their efficacy.

12 Rhode, Access to Justice, at 3 and 4.
limited in developing ones. If in the USA the ratio of lawyers serving poor people is one per 1,400 people, in Liberia there are only 250 lawyers in the entire country,\textsuperscript{13} serving a population of 3.4 million people.\textsuperscript{14} Since only a few of these 250 lawyers serve poor people, the ratio of lawyers serving the poor is probably well below one per 100,000 people. The difference between the USA and Liberia is of many orders of magnitude.

While there is an access to justice gap between high and low-income people almost everywhere in the world,\textsuperscript{15} this gap is more pronounced in low and middle-income countries; the divide between a highly sophisticated legal elite and the general population, is significantly more pronounced in these nations.\textsuperscript{16} The resolution of basic civil disputes in court in high-income countries is significantly more efficient and effective than in middle and low-income countries.\textsuperscript{17} Moreover, in most developing countries the cost of litigation (court and attorney fees) for even the most basic disputes is significantly higher than the monthly minimum wage.\textsuperscript{18} The net result is that in many developing countries formal courts do not seem to be an effective dispute resolution mechanism for the poor and other marginalized segments of society.\textsuperscript{19}

\begin{itemize}
\item \textsuperscript{13} I personally visited the registry and confirmed that in November of 2008, there were only 149 ‘qualified’ (licensed) lawyers in the country. According to the United Nations Office on Drugs and Crime (UNODC), the number of lawyers had increased to 250 by the end of 2011. United Nations Office on Drugs and Crime, \textit{Access to Legal Aid in Criminal Justice Systems in Africa}, at 12.
\item \textsuperscript{15} Cf, Agrast et.al., \textit{WJP Rule of Law Index 2011} (providing scores for access to civil justice for 66 countries). Notable exceptions include Germany, Sweden and the Netherlands, among other countries, where citizens’ income-level is not a determinant of access to justice. In most other countries, including the USA and Canada, poor individuals face significantly higher restrictions to access the court system.
\item \textsuperscript{16} See, e.g., Abel, \textit{The Politics of Informal Justice}, Chua, \textit{Markets, Democracy, and Ethnicity}.
\item \textsuperscript{17} Chapter 4 of this dissertation, below. \textit{See also}, Djankov et al., \textit{Courts}; Anderson, \textit{Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs}.
\item \textsuperscript{18} Chapter 4 of part 3 of this dissertation, below.
\item \textsuperscript{19} \textit{See generally}, part 4 of this dissertation. Other compounding factors include cultural traditions about dispute resolution forums, such as the culturally accepted—although often not legally binding—requirement among several religious groups to take disputes only to religious courts (Bet Din, Sharia, and
There are profound differences among societies on fundamental attitudes and social values, which impact the role of law and justice in these societies. One of the natural consequences of the recognition of this fact is that a certain “judicial equilibrium” that may be perfectly suited to a particular society in a particular time, may not fit another society or a different time.\(^{20}\) The previous chapters of this dissertation have shown how Roman, English and French procedures experienced dramatic transformations over the centuries, in response to changing social and political realities. Procedures changed as societies encountered the need to strike a different balance among the various elements of the legal and judicial apparatus. And arguably the evolution of the civil-law and the common-law traditions have led to slightly different “judicial equilibriums” that reflect different—deeply-rooted—tastes and cultural choices.

But we have also documented how this genuine search for the best balance among procedural guarantees and access to justice (the “judicial equilibrium”) does not tell the whole story. Procedures changed as a consequence of power struggles, so they also—and perhaps mainly—reflect different political arrangements among various powerful constituencies. This situation has profound consequences for “transplant” countries.

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\(^{20}\) Cf. Graziadei, *Comparative Law as the Study of Transplants and Receptions*, at 472.
Professor Merryman was wrong; the legal tradition does not “relate the legal system
[of a particular country] to the culture of which it is a partial expression.” Outside of the
“metropolis,” it relates the legal system only to the culture and needs of the colonizers.
For the vast majority of the population of developing countries the legal system often
remains a distant and even frightening “transplant,” not an integral part of their culture.
Even if we could argue that the tenant-friendly procedure of France, Germany and Japan
reflect a different notion of “fairness” than the landlord-friendly procedure of the USA,
Australia or New Zealand,\textsuperscript{21} it is hard to believe that these different cultural choices are
equally representative of the cultural values of lay people in, say, Bolivia or Ghana. As
revealed by the empirical evidence presented in the previous chapter, one may not
reasonably argue—as legal elites in low and middle-income countries do—that
cumbersome legal procedures are intended solely to safeguard Justice (with capital J), \textit{i.e.},
that the less efficient, less accessible and less impartial justice delivered by civil and
common-law countries in low and middle-income countries is a reflection of reasonable
policy choices under the judicial equilibrium. Legal and procedural restrictions in
developing countries are as much safeguards of Justice as they are instruments of
monopoly power and exclusion.\textsuperscript{22}

According to professor Huntington, “the sources of conflict are in fundamental
differences in society and culture.”\textsuperscript{23} This seems to be true for many legal and
procedural transplants, when “foreign” law and local reality seem to be deeply at odds.
This section proposes the idea that in many developing countries the “transplantation”

\textsuperscript{21} See detailed description of landlord-tenant disputes in civil law and common-law countries in the first
chapter of this dissertation.
process may have contributed to create a fundamental disconnect between law and reality, which translates into an abstruse and hostile judicial system for vast segments of the population of these countries. The poor and other marginalized segments of society in developing countries face significant limitations to access formal judicial institutions. Cultural and language barriers, overly-complex procedures and cumbersome legal requirements, financial, linguistic and geographical limitations, mistrust for institutions derived from a colonial past, and radically different views on the nature and role of justice in society, among other factors, hamper the ability of low-income citizens to effectively resolve their disputes in official courts. In the words of the Commission on Legal Empowerment of the Poor:

The law is the platform on which rest[s] the vital institutions of society… four billion people around the world are robbed of the chance to better their lives and climb out of poverty, because they are excluded from the rule of law… In too many countries, the laws, institutions, and policies governing economic, social, and political affairs deny a large part of society the chance to participate on equal terms. The rules of the game are unfair. This is not only morally unacceptable; it stunts economic development and can readily undermine stability and security. The outcomes of governance – that is, the cumulative effect of policies and institutions on peoples’ lives – will only change if the processes of governance are fundamentally changed.

In a recent survey conducted among female victims of violence in Pakistan, formal courts were described by the users as “frightening.” Respondents were also

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22 As explained in Chapter 4 of Part 3 of this dissertation.
24 See, supra note 19 and accompanying text, at 81.
asked to list what they would change about the formal court process for women. Their response was an “overwhelming demand for less delays and quicker disposal of cases.”

Formal courts in developing countries—civil-law and common-law alike—are perceived to be not only bureaucratic and ineffective, but also inaccessible and threatening. In most developing countries the divide between a highly sophisticated legal elite and the general population, is significantly more pronounced than in the developed world. Social and ethnic tensions are often concomitant to the uneasy interaction and clashes between traditional and “modern” legal and judicial institutions, which are often perceived by large segments of society as a foreign “transplant.”

Moreover, while most high-income countries have developed different layers of justice and different levels of complexity of procedures for different cases, many developing countries maintain the rigid structures of the colonial past. In the United States there were 87.5 million filings in state courts in 1996, of which only 286,732 were raised to the appeal level. Only a tiny fraction of all disputes are resolved through complex procedures—most disputes are dealt with in small-claims courts, in one hearing or two, which often last only a few minutes. “In Delaware more than half of all cases are

27 Irfan, Honor Related Violence Against Women in Pakistan, at 19.
29 See, e.g., Breyer, Stephen, "For Their Own Good": The Cherokees, the Supreme Court, and the early history of American conscience (explaining how the English legal institutions that were transplanted to America were not adopted or received by native Cherokees as their own); Kahn-Freund, On Uses and Misuses of Comparative Law, at 12 (explaining that rules and institutions may owe their existence to a distribution of power in the ‘mother’ country that may not be present in the ‘transplant’ country). See also, generally, e.g., Watson, Legal Transplants: An approach to Comparative Law; Benton, Law and Colonial Cultures. Elechi, Human Rights and the African Indigenous Justice System; Elechi, Doing Justice Without the State, supra note 19, at 81.
30 The author of this paper has had the opportunity to spend several years examining significant portions of the codes of civil procedure of 109 countries, as well as the Constitutions, labor codes and corporate laws of over 90 countries around the globe. While each code has its own flavor, similarities are often breathtaking.
disposed of at the justice of the peace court without any further impact on the state’s judicial system... a justice of the peace is often a non-lawyer who works part-time.”

Similarly, in Japan more than half of all cases filed in the court system between 1997 and 2006, were handled by summary courts. Even if the higher layers of the formal judicial system are inefficient, when the lower layers efficiently handle more than half of all cases—as it is typical in most developed countries—the system will deliver a service that will not be perceived by the layman as totally unresponsive. In contrast, most cases in low and middle-income countries, both at lower and higher level courts, are decided by means of bureaucratic courts and complex procedures.

Judicial stagnation in developing countries is not a recent phenomenon; the gap between developed and developing countries on judicial efficiency has been documented for decades. For instance, the average duration of a civil dispute in first instance in Germany in 1993 was of 4.2 months (County Court), of 4.9 months in second instance (District Court), and of 8.7 months before the Higher Regional Court. For the same year, the average duration of a case in France was of 4.8 months in the Tribunal d’Instance, of 9.3 months in the Tribunal de Grande Instance, and of 13.3 months in the Court of Appeals. In contrast, in India “in 1993 it was taking between 12 and 15 years for a case

32 Barnes, Desk Reference on American Courts.
33 The number of civil cases filed, disposed of and pending by year from 1997 to 2006 is available in the web page of the Supreme Court of Japan (site visited Apr. 15, 2009): http://www.courts.go.jp/english/proceedings/civil_suit_index.html
34 Platto, Economic Consequences of Litigation Worldwide, at 173.
35 Id. at 159.
to be tried before the Bombay High Court, with an additional period of 10 to 12 years before all appeals would be exhausted.  

*Latin America*

Latin America is often described as a region of French-origin countries. 37 The evolution of legal institutions in this region, however, is far more nuanced; in terms of procedures, while French influence remains strong, most of these countries may be better catalogued within the Spanish legal family, 38 mixed with a variety of other influences, including Italian, German, and recently American.

Langbein convincingly argues that the governing role of the judge and the inquest procedures of the civil-law system adequately address the fundamental inequality problem of the adversarial common-law, *i.e.*, the “inequality of weapons.” This advantage of the Civil Law judge seems convincing for Germany, Austria, France, Holland and Belgium—and similar countries. However, when the day-to-day reality of access to justice for everyday folks in Mexico and Colombia is put under the magnifying glass, the role of the judge as the protector of the weak is seriously called into question. Moreover, since almost all litigation is written and in most cases the judge never meets

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36 Cranston, *Access to Justice in South and South-east Asia*.
37 See, *e.g.*, Djankov et al., *Courts*. Indeed, many Latin American countries still have Civil Codes based on the *Code Napoléon*.
38 In many aspects Spain and its former colonies are historical representatives of the French legal family, for instance, with regard to the Civil Code. In other areas the laws of Spain and France had independent historical developments, and some Spanish colonies followed France more closely and others followed Spain. In terms of civil procedures, in most Latin American countries the Spanish influence seems to be stronger than the French influence. *See, e.g.*, Caenegem, *History of European Civil Procedure*; Zweigert and Kotz, *Introduction to Comparative Law*. 

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Specific laws differ among countries but the overall model of adjudication is remarkably similar across the Latin American region. In general, formal justice institutions are inaccessible and ineffective for ordinary people. The law on the books, based on European models, may not be entirely inadequate. It may actually be acceptable for higher levels of litigation, but it hardly answers to the needs of the ordinary person. For the bulk of potential litigation (the bulk of social disputes), there is a fundamental mismatch between these excessively technical and detailed procedures and the day-to-day reality of folk people. Customary justice systems partially fill this vacuum in rural areas, but these systems' applicability in urban areas is severely limited (in a region where more than 75% of the population lives in cities). Commercial arbitration is effective in several countries, but it is very expensive and, for this reason, inaccessible to the ordinary citizen.

Even the most expeditious, the most simplified and the most “oral” of all civil procedures in Colombia, the oral summary proceeding for smallest claims, exhibits traits that are more in line with the procedure intensive/control the judge process of Imperial Rome (or the Spanish and French Crowns). This simplest of all civil procedure in

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39 See, e.g., Corporación Excelencia en la Justicia, Necesidades Jurídicas Insatisfechas; Corporación Excelencia en la Justicia, Balance de los primeros cinco años de funcionamiento del sistema penal acusatorio en Colombia; Zepeda Lecuona, Myths of Pretrial Detention in Mexico; Ribando Seelke, Clare, Supporting Criminal Justice System Reform in Mexico; Mexican documentary Presunto Culpable at: http://www.presuntoculpable.org/

40 This is explained in detail in Chapter 7 of Part 4 of this dissertation.


42 See, e.g., Jaramillo, Justicia por Consenso; Kanyongolo, Malawi, Justice Sector and the Rule of Law.

Colombia does not look like the process of the lay judge of the classic Roman period, but rather like the Byzantine process of the late imperial period, when procedure had experienced a fundamental shift from private to public and official; from adversarial to inquisitorial; from oral to written; from public to secret; from single-layered into multi-layered; from simple (understandable by lay people) to sophisticated (the realm of professional experts).

In many Latin American countries (e.g., Argentina, Colombia, Mexico, Ecuador) there are also “Amparo” or “Tutela” proceedings for the protection of fundamental rights. In some cases these proceedings are both accessible and effective for lay people. However, the scope of these mechanisms is generally very limited, so they do not provide wide access to justice for the general population. Like the old Roman and English forms of action, access to justice through the “Amparo” proceeding is an exception to the general rule, applicable only in certain cases. Perhaps policymakers interested in more responsive, accessible, culturally competent and effective justice in Latin America may consider lessons learned from this anomaly (the informal Tutela procedural exception), as well as the community harmonizing ideal of justice, capable of tapping into local folk dispute resolution traditions, which is explained in the last two parts of this dissertation.

44 Amparo or Tutela proceedings are extraordinary writs for the direct enforcement of fundamental rights under the Constitution. They constitute procedural exceptions which greatly expand access to justice for the ordinary citizens (for the limited causes of action provided in those writs), by greatly simplifying procedures and enforcement of judgment, and severely diminishing the need to hire an attorney. See, e.g., Gaviria, La tutela como instrumento de paz, Chavez Castillo, Ley de Amparo Comentada.

45 “The tutela in particular, the mechanism to demand direct application of constitutional rights, has had such success that approximately one in forty Colombians at some point has come to a court or a judge to enforce his/her rights through this procedural mechanism.” Lemaitre Ripoll, El Derecho como Conjuro, at 24.

46 They have also been accused of excessive informality, which make them prone to frivolous litigation.
**Sub-Saharan Africa**

In Sub-Saharan Africa formal legal and judicial institutions in several countries continue to adhere closely to the laws and practices of the United Kingdom and France at the time of independence. Procedures seem to have frozen in time and reflect the laws in force in “mother” countries during the XIX or early XX centuries. This fact further increases the gap between law and reality in these countries; most of them have not caught up with the procedural simplification and modernization that took place in Europe during the second half of the XX century and the beginning of the XXI. The cases of Liberia and Malawi are illustrative of the situation of access to justice for the urban poor in Sub-Saharan African countries.48

In Liberia, procedures have been copied from the USA and formal litigation tends to follow American modes and practice.49 However, reality is dramatically at odds with the legal framework. There are only 250 lawyers in the entire country, and these few lawyers—most of whom come from the very exclusive Americo-Liberian elite of the Coopers, the Johnsons and the Brights50—exercise a virtual monopoly and extract very lucrative fees from the practice of the legal profession. The situation is similar in many countries in Africa, where “the overwhelming majority of lawyers are concentrated in urban centres, while the majority of people [67%] live in rural areas.”51 And these few lawyers are not evenly distributed across regions either; for instance, “the Tanzanian

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48 For an explanation of Liberian sui-generis ‘colonization’ process, see, Saye Guannu, *Liberian History up to 1847*.
49 See, Saye Guannu, *An Introduction to Liberian Government*.
50 Cooper, *The House at Sugar Beach: In Search of a Lost African Childhood*.
Women Lawyers Association estimates that 13 regions (out of 21) in the United Republic of Tanzania have no lawyers.\textsuperscript{52}

Access to justice for the vast majority of the population is negated in practice. In terms of the “judicial equilibrium,” the Liberian situation may be described as follows: Formal courts lack the most basic cultural competency,\textsuperscript{53} and they are mostly ineffective and inaccessible. For most people \textit{customary justice} is the only accessible and effective dispute resolution mechanism available. Despite growing allegations of corruption at the Chiefs’ level, these informal institutions work reasonably well for a variety of situations. However, important parts of the traditional justice system, such as the \textit{Sassy-wood} practice (Ordeal by Poisoning),\textsuperscript{54} seem to violate fundamental human rights\textsuperscript{55} and from the Western perspective, it is difficult to understand how they may be considered “justice.”

In Malawi, procedures were transplanted from England during colonial times, and they were essentially maintained in place after independence in 1964. The judicial system is relatively independent but inefficient, inaccessible to ordinary citizens, and severely lacking on resources.\textsuperscript{56} Access to justice is severely limited:

\begin{quote}
\text{[T]he vast majority of people are not able to enforce their rights because they cannot access formal justice delivery institutions, including the courts. Poor people, especially women, are disproportionately impeded by the various physical, financial and linguistic barriers.}
\end{quote}

\begin{quote}
\text{Physical barriers are mainly geographical. The majority of the people live in remote rural areas, and in some cases, people have to walk for up to eight hours to}
\end{quote}

\textsuperscript{52} Id. at 14.
\textsuperscript{53} See Cross, et al., \textit{Towards a Culturally Competent System of Care} (“Cultural competence [is a] set of congruent behaviors, attitudes, and policies that come together in a system or agency or among professionals that enables effective interactions in a cross-cultural framework.”).
\textsuperscript{54} The sassy-wood justice is explained in detail in Chapter 4 of Part 4 of this dissertation.
\textsuperscript{55} United Nations General Assembly, \textit{Universal Declaration of Human Rights}, articles 5 and 11, among others.
reach their nearest court. The effect of the distance is made worse by the fact that most rural areas do not have regular public transport. Where public transport exists, it is prohibitively expensive…

Financial barriers consist mainly of the relatively high financial cost of paying court and lawyers’ fees and transport costs. Although court fees may appear to be low, the majority of Malawians live below the poverty line, on an income of less than K140 (approximately US$1) per day. These income levels also mean that only a minuscule number of Malawians can afford to hire private lawyers, who demand as much as K10 000 (approximately $70) for an initial deposit and K7 000 (approximately $50) per hour thereafter. Unfortunately, neither the Ministry of Justice’s Department of Legal Aid nor non-governmental organisations have sufficient resources to provide the poor with a way round the barrier of lawyers’ fees.

Another factor that limits access to the formal justice system by the majority of people is the fact that English is the official language of the courts—although it is estimated that only a negligible proportion of the population is fluent in it. The Constitution does guarantee every person the right to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted, at the expense of the state. In practice, the judiciary ensures that there is an interpreter in any case in which the defendant does not understand English. However, standards of interpretation are generally poor, particularly in relation to technical words.57

There are approximately 300 lawyers in the country,58 for a population of 15 million people, and there are only 21 judges.59 There is only one law school, which graduates about 60 lawyers per year—which is a significantly expanded number of graduates, from historic average of about 5 per year until about four years ago.60 Legal aid is extremely limited, although “paralegal services fill an important gap in the criminal justice system in terms of human rights; particularly the rights of prisoners.”61

Customary justice in Malawi is the main source of justice, for an overwhelmingly rural population (80% rural in 2012):

57 Kanyongolo, Malawi, Justice Sector and the Rule of Law, at 19.
59 Figure provided to the author by the Chief Justice of Malawi during meeting held on March 13th, 2013. According to the IBA: “The current number of High Court judges is 27.” International Bar Association. Rule of Law in Malawi.
60 Figure provided to the author by the Dean of the Law School of the University of Malawi during meeting held on March 13th, 2013.
61 International Bar Association. Rule of Law in Malawi, at 47.
As a result of these barriers, most people in Malawi do not rely on formal court systems to deliver justice. Instead they depend on non-state institutions, of which the most frequently used are traditional leaders, traditional family counsellors (ankhoxwe), religious leaders, and community, non-governmental and faith-based organisations. The most common types of disputes dealt with in these fora involve land, chieftaincy, marriage and domestic violence, and the most prolific of the various non-state justice fora are those presided over by traditional leaders. It has been estimated that the country has over 20,000 traditional leaders of varying levels of seniority who administer justice in almost every village. The activities of the non-state fora, which are sometimes referred to as primary justice or informal mechanisms, do not appear to be factored sufficiently into the strategy and plans of most state-connected justice sector institutions. Although the Constitution allows for ‘traditional or local courts’ to be established, no legislation has been enacted to give effect to this provision; the Traditional Courts Act dating from the colonial period and expanded in authority under the regime of Hastings Kamuzu Banda remains technically in force, but the courts it regulated were abolished with the transition to a multi-party system in the early 1990s.62

Customary justice was severely handicapped due to regulatory restrictions which severed its ties to the formal court system and removed state funding:

Since the closure of traditional courts in Malawi in 1994, the effectiveness of the judicial system has been hampered, due to reduced access to justice. Despite the limitations of the traditional courts, they were readily accessible and fairly popular with the majority of the Malawian population. It should be noted that the poor and rural population of Malawi continues to struggle to access the formal courts – primarily due to lack of access to transport to the location of the courts. Furthermore, the few that do manage to access the courts often face other difficulties linked to covering costs for the process.63

The situation of lack of access to justice for vast segments of the population in Liberia and Malawi is similar to that in other African countries, as well as in many countries in Asia, such as Pakistan and Afghanistan. Formal justice is mostly ineffective and inaccessible to lay people, and traditional justice faces serious challenges.64 Most

62 Kanyongolo, Malawi, Justice Sector and the Rule of Law, at 21.
63 International Bar Association, Rule of Law in Malawi, at 43.
local and international efforts are directed towards improving the formal courts—to train more judges and officers, to enhance resources, to improve case-management systems. Not enough attention is placed on making them more culturally competent and responsive to the needs of ordinary people.

**Legal transplants in Japan, Singapore, the USA, Canada, Australia and New Zealand**

The cases of legal transplants in Japan, Singapore, the USA, Canada, Australia and New Zealand deserve particular attention. If they were also colonies (or conquered independent countries) and recipients of legal transplants from ‘mother’ countries, why is it that the ‘judicial equilibrium’ developed by mother countries appears to have migrated successfully to these high-income countries, while not to those in the developing world?

Let us consider first the Meiji restoration (1868) in Japan. After an initial attempt to transplant the French tradition, the German model was adopted—much as Roman law was adopted earlier in Germany during the Reception. French and German jurists drafted the first Japanese civil and commercial codes in 1889 and 1890, respectively. The urgent need of the Japanese reformers was not to design an effective dispute resolution system for the masses—Japan’s millenary tradition had this base covered. The overwhelming necessity was to adopt as fast as possible, a legal system and a court

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*Institutions; International Development Law Organizaztion (IDLO), Customary Justice: Challenges, Innovations and the Role of the UN.*

65 See, e.g., Botero et al, *Judicial Reform*, at 63.

66 See, *supra* note 64, at 93.

67 For a description of the German ‘reception,’ see, e.g., Caenegem, *History of European Civil Procedure.*
apparatus which could be seen as credible by the more technologically (not culturally) advanced foreign powers. According to Goodman:

Before the American Civil war, Commodore Perry arrived in Tokyo Bay with four ships (known to the Japanese as black ships because of the black smoke that belched from their smoke stacks) and a demand for a commercial treaty that would ‘open’ Japan to the West. The Tokugawa Shogunate had no desire to ‘open’ Japan but also had no match for Perry’s warships. When Perry returned six months after his first visit with eight ‘black ships’, Tokugawa officials negotiated a treaty opening Japan to the West. Soon other Western powers (and Russia) signed ‘unequal’ treaties with Japan. As all these competing treaties contain Most–favored-Nation provisions, Japan was in a downward cycle insofar as loss of its authority over tariffs, loss of authority over trade, loss of authority over territory where Westerners could live and trade in Japan, loss of control over its monetary system, etc. A group of rebels (centered mostly in western Japan, an area that historically opposed the eastern Tokugawa regime) saw this as an opportunity to topple the Tokugawa government. These rebels took advantage of the unequal treaties and built on indigenous objections to Tokugawa rule to mount a revolution against the Tokugawa government.

The unequal treaties went into effect and created in Japan consular jurisdictions similar to those created in China. Under these agreements, Westerners living in treaty zones were not subject to Japanese jurisdiction but rather to jurisdiction of Consular courts. When the rebels succeeded in their revolution, one of their principal objections was to undo these unequal treaties and regain Japanese sovereignty. Under the banner of throw the barbarian out and restore the Emperor, the rebels succeed in toppling the Tokugawa government. Upon doing so they moved the Emperor (who had selected the Meiji as the title for his era rule) from Kyoto to Tokugawa’s capital, the newly - named Tokyo (Eastern capital – to distinguish it from Kyoto, which had been the Imperial capital). The rebels began to govern in the Emperor’s name.

The rebels who engineered the Meiji Restoration took over control of the government in the Emperor’s name and set about ‘Westernizing’ Japan. They recognized that Japan required a constitution and for this purpose they used a Prussian model. Moreover, the rebels, who now were the de facto government of Japan, recognized that Japan needed a legal system. This recognition stemmed from two notions. First, consular jurisdiction by the Western powers could only be abolished if the Japanese could show the Western powers that Japan had a sophisticated legal system and thus the argument for consular jurisdiction could be blunted. Second, without a legal system Japan could not advance economically, politically and socially to rival the Western powers. To establish a legal system the new Japanese government briefly flirted with looking toward China (its historical cultural font) but determined that it should look further west. Two routes to creating a new ‘westernized’ legal system were followed: a) Western scholars were invited to Japan as advisors to the new government and b) Japanese scholars were sent to the West to study Western legal systems (law was simply one of many topics that were studied and numerous scholars were sent west to study other aspects of Western life).…
To the Japanese scholars the Codes of Western Europe appeared as good vehicles to assert the authority of the new government, as they appeared to control almost all conduct. To the Japanese oligarchs of Meiji Japan, law was not seen as a means to resolve the issue of how to rationalize individual freedom on the one hand with the need for structure and discipline on the other. Rather, law was seen as a devise (sic) that could be used to enforce structure and discipline. To the civil law lawyers who assisted the Japanese the codes served a fundamentally different purpose.

Having decided that western Codes should be utilized to form the basis of a new legal system, the Japanese turned to the French and German models. For purposes of this text it is not necessary to detail the debate between the French school and the English school and then the role of the German school, nor is it necessary to go into the debate over the adoption of the Civil Code, originally a French model but ultimately a German model built on a French base. What is significant is that Meiji government borrowed the wholesale parts from western civil codes to create the basic Japanese legal system—both its substantive and procedural rules (although they were careful to leave the family law system of the Ie (the samurai family system) in peace (and indeed to extend it to all classes of society). Those Codes were adopted by the new government and succeeded in their basic purpose of getting the Western powers to renegotiate the unequal treaties forced on the last Tokugawa shogun and to give up their consular jurisdiction. In 1890 the Civil code was promulgated (effective 1893) and in 1894 the Anglo-Japanese Commercial Treaty provided for the abolition of extraterritoriality in five years. By 1897 the other Western powers had followed suit. Through adoption of a western form of legal system the Japanese had regained their sovereignty. In the process they had created a new Japanese legal system based on the civil law model. This system looked very much like the German legal system and many of its provisions were borrowed wholesale from the German (or French) system.68

The case of Japan would suggest that legal transplantation per se is not the cause of the problem of legal exclusion—the ‘justice gap’—highlighted in this dissertation; it is rather the power struggle underneath the legal transplantation what seems to matter. In Japan the indigenous elites embraced the foreign transplant as a tool to assert their independence from European powers, not as a tool of European settlers and their heirs to assert their control of their colonies, as in Africa and Latin America. The laws may be very similar in Japan and Latin America—Imperial Roman law in Japan, through the adoption of French and German models, and Imperial Roman law in Latin America,

68 Goodman, The Rule of Law in Japan, at 20 to 23 (footnotes omitted).
through Spanish (French) colonization—but the meaning of the laws is radically different: Self-rule in Japan, and conquest in Latin America.69

The same motivation appears to be behind Lee Kwan Yew’s unwavering commitment to enforcing the English common-law in Singapore. After all, one cannot aspire to be treated as an equal, independent, civilized nation, unless one behaves like a civilized nation. Steadfast commitment to the rule of law was not a foreign imposition for the newly independent Singapore; it was a wholeheartedly-embraced survival imperative for a small island under constant threat of invasion. In Singapore the indigenous elites embraced the foreign transplant as a tool to assert their independence

69 In other words, while the legal systems of Japan and most Latin American countries may be very similar, as they are all members of the Civil Law family, the level of legitimacy and the very meaning of the legal system in the collective view of the masses is different. In Japan the Civil Law system was transplanted by the indigenous Japanese as a tool to fend off the Europeans; in Latin America, to the contrary, the Civil Law system was adopted by the Europeans and maintained by their white heirs, and used as a tool to maintain control over a large indigenous population—it was never embraced by the masses as their own. This lack of broad legitimacy of the European-transplanted law in several countries in Latin America appears to be tied to the ethnic composition of these countries. In some of them (Colombia, Venezuela, Bolivia, Ecuador, Peru, Guatemala, Nicaragua), the white creoles (Spanish descendents) largely maintained control over the instruments of political power, including the legal system, from the time of independence in the early 19th century (See, e.g., Ariza, Derecho, Saber e Identidad Indígena). During the second half of the 20th century, in the context of the Cold War, several guerrilla groups in these countries (e.g., Tupac Amaru, EPL, Sendero Luminoso), raised the claim of ethnically-driven exclusion from the legal system to justify their revolutions (See, e.g., Lemaitre Ripoll, El Derecho como Conjuro, Rodriguez, et.al, Conflictos y Judicialización de la Política en la Sierra Nevada de Santa Marta; Angel, et.al., Conflicto y Contexto). By the late 20th century the ethnic flag was successfully employed by democratically-elected revolutionary leaders in most of these countries, including Chavez in Venezuela, Toledo in Peru, Morales in Bolivia, Noriega in Nicaragua and Correa in Ecuador. These new revolutionary governments in almost all cases (except Peru) made the European-transplanted legal system a prime target of their revolution. In Mexico the process of popular conquest of the European-transplanted legal system took place one hundred years earlier, with the Mexican Revolution, and this legal conquest is expressed most prominently through the widely legitimate Mexican Constitution. However, in this country of mestizo people (mixed white and indigenous ethnic origin), the Mexican indigenous people who do not speak Spanish remain largely excluded from the system, according to many, including the new Zapatista guerrilla who continues to raise the flag of ethnicity-driven exclusion from the legal system to justify its revolution. Finally, this evolution is different in other Latin American countries (Argentina, Uruguay), where the vast majority of the population are European descendents and there have been hardly any ethnic tensions for the past one hundred years. It is beyond the scope of this footnote to trace the impact of ethnic tensions on the legitimacy of the legal system in Latin America—it would take an entire dissertation to do so—but only to suggest possible lines of connection which other researchers may explore in the future.
from neighboring powers. The meaning of transplant law in Singapore was freedom (like in Japan). not oppression and exclusion (like in Latin America and Africa).

This different meaning of foreign law is also present among common-law countries in high income countries. In the United States, “[w]hile in rebellion against the English king, the leaders of the American Revolution were not in rebellion against the English Common Law, rather they relied on the common law as the basis for their right to rebel.”

From the point of view of the system as a whole, the legal transplantation process in Japan, Singapore, the United States, Canada, Australia, and New Zealand does not appear to have produced or aided the exclusion of segments of the population from the legal system, as it did in Africa, Latin America and other parts of Asia. The legal system was transplanted to protect local populations from white Europeans in Japan and Singapore, or to protect local whites from European whites in the United States, not to maintain the European-heir’s control over massive indigenous populations (as in Latin America and Africa). In other words, there appears to be a fundamental structural difference in the mechanics and consequences of the legal transplantation process in high income countries and low and middle-income countries, depending on the political power struggles underlying such process.

70 One could argue that from this perspective, European law was not “transplanted” to Japan and Singapore, but rather it was assumed through a process of self-interested “reception” similar to the German reception of Roman Law.

71 See, e.g., debate on whether indigenous people were humans, in Ariza, Derecho, saber e identidad indígena, at 79.

72 “In the Liberian system of local government during the First Republic there existed within the same township or city two government units—one for Liberians who have adopted a ‘modern’ or Western lifestyle and the other for Liberians who have traditional ways. According to this arrangement more public funds went to the Westernized areas than to the areas inhabited by Liberians with traditional habits” Saye Guannu, An Introduction to Liberian Government. The most enduring case of legal exclusion was the apartheid regime in South Africa, see, e.g., Mandela, Long Walk to Freedom.

73 Goodman, The Rule of Law in Japan, at 14.
For the sake of argument, one may consider the alternative view that the exclusion of vast segments of the population from the effective protection of the legal system in low and middle-income countries throughout the 19th and 20th centuries, which appear to be related to the legal transplantation process in Africa, some parts of Asia (India, Pakistan, the Philippines, Malaysia), and Latin America, applies essentially in the same way everywhere, only that in some countries it is less apparent due to different demographic conditions, i.e., that the nature of the legal transplantation process per se has little or no influence on the marginalization of vast segments of the population from the protection of the legal system in low and middle-income countries. One could argue, for instance, that the differences presented above about the nature of the transplantation process between high-income countries on the one hand (USA, Singapore, Japan, Australia, New Zealand), and low and middle-income countries on the other, are explained by demographics: the white European predominance in USA, Canada, Australia and New Zealand over a shrinking indigenous population, as opposed to relatively smaller creole elite in Latin America or Afrikaan domination in South Africa. In other words, that the legal exclusion of indigenous communities that followed the transplantation of European law in these countries (USA, Canada, Australia, New Zealand) is simply less visible because of the overwhelming demographic predominance of the immigrants in all these countries, over a very small remaining aboriginal population. Indeed, from the perspective of indigenous minorities (native-Americans or aboriginal peoples) in the USA, Canada, Australia and New Zealand, the transplanted European legal system was to a large extent another tool used by the Caucasians to
impose their conquest on them.\textsuperscript{74} The history of the futile Cheyenne litigation before the US Supreme Court provides a good example of the extent to which indigenous populations could not benefit in practice from their formal legal entitlements.\textsuperscript{75}

In 1836, the United States and the State of Georgia forced the Cherokee Indian tribe to leave its home in Georgia and to move to the West. The Tribe did not want to move. It believed it had a legal right to stay; and in the early 1830s, it brought two actions at law in the Supreme Court designed to enforce that legal right. The story of those lawsuits is a story of courts caught in a collision between law and morality, between desire and force. It is a sad tale that forces us to examine the relation between law and politics, particularly with respect to the Court’s ability to enforce its judgments during the early years of the Republic…

Since at least the early 1820s, the Cherokees had made it very clear that they were happy on their tribal lands in northern Georgia and did not want to move. President Monroe sent Commissioners to the Cherokees to see if they would sell their lands. The Council of Chiefs replied that "it is the fixed and unalterable determination of this nation never again to cede one foot more of our land." The chiefs then sent a delegation to Washington, which declared to the president that "the Cherokees are not foreigners but the original inhabitants of America," and "they now stand on the soil of their own territory."…In this extraordinary struggle over American first principles, there was an obvious winner, the Supreme Court of the United States, and an obvious loser, the Cherokee Tribe, and an obvious irony, that the Supreme Court and the Cherokee Tribe had been allies, fighting on the same side of the issues.\textsuperscript{76}

Extensive polling of ordinary citizens in USA, Canada, Australia and New Zealand on access to and use of the legal system today confirm that ethnic minorities in

\textsuperscript{74} See, e.g., Robertson, \textit{Conquest by Law} ("The discovery of the Americas forced Europeans to adapt their traditional worldview to accommodate the Columbian landfall. For political and cultural reasons, the intellectual structure they ultimately applied to define the terms of their relationship to this 'new world' was legal. Over a succession of generations, Europeans devised rules intended to justify the dispossession and subjugation of the native peoples of the Western Hemisphere. Of these rules the most fundamental were those governing the ownership of land," at Preface, page IX). See also, Banner, Stuart, \textit{How the Indians Lost Their Land}, Duthu, \textit{American Indians and the Law}.

\textsuperscript{75} In early 19th Century the Cheyenne won a decade-long legal battle through the legal system, including an epic victory before the Supreme Court. However, this legal struggle was entirely futile, as they ultimately lost their lands. The struggle and the consequences of this struggle are explained by Justice Breyer in \textit{For their own good}.

\textsuperscript{76} Breyer, \textit{For their own good}.
these countries at least hold the perception that they are excluded from the system.  

The same appears to be true for the small Ainu ethnic minority in Japan.  

Thus, one could conclude that if we use the right lens one will find that legal exclusion was a corollary (or a manifestation) of legal transplantation in high income countries just as much as it was in low and middle-income countries. Yet, either way the gap between high income countries and low and middle-income countries remains huge; either if transplantation and exclusion in developed and developing countries are structurally different processes, or if they are intrinsically the same but in a different demographic scale, the legal exclusion gap between rich and poor countries is of several orders of magnitude.

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77 Findings of the WJP Rule of Law Index 2011 and 2012. Ethnic minorities in the United States, Canada, Australia and New Zealand report statistically significantly lower rates of trust, use of and satisfaction with various mechanisms and remedies afforded by the formal legal system than members of the ethnic majorities. Moreover, all of these countries underperform other high-income countries in the WJP Rule of Law Index Sub-Factors 4.1 (Equal treatment and absence of discrimination), 7.2 (Civil justice is free of discrimination), and 8.4 (Criminal system is free of discrimination).  

78 For a detailed account of legal discrimination against occupied Ainu people in Japan, see, Goodman, The Rule of Law in Japan, at 105 to 110.  

79 As presented in text accompanying supra note 13, at 81, if in the USA the ratio of lawyers serving poor people is one per 1,400 people, in Liberia it is below one per 100,000 people. Moreover, this question is beyond the scope of this dissertation, which focuses on access to justice in low and middle-income countries (see Introduction, above).
CHAPTER 3. LEGAL TRANSPLANTS AND COMPLEX LITIGATION IN LOW AND MIDDLE-INCOME COUNTRIES

This chapter acknowledges the fact that low and middle-income countries need formal courts for other reasons beyond providing access to justice for the poor and other marginalized segments of society. Complex litigation—however abstruse, cumbersome and inaccessible it may be to the ordinary citizen—may be a prerequisite for economic development in a globalized world. Thus, the complex and inaccessible procedures adopted or copied by low and middle-income countries, which were described in the previous chapter, may be fully justified even if they are inaccessible for the poor.

From an economic development perspective, legal and institutional “transplants” may facilitate standardization, enable adoption of best practices, and facilitate business transactions. In a globalized world, countries cannot integrate and advance the economic standard of living of their people, without a well-functioning dispute resolution system for ‘economically significant’ transactions.1 Efficient markets “depend on the establishment of an environment in which legal rights, especially property and contractual rights, are enforced and protected—an environment that is taken for granted in wealthy nations.”2 From this perspective, procedural sophistication and the ability to handle complex litigation in accordance with international standards in developing countries, may be required to guarantee the legal certainty, predictability, and impartiality

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1 Hernando De Soto claims that all property rights related transactions are significant (De Soto, The Other Path). This approach is highly contested today. While I don’t disagree with De Soto, I have chosen a more conservative formulation in this paper.

needed to handle disputes between multinational and local companies, and ultimately, to foster investment and economic progress.

It naturally follows that highly sophisticated (i.e., well trained and well remunerated) local legal elites, are necessary to handle such complex litigation. To test this theory, let us consider the “fundamental principle of the two instances,” or the litigants’ right to have a judicial decision revised by a higher court or authority. The institution of the appeal is a typical “transplant;” it is a manifestation of the policy implementing ideal of justice which is more akin to the civil-law tradition. As we saw above (Part 2), civil-law jurisdictions generally accept the “principle of the two instances,” pursuant to which appeal normally encompasses a trial de novo, rather than a simple review of issues of law:

As a general rule there is a right to an appeal in civil-law jurisdiction. Appeal has a special meaning here that is unfamiliar in the United States, where it is thought of as primarily a method of correcting mistakes of law made by the trial court.

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3 The notion of “legal elites” in low and middle-income countries refers to the status of the legal profession in most of these countries, as opposed to that in high-income countries. In high-income countries, professionals such as medical doctors, architects and lawyers tend to belong to the middle socio-economic class; while the average income of these professionals is generally higher than that of plumbers and contractors, the standard of living of these professionals is not significantly different from that of manual workers. A number of factors influence this outcome, including generally generous social security systems, universal access to health care (with the notable exception of the USA) and public education, wide coverage and affordability of higher education, low income disparities, and generally progressive tax regimes. While partners at large law firms often earn over a million dollars per year, the law profession as a whole does not constitute an ‘elite’. Conversely, in low-income countries, disparities in income and educational attainment are extremely high. Lawyers tend to be very scarce (see table of lawyers per 100,000 population in the following chapter), and the overwhelming majority of lawyers belong to the top quintile of the income distribution in these countries. The income disparity is compounded by low levels of educational attainment, and extremely low levels of employment in the formal sector of the economy. The combination of these factors implies that the law profession as a whole constitutes an elite in most of these countries. The situation in middle-income countries varies widely from one country to the next; in general, the law profession enjoys a higher status in society in these countries than it does in most high-income countries, given that both income and educational attainment disparities in middle-income countries are significantly higher than in high-income countries. Data on income inequality, income distribution, educational attainment and other indicators of socio-economic development, are available for all countries at: http://data.worldbank.org/. Last visited May 27, 2013. A summary measure of these indicators is the Human Development Index.

4 Which is described in Chapter 2 of Part 5 of this dissertation.
In the civil-law tradition, the right of appeal includes the right to reconsideration of factual, as well as legal issues. Although, the tendency commonly is to rely on the record prepared below as the factual basis for reconsideration of the case, in many jurisdictions the parties have the right to introduce new evidence at the appellate level. The appellate bench is expected to consider all of the evidence itself and to arrive at an independent determination of what the facts are and what their significance is. It is also required to prepare its own fully reasoned opinion, in which it discusses both factual and legal issues.

The use of a jury in civil action at the common law obviously forestalls review of the factual issues by an appellate court. The jury does not make specific findings of fact; it may, and often does, consider demeanor and other circumstantial factors; it need not justify (i.e. explain) its verdict; and its proceedings are not written. If the appellate court could independently decide factual questions, the jury’s role would, in effect, be nullified. As long as there is some factual basis in the record to support the jury’s (or the trial judge’s) verdict, the appellate court in a common law jurisdiction will honor it.5

The right to an appeal, as well as the statutory duty to express reasons for the judge’s decisions and to justify the judgment pursuant to specific articles of the law,6 are procedural tools designed to control the behavior of the judge. A detailed explanation of the historical evolution of these institutions in Rome (from the classical period to the empire), and during the nation-building process of the European continent in the Middle Ages, was provided in Part 1 of this dissertation.

What is the justification for the ‘right to an appeal’ as a ‘fundamental principle’ of civil procedure, in low and middle-income countries today? There are two main answers:

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5 Repeated quote, supra note 10, at 50 (Merryman, The Civil Law Tradition, at 120) (first emphasis added) (second emphasis in the original).
6 Supra note 9, at 49 (see Katz, Legal Traditions and Systems, at 108. As opposed to the common-law, where “no such legal obligation to motivate their decisions attaches to the superior courts” Jolowicz, On Civil Procedure, at 280). Accord, FED. R. CIV. P. 52(a). (“Findings and Conclusions. (1) In General. In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately... (6) Setting Aside the Findings. Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.”) (emphasis added) (establishing the trial court’s obligation to motivate the decision, and the appellate court’s duty to give due regard to fact
One, after two thousand years of legal evolution, from the barbaric trial by ordeal of the old ages to the civilized process of the modern world, the human race has found and universally accepted, that unchecked power of ‘enlightened’ judges always leads to tyranny and abuse. As one eminent jurist from a developing country has stated:

“In order to make the right to challenge the decisions of judges effective, so that the defendant may adequately contradict the plaintiff’s claims and the latter the exceptions of the former, the universal doctrine (jurisprudence) and legislation have established the hierarchical organization of the administration of justice; thus, as a general rule, every proceeding shall be known by two judges of different hierarchy if the parties so demand through a timely recourse of appeal, or through mandatory consultation in some cases.

It is fundamental in the procedure that all the judge’s actions which could harm the interests or rights of one of the parties, be subject to revision, this is, that there must be a recourse against them, so that any mistakes or vices may be corrected.”

The second answer is that the judicial system in developing countries has been designed to handle ‘important’ disputes, “to resolve disputes of economic significance.”

Faced with the dilemma between affordability and precision, the apparatus of justice leans on the side of safety, by providing the ‘right’ to an appeal. In other words, the right to an appeal provides the required level of legal certainty, predictability, and impartiality needed ‘to resolve disputes of economic significance.’ This may have an unintended consequence of limiting effective access for people who cannot afford lengthy proceedings. Yet, in a globalized world, countries cannot integrate and advance the economic standard of living of their people, without a well-functioning dispute resolution system for ‘economically significant’ transactions.


7 See, e.g., Montesquieu, The Spirit of Laws, quoted at supra note 4, at 47.
8 Devis Echandia, Compendio de Derecho Procesal, at 55 (emphasis added).
Again, from this perspective, the right to an appeal provides the required level of legal certainty, predictability, and impartiality needed to handle cases between multinational and local companies, and, ultimately, to foster investment and economic progress\(^9\). More generally, in today’s globalized world it is a practical impossibility to engage in complex BOT contracts\(^1\); counteract dumping and other anticompetitive practices of foreign competitors; negotiate and enforce mutually-beneficial technology transfer contracts; or sign free trade agreements between countries, without a highly sophisticated local legal elite.

I do not question the validity of both arguments; in my opinion, there is merit to both of them. However, there is also a third possible answer to the above question (What is the justification for the ‘right to an appeal’ as a ‘fundamental principle’ of civil procedure, in low and middle-income countries today?). This answer is corruption, rent-seeking, and monopoly power.

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\(^9\) *Id.* at 55–56.


\(^1\) “Build, operate, and transfer” contracts, which are a key mechanism for long-term financing of infrastructure projects in developing countries.
CHAPTER 4. LEGAL ELITES, LEGAL BUREAUCRACIES AND RENT-SEEKING\(^1\) IN TRANSPLANT COUNTRIES

Sophisticated legal elites and legal bureaucracies in low and middle-income countries around the world, from Mexico to Sierra Leone, continue to hold fast to some anachronic rituals of their ‘legal families’ (civil-law and common-law). Deliberately or inadvertently, they often rely on these long lineages of two thousand years of evolution, to justify structural inefficiencies of the legal process and perpetrate insurmountable barriers to access the legal system for large segments of the population. These barriers help the legal elites to maintain tight control over the formal dispute resolution system, and their rent-seeking behavior delivers suboptimal results for the society as a whole, and especially for the urban poor.

This third answer to the question presented above\(^2\) does not come from the economic development perspective, which advocates for effective dispute resolution for economically significant transactions.\(^3\) This is different. It relates the ‘right to an appeal’ and other procedural artifacts in developing countries, to monopolistic behavior, rent seeking, and sophisticated and crude forms of corruption. We are not talking here about

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\(^1\) “Rent seeking” refers to the investment of resources in efforts to create monopolies. Such investments impose a social cost (which may outweigh the benefit to the monopolist) because they are unproductive. That cost is greater than the mere cost of lobbying by special interests for privilege when the privilege is conferred in a way that is economically inefficient but politically feasible (which is often true of regulations). Research on rent seeking has demonstrated that the true social costs of promoting special interests thus greatly exceed the deadweight costs of the distortions introduced into the economy.” Tullock, Gordon, “Rent seeking.” *The New Palgrave Dictionary of Economics*. Second Edition. Eds. Steven N. Durlauf and Lawrence E. Blume. Palgrave Macmillan, 2008. The New Palgrave Dictionary of Economics Online. Palgrave Macmillan. 02 April 2013<http://www.dictionaryofeconomics.com/article?id=pde2008_R000100>

\(^2\) *What is the justification for the ’right to an appeal’ as a ‘fundamental principle’ of civil procedure, in low and middle-income countries today?*

\(^3\) *Cf.*, Posner, *Creating a Legal Framework for Economic Development*, at 1 (proposing that efficient markets “depend on the establishment of an environment in which legal rights, especially property and contractual rights, are enforced and protected—an environment that is taken for granted in wealthy nations.”).
two Pareto-optimal alternatives, such as the tenant friendly eviction of Japan, and the landlord friendly eviction of New Zealand, described in Part 1 of the dissertation. We are facing a whole new Pareto-suboptimal equilibrium.

**Legal bureaucracy and procedural inertia**

The most basic dimension of this problem is systemic failure due to sheer procedural inertia. The legal process in many countries seems to be operating in automatic pilot, with nobody in command. This is exemplified by the following case:

In Muzaffarpur, Bihar, a man found innocent at a criminal trial is illegally imprisoned without explanation. He is held in Bihar’s notoriously harsh prison conditions for nine years before the government enquires into his condition, but he is still not released for another five years. When he is finally freed after 14 years of wrongful imprisonment, the Bihar government is unable to come up with an explanation for his detention, although his innocence is in no doubt. During his time in jail he has not only suffered irreparable injury to his physical and mental health, he has also lost wages from fourteen of the most productive years of his life.

Byzantine—late Imperial Roman—procedures and restrictions on the judicial officer, which were originally designed to ensure proper implementation of imperial rule and to prevent abuses of power (including deviations from official state policy by independent-minded judges), have in many countries led to systemic stagnation. Procedures have certainly evolved but the bureaucratic mindset of control which was engraved in them during the late Roman Empire is still alive. Officials are often reluctant to make a decision for fear of the consequences; it is best to let the process flow as it is. Bureaucratic inertia is a major threat to effective justice around the world, and especially in low and middle-income countries.

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Basic corruption

A second dimension of this problem is simple graft. Let us consider the ‘sanctity of procedure’ in light of another real life example:

A man who is too old to work is left without assets or income after his son is murdered. In order to gain access to his son’s estate, he requires a “succession certificate” from the civil court of first instance in Lahore, Pakistan – over 160 kilometres to the south of his village. The cost of the train journey and the bribe demanded by the clerk of the court send him deeper into debt, but after five separate trips to the court over as many months, he has still not been given the stamped piece of paper to which he is legally entitled. Each trip to court sends him further into debt, but the clerk refuses to produce the certificate while the authorities in his home village refuse to give him access to his son’s assets until the certificate is produced.6

Nobody in town denies that the father is the rightful heir of his deceased son. However, the legal elites—court and government officers in this case—refuse to do what is right for self-interested motives (corruption), or for simple inertia. Yet, they justify their actions on the ‘sanctity of procedure’—the certificate is, of course, vital.

The problem of corruption—the simplest form of rent-seeking—operates similarly throughout the world (including in high-income countries). It is a common say among multinational corporations when facing a legal dispute in Mexico that they have two options: hire a lawyer or bribe a judge.7 While this problem is not exclusive of low

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7 These two activities may also go together, as lawyers may be the conduits for ‘commission’ payments to judges and government officers. In the Global South the practice has been aided by multinational companies and essentially ignored by governments of high-income countries: “Until very recently, if a French company bribed a public official in a bottom-billion society, the payment was tax deductible. Think it through: French taxpayers were subsidizing bribery. Of course, it did not apply to the same behavior within France: if a French company had reported that it had bribed a French politician, the consequences would have been a criminal investigation, not a reduced tax bill. France was not alone in this practice…. Eventually, after a lot of pressure, in 1999 the OECD managed to organize the necessary coordination to escape this dilemma: an agreement among its member governments that they would all legislate to make bribery of a public official in a foreign country an offense. The question is now how vigorously this legislation will be enforced.” Colliers, *The Bottom Billion,* at 137. It is outrageous that still today most developed nations lack the equivalent of the American Foreign Corrupt Practices Act of 1977, as
and middle-income countries, complex procedures and lengthy litigation also play a role in this game, as they maximize the opportunity for rent-seeking in dealing with government regulation and litigation. However, the problem of rent-seeking goes deeper and it is more complex than simple corruption.

**Market entry restrictions**

In November, 2008 I asked many people in Liberia, including lawyers, judges, traditional chiefs, and ordinary people, why the formal courts did not seem to work to resolve disputes for the people. The answer was simple: On the one hand, the pursuit of formal justice is far more expensive and lengthy than customary justice; on the other, the punitive system of formal justice is viewed with suspicion as it creates separation and distrust between people.

If someone wants to pursue a claim through the formal justice system, there is an overwhelming amount of fees and indirect costs, in which he or she will have to incur, making the system unaffordable and hardly accessible for many. The fees and associated costs usually include finding and paying for transportation to the police station, also paying for transportation of the police officer, and for all costs involved in putting someone into custody. Then there’s a series of filing and registration costs, both in the police station and in court, lawyer’s fees and bribes, which are considered indispensable if a litigant wants to win a case. Even in some cases the plaintiff is also responsible for the offender’s food while in custody, otherwise he will be released. All these incomprehensible extent of fees makes many people to feel further victimized or

amended, 15 U.S.C. §§ 78dd-1, et seq. ("FCPA"). With all its shortcomings, the FCPA provides some deterrence for American companies to engage in these practices. European and Asian multinational
excluded by formal justice. Besides that, there is also the indirect cost in time, since pursuing a formal court proceeding involves significant investment in time outside livelihoods, and for many people it is expensive (in the form of lost income).\(^8\)

Let us consider the ‘right to an appeal’ as a ‘fundamental principle’ of civil procedure\(^9\) in this context. What is it that justifies a multi-layered judicial system in Liberia? Is it to prevent abuses of tyrannical judges if they exercise unchecked power; is it to correct good-faith mistakes of judicial officers; or is it because the State courts ought to be reserved ‘to resolve disputes of economic significance’? There are about 250 ‘qualified’ (licensed) lawyers, for a population of over three million people in Liberia.\(^10\) There is only one law school in the country, which refused to graduate more than a couple of new lawyers per year,\(^11\) and repeatedly denied the requests for admission to practice of a very smart Liberian attorney who had returned to the country after obtaining his law degree from Cambridge University. Barriers to access the legal services market were explained to me by the Dean of the law school and members of the Bar, and justified on the need to maintain high quality standards for the profession. In this context, the alleged ‘high standards of quality’ of the common-law tradition smell like an alias for oligopoly power and rent-seeking—a small number of service providers (the

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\(^8\) See, Isser, et. al., *Looking for Justice*.

\(^9\) Devis Echandia, *Compendio de Derecho Procesal*, at 55.

\(^10\) I personally visited the registry and confirmed that in November of 2008, there were only 149 ‘qualified’ (licensed) lawyers in the country. According to the United Nations Office on Drugs and Crime, the number of lawyers had increase to 250 by the end of 2011. United Nations Office on Drugs and Crime, *Access to Legal Aid in Criminal Justice Systems in Africa*, at 12.

\(^11\) As it was explained to me during a personal interview with the Law School Dean in November, 2008. It is my understanding, based on more recent interviews with rule of law implementers active in Liberia, that the number of law graduates per year has greatly increased since then.
legal elite) collude to raise barriers to enter the dispute resolution market to keep supply scarce and raise prices.\textsuperscript{12}

In most developing countries the cost of litigation (court and attorney fees) for even the most basic disputes is significantly higher than the monthly minimum wage. Local elites justify this on the ‘sanctity of procedure’; as Professor Gandasubrata declared, “in connection with the nature of the judicial process itself and considering the formal, punctual and rather complicated manners and usages upheld by the courts according to the Law on Procedure, it could be said that \textit{correct judgment cannot be performed in a short time.}\textsuperscript{13} Of course, lengthier and more complex proceedings often mean more lucrative attorney fees. Moreover, they produce a very steep barrier to access the market for potential competitors (including the litigants themselves, if they consider handling their own disputes without assistance of a lawyer), which may guarantee a stream of revenue in the long run.

Complex and lengthy proceedings also create a deterrent for litigants to take their disputes to court, which reduces the demand for legal services. However, even if many disputes go unresolved, and attorneys ‘lose’ the fees that they would have gained by resolving them, and judges and court personnel ‘lose’ the bribes that could have been collected, since the most complex disputes still require courts, these complex and lengthy

\textsuperscript{12} Remarkable efforts of the Liberian government and judiciary, and effective technical assistance from the American Bar Association’s Rule of Law Initiative (ABA-ROLI), the Carter Center, and others, are making great strides in changing this situation through programs that expand access to legal education and modernize the bar. However, there is still a long way to go in order to expand access to legal services to a significant portion of Liberia’s population. A description of these programs is available at ABA-ROLI’s web page at: \url{www.abanet.org}. The Carter Center has implemented similar programs in the country, which may be accessed on line at: \url{www.cartercenter.org}

\textsuperscript{13} Purworo Gandasubrata, \textit{Indonesia. Administration of Justice: Procedural Reforms on Court Congestion}, at 7 (emphasis added).
proceedings may nonetheless provide an opportunity for colluding attorneys and corrupt courts to ‘skim’ the market, maximizing their own utility. This is typical rent-seeking behavior, which affects the litigants’ rational choices and produces a suboptimal allocation of resources for the society as a whole. The net result is that in many developing countries formal courts are not an effective dispute resolution mechanism for the poor and other marginalized segments of society.\(^\text{14}\) This weakens social cohesion and harmony and increases transaction costs.

The overwhelming barriers to enter the market for legal services in Liberia are even more restrictive in other African countries, where the number of attorneys is tightly maintained very low. A recent survey by the United Nations Office on Drugs and Crime provides data on availability of attorneys throughout the African continent:

\begin{center}
\textbf{Table 1. Lawyers to population}\(^\text{15}\)
\end{center}

<table>
<thead>
<tr>
<th>Country</th>
<th>Population (millions)</th>
<th>Population living in rural areas (%)</th>
<th>Number of lawyers</th>
<th>Lawyers per 100,000 population</th>
</tr>
</thead>
<tbody>
<tr>
<td>Egypt</td>
<td>82</td>
<td>57</td>
<td>40000</td>
<td>48.8</td>
</tr>
<tr>
<td>South Africa</td>
<td>49</td>
<td>39</td>
<td>20059</td>
<td>40.9</td>
</tr>
<tr>
<td>Swaziland</td>
<td>1</td>
<td>75</td>
<td>400</td>
<td>40.0</td>
</tr>
<tr>
<td>Nigeria</td>
<td>151</td>
<td>52</td>
<td>50000</td>
<td>33.1</td>
</tr>
<tr>
<td>Lesotho</td>
<td>2</td>
<td>75</td>
<td>506</td>
<td>25.3</td>
</tr>
<tr>
<td>Botswana</td>
<td>2</td>
<td>40</td>
<td>465</td>
<td>23.3</td>
</tr>
<tr>
<td>Ghana</td>
<td>23</td>
<td>50</td>
<td>5000</td>
<td>21.7</td>
</tr>
<tr>
<td>Namibia</td>
<td>2</td>
<td>63</td>
<td>400</td>
<td>20.0</td>
</tr>
<tr>
<td>Zimbabwe</td>
<td>12</td>
<td>63</td>
<td>1200</td>
<td>10.0</td>
</tr>
<tr>
<td>Kenya</td>
<td>39</td>
<td>78</td>
<td>3817</td>
<td>9.8</td>
</tr>
<tr>
<td>Dem. Rep. of the Congo</td>
<td>64</td>
<td>66</td>
<td>6000</td>
<td>9.4</td>
</tr>
<tr>
<td>Sudan</td>
<td>41</td>
<td>57</td>
<td>3000</td>
<td>7.3</td>
</tr>
<tr>
<td>Liberia</td>
<td>4</td>
<td>40</td>
<td>250</td>
<td>6.3</td>
</tr>
</tbody>
</table>

\(^{14}\)As explained in Chapters 1 and 2 of Part 3 of this dissertation.  
\(^{15}\)Based on data from United Nations Office on Drugs and Crime, \textit{Access to Legal Aid in Criminal Justice Systems in Africa}, at 12.
<table>
<thead>
<tr>
<th>Country</th>
<th>Number</th>
<th>Attorneys</th>
<th>Population</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Uganda</td>
<td>32</td>
<td>87</td>
<td>2000</td>
<td>6.3</td>
</tr>
<tr>
<td>Zambia</td>
<td>13</td>
<td>65</td>
<td>650</td>
<td>5.0</td>
</tr>
<tr>
<td>Sierra Leone</td>
<td>6</td>
<td>62</td>
<td>298</td>
<td>5.0</td>
</tr>
<tr>
<td>Ethiopia</td>
<td>81</td>
<td>83</td>
<td>4000</td>
<td>4.9</td>
</tr>
<tr>
<td>Gambia</td>
<td>2</td>
<td>44</td>
<td>90</td>
<td>4.5</td>
</tr>
<tr>
<td>Mozambique</td>
<td>22</td>
<td>63</td>
<td>779</td>
<td>3.5</td>
</tr>
<tr>
<td>Angola</td>
<td>18</td>
<td>43</td>
<td>570</td>
<td>3.2</td>
</tr>
<tr>
<td>Rwanda</td>
<td>10</td>
<td>82</td>
<td>316</td>
<td>3.2</td>
</tr>
<tr>
<td>Guinea-Bissau</td>
<td>1.5</td>
<td>70</td>
<td>45</td>
<td>3.0</td>
</tr>
<tr>
<td>United Rep. of Tanzania</td>
<td>42</td>
<td>75</td>
<td>1135</td>
<td>2.7</td>
</tr>
<tr>
<td>Djibouti</td>
<td>0.8</td>
<td>13</td>
<td>20</td>
<td>2.5</td>
</tr>
<tr>
<td>Mali</td>
<td>13</td>
<td>68</td>
<td>265</td>
<td>2.0</td>
</tr>
<tr>
<td>Côte d’Ivoire</td>
<td>21</td>
<td>51</td>
<td>420</td>
<td>2.0</td>
</tr>
<tr>
<td>Malawi</td>
<td>15</td>
<td>81</td>
<td>300</td>
<td>2.0</td>
</tr>
<tr>
<td>Burundi</td>
<td>8</td>
<td>90</td>
<td>106</td>
<td>1.3</td>
</tr>
<tr>
<td>Central Africa Republic</td>
<td>4</td>
<td>61</td>
<td>38</td>
<td>1.0</td>
</tr>
<tr>
<td>Burkina Faso</td>
<td>15</td>
<td>80</td>
<td>131</td>
<td>0.9</td>
</tr>
<tr>
<td>Niger</td>
<td>15</td>
<td>84</td>
<td>112</td>
<td>0.7</td>
</tr>
</tbody>
</table>

The rate of 6.3 attorneys per 100,000 population in Liberia is much lower than in other countries in the region, including Egypt and South Africa, where the same rates are 49 and 41, respectively. Yet, the same rate is much lower in most other countries surveyed; in some of them (Niger, Burkina Faso and Central African Republic), there is less than 1 attorney per 100,000 people. This extraordinarily limited supply of lawyers creates a very tight market which is artificially sustained by overwhelming entry restrictions. These restrictions are justified on the need to maintain high professional standards—to uphold the procedural safeguards inherited from the civil-law and the common-law traditions, which are necessary to ensure that Justice (with capital J) is properly served. So, injustice (through lack of access to legal services for the vast majority of the population) is justified on the need to guard Justice. This is not
corruption proper; it is rather an extremely purist—and very profitable—understanding of the ‘sanctity’ of the common-law and the civil-law process.

Due to severe income inequalities and significantly tighter markets in low and middle-income countries, the sophisticated elite as a whole enjoys privileged access, and often engages in rent-seeking behavior or simply neglects the lower (less profitable) slices of the market of dispute resolution. Complex and time-consuming procedures ensure that lawyers are always needed, and perpetrate the lawyer’s control over the dispute resolution market even in countries where the number of lawyers is high. These procedural restrictions may be seen as a manifestation of the policy-implementing sovereign trying to protect the weakest party to the dispute—the stated purpose is to safeguard Justice (with capital J). Yet, this sub-optimal allocation of resources leaves large segments of the population (the poor) without any recourse to dispute resolution.

In my opinion, which is based on my experience on negotiations and litigation with state bureaucrats and private lawyers in some 30 low and middle-income countries, this situation is not caused by the lawyers’ deliberate attempt to exclude or marginalize the poor. In my view, this situation is an unintended side-effect of the prevailing mindset of the legal profession in low and middle-income countries; it is “the way things are,” and the way they have been for 2,000 years. It is the ghost of the formalistic, bureaucratic, control-obsessed procedure of the late Justinian Rome.
The gap between formal legal institutions and everyday reality is filled in many countries by co-existing informal (customary, traditional, aboriginal) dispute settlement mechanisms.

This fourth part of the dissertation has seven chapters. The first one describes a variety of customary justice systems from different latitudes, from the perspective of ordinary folk knowledge in the western world; we call it “the BBC News perspective.” The second chapter describes customary justice from the perspective of the users of these systems. Chapter three proposes two models of customary justice. Chapter four presents a revised account of the sassy-wood justice based on in-depth interviews held with customary justice chiefs in Liberia. The fifth chapter provides a detailed account of the justice system of the Kogi indigenous community of Sierra Nevada de Santa Marta, Colombia. Chapter six discusses different alternatives for state-customary interface and the problem of enforcing culturally conflictive decisions. The final chapter discusses the
operation of customary justice among the urban poor in low and middle-income
countries today.

CHAPTER 1. THE ‘BBC NEWS’ PERSPECTIVE OF CUSTOMARY JUSTICE

Customary justice comes in many varieties. This chapter describes a few of
them, from the point of view of how they are perceived in the west; as an instrument, I
use recent BBC News reports. Some of them describe situation which are still very
common today, while others are rare. A few are outliers. Nonetheless, these outliers are
particularly important; as they gather so much attention from the western media, they
become the way that customary justice systems as a whole are perceived in the ‘civilized
world’.

The divide between the ‘primitive’ and the ‘civilized’ has shaped the way we see
these ‘other’ systems of justice and the way we interact with them. The prism that we
commonly use to see customary justice is so thick, that we are bound to get a heavily
distorted image of reality. This prism is the millenary tradition of the European trial by
ordeal, which was discussed above (Part Two, Chapter 1).

We now turn our attention to a variety of still existing customary justice systems,
and we look at them mostly as they are described by BBC News reports.

Stoning of child witches in Sub-Saharan Africa

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1 Several agencies of the United Nations recently published a conceptual map of the continuum of
formality/informality and state recognition of customary justice systems: UN Women, Unicef and UNDP,
Informal Justice Systems, Charting a Course for Human Rights-Based Engagement, at 36. See also, e.g., Harper,
Customary Justice: From Program Design to Impact Evaluation, at 17; Schärf, Wilfried, Non-State Justice Systems in
Southern Africa, at 4; Endalew, Luba Basa and Harma Hodha: Traditional Mechanisms of Conflict Resolution in
Metekkel, Ethiopia.
Stoning and communal lynching of witches in DRC, Nigeria, Uganda, Tanzania, Kenya and other places in Sub-Saharan Africa and elsewhere are relatively common today. This problem affects children as young as five years of age who are accused of witchcraft, and it is widespread in some countries: “Unicef’s Regional Child Protection officer for West and Central Africa told the BBC more than 20,000 street-children had been accused of witchcraft in the DR Congo capital Kinshasa.” These procedures may be seen as a modern version of the witch hunts that took place in Massachusetts, USA, and Lancashire, England, a couple of centuries ago. They are examples of ‘justice’ through a combination of community pressure and the intervention of magic and the supernatural.

My goal is not to state the fact that witch hunts still happen in many parts of the world today, or to describe the determinants and characteristics of these modern expressions of ‘justice’. My point here is to highlight the way these forms of ‘justice’ are perceived in different parts of the world; according to a recent BBC News report:

**Nigeria 'child witch killer' held.**

Police in south-east Nigeria have arrested a man who claimed to have killed 110 child "witches." "Bishop" Sunday Ulup-Aya told a documentary film team he "delivered" children from demonic possession. But after his arrest, he reportedly told the police he had only killed the "witches" inside, not the children. Child rights campaigners say children are frequently abandoned, hideously injured and even murdered because their families believe they are witches. Self-proclaimed "pastors" extort money from families to exorcise the children, but none has been charged until now. Mr Ulup-Aya was arrested in Akwa Ibom State after a child rights campaigner led police to his church and negotiated a consultation fee for an exorcism. He has now been charged with

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5 [http://news.bbc.co.uk/2/hi/africa/8119201.stm](http://news.bbc.co.uk/2/hi/africa/8119201.stm)
murder. Five others have been arrested since the weekend and the state government says more arrests are planned.

Embarrassed

So many people here believe that children can be possessed by demons that there is rarely any action taken against those who claim to deliver the children in violent exorcisms," says Sam Ikpe-Itauma, of the Child Rights and Rehabilitation Network (CRARN). He says he has been working for six years to bring the attention of the state government to the children being abandoned, sold to traffickers, or murdered.

But it was not until a British documentary - Dispatches: Saving Africa’s Witch Children - was aired on Channel 4 last month that an arrest was made. His organisation is looking after 170 children who have been abandoned or abused after being accused of being witches. Akwa Ibom State spokesman Aniekan Umanah denied they had been embarrassed into acting. "Nobody knew about him, he lives in a very remote village," he said. The state has cared for child victims of abuse, but has not been able to track down abusers because of "lack of documentation,” he said.

'Misunderstanding'

Mr Ulup-Aya reportedly told police he had not actually killed children.

He said there was a misunderstanding - he meant he had killed the witch inside the child, not the child themselves. When police raided his house they found two children inside, but no evidence that any others had been murdered there. "We have him on tape admitting to killing," said Mr Umanah.

It is now up to him to prove otherwise." In the past other "pastors" who claim to have the power to deliver children from demonic possession in violent exorcisms have been arrested, but then quietly released by the police, according to Mr Ikpe-Itauma. "I fear for my life now," he says.

 Trafficking

The fear of child witches is a relatively new phenomenon in Nigeria. Belief in witchcraft is strong across the country but a fear of child witches has become widespread in Akwa Ibom State since 1990s. Now children are blamed for all kinds of misfortune that befalls their families. They are abandoned or sold to child traffickers who then indenture them as house-workers in other parts of Nigeria or into prostitution. Others are violently exorcised to rid the child of the "demons." Exorcism victims seen by CRARN in the past include a child who had nails driven into her head. Earlier this week Mr Ikpe-Itauma said a six-year-old child was brought to their rescue centre after clambering out of a fast-flowing river. "The boy's uncle was experiencing painful swelling in his legs," Mr Ikpe-Itauma told the BBC. "He concluded the child was a witch and had placed a curse on him, so he took him on his bicycle to the river and threw him in."

In many countries witchcraft is considered a criminal conduct punished by law.

In some others, while the conduct is not illegal, it is still prosecuted by the police and the
courts; in Malawi, for instance, people accused of witchcraft may stand trial and be punished by “sentences of between four and six years in prison for practising witchcraft,” even though “the convictions [are] illegal as there [is] no law against witchcraft.”8 This situation presents an interesting paradox: According to NGO activists, “the problem is that our police and our courts most of them are witchcraft believers and this belief is very strong here in Malawi.”9 So, formal courts and institutions are used to punish conducts which are not punishable under formal laws and procedures, because the formal officials who administer the formal institutions believe in magic and supernatural ‘justice’.

The boundaries between injustice on one hand, and physical and spiritual illness, on the other, are blurred.

Illness is a particular area where the physical and spiritual meet. There is no fixed demarcation between body and soul. In Africa illness may be treated with herbs very successfully. But often it will have a spiritual dimension. It may be seen as a punishment from God or the deities, or it might be the result of ill will from an enemy. In this case some form of spiritual power will be needed to combat it; a medicine man or woman will then be consulted. There is a common belief that if the illness has been brought about by an enemy, then the likelihood is that the enemy consulted a witch. The concept of witchcraft is a complicated one. People judged to be witches are usually women. They are outsiders; they may be very old, or very ugly, without children or family. They may admit to witchcraft, they may not. The point is they are seen as a threat to the community. The issue is obscured by a belief that the witch not only operates secretly at night, she may not even know that she is a witch. It’s hard to get a fair trial once accused of witchcraft.10

“Tar and Feather” and other forms of ‘vigilante justice’

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It is a culturally accepted practice in many parts of the world, for the community to take justice in its own hands. The following account describes one of these modalities, the “tar-and-feather” justice, which is common in Cameroon and other countries:

*Tar and feather attack 'barbaric'.*  
**BBC News.** 2007/08/28

Police have described as “brutal and barbaric” an attack on a man who was tarred and feathered... It is thought the attack was carried out on Sunday evening by two men wearing balaclavas, as a crowd including women and children looked on. The victim was made to wear a placard reading “I’m a drug-dealing scumbag.” Elements of the [group] were blamed for the attack by politicians, although its political wing denied the loyalist paramilitary group was responsible. [A spokesman] said “local people had gone to the [group] to ask them to sort it out,” but that it told them to go to the police. He claims that the police then failed to act on information passed on and that people in the area decided to take the matter into their own hands. In a statement, the police said there was “no place in civilized society for people taking the law into their own hands resulting in such a brutal and barbaric attack.” “We have been working closely with local community groups to try and address these issues and find solutions.” “If people have concerns and grievances about what is happening in their local community they should bring that evidence to the police.”

This recent case took place in... south Belfast, Northern Ireland, and the group allegedly involved is the Ulster Defence Association (UDA). Similar accounts are available from throughout the developing world.

**The “Eyes of the Cougar” in the Amazon Jungle**

Dispute-settlement mechanisms among various indigenous communities in Colombia exhibit significant variations which are tied to their level of acculturation to the rest of the country. There are over 80 indigenous communities in the country, ranging from fully integrated urban indigenous communities, to groups that still live in the midst of the Amazon jungle and who have had very little contact with the “civilized world.”

Despite these variations, certain elements remain central. The indigenous peoples’ conception of justice and their understanding of the dispute resolution process is radically different from those prevailing among the rest of Colombians. Justice among the Indians is holistic. Again, the concepts of justice, crime, punishment, and dispute resolution cannot be properly understood in isolation; they are intrinsically related to a broader understanding of community harmony, social and individual healing, and equilibrium with the natural and supra-natural world.\(^\text{12}\)

Experts consulted provided several examples of the use of “magic” as part of the dispute resolution process,\(^\text{13}\) including a procedure to “borrow the eyes of the cougar” to enhance awareness and cause sickness to an unidentified transgressor, as a means to ascertain his/her identity. What follows is a witness’ account of a case that took place some 10 years ago among a highly isolated tribe of the Amazon jungle, which has had barely any contact with modern Colombia:

> One man in the community complained to the shaman that some tool of his had been stolen. The shaman responded that within a couple of days he was going to find out the identity of the thief. The shaman proceeded to borrow the eyes of the cougar through a highly elaborated ritual and with some help of hallucinogen substances. The cougar’s eyes allowed the shaman to see. A couple of days later another man fell terribly ill; he was the thief. Through his illness he was identified, and he confessed. The shaman then proceeded to heal the transgressor, but only after apology, compensation and reconciliation had taken place.\(^\text{14}\)

\(^{12}\) According to anthropologist Luis Eduardo Luna, the Peruvian Amazon ‘ayahuasqueros’ (shamans) “say that ayahuasca [the plant] is a doctor. It possesses a strong spirit and it is considered an intelligent being with which it is possible to establish rapport, and from which it is possible to acquire knowledge and power if the diet and other preparations are carefully followed.” Cited in Narby, *The Cosmic Serpent*, at 18. A detailed description of the “shaman’s sacred drink made from ayahuasca, the ‘soul vine,’” is available in Harner, *The Way of the Shaman*, at 2 to 8.

\(^{13}\) My understanding is based on multiple interviews with Colombian indigenous leaders over the years.

\(^{14}\) Quote from my notes from interview with medical doctor who witnessed first-hand this illness and cure while living with a highly isolated indigenous community in the Amazon jungle during his rural year of mandatory community service for medical graduates in Colombia (“año rural”).
Witnesses also conveyed to me apparently “miraculous” healings related to other dispute-resolution procedures in the Colombian Amazon jungle. Justice is “circular” (as opposed to linear) among most indigenous communities. Healing, not punishment, completes the circle of justice in the Amazon. Healing comes with compensation, restitution, apology and reconciliation—the ultimate goal is social harmony, not punishment. And “Elders” and “Shamans” (medicine men) play a pivotal role in dispute resolution, not only in highly isolated communities but also among some urban indigenous groups.

*Tribal Jirgas in Pakistan and Afghanistan*

A well-established system of traditional justice operates in Afghanistan and other countries in the region, particularly in rural areas.

> Jirga in every day practice refers to a local/tribal institution of decision-making and dispute settlement that incorporates the prevalent local customary law, institutionalised rituals, and a body of village elders whose collective decision about the resolution of a dispute (or local problem) is binding on the parties involved... Those on the jirga combine ‘traditional authority’ (based on personal qualities, social status, and leadership skills) as well as ‘competent authority’ (based on the individual’s recognised expertise and skills), which play a central part in achieving a prikra (ruling) that is satisfactory to both parties.  

In spite of some advantages, customary justice in Pakistan and Afghanistan has serious shortcomings.

> However jirga/shura has its own problems: in some cases of murder jirga may recommend badal (direct vengeance), or the marriage of a woman from the part’s [guilty party] tribe to the victim’s close relative. Although these practices have become increasingly rare in recent years (Johnson at al 2003), the first punishment is in direct conflict with the Afghan state laws, and the second one is a clear violation of fundamental human rights. In addition, jirga/shura is generally a male-only institution; it can also be excessively influenced sometimes by powerful elders. More

importantly, in areas where warlords exercise direct control over the population, jirga/shura decisions are influenced (or undermined) by those with guns and money.\textsuperscript{16}

In a recent paper entitled \textit{Honor Related Violence Against Women in Pakistan}, Hannah Irfan provides a very informative analysis of the multiple dimensions involved in the delivery of justice in rural areas of developing countries.

Like in many other countries, in the rural areas of Pakistan a parallel system of justice operates alongside the formal system and village elders, tribal chiefs or local religious leaders dominate this system. Tribunals set up within this informal system have no legal recognition under statutory law and operate as quasi-judicial structures that have strong social legitimacy.\textsuperscript{17} These tribunals are very influential within their communities; in fact most of the times they are more powerful than the local state administration, and exert informal control over women’s lives and bear responsibility for violations of women’s human rights. Sometimes they commit acts of violence against women; sometimes they encourage or permit such acts.\textsuperscript{18}

Tribal Jirgas, Faislo, Panchayats,\textsuperscript{19} are all forms of local informal adjudicative bodies that operate at the village, clan or tribe level. They take various forms depending on the particular area of Pakistan where they are found; comprising of village or clan elders, religious leaders, a group of local tribesman headed by the head of that tribe, but one thing remains common: all the participants in these tribunals are exclusively male and women in a majority of cases are not allowed to even appear before the tribunals (regardless of whether the subject matter of the case effects or involves them in any way).\textsuperscript{20} The tribunal members have no formal adjudicative training and usually implement the local customary laws influenced largely by their own individual interests, perceptions and understanding of the social norms with regards to the particular issue before them. A jirga has sweeping powers to impose penalties in

\textsuperscript{16} Id. at 319–341.

\textsuperscript{17} [Quote in the original] System of Sardari (Abolition) Act 1976 – The system of sardari prevalent in certain parts of Pakistan is the worst remnant of the oppressive feudal and tribal system which, being derogatory to human dignity and freedom, is repugnant to the spirit of democracy and equality enunciated by Islam and enshrined in the Constitution of the Islamic Republic of Pakistan and opposed to the economic advancement of the people.

\textsuperscript{18} [Quote in the original] Tribunals encourage the traditional practice of Saurra or Vani or offering of women (often young girls) as compensation to end disputes. Sentencing women rapists, sanctioning Honor Killings and inhuman punishments like walking on hot coals or administering of stripes are normally handed out by local tribunals. Documented in Amnesty International’s Report “Pakistan: The Tribal Justice System.” Amnesty International Publication, 2002.

\textsuperscript{19} [Quote in the original] The terms ‘Tribunals’ and ‘Jirgas’ will be used interchangeably throughout the paper and mean the informal local adjudicative bodies that operate at the village or community level and handle and decide disputes based on customary law and traditions.

\textsuperscript{20} [Quote in the original] “The big problem for women is that no one informs them about anything. Women do not take part in any deliberations because a village council is only formed of men. Whether a woman is the object of the conflict or the compensation for the offence, she is, on principle, sidelined. She is told from one day to the next that she has been ‘given’ to such-and-such a family. Or, in my case, that she must beg forgiveness from this or that family… the dramas and conflicts in a village are true knots untangled by councils without respect for our official laws, especially those regarding human rights.” Mukhtar Mai, \textit{In the name of Honor: A Memoir}. Virago Press Great Britain, 2007.
criminal cases. It can award sentences of fines, whipping and life imprisonment, demolition of a convict’s house and the blockade of a hostile or unfriendly tribe. There is no appeal allowed against the decisions taken by a tribunal and the majority of these decisions are followed and enforced through local thugs and social boycotts, allowing for very little dissent on part of the people affected by these often cruel authoritarian decisions.

Traditionally tribunals deal with a variety of issues and conflicts that arise at the local level including land and water disputes, inheritance disputes, breaches of the ‘honor’ code, arbitration between warring parties etc. Women rights are increasingly made the subject of tribal conflicts that come up before these local jirgas. Broadly speaking, from a gender rights perspective, women are made subjects of conflicts before jirgas in two main ways; firstly, either as transgressors of social norms, where women’s infidelity and immorality (marriage by choice, illicit relations, seeking of divorce and being raped) are the direct subject matter of the dispute and the aggrieved party - the family of the woman, is seeking a decree against her and her abettor (usually a paramour or husband of choice etc.). Secondly, women are considered a commodity by the members of the jirga to be traded at the time of sentencing as compensation, regardless of the nature of the dispute.

An incident that gained much international media coverage was that of Mukhtar Mai, a 30 year old woman from the province of Punjab. Mukhtar Mai’s 12 year old brother was found guilty by a local tribunal of having illicit relations with an older woman belonging to the Mastoi tribe, a more influential tribe in the village. The tribunal ordered that as compensation for the alleged illicit relationship and as punishment for the boy’s family, members of the Mastoi tribe would gang-rape a woman from the boy’s family and the tribunal picked Mukhtar Mai. This sentence was passed in the presence of several hundred local residents as well as some members of the local police, and no one intervened to stop the heinous crime, which was carried out there and then by four men, including a member of the tribunal.21 Mukhtar, in her biography tells of her ordeal, that she says she shares with millions of other women in Pakistan. In her case the story became public after a journalist visiting the village heard of the incident from the local maulvi at the mosque.22

It is not my objective to deny the serious problems of customary justice that were presented above, like the stoning of 5-year-old witches or the gang raping of Mukhtar Mai. My point is only that the “BBC News perspective” of customary justice provides a very limited description of a much more complex phenomenon.

CHAPTER 2. CUSTOMARY JUSTICE, AS PERCEIVED BY USERS – THE AFRICAN TREE

Customary justice is widely used by vast segments of the population in developing countries, for a variety of reasons:

Many observers point to the practical needs of rural populations when explaining the popularity and functionality of informal justice institutions. Rural populations often have better access to informal justice systems than to the state judiciary and they prefer them for a number of significant reasons: typically, the procedure takes place on site, it is more or less free of cost and less prone to corruption, it is exercised by trusted people in the language everybody speaks, and decisions are taken according to rules known to all community members. Informal procedures typically aim at restoring social peace instead of enforcing abstract legislation. They are consent and justice oriented. In this sense, informal justice systems allow for better “access to justice”.

Apart from these common features, informal justice institutions are, in large geographical areas, the only choice due to the absence of the state. This is often the case in regions where colonial powers did not attempt to establish formal court systems, such as North Yemen or Afghanistan. In the situation of armed conflict, informal justice institutions often gain more importance due to the breakdown of the formal court systems. In post-conflict societies they can play a crucial role in the stabilisation and reconciliation process.¹

In Pakistan, “the formal legal system proves less efficient and less accessible in terms of infrastructure, language and facilities as well as actual delivery of justice to the citizens, and hence there has been an increased reliance on this alternative and traditional form of dispute resolution in Pakistan. It is argued that local tribunals because of their proximity substantially reduce the cost of dispute settlement for the poor, and are decided on the basis of customary law, which the villagers can comprehend. Most importantly, however, the contrast drawn between the formal system and the informal tribal system is that the decisions of the tribal system enjoy the ‘sanction of tradition and are more readily and willingly acceptable’ by the parties. State laws are rarely understood

¹ Röder, Informal Justice Systems: Challenges and Perspectives.
by the uneducated masses and ‘court decisions do not inspire confidence either in merit or impartiality.’ [Rehman, I. A. Dark Justice, News Line, August 2002]”

Similarly, “the main reasons that Afghan people have preferred jirga/shura to formal justice is because the former is conducted by respected elders with established social status and the reputation for piety and fairness. In many cases, the disputants personally know the local elders and trust them. In addition, in the context of jirga/shura, elders reach decisions in accordance with accepted local traditions/values (customary law) that are deeply ingrained in the collective conscience of the village/tribe – they have a profound existence in the collective mind of the village and in the minds of its individual members. Also unlike state courts, jirga/shura settle disputes without long delays and without financial costs. Illiteracy plays an important role in discouraging people from using the formal courts – the overwhelming majority of Afghans are unable to make applications, read/understand the laws or complete the paper work.”

Furthermore, for many Liberians, the punishing system of formal justice is widely regarded in disbelief as it is not concerned about getting to the root of the problem, but in placing blame and punishing, eventually further dividing society. To many people, this system is not constructive and not worth it; they are rather interested in making amends, forgiving, and strengthening the community through the dispute resolution process. More than tradition, restorative justice which favors social reconciliation—the African tree—is linked to the socio-economic context in which the majority of Liberians live;

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bearing in mind the means of subsistence and economic interdependence of rural societies, confrontational relations among neighbors can have serious costs.4

Survey after survey around the world5 tends to confirm the users’ preference for customary justice, for the reasons explained in the previous paragraphs. According to the most recent study published by several agencies of the United Nations, “[t]he data collected [in Malawi] confirmed previous conclusions that a major proportion of the population primarily use IJS [Informal Justice Systems]. In the qualitative data collected, approximately one third of the respondents said they preferred to take a case to the traditional leaders first (see below), while another third would first go to church leaders. While the nature of the services provided by church leaders tends to differ from IJS, and a religious official or paralegal might provide advice rather than dispute resolution as such, it can be said that the main sources of help for people facing disputes are the family counselors, religious leaders, NGOs/CBOs, and traditional authorities (TAs).”6

<table>
<thead>
<tr>
<th>Intended users</th>
<th>Goals</th>
<th>Standards</th>
<th>Procedures</th>
<th>Time</th>
<th>Cost</th>
<th>Location</th>
<th>Language</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Formal courts</strong></td>
<td>Elite / Urban areas</td>
<td>Resolve a case or implement a state policy</td>
<td>Transplant European law</td>
<td>Sophisticated / Multi-layered</td>
<td>Lengthy</td>
<td>High Cities</td>
<td>European (English, Spanish, French, Portuguese)</td>
</tr>
<tr>
<td><strong>Customary justice</strong></td>
<td>Masses / Rural areas</td>
<td>Social harmony</td>
<td>Community-based</td>
<td>Simple / Single-layered</td>
<td>Speedy</td>
<td>Low Villages</td>
<td>Local languages</td>
</tr>
</tbody>
</table>

4 See, e.g., Isser, et. al., Looking for Justice.
5 E.g., The Asia Foundation and USAID, Law and Justice in Timor-Leste. A Survey of Citizen Awareness and Attitudes Regarding Law and Justice, at 33; UN Women, Unicef and UNDP, Informal Justice Systems, Charting a Course for Human Rights-Based Engagement, at 321; World Justice Project’s surveys in 97 countries.
6 UN Women, Unicef and UNDP, Informal Justice Systems; Charting a Course for Human Rights-Based Engagement, at 321.
For most people around the world, the notion of ‘customary justice’ does not relate to the ‘BBC News perspective’ presented in the previous chapter; it is more readily identified with the notion of the ‘African Tree’ – the friendly meeting place where the community comes together to amend the broken bonds. Skelton presents the South African variant of this notion as follows:

The ‘African philosophy’... is known as ubuntu. It has been described as an African worldview, which is both a guide for social conduct as well as a philosophy of life. Archbishop Desmond Tutu explains in his book about the TRC [Truth and Reconciliation Commission] that during the negotiation process, a decision had to be made about what form the commission to deal with South Africa’s past should take. The two possibilities of the Nuremberg-type trials or an unconditional amnesty process were overtaken by a third approach of conditional amnesty, and that this approach was consistent with Ubuntu. He explains further:

Ubuntu is very difficult to render into a Western language. It speaks of the very essence of being human. When we want to give high praise to someone we say ‘yu, u nobuntu’ (hey, he or she has ubuntu). This means they are generous, hospitable, friendly, caring and compassionate. They share what they have. It also means my humanity is caught up, is inextricably bound up, in theirs. We belong to a bundle of life. We say, ‘a person is a person thought other people.’

He goes on to clarify how ubuntu is linked to the idea of forgiveness. He asserts that to forgive is not just to be altruistic, it is the best form of self-interest because forgiveness gives people resilience, enabling them to survive and emerge still human despite all efforts to dehumanize them. He concludes that even the supporters of apartheid were victims of the vicious system which they implemented, because within the context of ubuntu, our humanity is intertwined.

The concept of ubuntu has underpinned societal harmony in Africa for many years, and guided traditional conflict resolution. Traditional mechanisms to deal with problems arising in communities have been effective structures for upholding African customary law. It has been said that ‘reconciliation, restoration and harmony lie at the heart of African adjudication,’ and that the central purpose of a customary law court was to acknowledge that a wrong had been done and to determine what amends should be made. Some of these customary courts, known as Izinkundla, Izicawu or Makgotla are still in operation throughout South Africa today, mostly in rural areas.

The traditional model currently practiced in rural areas in South Africa is similar to indigenous traditions in other countries such as New Zealand and Canada. It involves elders (almost exclusively men) who preside over the resolution of problems experienced by members of the community, which have not been resolved at the family
or community level. With the emphasis on ‘problems’ rather than offences, these structures hear the stories of the parties involved and then make decisions regarding outcomes. These outcomes aim to heal relationships, and they ensure restitution or compensation to victims. Symbolic gestures such as sacrifice of animals and the sharing of a meal indicate that the crime has been expiated and the offender can now be reintegrated.8

The ‘African Tree’ notion of justice includes many variants and is not exclusive of the African continent; manifestations of the same concept of justice in other latitudes are presented in the following chapters of this dissertation.

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CHAPTER 3. COMMUNITY PRESSURE AND JUDICIA DEI

While there is enormous diversity in the field, all customary justice institutions may be grouped for analytical purposes in two basic camps:

1) Mechanisms of social control through community pressure, and

2) Systems of social control through the intervention of the supernatural world.

Examples of social control through community pressure would range from the patient work of Village Elders in bringing together two disputing parties in a rural village of Kenya, to the “tar and feather” system in Cameroon. Auerbach provides many modern examples of social control through non-legal dispute settlement based on community pressure in America.

In many and varied communities, over the entire sweep of American history, the rule of law was explicitly rejected in favor of alternative means for ordering human relations and for resolving the inevitable disputes that arose between individuals. The success of non-legal dispute settlement has always depended upon a coherent community vision. How to resolve conflict, inversely stated, is how (or whether) to preserve community.

Historically, arbitration and mediation were the preferred alternatives. They expressed an ideology of communitarian justice without formal law, an equitable process based on reciprocal access and trust among community members. They flourished as indigenous forms of community self-government. Communities that rejected legalized dispute settlement were variously defined: by geography, ideology, piety, ethnicity, and commercial pursuit. Yet their singleness of vision is remarkable. Despite their diversity they used identical processes because they shared a common commitment to the essence of communal existence: mutual access, responsibility and trust. The founders of Dedham (a seventeenth-century Christian utopian community in Massachusetts), Quaker elders in Philadelphia, followers of John Humphrey Noyes at Oneida (a nineteenth-century utopian commune), the Chinese in San Francisco and Scandinavians in Minnesota, and even Chamber of Commerce businessmen easily could have collaborated on a common blueprint for dispute settlement. Sharing a suspicion of law and lawyers, they developed patterns of conflict resolution that reflected

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1 See, e.g., Gibson, On some Ancient Modes of Trial, especially the Ordeals of Water, Fire and other Judicia Dei.
2 Community lynching of suspected criminals. Death comes from burning with tar. Chicken feathers are thrown to the dying criminal, who is then left in the street to be seen by all, mostly as a deterrent mechanism.
their common striving for social harmony beyond individual conflict, for justice without law.\(^3\)

Typical examples of customary justice mechanisms of social control through community pressure are the *Jirgas* in rural Afghanistan and Pakistan, and customary justice among the Wayúu community of La Guajira, Colombia.\(^4\) Unlike many other systems of customary justice where the functions of healing and resolving disputes are closely linked, in these two cases these functions are clearly separated. Just like in Afghanistan and Pakistan, in the Wayúu community the ‘medicine man’ is a different person and performs a different function from the ‘palabrero’ (speaker/mediator).

The most salient form of social control of harmful behavior through community pressure in ancient times was the exile. This practice, which can be found in all corners of the planet, from the Greeks, to the American Cheyenne,\(^5\) to the Polynesians, to the Amazonian Indians, to the Eskimo,\(^6\) probably dates back millions of years. When our long forgotten ancestors lived in nomadic clans and had to compete with other animals for their subsistence, banishment from the group was “tantamount to a death sentence.”\(^7\) However, this sentence was one that could be commuted through hardship and redemption.

Llewellyn and Hoebel’s seminal work, *The Cheyenne Way*, provides an illuminating account of the interaction of social control through community pressure and “the

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4 For a detailed description of the legal system of the Wayúu, see Perafán Simmonds, *Sistemas Jurídicos Paez, Kogi, Wayúu y Tule*.
5 Llewellyn and Hoebel, *The Cheyenne Way*.
6 Hoebel, *The Law of Primitive Man*.
7 Llewellyn and Hoebel, *The Cheyenne Way*, at 133.
supernatural” in the handling of cases of homicide among the Cheyenne, Dakota and Arapaho Indians in North America.

**Homicide and the supernatural.**

The homicide record of the Cheyennes—sixteen recorded killings within the tribe in two generations (1835–1879), or an annual rate of almost one killing to a theoretical ten thousand of population—is another evidence of the conflict between the aggressive personal ego of the individual male and the patterns of restraint which were also ideationally promulgated by the culture.

The killing of one Cheyenne by another Cheyenne was a sin which bloodied the Sacred arrows, endangering thereby the well-being of the people. As such it was treated as a crime against the nation… Fear of supra-social consequences and the resultant efforts of the Cheyenne community to purify itself from the stain of Cheyenne blood on Cheyenne band are most probably what brought homicide under the public law. Killing became a crime; its criminal aspect came then to dwarf its aspect as sin, though by no means to displace the latter; and the criminal aspect had in law gone far to actively displace the privat wrong concerned: Homicide had ceased to be legally a matter for blood-revenge. So far as concerns total discountenancing of blood-revenge, this is a logic consequence of the social calamity of bloodling the arrows…

When murder had been done, a pall fell over the Cheyenne tribe. There could be no success in war; there would be no bountifulness in available food, ‘game shunned the territory; it made the tribe lonesome.’ So pronounced Spotted Elk; so assent all Cheyennes.

There is thus a branding synonym for ‘murder’ in Cheyenne, putrid. Such was the murderer’s stigma. With murder a man began his internal corruption, a disintegration of his bodily self which perhaps contrition could stay, but never cure. About the killer clung the murderer’s smell, an evil mantle eternally noisome to fellow men and the sought-after animal denizens of the plains. Though the tribe, after ridding itself of the murderer’s presence through banishment, could purify itself by the sacred ritual of renewing the Medicine arrows, the murderer was tainted beyond salvation. Hence, the immediate consequence of murder was a conference of the tribal chiefs—such as were in population of the band at the moment. By them a decree of exile was given.

It is too often said that in primitive life banishment from the group is tantamount to a death sentence. That depends on the conditions of physical and social environment. For the banished Cheyenne circumstances were relatively kind… he was accepted by the friendly alien tribes without voice opprobrium. Yet homesickness seems to have played an important part. Again and again the remission of banishment was preceded by eloquent presentation of the wretched condition of the banished man and his family, cut off as they were from association with the tribe.

The ceremony of purifying the arrows is in itself of no direct legal significance; the compulsion to perform the ceremony is. For the murderer’s transgression the tribe paid penalty, until the ceremony was performed. The control significance of such penalty must not be overlooked. It must not be overlooked, even though active references to it
when a killing seemed toward (sic), are not found. For instance, people intervened when
men quarreled violently. What they said was ‘You must not.’ ‘You must not be a
murderer.’ ‘You will disgrace yourself.’ ‘It is not worth it.’ This is the language of law
and morals, reputation and horse sense, not of religion and sin and supernatural
visitation upon the people. But we bold the shadow of this latter to have been present
and felt, despite the powerful secularization of overt expression. When sweet medicine
gave the holy arrows to the tribe so many generations ago, it is told that he then
instructed the Cheyennes in the rituals of purification. They were to keep the arrows
forever sweet and clean. This the Cheyennes have faithfully done. Were there to be a
murder among either the northern or southern Cheyennes today, an abridged form of
the renewal ritual would be performed in Oklahoma, well shielded from the prying eyes
of white men. In the old days, the renewal occasioned the presence of every living
Cheyenne, except the murderers, their families and followers. The military societies saw
to the presence of all citizens in good standing and enforced the absence of the others.
Surely the division of goats from the sheep was a painfully potent form of ostracism.
Surely it impressed upon the minds of all the values in good conduct. Of course,
unification of the tribe was cemented in the sentiment of social solidarity, so engendered
in mutual sharing of the awesomely wonderful rite of the Arrow-renewal. To the
Cheyennes, as well to the Ontong Javanese of the southwest Pacific, Hogbin’s word’s
may be appropriately applied: “The effect that many of them [the tribal ceremonies]
produced was an intensification in each individual of the feeling that he and the rest of
the community were closely linked together. He thus became mindful of his fellow-men,
and paid more respect to their rights, at the same time, too, fulfilling his obligations
with greater consideration. In a ritual so carefully controlled as the sacred arrow
ceremony the tribal nature of existence was made even more explicit.”

While ‘the supernatural’ appears to be present in one way or another in most
customary justice systems around the world, Llewellyn and Hoebel’s account is
particularly useful in describing how the operational mechanism of justice among the
Cheyene is not the intervention of ‘the supernatural’ per-se, but rather a system of social
control through community action—faced with a case of homicide, the conference of
tribal chiefs gets together and issues a decree of exile which is effectively enforced by the
whole tribe. Communal fear to the supernatural may be part of the motivation for the

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8 Llewellyn and Hoebel, The Cheyenne Way, at 132 to 138.
communal enforcement of the decree, but the supernatural plays no role in the operation of justice per se.

The second group of customary justice mechanism includes a wide variety of systems of social control through the direct intervention of the supernatural world.

A taboo is a social injunction that is sanctioned by supernatural action. It is not just anything forbidden. If it were, all laws would be tabus, as well as all violations of all norms. Better that usage confined the meaning of the term to its original Polynesian sense, which is that held here. A sin is the act of violating a taboo. Its punishment comes from the supernatural.

It is when the members of a society believe that the consequences of a sinful act may spread to the entire group, not confining its baleful effect to the sinner alone, that sins frequently become crimes, too. The sinner is punished by direct legal action through sanctions in the hands of men in addition to sanctions evoked by the supernatural. Then sin is crime as well. It may also be that men regard themselves as helpers of the supernaturals, their mundane agents. Then, as does the Ashanti chieftain, they lighten the burden of the supernatural and ingratiate themselves with it by punishing sinners instanter.

The supernatural also enters into the law-ways as the supporter of legal process not, it should be noted, as the source of substantive rules but as an instrument of judgment and execution when men's fallible means of determination of evidence are unequal to the task of establishing the facts. Recourse is had to conditional curse, divination and ordeal. The spirits know the truth. They are omniscient, or nearly so; and if properly appealed to, they will judge the case. They may also punish directly, or it may be that this job is left in the hands of human agencies. On the other hand, a man or a public official may judge a man to be wrongdoer and so utilize magic to harm or kill him. This may or may not be a legal privilege-right, depending on the culture and the details of the situation. Misuse of supernatural powers—sorcery—frequently enters into the law as a tort against the victim and his kinsmen or as a criminal offence against society.

Tribal Jirgas in Afghanistan and Pakistan today are examples of customary justice through community action. Ordeals in Liberia represent a combination of community pressure and the intervention of the supernatural. Finally, an Amazonian shaman who “borrows the eyes of the cougar” and delivers ‘justice’ by causing physical sickness to an

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unidentified transgressor, is an example of customary justice through the intervention of the supernatural.  

This was my understanding of the problem for a long time. Yet, further interaction with chiefs, shamans and village elders in Liberia, Colombia and other countries, particularly with the Kogi people of Sierra Nevada, has changed my perspective. The reality of customary justice in the field is far more nuanced than the simple dichotomy between social control through community pressure and through the intervention of the supernatural.

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10 There is an extensive anthropological literature on the direct intervention of the supernatural on dispute settlement among the Amazonian indigenous communities. Narby, The Cosmic Serpent, at 18.
CHAPTER 4. ‘SASSY-WOOD’ JUSTICE IN LIBERIA

Sassy-wood and other forms of Ordeal in Liberia

In her Autobiography, Mrs. Amanda Smith describes a trial by ordeal in sub-Saharan Africa at the end of the nineteenth century (1893):

While we were there the old king’s head wife, who was the queen wife, was tried and condemned as a witch. This meant that she was to die by drinking sassy wood.

One of the other wives of the king accused the head wife of bewitching her child. The child was a girl about fourteen years old, and while in the cassava farm digging cassavas she was bitten by what is called the cassava snake, which is as poisonous as the cobra of India. When this child died they said it was because the head wife had bewitched her; and when any one is accused of being a witch she must die... and the penalty was to drink the sassy wood. If she throws it up she has gained the case.¹

Mrs. Smith describes in detail the procedure for administering the sassy-wood (a poisonous concoction), and how this woman threw it up and lived. An earlier account by Rev. Robert Finley (first half of the nineteenth century), provides a detailed description of the procedure and adds that:

If one man loses anything and accuses another of having stolen it, the accused is required to drink sassy-wood water to prove his innocence. The ordeal of sassy-wood is, therefore, a penalty for almost all crimes, and exerts a powerful restraining influence on the community... the ordeal of sassy-wood is frequently made to decide points of honor, precisely like the custom of dueling in the United States.²

There are numerous other accounts of sassy-wood ordeals in Liberia, The Gambia and other sub-Saharan countries during the nineteenth and twentieth centuries, which are reminiscent of the adultery test described in the Christian Bible (Numbers 5:11-31).

Traditional justice in contemporary Liberia includes several mechanisms, such as generally efficient and accessible mediation and arbitration by local Chiefs, as well as rare

¹ Smith, The Story of the Lord’s Dealings with Mrs. Amanda Smith, at 386 and 387.
² Finley, Biography.
instances of trial by ordeal (sassy-wood and others). Sassy wood has been illegal in Liberia for almost a hundred years: “The Liberian constitutional court out-lawed trial by ordeal in 1916 if it was forced upon the individual and if the practice is life-threatening or causes inhuman or degrading treatment.” 3 But it continues to be practiced in this and other countries in the region, especially in rural areas. According to a BBC News report of March 18, 2009:

Up to 1,000 Gambian villagers have been abducted by "witch doctors" to secret detention centres and forced to drink potions, a human rights group says.

Amnesty International said some forced to drink the concoctions developed kidney problems, and two had died. Officials in the police, army and the president’s personal protection guard had accompanied the "witch doctors" in the bizarre roundup, said witnesses…

The London-based rights group said the witch hunters, said to be from neighbouring Guinea, were invited into Gambia after the death of the president’s aunt earlier this year was blamed on witchcraft…

Amnesty spoke to villagers who said they had been held for up to five days and forced to drink unknown substances, which they said caused them to hallucinate and behave erratically. Many said they were then forced to confess to being witches…

Eyewitnesses and victims told Amnesty the "witch doctors" were from neighbouring Guinea…

Three hundred men and women were allegedly randomly identified and forced at gunpoint into waiting buses, which ferried them to Kanilai.

Once there, they were stripped and forced to drink dirty herbal water and were bathed with herbs, the eyewitness said.

Many of those who drank the concoctions developed instant diarrhea and vomiting, the eyewitness added.4

It is difficult to understand this system of ‘justice’ when looking at it from outside of the rich traditional culture of these countries. It does not seem possible to make the random abduction of citizens and the forced ingestion of poisonous

3 Gienanth and Jaye, Post-Conflict and Peacebuilding in Liberia.
concoctions, as a mechanism to ascertain guilt or innocence, compatible with due process requirements of Western civilization.

However, western accounts of African ordeal proceedings and other ‘primitive’ forms of justice presented here, provide a very limited description—a little more than a caricature—of a much more complex phenomenon. They miss the forest for the tree. They miss a fundamental element: traditional justice in sub-Saharan Africa is holistic. There are no separate systems for criminal and civil cases. The concepts of justice, crime, punishment, and dispute resolution cannot be properly understood in isolation; they are intrinsically related to a broader understanding of community harmony, social and individual healing, and equilibrium with the natural and supra-natural world. Taking these facts into account is essential for anyone interested in promoting more culturally competent\(^5\) and accessible justice in those countries.

**The customary justice system of Liberia**

The customary justice system of Liberia is composed by a national network of Tribal Courts:

Tribal Courts are often found in areas of the country where the vast majority of the people practice traditional customs. The highest tribal court is that of the paramount chief and next to it is the court of the clan chief. . . .

Chiefdoms still exist and are governed by paramount chiefs who are now appointed in the same manner as superintendents. Before 1964 a paramount chief was the highest official in the chiefdom. This is no longer the case. The highest official now is the county district commissioner. He deals with matters relating to the general welfare of the county district. The county commissioner has original jurisdiction in some cases to which a clan is party and hears cases upon appeal from the court of the paramount chief and occasionally from the court of the clan chief.

A clan is a sub-division of a chiefdom and is administered by a clan chief, who was himself elected (but now appointed by the Head of State) for the same length of time as the paramount chief. The clan chief has original jurisdiction in cases from

\(^5\) **Supra** note 53, at 91.
which a town is a party and appellate jurisdiction in cases from the court of the town chief.\textsuperscript{6}

**Personal narratives of customary justice users and operators in today’s Liberia**

In November of 2008 I had several meetings (totaling more than 8 hours) with several male and female traditional chiefs and elders in Liberia, including two prominent figures. I also had extensive conversations with ordinary citizens, users of customary justice. These conversations increased my understanding of indigenous/traditional dispute resolution mechanisms in Liberia, including the justice by ordeal.\textsuperscript{7}

The context of these dialogues was a seminar convened by the government of Liberia and international donor agencies to discuss the need to abolish the sassy-wood practice and other forms of ordeal, due to the incompatibility between these practices and internationally sanctioned ‘universal’ human rights standards which are binding on Liberia. Of course, this was not a dialogue at all; each party talked to each other with deaf ears, as ‘ships crossing at night’.

Once the seminar ended, I spent over 8 hours speaking with several traditional chiefs. I learned a great amount of information about the sassy-wood practice and other forms of ordeal. Unlike it is described in most of the literature, the sassy-wood ordeal is not a process among three people (the accuser, the accused and the chief); it is a collective healing practice which has similarities to the process of amending the Medicine Arrows of the Cheyenne.\textsuperscript{8} According to the Liberian chiefs, the sassy-wood was originally conceived, and has remained for centuries, as a collective gathering in which

\textsuperscript{6} Saye Guannu, *An Introduction to Liberian Government*, at 34 and 46.
\textsuperscript{7} Voluntary ingestion of poison (Sassy-wood) or use of burning knives to prove innocence or guilt of people accused of witchcraft and other crimes.
\textsuperscript{8} Described in text accompanying *supra* note 8, at 134.
the entire community comes together to heal the broken community harmony. The significance and extent of such gatherings have apparently diminished of late. Outsiders are not allowed. The sassy-wood is a poisonous concoction prepared from a tree of the same name. At the community gathering the accused party is ‘invited’ to drink the sassy-wood to prove his/her innocence. If the accused drinks the sassy-wood and expels (vomits) it, this proves the accused’s innocence. If he/she does not expel it, this constitutes evidence of guilt. Today the chiefs do not allow guilty parties to die from poisoning; they administer coconut milk which counters the effect of the poison. The chiefs also explained to me that contrary to public belief, the sassy-wood poison alone has little significance. The poison is only a tool, an external manifestation of an inner or spiritual reality which only the ‘wise man’ can see; the chiefs explained to me that “only the wise chief knows when, how, why and to whom to administer the sassy-wood.” The implication is clear: the chief ‘knows’ whether the accused is innocent or guilty—and presumably, what is best to restore community harmony—and based on this inner knowledge the chief administers the sassy-wood in one way or another. However, I was unable to go further in my investigation, and to obtain a definitive answer to my questions on whether this inner understanding simply comes from the chief’s intimate knowledge of the community, or from his/her supernatural powers or skills in divination. Be it as it may, the sassy-wood ordeal is essentially a highly ritualized form of community healing.

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9 This long conversation with Liberian chiefs was not conducted as a reporter’s interview. It was a dialogue that went in circles, full of colorful metaphors and stories. My main interlocutor was a very impressive person—no doubt he was a very knowledgeable and wise man. He was also surprisingly lacking in knowledge that we take for granted in the West, for instance, that South America is a separate continent—it was interesting to discuss the shape of the globe and the location of the Amazon jungle, where, as I
In the customary justice system of Liberia, mechanisms of social control through community pressure are deeply intertwined with superstition and the intervention of the supernatural—the sassy wood tree, for instance, “is the tree of truth,” and it “is so powerful that witches cannot fly above it, because if they attempt to do it they fall to the ground.”\(^{10}\) The work of the Liberian chief depends on his/her understanding of two different layers of reality, one accessible to all people and a deeper one only accessible to the chief.\(^{11}\) However, customary justice in Liberia is a weakened system which has lost much of its might of old. After 25 years of a bloody civil war, the traditional bonds and mechanisms of social cohesion have been severely affected. In the opinion of one of these chiefs, there are two reasons for this decay:

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10 Quote from first-hand explanation of the nature of the sassy-wood tree given by a Liberian Chief to the author, November, 2008.

11 Michael Harner explains a similar dichotomy (or contradiction) between the external manifestations of the work of medicine men and the inner meaning of the same work, with regard to shamanic work among Jivaro Indians in Ecuador. According to Harner, “The shamanic removal of harmful power intrusions is difficult work, for the shaman sucks them out of a patient physically as well as mentally and emotionally. This technique is widely used in shamanic cultures in such distant areas as Australia, North and South America, and Siberia. If you ever viewed the firm Sucking Doctor, which shows the healing work of the famous California Indian shaman Essie Parrish, you saw a shaman pulling out intrusive power. But Western skeptics say that the shaman is just pretending to suck something out of the person, an object that the shaman had already secreted in his mouth. Such skeptics have apparently not taken up shamanism themselves to discover that is happening. What is happening goes back to the fact that the shaman is aware of two realities. As among the Jivaro, the shaman is pulling out an intrusive power that (in the Shamanic State of Consciousness) has the appearance of a particular creature, such as a spider, and which he also knows is the hidden nature of a particular plant. When a shaman sucks out that power, he captures its spiritual essence in a portion of the same kind of plant that is its ordinary material home. That plant piece is, in other words, a power object. For example, the shaman may store in his mouth two half-inch-long twigs of the plant that he knows is the material ‘home’ of the dangerous power being sucked out. He captures the power in one of those pieces, while using the other one to help. The fact that the shaman may then bring out the plant power object from his mouth and show it to a patient and audience as Ordinary State of Consciousness evidence does not negate the nonordinary reality of what is going on for him in the Shamanic State of Consciousness.” Harner, *The Way of the Shaman*, at 117.
First, much of the ancient knowledge is lost; a great number of fake ‘healers’ and charlatans now dominate the landscape of customary justice, and they repeat the practices without understanding their inner meaning—it is becoming an ‘empty vessel’, like an empty glass of wine in which the wine’s aroma lingers after the liquid is gone. One chief explained to me this ‘empty-vessel’ phenomenon in the context of the ordeal by burning knife. In this ordeal the chief puts a knife into fire until it is burning, and then applies the knife first to the chief’s own arm and then to the accused. If the accused burns, it is because he/she is not truthful. The chief’s arm does not burn because the chief is ‘clean’. However, this process has two meanings or two different layers of reality. At a superficial level, the chief’s arm does not burn because he/she applies to his/her arm a concoction similar to asbestos, which prevents the burning knife from reaching the chief’s skin. Charlatans of today have learned the trick and they use it to ‘resolve disputes’ but without understanding the second, deeper meaning of the ordeal. At a deeper level the burning knife is just a tool, a symbol which the chief uses to explain to the masses of uninitiated an underlying reality that only the chief can see. The chief’s highly developed inner vision (or intuition, or knowledge) and his very acute knowledge of the community are the keys to the ultimate fairness and community healing objectives of the process. When the chief performs the theatrical act, he already ‘knows’ whether the accused is guilty or not. This inner knowledge and wisdom is what the charlatan lacks, and thus his judgment is not fair; it is often just a business without any healing power.

Secondly, while the vast majority of the urban poor in Monrovia still have a strong belief in witches and the direct intervention of the supernatural, they no longer
profess allegiance to the traditional system. The system has lost much of its internal strength and community support, and foreign pressure to completely abandon the traditional ways is further eroding the system’s reach among the increasingly urban population of Liberia.

To conclude this chapter, it is worth noting that the BBC News report of March 18, 2009, transcribed above, about the poisoning of 1,000 Gambian villagers by ‘witch doctors,’\(^\text{12}\) does not capture the rich cultural tradition of the sassy-wood; it only reflects rampant abuses of a weakened customary justice system.

It is important not to overemphasize the role of the sassy-wood poison in the customary justice system of Liberia. Customary Justice in Liberia is essentially another example of the “African Tree” (the friendly meeting place where the community comes together to amend the broken bonds). In the overwhelming majority of cases the dispute resolution process before the traditional chief takes the form of extremely simple and informal community mediation, without recourse to supernatural elements.

\(^\text{12}\) BBC News web site: \url{http://news.bbc.co.uk/2/hi/afrika/7949173.stm} Visited, April 10, 2009
CHAPTER 5. JUSTICE AMONG THE KOGI INDIANS OF SIERRA NEVADA

The Kogi people of Sierra Nevada de Santa Marta, Colombia, have preserved their millenary traditions and dispute resolution methods almost intact, and have steadfastly resisted acculturation and integration with the ‘civilized’ world. This group is characterized by a humble material existence and a rich spiritual life. Heirs to the legendary Tairona, one of the most technologically advanced, socially harmonious, and ecologically conscious civilizations existing in America when the Spaniards first landed in these shores 500 years ago, the Kogi enjoy a very high moral standing—even admiration—among the rest of Colombians. For all these reasons they constitute a particularly interesting case to explore the boundaries and limitations of possible state-customary justice interplay in the modern world.

Kogi material culture is extremely simple and, with very few exceptions, the artifacts of daily use are devoid of ornamentation. The few ordinary pottery vessels, 1

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1 “Among the surviving native groups the Kogi (or K’aggaba) have best preserved their cultural heritage and, at present, constitute a small but highly integrated society that has retained many traits of its former system of rank, lineages, and authoritarian chiefs. Some 5,000 or 6,000 individuals of this Chibcha-speaking group live in and around villages from about ten to several dozen round, straw-thatched huts hidden in the narrow mountain valleys, at an altitude of about 1,000 to 2,000 meters above sea level… In most of the settlements the houses, each about 3 meters in diameter, cluster around a somewhat larger building, the temple or ceremonial house, where women and children are not allowed to enter. Each individual hut is occupied by one single, monogamous nuclear family, composed of rarely more than four or five people. These villages, however, are not permanently inhabited; most if not all Indians live in scattered homesteads in their fields, at several hours distance. A single family may own as many as four or five houses, each of them surrounded by small garden-plots and situated at different altitude levels, over a range of almost 2,000 meters. This pattern of occupying a vertical scale of mountain slopes allows them to participate in many different ecological systems, a form of adaptation that seems to have been well developed already by the prehistoric slope-dwelling chiefdoms of the Colombian interior. The villages, then, are gathering places where neighbors come together periodically, perhaps twice a month, to exchange news, discuss community matters, perform some minor rituals, or to trade with visiting Creole peasants. The traditional patterns of family life among the Kogi demanded that men and women live apart, collaborating in strictly prescribed ways in the daily task of making a living but otherwise occupying separate spheres of activity. When staying in the village for a few days, most men will spend the night in the temple where they talk, talk, sing or listen to the elders while their women and children sleep in the huts. When living in the fields many Kogi occupy two closely neighboring huts, one inhabited by his wife and children. The economic basis of the Kogi consists almost entirely in small, individually owned garden-plots where plantains, bananas, sweet manioc, cucurbits, beans, and a number of fruit trees are cultivated.” Reichel-Dolmatoff, The Sacred Mountain of Colombia’s Kogi Indians, at 6 - 10.
gourd containers, carrying nets, string hammocks, or rough wooden benches are of course manufacture, and are replaced only when they become utterly unserviceable. The visitor, on passing through a Kogi village, is likely to gain the impression of misery and neglect, and the unkempt countenance of the Indians, together with the ruinous conditions of their huts, adds to this image of poverty and decay.

This impression, however, is dispelled as soon as the visitor is allowed to become a casual witness to some aspects of the Kogi's spiritual life. A dance, a song, an old man telling a tale, will suddenly introduce the observer to a dimension of unexpected inner depth, to a richness of imagination and artistry, a delicacy of expression in mien and bearing which are evidence of an ancient and cherished cultural tradition. Even after long acquaintance with the Kogi, this refinement of manner underlying the coarse nature of all material conditions of life in the mountains, always comes as a renewed surprise, and turns into an unsettling experience when brought into focus by one's knowledge of the horrors of the Spanish conquest.2

In spite of their extremely humble material existence, the status of the Kogi people among Colombians is elevated. On his first day in office on August 7th, 2010, immediately after being sworn in as President before Congress, Juan Manuel Santos flew to a sacred place in the highlands of Sierra Nevada to be sworn in again before the Kogi. This was not a legal requirement but a symbolic gesture of the new President's adherence to the spiritual guidance of the venerable Kogi people. The President has visited with them on several occasions, including most recently with Chilean President Sebastian Piñera (picture below):

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2 Id.
The following account from the Irish Franciscan Friar Brendan Forde provides important information about the context in which the Kogi live today (2005):

I live in Colombia and I am a member of a Franciscan itinerant community which accompanies the victims of violence and intimidation by different armed groups. For the past year I have lived with the Kogi indigenous people who inhabit the Sierra Nevada in the north of Colombia. The Kogi are profoundly spiritual. The Sierra where they live is the first creation of La Madre, the religious leader of the Kogi. The Sierra is the origin and centre of the rest of the world, and they, the Kogi, were created to protect it. In their hills live the “Mothers and Fathers” of all existence, hence the harmony of the whole cosmos depends on the care and veneration they give to the Sierra. They are responsible for the whole world. They are our “Older Brothers and Sisters” and only they have the wisdom to carry out this responsibility. They say when the last Kogi dies, the cosmos dies also. When the Spaniards arrived five hundred years ago they numbered 300,000 but now there are about 5,000 left.

Two years ago the armed groups invaded their mountain. The Farc, the left-wing guerrilla army, prevent the Kogi from going to their sacred places, where they listen to La Madre and discern what she wants them to do. Likewise, the AUC, the rightwing paramilitary group and the allies of the government army, control the foot of their mountain and stop food supplies reaching the community. They have killed six Kogi this year. When one of the Kogi protested to the leader of the paramilitaries he was told “We have a right to kill Indians.” Ironically, the Kogi call us, the white people, ‘the civilised’.

In this conference, it has been mentioned that women and children are particularly vulnerable to human rights abuses. I would like to put on record that in
all my years, having lived in various countries and with different ethnic groups, I have never met a people who treat their children with such respect and gentleness. They never raise a hand or a voice to them and although they are very poor materially they are the happiest children I have ever met.3

I met the Kogi about ten years ago. My first contact with them was in the context of the negotiation of the free trade agreement between Colombia and the United States. Under the Colombian Constitution,4 such agreement required consultation with the indigenous communities.5 In order to fulfill this obligation, several members of the negotiating team, including I, travelled around the country to discuss the terms of the trade agreement with leaders and representatives of many of the 80 or so indigenous groups that live in Colombia. The most memorable of these meetings was with the Kogi people.

Over the past decade I have spent many hours speaking with various Kogi men and women from different ranks and ages. While I have never visited their homes in the high mountains, I have met them in Bogota and Santa Marta, and in rural areas at the outskirts of their lands in Sierra Nevada. Most of my interaction with the Kogi people has taken place during the past four years, while conducting research for my SJD dissertation. This dialogue has centered on issues of justice delivery and dispute resolution among the Kogi and between them and other indigenous groups and the ‘civilized’ people. My direct experience with the Kogi is nonetheless limited—after

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4 The Colombian Constitution incorporates within the so-called ‘constitutional block’ fundamental human rights treaties ratified by Colombia, including ILO Convention 169, which provides for mandatory consultation of indigenous communities about decisions which may affect them. See, Anaya, Indigenous Peoples in International Law, at 58.

5 Specifically, Chapter 16 of the agreement, as it relates to traditional knowledge of indigenous communities.
interacting with them for years and doing extensive reading about them, I realized that I might not be able to understand them. The Kogi remain a charming mystery.\(^6\) A BBC documentary from Alan Ereira entitled *From the Heart of the World*, provides a quick introduction to the Kogi worldview and way of life.\(^7\)

The Kogi are not a unified nation with centralized authority and unitary government. The socio-political organization of the Kogi is an amalgam of independent units, which are not connected through political ties or power-based hierarchies, but rather through deep spiritual bonds among them, and between them and the natural and spiritual worlds. According to anthropologist Carlos Alberto Uribe:

> The Kogi do not conform a tribe of “primitive” Indians. The way we see other social forms which are different from those prevailing in the West, distorts the reality of this kind of societies. Among the Kogi there is no socio-political integration which

\(^6\) Yet, one must not swallow an idealized image of the Kogi without reflection; alternative readings are also available. “Every village has two or more mamas [shamans]. They care for the village in every way, controlling everything including the fertility of people, the land, society, and the cosmos. The way they control society is simple: namely, through the threat of illness, hunger, and sterility from the supernatural powers in their cosmos... Although coca chewing is thought to enhance the sexuality of younger men just past puberty, the Kogi say that later it reduces the desire for sex and causes impotency. All this is good, since the Kogi say that sex is bad and dangerous, and that the suppression of sex is an important and desired effect of chewing coca. For this reason, however, the younger men try to avoid chewing coca, but the mamas and other men often criticize them for not chewing it. The physical weakness of the undernourished and coca-drugged men causes sexual tension with the women, and Reichel-Dolmatoff noted a high frequency of sexual aberrations among the Kogi: female and male homosexuality is present, he says, in all villages and incest within the nuclear family is also high... The women see the ceremonial house as their great rival, as they wish that the men would stay with them at home. A woman may even pretend to be ill so that her husband will stay home. The anti-aphrodisiac qualities of coca are well known. Overall there is much tension between man and wife. From an early age, a man learns that women are dangerous, that they represent the forces of instability and chaos. Indeed, after marriage men consider their wives to be the greatest stumbling block in their attempt to acquire knowledge (about the Ancient Ones). Such knowledge, they feel, is the only way to acquire security, serenity, and the guarantee that the Cosmos will continue to exist (!)... So, as the ceremonial house increasingly takes over the man’s attention, he pays less and less attention to his house and his wife and children, and to “real” life as he opts for the coca-drenched world of the Ancient Ones. But the great obstacle is that the men live in the real world, which requires the production of food and the sexual act to keep the Kogi viable as a population. So, women are dangerous but indispensable, sex makes the men tired but they do desire it nonetheless, and food is a futile pleasure, here now and gone a little later. Finally, the men consider the women as being less responsible for societal maintenance than are the men, since it is assumed they ‘know less,’ just as younger people know less than olders ones. Thus, the ideal Kogi man would eat nothing but coca, abstain totally from sex, never sleep, and spend his entire life lying in his hammock: “womb” talking with the other men about the Ancient Ones. Coca is the marvelous plant that helps the men approach this (Freudian) ideal.”


requires a centralized authority, nor a supra-communitarian organization over a specific territory. All these things go against their feelings for being part of the same ethnic group, sharing the same language, having similar customs and professing the same old religion. Instead, we find ourselves before a great mosaic of farmer communities, settled in small villages and around ceremonial centers, each of them guided by the dominant figure of a native priest. Coming together in each town, the Máma and his respective vassals (‘vasallós’), create a somewhat autonomous unity, even though they all recognize each other as Kogi, the people, the Elder Brothers of humanity. Even though they all decided to assume for themselves the task of taking care of the world and its center, the Sierra Nevada de Santa Marta.8

The Kogi believe there are nine layers of reality. The following graph depicts the Kogi’s understanding of the Universe:

**The Cosmic ‘egg’**:
The egg-shaped object is the universe, brought into existence by the Great Mother, Gaulcovang. The nine layers to the universe are the nine worlds. They correspond to the nine months of human gestation in the womb, and are represented in certain structural details of temple architecture.

The cosmos is described as an egg. When drawing this diagram using Gerardo Reichel-Dolmatoff’s descriptions of the different worlds, however, there was no conscious attempt to reproduce an egg shape. Reichel-Dolmatoff, following Kogi descriptions, describes the middle or fifth world, in which humans and the natural world exist, as the largest world and the top world, ruled by Mama Mususi & Hába Nyexan, as the

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8 Uribe, *Los Kogis de la Sierra Nevada de Santa Marta*, at 1.
As there is a symmetry between the upper and lower worlds, the egg shape naturally occurs when attempting to represent the worlds graphically.\(^9\)

This complex understanding of reality permeates every aspect of Kogi life, including their notion of justice. “The Kogi people think they are superior to [other indigenous groups] and to the entire human race,”\(^10\) as they believe they maintain a closer connection with the upper layers of the invisible world. However, at the same time the Kogi are very humble people; their sense of superiority may be seen as Jesus, the Son of God, stating that “whoever wishes to become great among you shall be your servant.”\(^11\)

According to Máma Don Juan:

> Our customs, our beliefs are like a torch, like a light that illuminates the world. If this light switches off, the world darkens and dies. The civilized do not know it, but if it was not for us (for our work), the world would have already ended.\(^12\)

> “The conduct of ‘younger brothers’, who are by definition crude and ignorant, is never a reason for laughter or contempt among the Kogi.”\(^13\) The Kogi are peaceful and spiritual to the core, and always display an “attitude of tolerance towards other cultures”\(^14\) which sets them apart from most fellow humans.

The Kogi are one of Colombian tribes which display a deep consciousness of the tragic sense of life. The rainforest tribes of the tropical lowlands are often dramatic in their myths and rites, Dionysian if you will, sunk in the easy ecstasy of hallucinogenic drugs. To the contrary, the temperate way of the Kogi seeks equilibrium (balance), the ‘acuerdo’, as they call it. Yet the path to such state of equanimity and beatitude is obstructed at every turn by the hybris or the inertia of men. In Kogi mythology we find unforgettable characters and images which express such idea of a tragic destiny. There we find arrogant shamans, condescending mothers, the insolence of


\(^12\) Reichel-Dolmatoff, *Indios de Colombia*, at 100.


\(^14\) Id.
power, and the seeking of the visionary who, beyond Good and Evil, explores dimensions of other worlds within his/her own self.\footnote{Reichel-Dolmatoff, \textit{Los Kogi de Sierra Nevada}, at 27.}

Justice among the Kogi is a catharsis, a stiff, arduous and lonely road of inner search and spiritual cleansing.

\textit{Justice and dispute resolution among the Kogi}

The delivery of justice and dispute resolution among the Kogi are based on a set of assumptions which are incompatible with our western ways of adjudication.

\textit{The Kogi are a highly mystical society. The Sierra is the center of world for them, and the mission of the 'elder brothers', as they call themselves, is to take care of the 'mother', on whose fate depends the destiny of the entire universe.}\footnote{Perafán Simmonds, \textit{Sistemas Juridicos Paez, Kogi, Wayúu y Tule}, at 122.}

They believe that aside of the visible world that we all see, there is a spiritual world which is intimately interconnected with it; and the creators of the world, mother Seinekan and father Seiyankua, are the judges of all disputes.

The Kogi legal system is based on the theological principle that any offence against the regulations of the so called 'law of origin' triggers an imbalance of the cosmos, turning it into chaos. Therefore, the procedures of expiation of guilt are oriented to restore the balance of the spirit and of nature in order to recreate the cosmos.

It is understood that this theological duty is the responsibility of the Kogi society -- the 'elder brothers' -- as a whole, for which they have the guidance of priests known as mamas, on whose shoulders the jurisdictional functions rest.

The preservation of the harmony of the cosmos is a spiritual task to the people and to nature, which task is carried out through 'pagamentos' (payments) with stones called 'sewa', which are understood to have the power to feed energy from the Gonawindúa hill.

The 'pagamentos' (payments) take place in key places of the territory where the 'kággaba' rocks -- men of stone-- are located, the ancestors of the Kogi.

There are two types of rocks: the ones that represent the ancestors who committed the same mistakes, to whom one must confess one's faults. And the ones that represent virtuous ancestors, from whom, through the intervention of the mama, one receives advice to rehabilitate in society.\footnote{Perafán Simmonds, \textit{Sistemas Juridicos Paez, Kogi, Wayúu y Tule}, at 122-123.}
According to the ‘elder brothers’, as the Kogi call themselves, our rudimentary understanding of reality leads us (the ‘younger brothers’) to believe that we can isolate an individual human act, ascertain the facts, apply the law to these facts, and deliver an enforceable decision which we call “justice.” To the Kogi, this idea is a delusion.

In the Kogi’s view, specific facts (such as a dispute among two neighbors or a case of involuntary manslaughter) may not be isolated from the actors and endless connections between the natural and the supernatural. If we were able to see the world as it really is—they say—we would realize that everything is inexorably interconnected. What we, the ‘younger brothers’ perceive as isolated facts, are only manifestations of an all-encompassing spiritual reality; only when problems are addressed and resolved at the spiritual level, they may be resolved at the material level.

Among the Kogi the process of delivering justice means to harmonize or reach agreement (“acuerdo,” as they call it) between the individual person, animal or plant, and the entire Universe at the spiritual level. This process applies equally to a dispute among neighbors, a case of involuntary manslaughter, a mere thought of killing someone, the decaying of an animal, a failing potato crop, a particularly dry season, a case of child diarrhea, a broken bone, or the problem of global warming. In the words of Wade Davis, “what is important, what has ultimate value, is not what is measured and seen but what exists in the many realms of meanings and connections that lie beneath the tangible realities of the world, linking all things. The nine-layered universe of their cosmology, the

18 Uribe, Nosotros los Hermanos Mayores: Continuidad y Cambio entre los Koggaia de la Sierra Nevada de Santa Marta, Colombia.
nine-tiered temple where they gather, the nine months a child spends in its mother's womb are all expressions of creation, and each reflects and informs the other.19

There is no such thing as “Justice”; there is “acuerdo” (material/spiritual harmony) or lack thereof. There are highly sophisticated priests, the Mámas, who undergo 18 years of arduous training and material deprivations to learn how to intermediate between the visible and the Supernatural worlds. But they are not judges—they are only intermediaries or advocates (‘abogados’), 20 as the judges are always mother Seinekan and father Seiyankua. The role of the Máma is that of our advocate before mother Seinekan and father Seiyankua, seeking this “acuerdo.”

The Máma performs a second vital function in the process of justice delivery and dispute resolution, i.e., the role of confessor and spiritual/psychological healer. Justice among the Kogi is a catharsis, a process of deep inner search and spiritual cleansing. An essential component of this process is the regular, periodic confession of all evil thoughts and deeds.21 As noted above, the Kogi do not live in cities; they visit the towns about once a month for a few days, and during this time all men sleep in the temple. For days and nights without ending the Máma patiently listens to the Kogi men (and women, in a different setting) in confession, and provides spiritual guidance and advice. Kogis describe this process in a way that resembles modern psychoanalysis—the Máma is not a judge passing judgment on the accused; he listens attentively, trying to ascertain which transgression against Mother and Father (the supernatural) may be causing problems

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20 They use the Spanish word ‘abogado’, which primarily means lawyer or attorney, although it also implies the idea of ‘advocate’. Reichel-Dolmatoff, Los Kogi de Sierra Nevada, at 37.
21 Id. at 37-38.
with the crops or with the neighbors. The Máma’s listening is non-judgmental, like a modern psychoanalyst. However, since the same Máma is the confessor of all members of his group, when there are disputes among them the Máma’s advice and guidance operates in practice as both, psychological guidance and mandatory arbitration. This is an important component of the dispute settlement system of the Kogi.

The Máma performs a third jurisdictional function as mediator, when disputes arise between a member of his group and an outsider, including members of other Kogi units and other indigenous groups of Sierra Nevada (and, to some extent, also including disputes with the ‘civilized’, including the guerrilla and paramilitary groups in the region, as it is described in the last section of this chapter).

When disputes among members of different groups arise, the two or more Mámas involved meet and mediate the dispute. The decision adopted by this conference of Mámas is in practice binding on all parties, so in this regard it is similar to a modern (Western) arbitral award. However, the Mámas’ role in solving the dispute is not that of a judge or an arbiter who gathers the facts, applies the law, and issues a judgment or an award. To the contrary, the Máma acts like a greatly respected mediator, who is always seeking consensus and harmony between the parties and among them and the natural and supernatural worlds.

In sum, justice among the Kogi is a circular process of harmonizing a multilayered and inexorably intertwined material/spiritual reality, as opposed to the western notion of linear adjudication of specific facts based on direct causality and

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22 I received identical accounts from both Kogi and non-Kogi indians in Sierra Nevada, about this procedure to resolve disputes between Kogi people and non-Kogi indians.
individual responsibility. This notion is not unique to the Kogi—indeed, it can be traced to other spiritual traditions, including very old, Hindu, Taoist, Buddhist and Sufi teachings. A Sufi folk tale illustrates this notion as follows:

What is destiny? —an scholar asked Nasrudin.
—An endless succession of intertwined facts, which influences one another.
—Truly, this is an unsatisfactory answer. I believe in cause and effect.
—Alright, look at this—said the Mullah, pointing out to a parade of people down the street—. They are taking this man to be hanged. Is it because someone gave him a silver coin, which allowed him to buy the knife which he used to commit the crime? Or because someone saw him? Or because nobody prevented him from doing it?23

While the above story refers to the interconnected elements of the material world, in Sufi teachings those are inexorably related to the various layers of the spiritual world.24 Chinese Taoist tradition has a similar view of reality as a complex web of intertwined layers:

To the ancient Daoists, existence was a multi-faceted network of inter-related energies. Rather than restricting their view of life to the three-dimensional, physical world with which Western thought usually concerns itself, Daoists attempt to understand and work with the subtle elements of existence which sit within various overlapping realms.25

From this perspective, the processes of judging a criminal or resolving a civil dispute between two neighbors is not the linear adjudication of specific facts based on direct causality and individual responsibility. The Western understanding of the legal process as a method of separating the person (the criminal or the contracting party) from the act (the crime or the contract violation), and assessing the conformity of the specific act or violation with a pre-existing law, in isolation, clashes with a ‘mystical’ perspective

24 See, e.g., Rumi, The Mathnawi.
of reality. While I am not an expert on Sufi or Taoist philosophy, I hope that these external references to these better-known traditions may help to bring some perspective to the Kogi’s view of justice and dispute resolution, as it was explained to me by members of the Kogi community. When reality itself is an endless succession of intertwined facts, which influences one another within various overlapping (visible and invisible) realms, dispute resolution becomes a process of harmonizing the antagonizing elements in order to restore the material/spiritual balance. When everything is linked, the notions of ‘cause’ and ‘effect’ (which are at the core of Western legal thinking), turn relative, and the dividing line between thoughts and deeds become blurred.

The notion of circular or holistic justice is also common to many indigenous communities and customary justice systems worldwide. Anthropologist Maria del Rosario Ferro has studied the concept of justice among the Iku Indians of Colombia, distant relatives of the Kogi. Justice among the Iku works as follows:

The Iku say that everything that exists in material terms has its origin in the spiritual world, or ‘in anuwgwe’. Because of this, each element in existence has ‘its spirit’ which connects it with the ‘unseen world’. Likewise, everything that is done in the material world has a spiritual effect. This bond leads to an exchange relationship in which the spiritual owners of an element ‘give makruma’. The element receives it, concentrates it, obtains the makruma, uses it and, then, gives the makruma back.27

The vital energy is recognized and exchanged through ‘makruma’, the Iku gift. Makruma refers to the produce of life — material and spiritual—that every being/living thing has for sharing in an exchange relationship.28

The Earth’, say the mamus [Mamas], is just a little piece of such totality and it has access to major forces through the sacred places. Each of these places of Mother Earth represents a place of origin, as a communication channel with the

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26 See, e.g., Ulrich, Widening the Circle; 27 Ferro, MAKRUMA, El don entre los iku de la Sierra Nevada de Santa Marta., at 77. 28 Id. at page XVII of the prologue. It is not only that every river and every mountain “has its spirit which connects it with the unseen world,” but also that there is a bi-directional relation between these worlds, so every action in either of these worlds influences the other. It is interesting to notice the similarities between the role of these ‘river and mountain spirits’ among the Iku, and those of the Japanese Shinto tradition.
spiritual world. The Iku explain that ‘it is like a code’ and thus ‘nature is an open
book that one must know how to read’. The mamus are the ones who have the
knowledge to access such points of communication and exchange with the spiritual
world. When a mamu directs the spiritual payment to one of these places, this has
repercussions in the rest of the Cosmos. The greater the spiritual force of the mamu, the
further it goes. However, if a mamu takes on a job for which he doesn’t have enough
power, they say he can jump out of his orbit, creating chaos which not only affects him
but the entire Cosmos.

‘Making a spiritual payment’ is like sending a message through one of those
communication channels. In the Sierra the messages are of fundamental importance,
not only for the spiritual owners, but for the people, since it is the mean that
materializes the spiritual power through matter. The mamus record the concentrated
spiritual force or makruma of the people that make the traditional work, as a body-
thought that runs across the offering. This way, it attracts the attention of the spiritual
owners to whom the payments are directed. Is like a letter which engraves the energy of
thoughts and feelings of a person.29

These notions appear to have reached a level of sophistication among the Kogi
which stands apart. Reichel-Dolmatoff describes the relations among the Kogi and the
Iku (or Ika), their distant relatives, as follows:

According to the Ika, they and the Kogi belong to the same aboriginal
culture, especially with regards to their worldview, religion, and philosophical concepts.
Yet they say that this body of knowledge is far more sophisticated among the Kogi and
that such knowledge is possessed by virtually all adult Kogi men, while among the Ika
only the Mamas and the elder know about such things. Indeed, if one gets to know the
Kogi and their great religious devotion, the materialism and realism of the Ika stand in
sharp contrast. But this does not mean Ika’s rejection or lack of interest for the Kogi
spirituality. To the contrary, they acknowledge that they depend on the Kogi for all
that refers to the religious code, deep meditation, complex forms of divination, and the
philosophical concepts of equilibrium (balance) and the control of emotions.30

The distinctive features of the Kogi tradition manifest in many ways in daily life,
such as through a remarkably high level of social harmony,31 a very low crime rate, and a
particularly high life expectancy.

29 Id. at 80-81.
31 Even though from the perspective of an external observer there seems to be underlying gender
discrimination in daily life. For instance, according to the Ika indians of Sierra Nevada—distant relatives of
the Kogi—“among the Kogi, men eat much more than women and women work more than men”
The Kogi display at once a very simple and primitive material existence and a remarkably deep spiritual life which resemble those of mystics of other latitudes. Speaking about the richness of the Kogi spiritual tradition, Reichel-Dolmatoff asks: "Where is the limit between the [European] Saint and the Máma?" While there are big differences among Mámas—the Kogi recognize that some Mámas are more powerful than others—there is something about the sacerdotal ranks of the Kogi as a whole which sets them apart from other indigenous groups.

The Kogi Máma: Priest, astronomer, governor, chief, healer, judge or advocate?

According to one of the most acute observers of the Kogi people, anthropologist Carlos Alberto Uribe, the role of the Máma is as follows:

The entire social life of a Kogi town gravitates around the dominant figure of the Máma. A good Máma is like a father or a mother, always nourishing and taking care of his children, his subordinates (“vasallos”), the Kogi people. A good Máma knows meticulously the so-called Ley de la Madre (the Mother’s Law), the law of the ancestors, and he knows by heart the genealogy of the sacred lineages, which he recites in téijua, the ancient language of the Tairona which no ordinary Kogi understands. He also knows the sacred texts, songs, and dances that narrate the stories and exploits of the sons and daughters of the Mother, and of the priests and elders of old times. A good Máma knows the necessary ritual to baptize the children, to initiate the boys and girls, to foretell future misfortunes and diseases lurking the life of his vassals. A good Máma listens to his vassals in confession to determine which transgression against the Mother is causing ill with the harvest and cattle. The Máma is the only one able to decide when the numerous religious festivities should take place, as he is also a brilliant astronomer and he is able to control the weather. In his isolation and distance, everyone fears and respects him. He has the authority and the supernatural power to enforce this authority, and his subjects obey him since he is a good Máma, their protector.

(Reichel-Dolmatoff, *Los Ika. Ethnographic Notes 1954-1966*, at 99). While I witnessed unequal treatment between genders in my interactions with the Kogi, I could not ascertain for instance whether the separation of labor and dwellings by gender are indeed discriminatory.

32 To me, the demeanor and way of life of some Kogi Mámas are reminiscent of those of highly-accomplished Franciscan, Zen, or Sufi monks. Kogi meditation techniques, at least to an outside observer, appear to have similarities with Zen *zazen* or Daoist *neigong*.

33 Reichel-Dolmatoff, *Los Kogi de Sierra Nevada*, at 27.

34 Uribe, *Los Kogis de la Sierra Nevada de Santa Marta*, at 1.
Anthropologists Gerardo Reichel-Dolmatoff, the most prolific writer about the Kogi people, describes the role of the Máma as follows:

In everything, absolutely everything, the Mama’s influence and unquestionable authority are present and people always abide by and obey him. The Máma ‘takes care of the people’ and nothing evil may happen to them as long as he is present. The Kogi usually say that the Máma is like a defender and protector and they frequently use the Spanish word ‘abogado’ (lawyer) to describe his functions. This ‘defender’ position refers to his job as an intermediary among the individual, the society and the supernatural world. And so, in dreams, the Máma is symbolized as a horse, which is explained with the words: ‘the Máma carries us’.

The Mámas are never considered as possible enemies, dangerous or ‘evil’. We have to point out here that the Máma always acts for what is best for his subjects and does not abuse them. The Manichaeism which dictates that the sovereign should not interfere, neither with religion nor with his subject’s women, is not valid in this culture and, on the contrary, it’s the Mama’s duty to continuously adapt religion to the necessities and tensions of the moment and should ‘correct women’ (‘componer a las mujeres’) since they represent, according to the Kogi, a real danger for the course of the universe. The attitude of society is thus of veneration, admiration and personal affection. The Máma is like my mother’ said a Kogi and others frequently compare him with their ‘elder brother’. Only in rare occasions the myths talk about an ‘evil’ Mama, but the Kogi quickly clarify that this ‘mean Mamas’ used to live in the ‘Ancient’ times, and that back then ‘there were lots of evil people’. Although this attitude is apparently sincere, it is possible that occasionally, certain hostility towards a Máma may exist.

The Mámas are usually elder men, some of them very old. Years and years of hard work and self-control have forged the Máma, who intimately knows the small group under his direction. A Máma knows the genealogy of each individual. Among the Kogi, confession, not only of consummated acts considered as sins, but also thoughts and intentions, is an institution of very big religious and social importance, which gives the Máma the possibility of controlling his group in their acts and most intimate relations. He uses this knowledge with admirable diplomacy, cleverness and tact. By knowing the behavior of each individual, the Máma is able to control the community and he does that sometimes with energy and certainty. There is nothing charlatan or healer (‘curandero’) about a Kogi Máma, although he knows very well how to act like one when required, when he negotiates with the civilized ones.35

Reichel-Dolmatoff describes the origin of the Máma’s authority as hereditary:
In general terms the position of the Máma is inherited. A Máma gives the necessary education to his elder son and teaches him all his esoteric knowledge methodically, in hopes that his firstling will also become a Máma. The succession should be ratified several times through divination, which evidently is adapted to the father’s criterion. Sometimes a Máma predicts that his son will also become a Máma, but if he realizes that the boy’s inclination are not oriented to this end, his father (the Mama) simply predicts that his son won’t be Máma. If a Máma doesn’t have children or doesn’t want any of his kids to become Mamas, he predicts the name of his successor, who, since the early childhood receives the proper education. The atmosphere at the Máma’s home influences the kids, and may easily lead to the formation of successive generations of Mámas. Actually, in some Mámas families this job heritage has been present for long years and it can go back sometimes for thirty generations, according to what the offspring say.36

However, the presence of these long lineages among the Kogi do not mean that the offspring of Mámas belong to a different class, such as the sacerdotal cast of the Hindu Brahmans.37 To the contrary, all Kogi are essentially equal not only among themselves but also with respect to other humans, animals, plants and rocks—we are all children of Universal Mother.38 Nonetheless, these lineages have also a deeper spiritual meaning, as the Kogi believe in spiritual inheritance.39

35 Reichel-Dolmatoff, Los Kogi de Sierra Nevada, at 37-38.
36 Id. at 36.
37 Rather than as the Hindu cast system, the Kogi system of lineages could be interpreted in the way that ordinary Americans see the succession of Presidents Bush Sr. and Jr., or Colombians’ view Presidents Misael Pastrana and his son, Andres; while Americans and Colombians may think that younger presidents Bush and Pastrana had a head start through early exposure to power, they would never say that such father-son succession implies a comeback of the monarchy. The Kogi say that the Mamo’s son (or daughter, very rarely) follows his father’s footsteps because he has been found to have the characteristics required to perform the task, as per mother Seinekan and father Seiyankua’s decision.
38 Reichel-Dolmatoff, Los Kogi de Sierra Nevada, at 55 (“The universe, the earth, the stars, the atmospheric phenomena, the animals, the plants or the minerals, they all take part of a huge family of animated and to each other related beings, whose common origin is the Universal Mother, the personification of the creative force. This great family is divided in smaller families and finally in individual representations. The sun, the winds, the animals or plants take part of certain families, each of them has a Father and a Mother and of them descent new Fathers and Mothers as parents of new species or varieties.”)
39 “The spiritual inheritance was expressed to us as follows: ‘The father has to organize himself, so he won’t leave the voids to his children. In every single place he goes through confessing himself. The person is made out of nature. Not only is the person being organized here, but the nature and the rivers and winds, who are the sons of nature. To whom will he leave this legacy? To nature itself, but this nature represents his children as well. The spiritual legacy is required to have a good life, for us to have good waters. With our acts we abuse nature, because we were born out of it and therefore, we have to pay her back. The procedure called «Seizgomi» -organizing- must be executed the whole time, not only while
The training of Mámas

The training of a Máma lasts 18 years, divided in two periods of nine years starting from birth or early childhood. The process is characterized by extreme hardship and sensory deprivation. The following account from Reichel-Dolmatoff, from half century ago:

All training is carried out under conditions of strictly scheduled lighting changes: for years the novice must live in an enclosure where he must rise at sunset and go to sleep at dawn. The apprentice must lead an entirely nocturnal life; during the night they may go for a short walk and bathe in the river but when there is a moon they should cover their heads with a small woven mat. Besides, the whole training period is accompanied by a complete change in diet. The manifest intention of the priestly teachers is to deflect the child-novices from their accustomed circadian activity rhythms, and to ungear or “declutch” their time perception. It is significant that Kogi priests declare that in children whose training began after the age of five, their circadian rhythms may be very persistent and that, for this reason, they prefer children of two or three years for initial training… Since Kogi priests believe that timing can be manipulated, they also believe that light/darkness stimulation can be manipulated for specific ends, and that this can be done quite independently of time. The idea of ‘throwing time out of gear’ - if I may say so - is found mainly in the early stages of priestly training and, later on, in the preparation for mystical experiences… The knowledge and interpretation of circadian rhythms is used by the mámas in their attempt to deflect young children from biologically-based activity patterns, in order to create in them another, culturally-defined, perception of the relativity of time and space. Time and space are not thought to set inescapable barriers to the human condition, and a true mama must be able to step outside of time… This manipulation of circadian rhythms is combined, in the Kogi case, with a specific, protein-low diet, salt-starvation, severe sexual repression, the absence of female affectivity, unaccustomed iterative learning, the occasional use of hallucinogenic substances, and other practices the nature of which is still little known.  

committing the act, but also before. We have to communicate with all these places so that the child won’t have evil thoughts. For everything takes part in this organism. The father dies, his soul stays, and the law asks the child: where did your father leave this organism? If the grandfather was a thief, this negativity was left somewhere, and if the father hasn’t paid for that organism yet, then he must go and pray there so he can have a good life, so his children can have a good life in the future. This figure was left there before dawn, because he saw that his grandchildren would have the same thoughts.”  

Perafán Simmonds, Sistemas Jurídicos Paez, Kogi, Wayuu y Tule, at 125-126.

Reichel-Dolmatoff, The Sacred Mountain of Colombia’s Kogi Indians, at 6 - 10. Also available at: http://tairona.myzen.co.uk/index.php/culture/the_role_and_the_training_of_the_mamas/
A more recent account from Mama Jacinto, as follows:

To pass on the teaching well you have to choose a new-born child, and keep it in a ceremonial house. To make a really good Mama, you have to take the child right at the moment it is born, and then you keep it shut away. You bathe it in a stone mortar. And you move the water around in the stone mortar, so that it is purified, and then you bathe the baby in it. And then you have to shut away the child where there is no fire and no light. It should be kept where it sees nothing, no light, and is not seen by anybody. It is in a small ceremonial house, which has had partitions made inside it, so that there is a small room for the baby. It is alone with its mother, who lives in a house nearby and takes care of it. A cabo looks after the baby all the time. He only brings it out in the middle of the night. Whenever the baby cries, the cabo calls the mother to come and feed it. At night, the mother comes and bathes it and dries it outside, she breast-feeds it, then the cabo takes it inside again... And then the baby starts to grow and at five months it starts to crawl. So then the cabo has to be constantly alert so that it does not go out and leave the house. The mother still stays near the house looking after the baby, still eating only Moi boi boi. She feeds the baby and then leaves it alone, so that it stays there in the quiet... And the cabo is there, always eating his poporo so that he does not sleep, he is always on the lookout, always sitting there awake. But the mother can sleep. They feed the moro on flour ground from potatoes and bakata. Sometimes they put a little bit of a small coconut in it... When the baby is four years old it is taken off its mother’s milk, the mother is blessed, and once she has been blessed she can go and bathe in the river again. When the child has been weaned the mother can go about again. But still the child cannot go out, he has to be shut away inside all the time... One night the mother comes and she bathes him throughout the night in warm water... After this his water doesn’t have to be warmed any more. And then she gives the child over to the cabos completely... And from then on the child grows up with the cabos. It grows and then it begins to sing. All by itself, it begins to sing. When it is older they begin to take it out at night, always with a straw head-shade on. They take him out, to teach him, so that he can do offerings and he talks in aluna to the fathers and the masters of the world. Sometimes his mother still comes to the door of the house, and then the child dances, dances, dancing, playing. He’s dancing and dancing and the mother sings to him and then he is shut in again. So a moro doesn’t know about anything. He’s never seen a chicken and he’s never seen a pig, he’s never seen trees or birds, he doesn’t know anything about the world outside the house. And the Mamas are always praying to Serankua and asking him for food in aluna, for meat, all the foods, but in aluna. And they give these to the moro. They bless him and they give him food in aluna. And to make him grow strong, they rub him, they massage him... The child asks for water, he asks for it. And then perhaps he looks in the water and notices the bubbles and likes them. He goes on asking for water because he likes it, he learns by himself, the Mamas don’t really teach him anything, he learns from listening, listening spiritually. Knowledge comes to him in aluna, the Mamas themselves don’t teach him directly. When you want to be a Mama you have to concentrate, you can’t wander about thinking about girls, thinking about this and about that. You have to concentrate and really listen to what the Mamas say.
to you. And when you start to be a moro you can’t just do whatever you want, everything is controlled. When the Mamas take you out to make an offering you have to fast, you go without eating, and when you come back they also don’t give you anything to eat. Perhaps in the middle of the night they’ll give you something to eat. So there you are, hungry, you want to sleep and you do not understand what the Mamas are saying - you want food, you want to be with your mother and father, you want a drink of water, but you are not allowed anything. It’s really hard learning to be a Mama. But in the end you get used to it. You get used to being hungry, to only eating in the middle of the night. When you’re older you get used to it.

Boundaries between religious and civilian authorities among the Kogi

The boundaries between religious and civilian authorities and the allocation of power and responsibilities among them are blurred. “Traditionally two authority figures rule the Kogi society: the priest (Máma) and the cacique/chief (Makú), whose job has lost almost all its importance, in favor of the former.”

Kogi-born writer Basilio Coronado Conchala, depicts the political system of the Kogi as follows:

The towns are ruled by the Máma, who is the most important person of the town since antiquity, his subordinates are the “cabos” (sergeats) or “semaneros,” who are responsible for transmitting the Máma’s orders to the community. The kaggaba (Kogi) are currently governed by sheriffs (‘comisarios’). This position was born when the whites took over their laws, ignoring the Máma’s authority. All this has brought to great division in the community. However, after several agreements and meetings with the government it was achieved that the Mama was respected as an authority and was able to be in charge once more. There is also an authority that represents the Máma before the government, which is the “Cabildo Gobernador.” The Mama is the

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41 Ereira, *The Heart of the World*, at 126 to 130 (including a full transcript of Máma Jacinto’s detailed account of the training process. The full text is available on-line here: [http://tairona.myzen.co.uk/index.php/culture/mama_bernardos_description_of_the_training_of_a_mama](http://tairona.myzen.co.uk/index.php/culture/mama_bernardos_description_of_the_training_of_a_mama/))

42 Reichel-Dolmatoff, *Los Kogi de Sierra Nevada*, at 36.

43 He was born among the Kogi and left the community at early age, upon the death of his father, and was raised at a foster home with Wayuu indians. While the Kogi always display great respect and appreciation for other people, including other indigenous groups, they show little inclusiveness for Kogi Indians who leave the Kogi community. Thus, it is unclear whether the Kogi see this author as Kogi. There are other so-called “Kogi authors”; a recent literature review by Fabio Gomez Cardona identifies other such texts (Gomez Cardona, *El Jaguar en la Literatura Kogi, Análisis del complejo simbólico asociado con el jaguar, el chamanismo y lo masculino en la literatura Kogi*). Salient accounts include: Torres Márquez, *Las Indígenas Arhuacos y la “Vida de la Civilización”*; Torres Márquez, *Universo Arhuaco*. However, it is unclear whether the Kogi would see any of these texts as ‘theirs’.
number one, the son of the sun, the wise, the doctor, the seer/prophet. Every Mama represents the sun, where his name comes from.44

In addition to the institution of the Máma, the literature identifies other four important institutions that play a role in dispute resolution and carry some form of jurisdictional authority. They are the Máma’s assistants, or Cabos; the cacique/chief (Makú) of old times, now known with the Spanish name ‘Comisario’; the village elders; and the head of family. Reichel-Dolmatoff describes the hierarchy among them as follows:

The Mama has at least two people of trust, who are called ‘cabos’ in Spanish, and occasionally there is a distinction between ‘Cabo Mayor’ and ‘Cabo’. These two cabos are named by the Máma himself, choosing people with high status and respected by the community, and they assist him with job as priest, governor, judge and doctor (healer).45

It’s commonly said that every Kogi population had a civil leader called Makú… Each makú had two helpers called kánkua-kúkui, who were also in charge of two assistants called hukúkui. This administrative body still exists, but the native titles were replaced with Spanish titles; the makú is now called ‘Comisario’ (sheriff), the bámkua- kúkui as ‘Cabo Mayor’ (First Sergeant) and hukúkui as ‘Cabo’ (sergeant). According to the Kogi, the position of the Makú was inherited among the Hankua-túxe, but today it is the Máma himself the one who designates the Comisario, who, on the other band, chooses his Cabos (sergeants) in accordance with the Mámas divinations. It has been a practice that the Comisario and the Cabos are officially recognized by the Colombian authorities, that is, by the Majors of Ciénaga, Valledupar, Riohacha and the natives are proud of being able to base their authority in the official documents, which include seals and signatures. As we mentioned earlier, the Comisario’s functions are very limited. He is in charge of settling small familiar disputes, controlling communal works, welcoming visitors, enforcing credit negotiations and contracts, and collecting fines for light offences (misdemeanors), but he has to consult the Máma before taking any important decision. The Cabos, on the other hand, are simply his assistants and work as messengers without much real authority.

Besides these two authorities—the Máma and the Comisario—there are the ‘Mayores’ (elders) (náuma). Among the Kogi each man with high status and advanced age (40-50 years old), is considered ‘elder’ and together they form an advisory body, that meets every time the Máma deems it appropriate. The Elders have, in minor cases, jurisdiction over their families, that is, women, children, son-in-laws, younger

45 Reichel-Dolmatoff, Los Kogi de Sierra Nevada, at 37-38 (emphasis added).
brothers and cousins, but they must contact the Máma if the crime is considered of some importance. The main function of the elders is to safeguard the old traditions and, therefore, to control the behavior of younger generations. Since age and esoteric knowledge were always valued among the Kogi, the elders are revered and respected in every decision.46

Since the Kogi are not a unified nation with a centralized system of government47, the boundaries between religious and civilian authorities are not uniform across Kogi lands.

The prestige and the duties of the Máma and the Comisario are intimately connected with the surrounding economic conditions. Since these conditions vary among the different geographical zones and within them, there might be time periods of scarcity or relative abundance; we have to refer here to such differences and their meaning for the culture. In the northern region the Mámas and Comisarios usually have very different jobs; they even live two separate lives. A Máma never lives inside the village or the surroundings; he lives far away, near the ceremonial center. The Comisario, on the other hand, lives inside the village or in its surroundings. From there he orders his ‘subjects’ to clean the town once a week, controls community works like repairing bridges, paths, walls and public buildings, such as the ‘casa cultural’ (house of culture) and the Casa de Gobierno (House of the Government). He also collects fines for crimes against the property or for minor personal offences, or he settles familiar disputes…

In the occidental region the situations is very different. Here the Máma and the Comisario live inside the village and rarely go away. The role of the Comisario is entirely subordinate to the Máma’s authority and his job is merely symbolic. Hunger, poor harvest, bad ground, diseases, all these things make the people follow the Máma, while the Comisario stays behind, for the crimes considered minor in the North, are considered grave in the West, falling under the Máma’s jurisdiction. Very minor crimes are normally not even punished. The Comisario does not impose any fines, since nobody is able to pay them; he does not arrange communal meals, because they simply don’t happen. He and his Cabos are under the Máma’s command, who concentrates all authority and exercises it according to the situation.48

Legal process among the Kogi

The reader will have realized by now that the modern notion of legal process is not compatible with the Kogi idea and practice of justice. Moreover, the functional

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46 Reichel-Dolmatoff, Los Kogi de Sierra Nevada, at 38-39.
47 Uribe, Los Kogis de la Sierra Nevada de Santa Marta, at 1.
48 Reichel-Dolmatoff, Los Kogi de Sierra Nevada, at 40-41.
equivalent of a modern legal process, which appears to be highly developed among other natives, such as the American Cheyenne⁴⁹ or certain African aboriginal groups, does not apply among the Kogi.

Procedure among the Cheyenne includes evidence gathering, deliberations by a body of tribal elders (the “conference of tribal chiefs”), an opportunity to hear the accused, and a formal judgment (the “decree of exile”); it also provides for a collective procedure in which “the tribe, after ridding itself of the murderer’s presence through banishment, could purify itself by the sacred ritual of renewing the Medicine Arrows.”⁵⁰

The line between process and ritual may be blurred among the Cheyenne, as it is in most aboriginal societies, but the components of such ritual may be mapped—and indeed, have been mapped by Llewellyn and Hoebel—to a functional equivalent of modern legal process.

If in terms of procedural detail and sophistication, the laws and procedures of the late Justinian Rome (or the 19th century courts of France or England)⁵¹ are at one end of the spectrum, at the other end we find the exquisitely detailed rituals of the aboriginal tribes of the Amazon. In the rituals of tropical rainforest tribes, the shaman methodically prepares the stage and, when the timing is right, he dances, screams, and throws himself to the floor in histrionic frenzy, under the effect of hallucinogenic drugs, in order to connect to the spiritual world, “borrow the eyes of the cougar” and find or implement

⁴⁹ See, Llewellyn and Hoebel, *The Cheyenne Way*.
⁵⁰ *Id.* at 133.
⁵¹ Chapters 1 and 2 of Part 2 of this dissertation.
justice. To the western eye, this ‘process’ is nothing but randomness and madness; it is not a legal process at all.

The Kogi notion of process has as much in common with the Amazonian Shaman, as it does with the British courts. It is radically different from each. A Kogi process may or may not include a complaint; there is no evidence as such; fact-finding, proofs and testimonies are immaterial; an ‘accused’ may be condemned for transgressions that were never examined at trial (because there is no trial as such); and punishment does not follow strict rules. Evidently there is no separation between civil and criminal matters. Yet, there are no dances, rituals, screams and hallucinogenic drugs involved, as in the Amazon. In my view, the Kogi judicial procedure and punishment look a lot like modern psychoanalysis. According to Perafán-Simmonds:

The Kogi procedure does not provide for testimonial evidence, although this does not mean that proceedings may not be initiated by testimony, which testimony abounds in the daily revision ['confession'] at the ‘nuhve’ [Kogi temple]. What happens is that full proof of the occurrence of an illicit conduct is the divination in procedure from person to person, followed by the confession, which [procedure] is expressed as ‘the law says it is such person, and he/she must confess’

The strict control of the Kogi people’s actions by the Mámas is expressed in this formula: ‘there suddenly appears (manifests itself) that the person has not done what was attributed to him/her, but he/she has done something else.’ This reason justifies the belief that in the process of investigation, the Mámas ‘do not make mistakes’.

In handling specific cases (transgressions or disputes), the Máma may convene a meeting of village elders, but this is not mandatory. There may be an accusation, but this is not required. There may be a reply from the accused, but it is not required either. And there may be an edict issued by the Máma, although there is absolutely no need that such

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52 Chapter 1 of Part 4 of this dissertation.
decree has any relationship whatsoever with the accusation, the reply, or any of the issues discussed at ‘trial’. As it was indicated above, the Máma is not a judge; he is only an ‘advocate’. The judge is\textsuperscript{54} always Mother and Father.

The above pages presented a brief account of the meaning and institutions of justice among the Kogi. The remaining pages of this chapter illustrate the practical operation of justice with one specific case.

\textit{One Kogi case: The judgment of a Kogi for the alleged delivery of 100 pairs of boots to the guerrilla}

The following text transcribes verbatim seven minutes of a four-hour long conversation with the Kogi ‘elder’ Juan\textsuperscript{55} at the outskirts of Santa Marta in January, 2012.

I have maintained the text in Spanish, word for word from my tape recording, and I have also provided a translation to English in a footnote:\textsuperscript{56}

\textsuperscript{54} The judge \textit{is} (not \textit{are}) Mother and Father. Since these notions may come from a translation from \textit{tíjua} to Kogi language, and from that to Spanish, and finally to English, a lot may have been lost in translation.

\textsuperscript{55} Not his real Spanish name. All names have been changed here.

\textsuperscript{56} “But this wasn’t the problem, it was a problem with the ‘paracos’ and the guerrilla. And because of the people of the town themselves, for envy. Because I had my animals and bought my goats, but worked with the coffee, I planted coffee, bananas, and so on and sold them in the town. And well, I mean, that causes envy. And then, umm… the ‘paracos’ said that, that I was allied with the guerrilla. That I used to bring them groceries. And the others, the guerrilla, said that I was friends with the ‘paracos’. And so I was caught in the middle. And when I used to go down to the ‘mingueo’… to bring my, I called, I called the man, Pedro the deceased who died. I told him “Hey, come pick me up on the ‘cuchilla’, there by the, by the ‘mingueta’.” He told me “Juan I advise not to come down, because if you do they’ll kill you.” “Why? What kind of problems do I have?” “I don’t know. You gave them a hundred pairs of boots” “But when?” “They checked over me, they, the ‘paracos’, they saw me.” And I didn’t even give them a candy. That was strange! So I stayed in my town very quiet. One week later a ‘paraco’ came where I was, he went to Luis. And they told Luis “call Juan, bla bla bla, with how many people, now that he is working for the guerrilla. They tell me here that this is true.” And Luis told him, that that wasn’t true, that the person he was talking about was a good leader, and this and that. He said to him “Well, you shouldn’t know, you can’t get involved in it. They are just going to have a conversation with him.” And he called me. Innocent me, he called me, I came home and he told me “My friend you have a problem.” “What problem?” “You have a problem. You brought a hundred pairs of boots to the guerrilla.” “When?” After that someone came and told me that they wouldn’t even ask me about anything, they would just come and kill me. That that was the reason he came here, he was right here, he was near. Almost four kilometers away, they were there. And then I called a man, who is called Old Miguel. He passed away two years ago. Umm… do you know him, Jorge? -- I can’t remember him. -- Well. Umm… his father-in-law, I called
Pero no fue así problema, fue un problema con los ‘paracos’, problema con la guerrilla. Y por la misma gente, que envidia. Porque yo tenía mis animalitos, yo compraba mis cabritos, pero yo trabajaba en café, sembraba el café, plátanos, bueno así yo lo vendía abí. Entonces este, o sea se envidia. Después eh… los ‘paracos’ dijeron que, que yo estaba aliado con las guerrillas. Que yo les llevaba compras a las guerrillas. Y otro, las guerrillas les decía que yo soy amigo de los ‘paracos’. Entonces nos dejaron en medio. Y cuando yo siempre bajaba al mingueo… a llevar mi, yo llamé, yo llámé al señor, el difunto Pedro que se murió. Yo llamé “Oye mañana o pasado venga a recogerme en la cuchilla, allá donde, donde mingüeta.” Me dijo “Juan le aconsejo, no baje, porque si te vienes te matan.” “¿Por qué? ¿Qué tengo problemas?” “No sé. Usted llevó cien pares de botas” “¿Pero cuándo?.” “Ellos me revisaron, ellos los ‘paracos’ ellos me, ellos mismos me vieron.” Y yo no pasaba ni un conflicto. ¡Qué raro! Yo me quedé en mi pueblo tranquilo ahí. Entre una semana llegó un ‘paraco’ internado por allá donde yo estaba, donde estaba Luis. Y a Luis le dijeron “que llame a Juan, ta ta ta, ta ta ta, con cuántas personas, con eso que trabaja con la guerrilla. Es cierto, me aprueban aquí.” Entonces Luis le dijo que no, que esta persona buen líder, buen tal, que no sé que. Le dijo “Bueno, usted no puede saber, usted no se meta en eso. Ellos lo que, ellos lo que van es a hablar.” Y me llamó. Y por ahí inocentemente yo, me llamó, yo llegué abí a casa, me dijo Luis, me dijo “No hombre
que usted tiene un problema.” “¿Pero de qué?” “Usted tiene un problema. Usted habían traído cien par de botas par la guerrilla.” “¿Cuándo?” Después abi uno llegó, me dijo que no que a usted nada, no pregunta nada, te cogen y te matan. Y a eso vino, está abí, está cerquita. De aquí como de cuatro kilómetros, ellos estaban abí. Entonces yo llamé un señor que se llama Viejo Miguel. Ya él se murió, hace dos años que se murió. Eh… ¿usted conoce Jorge?
- No me recuerdo del.
- Bueno. Eh… el suegro del, yo lo llamé, él un Máma. Yo le dije “oye, yo tengo un problema.” Y él consultó con su mente, con su, su espíritu. Y me dijo “que te vas a pasar mal. Y vamos a buscar un sitio donde esta el Madre y oramos y hacemos los trabajos, por espirituales. Para que Madre y Padre para que te cuiden. Así no te van a pasar nada.”
- ¿Y Madre y Padre son tu mamá y tu papá?
- No. Eso es de los que hicieron el mundo.
- Eso es… ¿Cómo es que se llama la Madre? Haba Sei y Seiyancua
- Seiyancua, y entonces me llevó un sitio. Me dijo, y me entregó, “confíese todo lo que usted había pensado malo.” Y yo confesando, entregando a la Madre abí. Y él me estaba haciendo trabajo de limpieza y todo eso. Bueno. Y llegué a la casa. Dijeron que a las doce, a medio día yo llego allá. Pasando las doce, media noche, media día no llegó, hasta la tarde. Y después mandó otra carta “mañana a la diez, sino llego a las once, llego por allá.” Esperé, al siguiente día y esperé siguientes días. Y ellos no llegaron. A las diez, hasta las once, las doce, hasta la una, las dos. Y llegó autoridad mía, que la autoridad, y me dijo “porque usted cumplió, y ayer y hoy… Ah, usted no debe” y me sacó y me llevó. Cuando se, me fui, entre una hora y ellos llegaron. Y le preguntaron Luis “¿Qué hubo, dónde está el señor?” “Él cumplió ayer y hoy. Y vino su autoridad, lo cogió y lo llevó.” Y entonces…
- ¿Su autoridad era el Máma?
- Sí, claro. Eh… Me fui. Me dijo “de aquí usted tiene que irse mañana o pasado, tiene que llegar arriba hay un sitio a donde hay un Máma más grande, más jefe. Usted tiene que quedarse allá.” “Pero allá esta guerrilla.” “No. No importa, vaya.” Y entonces subo. Porque, porque los ‘paracos’… Era la guerrilla se metieron con los ‘paracos’. Y ellos, ellos bajaron. Cuando llegaron quebra Andrea, ellos mismos y los ‘paracos’ se dieron plomo. A ese cuando me estaba buscando lo mataron. Porque? Uno que me estaban persiguiendo a mí. Entonces ¿por qué?, los papás Seiyancua, la Madre ¿por qué? te mira que usted no debe, El mismo vuelve a cobrar. Si cuando uno, por ejemplo me dice “No que señor me debe tanto. Entonces que vaya cóbrelo.” Entonces uno llega abí “no que yo no debo nada a usted.” No debe, entonces vuelve a cobrar otra vez a él. Así mismo lo hacen. Son nuestros padres y nuestros madre. Por eso el padres no está muero porque está viva. Porque pasa en brisa, agua. La naturaleza, por todo los, por eso la madre naturaleza es que nos reclama.
As mentioned above, our understanding of cause and effect and our very notion of time, do not match those of the Kogi. At first sight, the above description appears to relate events spanning about a week. In the course of this four-hour-long conversation it became clear to me that such events took at least six months to unfold. Among us, time is a linear succession of events which evolve as a bowling ball rolling towards the pins. In contrast, time among the Kogi may be described as a collection of powerful instants, like a bouncing ball which sometimes bounces back and sometimes forward. Again, “what is important, what has ultimate value, is not what is measured and seen but what exists in the many realms of meanings and connections that lie beneath the tangible realities of the world, linking all things.”

Let us consider the facts as they were presented by our interlocutor:

- He was a prosperous and honest trader of coffee and other agricultural products between the Kogi and the colonos.

- Some people became jealous of him and unfairly accused him before the paramilitaries (right-wing guerrillas) to be a collaborator of the guerrillas. Others accused him before the guerrillas of being a helper of the paramilitaries. Thus, he got caught in the middle.

- At some point he was specifically accused of having delivered one hundred pairs of boots to the guerrillas, and several people confirmed this transgression. He claims that these were false accusations.

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57 For a detailed account of the notion of time among the Kogi, see, Reichel-Dolmatoff, *The Sacred Mountain of Colombia’s Kogi Indians*.
• The local paramilitary leader went into Kogi lands looking for him, allegedly “to talk.”

• He was advised by another Kogi that he was going to be summarily executed, so he did not attend the meeting. He was taken to a Máma who started spiritual work with him.

• He was summoned again by the paramilitary leader and this time he did attend the meeting. However, the paramilitary leader did not arrive. The same happened at least two times, i.e., the executioner missed several appointments.

• Finally, the Kogi authorities saw that since he had appeared several times, he was clean and should not stay.

• He was taken to a more powerful Máma high up in the mountains, and he was held there for three years.

• At some point the paramilitary leader went looking for him, to ‘bring him to justice’, i.e., to kill him. Since he was not guilty, mother Seinekan and father Seiyankua (the supernatural) not only protected him, but they also passed judgment against this paramilitary leader.

• Judgment was materialized and implemented in the visible world through an encounter between the paramilitary and the guerillas, in which the paramilitary leader was finally killed.

The above facts may be considered from different perspectives. First, as they were presented by the Kogi elder Juan, the ‘accused’: He was wrongly accused by jealous
people to be a guerrilla collaborator. The supernatural passed judgment. Since he was clean, the supernatural protected him and killed his opponent (the paramilitary leader).

Secondly, from the point of view of an external observer: He was accused by the paramilitaries to be a guerrilla collaborator. Since he was indeed friends with the guerrilla, the guerrilla came down the mountain to protect him, and ultimately killed the paramilitary leader who was chasing him.

Thirdly, from the perspective of my personal interpretation of the Kogi notion of justice: His crime was not to deliver one hundred pairs of boots to the guerrilla (which most likely he did). His transgression was to have left the Kogi people and most importantly, to abandon the Kogi way of life. He became a trader among borderline people and profited from supplying goods to the guerilla. When the paramilitary went looking for him—and he was going to be killed—he was already an outcast and the Kogi people helped him but they refused to expose themselves to open war with the paramilitary in order to protect him. He had to face the paramilitary accuser at least two times. However, since the executioner missed these two appointments, this very fact might have been seen by the Kogi ‘authority’ as a decree that he was to be protected.59 Then, only then, he was taken up high in the mountains (beyond the reach of his enemies), where he was held for three years.

59 He did not use these words. He went to the sacred place for three years to be healed, to amend his problem with the Mother, to make pagamentos with the Mama and seek acuerdo. He acknowledged that he was “held” there, although he never said that he was held there to pay jail time. However, from the context of a four-hour-long conversation and from several other dialogues with Kogis about justice, crime and punishment, it is clear to me that he was punished. This conclusion is also consistent with the only existing literature about jail time for outcasts among the Kogi, i.e., Perafán Simmonds, Sistemas Jurídicos Paez, Kogi, Wayúu y Tule, at 139.
Judgment was not passed by the Kogi Mámas; mother Seinekan and father Seiyankua decided to protect him, as they decided to hold (imprison) him for three years, to kill the paramilitary leader, and to restore a place for him within the Kogi community.

The three years that he was held at the sacred place up in the mountain were not meant as a safe haven; this was jail time—his sentence and punishment for all his life transgressions, starting with that of having abandoned the Kogi way. However, at the same time, this imprisonment was his catharsis. During this time he purged all evil thoughts and deeds under the careful guidance of the Máma, and he was cleansed. Then he became a respected elder.

According to Perafán Simmonds, “the crime of treason (‘sedición’) is not considered, and there are no reported accounts of young Kogi people joining the guerrilla. The Kogi attitude towards the guerrilla is silence”60 Moreover, “the crime of rebellion (‘rebelión’) is not considered punishable.”61 Juan’s main transgression in this case was not to deliver boots to the guerrilla; Juan’s transgression was, in my view, the Kogi crime of ‘Eguitámale’ (attack to or be against the authority). According to Perafán:

This conduct is described as the conduct in which incurs someone (a Kogi) who ‘controls himself the things that will work/happen, cutting the way of tradition’, someone who ‘says that things are not as the tradition dictates and goes against what the forefathers said’.

There is a hill with this name (‘Eguitámale’), which ‘started criticizing’ and ‘was unable to guide (‘orientar’) the people’. According to this precedent, ‘if someone goes against (goes against authority), this story must be told’. The transgressor is sentenced to confront his/her thinking in ‘aluna’ (the spiritual world) with this hill.

Previously the transgressor has been convened by the Mámas and he/she is told: ‘you will —pretend to— control all the law that we have. Tradition says that Eguitámale was never able to guide. If you want to be like authority, find the way, participate with the elders, so that you listen, so that you learn’. To this end he/she is

60 Id.
61 Id.
taken to a place ‘Nukábindo’—a hill called ‘understand thinking’—so that he/she may listen there to this other hill which ‘guides’. Only if the transgressor let not himself be guided, the punishment described in the previous paragraph applies. In all cases, the proceedings (the legal process) shall end with the ‘guidance’ of the ‘Nukábindo’ hill.62

One must face one’s own evil thoughts and deeds, and seek and find guidance. If one refuses to listen, one must be taken to a physical place (a specific mountain) where one faces, in the spiritual world, one’s own stubbornness. The process is a very deep and lengthy self-examination, which includes a self-reflection of all things, including the most insignificant faults and thoughts from childhood. To my untrained eye, this looks a lot like Jungian therapy.

From a different perspective, it is important to highlight that judgment in Juan’s case does not refer to a particular set of facts. Judgment covers not only the whole person of the accused in all its complexity, but also all surrounding circumstances in the visible and invisible worlds. He was not asked to answer for a specific transgression—the delivery of 100 pairs of boots to the guerrillas. He had to confess and cleanse all evil thoughts and deeds, even tiny ones—in the course of our long conversation he explained to me that he had to confess and cleanse all sort of thoughts and actions, even the thought of killing a bird when he was a little kid.

Whenever ‘acuerdo’ (agreement between the material and spiritual dimensions of reality) is missing, people must work hard to get ‘organized’ (come into harmony with the spiritual world). The whole person is accused, the whole person is judged, and the whole person is cleansed. Specific facts and reasons are secondary; everything is simultaneously considered, including body, mind and soul.

62 Id.
Finally, a salient feature of the Kogi notion of justice, as shown in this case, is that judgment is not passed by the Mámas (they are only ‘advocates’). Judgment is passed by the supernatural, and such judgment manifests itself in the visible world in different ways. For instance, in this particular case, through the paramilitary leader missing the appointments and through his being ultimately killed by the guerrillas. However, this serendipitous chain of events do not quite conform to the ‘primitive’ notion of the Gods intervening in worldly affairs—as in the biblical ten plagues of Egypt. This is a more complex notion of interconnectedness, which—to my unpolished eyes—seems closer to the Buddhist idea of timeless oneness of all things. There is no ‘cause’ and ‘effect’ or ‘crime’ and ‘punishment’ as such. Justice is first and foremost, an endless search for universal balance and harmony.

**What can we learn from the Kogi system of justice and dispute resolution?**

If the above description of the substantive and procedural aspects of dispute resolution among the Kogi is accurate, is there anything we can learn from their millenary tradition, which we could use to develop more accessible, effective and culturally competent justice for the rest of Colombians? Not likely. Not even for all the gold in the world I would relinquish my constitutional liberties and subjugate myself to a monthly confession of my every thought before an all-too-powerful Máma. Not even if this was necessary to achieve peace and social harmony in Colombia, as I recognize it is among the Kogi. I suspect most fellow Colombians, children of the 1991 Constitution, agree with me wholeheartedly.
Even if all Colombians were convinced that the Kogi system of justice is superior to the formal judicial system of the country, the gap between the Kogi way of life and that of Colombians is so deep, that integration is impossible. Kogi justice does not work, cannot work outside of the very narrow confines of the Sierra Nevada highlands. There is nothing that the ‘civilized’ can immediately adopt or transplant from the Kogi to make the Colombian judicial system more accessible or culturally competent. Colombians and Kogi literally live in incompatible worlds.

CHAPTER 6. STATE-CUSTOMARY INTERFACE AND THE PROBLEM OF ENFORCEMENT OF CULTURALLY CONFLICTIVE DECISIONS

Particular attention deserves the problem of enforcement of customary justice. The following colorful story from BBC News about the legality of a “Shaman rain contract” in Colombia, serves as backdrop for the analysis:

18 January 2012

By Arturo Wallace, BBC Mundo, Bogota

Colombian prosecutors are investigating why organisers paid a "shaman" $2,000 (£1,400) to keep rain away from the closing ceremony of the Fifa U-20 World Cup held in the country last year. The inquiry was launched after cost overruns totaling $1m came to light.

But the focus of their questions is a 64-year-old man who says he uses dowsing to stave off or attract rain.

The event's organisers defended their decision to use him, noting that the final event was indeed rain-free.

The "rain-stopper" in question, Jorge Elias Gonzalez, has been dubbed a "shaman" or medicine man by the Colombian media.

A dark joke doing the rounds in the capital, Bogota, asks why the shaman was not also hired to minimise the impact of the last rainy season, which killed 477 people and affected some 2.6 million Colombians.

Yet more cynical voices have said that, given the corruption allegations involving the Bogota authorities in recent years, Mr Gonzalez should be praised as the only contractor to deliver what he promised.
The spectacular closing ceremony in Bogota’s El Campin stadium on 20 August last year remained dry - a stark contrast with the opening event in Barranquilla a month earlier that was drenched.

Ana Marta de Pizarro, the anthropologist and theatre director who was in charge of the ceremony, used this argument to defend the hiring of a rain stopper.

"Had it rained, the event would not have taken place. It didn’t rain on the ceremony, it was successful and I would use him again if I needed to," she said.

And Ms Pizarro also said Mr Gonzalez had been hired in the past to ensure Bogota’s International Theatre Festival was rain-free.

In an interview with a local radio station on Wednesday, Mr Gonzalez also said he was also hired to keep the rain away from the swearing-in ceremony of President Juan Manuel Santos.

This has, as yet, neither been confirmed nor denied by the president’s office.

Respect

Prosecutors are adamant that Mr Gonzalez’s contract will be investigated.

The procurement law requires efficiency and professionalism in all service providers paid for by public funds ”and that doesn’t include shamans," a statement from the local comptroller’s office said.

"We’ll ask him to explain in which circumstances, bow and where he can stop rain," said the deputy prosecutor, Juan Carlos Forero.

The debate has also drawn in those who want to make sure no public funds are used to pay for any sort of religious rites, and those who want the traditions of indigenous Colombians to be treated with more respect.

In a bizarre twist to the dispute, Mr Gonzalez has always insisted that he is not a shaman.

"I'm not indigenous, so don't call me a shaman, for I don't even know what that is. Nor am I a wizard," he told a local newspaper several years ago.

Mr Gonzalez has said that he can stop or attract rain using dowsing, although he also prays.

Anthropologist Mauricio Pardo believes that by describing him as a shaman, the Colombian media might end up belittling an important indigenous tradition.

"And those traditions deserve to be respected. Even our constitution demands so," he told BBC Mundo.'

This case is particularly interesting because it is not about the enforcement of a private contract between two private parties for the delivery of ‘supernatural’ benefits, but rather a contract between a public entity (the city of Bogota) and a private service provider.

Let us consider the enforcement of this rainmaking procurement contract across the continuum of societies which spans from the overwhelmingly secular to the predominantly magical. The case is not problematic at the extremes of this continuum: In Toronto, as we saw above (chapter 1 of Part 4, at page __), where courts generally do not believe in magic, this contract is not enforceable; this case would probably be seen as a criminal swindler pretending to use magic to extract some rents from the local authorities. Conversely, the situation in a predominantly magical society would be relatively straightforward; since “our police and our courts most of them are witchcraft believers and this belief is very strong,” the contract could conceivably be regarded as an agreement for the delivery of legitimate wizardly services—I ignore whether this could indeed be the case in any specific country; my point is only that the above facts would pose no fundamental legal contradiction in a society where the mediated intervention of the supernatural was widely regarded as legitimate.

The case is more complex in Colombia (and in most middle-income countries today), where the vast majority of the urban population does not believe in magical rainmaking, while a small albeit clearly defined subset of the population (the indigenous communities) overwhelmingly believe in various forms of mediated intervention of the Supernatural. For many indigenous communities in Colombia today, shamanic rainmaking may be a standard practice; it may be a legitimate service that one could legitimately offer to the local authorities to prevent rain during a soccer game. Since

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there is no all-inclusive list of lawful services that may be procured by local authorities, and since the Colombian Constitution expressly recognizes the multi-cultural nature of the Colombian nation (and of its legal system), one could reasonably argue in favor of the legality of the enforcement of this rainmaking contract in Colombia. This outcome, however, would imply a cultural clash, as it would be widely regarded as illegitimate by the vast majority of the Colombian population. The contract’s lawfulness and enforceability largely depends on context.

The same dilemma is faced by all societies around the world where customary justice remains alive. Legal enforcement of culturally conflictive decisions of customary justice institutions is particularly problematic in those instances when these decisions are widely regarded as legitimate by the micro-cosmos of the community where they are adopted, and yet widely regarded as illegitimate by the wider regional or national community or by the international community at large. There are three basic options to deal with this conflict:

1. **Preeminence of universal standards.** Legal enforcement of culturally conflictive decisions of customary justice institutions may be rejected, such as in the case of stoning of child witches in DRC, Nigeria, Uganda, Tanzania, and Kenya; Sassy-wood poisoning in Liberia and the Gambia; and the gang-raping

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7 [http://news.bbc.co.uk/2/hi/africa/8119201.stm](http://news.bbc.co.uk/2/hi/africa/8119201.stm)
8 Sassy wood has been illegal in Liberia for almost a hundred years: “The Liberian constitutional court out-lawed trial by ordeal in 1916 if it was forced upon the individual and if the practice is life-threatening or causes inhuman or degrading treatment.” But it continues to be practiced in this and other countries in the region, especially in rural areas. Gienanth and Jaye, *Post-Conflict and Peacebuilding in Liberia.*
of Mukhtar Mai in Pakistan.\textsuperscript{10} Human rights advocates propose that international instruments such as the ICCPR\textsuperscript{11} provide the ultimate boundary of legality and enforceability of customary justice.\textsuperscript{12} This solution implies the supremacy of universal standards over cultural relativism. The problem, however, is that these ‘universal’ standards are not nearly as universal as the West assumes them to be. For instance, from the perspective of vast segments of the world’s population, especially in low and middle-income countries, the woman’s right to choose recognized in \textit{Roe v. Wade}, 410 U.S. 113 (1973), is widely perceived as a violation of a ‘universal’ standard. In our American culture it is simply inconceivable to equate the stoning of child witches to \textit{Roe v. Wade}. Nonetheless, what most North Americans and Europeans call a barbaric killing of defenseless African children, many in Sub-Saharan Africa call a legitimate societal defense against evil demons, and what the West calls the woman’s right to choose, many call a systematic killing of defenseless unborn babies. ‘Universal’ standards are

\textsuperscript{10} Irfan, \textit{Honor Related Violence Against Women in Pakistan} (incident is transcribed in text accompanying supra note 22, at 125).


\textsuperscript{12} Barfield, \textit{Afghan Customary Law and Its Relationship to Formal Judicial Institutions}. (“One reason that Afghan society has survived so many years of turmoil has been its ability to govern itself at the local level even in the absence of state institutions. The international community should take advantage of this strength by recognizing that most problems are not solved in the formal judicial institutions but rather informally. Some ways of keeping order, such as blood feud, will never be acceptable and should disappear as state authority expands. Others such as the use of jirgas or shuras to hear local disputes are grassroots democratic institutions that should be encouraged. But precisely because such institutions give priority to the community over the individual, disputants should always have the right to the formal legal system where they can get a hearing by more dispassionate judges or demand enforcement of their rights through national law codes that apply to all citizens equally.”) (emphasis added). \textit{See also, e.g}, UN Women, Unicef and UNDP, \textit{Informal Justice Systems, Charting a Course for Human Rights-Based Engagement}; Irfan, \textit{Honor Related Violence Against Women in Pakistan}; Harper, \textit{Customary Justice: From Program Design to Impact Evaluation}; Wardak, \textit{Building a post-war justice system in Afghanistan}; Röder, \textit{Informal Justice Systems: Challenges and Perspectives}; International Development Law Organization (IDLO), \textit{Customary Justice: Challenges, Innovations and the Role of the UN}; Faundez, \textit{Access to Justice and Indigenous Communities in Latin America}, at 97 – 98.
not context-free. Let us hope that the relentless human pursuit of universal standards will solve this cultural clash. An honest search for common ground cannot simply ignore it.

2. **Preeminence of cultural relativism.** The alternative view—widely held by customary justice authorities around the world—holds that in a post-colonial, multi-cultural world, there is no longer room for the forceful transplantation of foreign standards about what is ‘good’ and ‘evil’. As long as a customary justice decision is widely regarded as legitimate by the relevant community—they claim—it must be enforced irrespective of considerations beyond the particular community. The problem of this approach is that, by making the community (as opposed to the individual) the unit of analysis of this dilemma, customary justice advocates conveniently ignore the fact that in virtually all places around the world where customary justice is practiced, in the overwhelming majority of cases decisions are made by the ‘leaders’ of the community, i.e., old powerful men.13 The most vulnerable members of these communities—women, children, and ethnic minorities—rarely have a say on the selection of the judges, the collection of the evidence, or the outcome of decisions that affect them.14 In other words, nobody asked Mukhtar Mai herself whether she also regarded as

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13 E.g., Skelton, *Restorative Justice as a Framework for Juvenile Justice Reform: A South African Perspective*, at 499 (“The traditional model currently practiced in rural areas in South Africa is similar to indigenous traditions in other countries such as New Zealand and Canada… It involves elders (almost exclusively men) who preside over the resolution of problems experienced by members of the community, which have not been resolved at the family or community level.”) (emphasis added).

legitimate the Jirga’s decision to brutally and publicly gang-rape her in payment for her 12-year-old brother’s alleged transgression.\textsuperscript{15}

3. **Accommodation.** The literature is rich in examples of different ways in which culturally conflictive decisions can be accommodated; none of them is fully satisfactory. The laws of many countries have dealt with this problem in different ways, ranging from territorial, to ethnical, to subject-matter subsidiarity between formal and customary justice. Erica Harper, from the International Development Law Organization, provides the following taxonomy of these alternatives:

**Modalities of state-customary law interface:**

**Recognition:**

- Unqualified recognition: a specific group is granted an autonomous legal space, usually in the form of special jurisdiction, insulated from state interference;
- Conditional recognition: customary law is recognized insofar as it is consistent with statute, human rights standards and/or constitutional provisions; and
- Qualified recognition through specific legislation, regulations or instructions.

**Incorporation**

- Customary law is recognized as a source of law, and courts (usually at the bottom rung of the state hierarchy) are vested with the authority to adjudicate customary cases and apply customary law.

**Decentralization**

- Customary courts are integrated into the state court hierarchy, usually as the bottom tier of the court structure.\textsuperscript{16}

\textsuperscript{15} The incident is described by Irfan, *Honor Related Violence Against Women in Pakistan*, supra note 22, at 125.
An example of conditional recognition is the case of indigenous jurisdiction in Colombia, which is fully autonomous within the confines of the community—and subject to standard conflict of laws rules beyond it—unless its decisions violate human rights standards or the Constitution. 17 Similarly, in Malawi: “The only link that exists between non-state traditional courts and the formal judiciary is that the High Court can in theory review any decision made by any person or institution, including traditional authorities, to determine whether it respects and upholds the human rights guaranteed by the Constitution. The constitutional duty to respect and uphold human rights is imposed not only on the three branches of government, but also all its agencies and all persons [Constitution, 1994, section 15 (1)]. By definition this includes the traditional authorities, which are recognised by the president under the Chiefs Act, as well as those who operate non-state ‘courts’ outside the ambit of the act.” 18

A case of incorporation is that of Liberia, where formal courts may apply customary law within limits, while traditional Chiefs are essentially outside of the system. 19 Finally, a case of decentralization is that of Papua New Guinea, where

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17 Article 246 of the Colombian Constitution provides: “The authorities of indigenous peoples may exercise jurisdictional functions within their territories in accordance with their norms and procedures, provided they are not inconsistent with the Constitution and the laws of the Republic. The law shall regulate the way this special jurisdiction will relate to the national judicial system” (quoted in Faundez, Access to Justice and Indigenous Communities in Latin America, at 96). For a comprehensive description of the interplay between indigenous and formal justice institutions in Colombia, see, e.g., Ariza, Derecho, Saber e Identidad Indígena. A detailed account of the constitutional recognition of indigenous jurisdiction in Colombia, as interpreted and developed by the Constitutional Court, is available at Faundez, Access to Justice and Indigenous Communities in Latin America, at 100 – 103.
18 Kanyongolo, Malawi, Justice Sector and the Rule of Law, at 147.
19 Sage Guannu, An Introduction to Liberian Government, at 34 and 46. Quotes transcribed in Chapter 4 of Part 4. However, the situation of Liberian state-customary justice interplay may also be described as one of conditional recognition, since “[t]he Liberian constitutional court out-lawed trial by ordeal in 1916 if it was forced upon the individual and if the practice is life-threatening or causes inhuman or degrading treatment.” Gienanth and Jaye, Post-Conflict and Peacebuilding in Liberia.
customary justice is the lower tier of the formal system. The list of alternatives for state-customary justice interface is not all-encompassing. An additional option not included in this taxonomy is that of the criminal Sentencing Circles in Australia, where judgment is entered by formal courts (verdict on guilt or innocence), while punishment (jail time or otherwise) is decided and imposed by the elders of the relevant indigenous community.

The critical question is the extent to which each of the above alternatives leads to further social integration, or if they respond to a zero-sum game; whether they help to bridge the gap between state and customary justice, or they are only ways to distribute jurisdiction among two incompatible and antagonistic spheres.

The second question is whether social integration is always a desirable objective. Let us consider the case of Kogi elder “Juan” discussed in the previous chapter. Juan received a sentence of three years of mandatory ‘confession’ in almost entire isolation at a remote location, for his transgression of selling 100 pairs of boots to the guerrilla. Even if this sentence saved his life from certain death—as it clearly did—and his spirit—as he claims it did—there is no way that this decision may be acceptable under Colombian law; it blatantly violates Juan’s fundamental rights under the Colombian Constitution, as well as the principle of proportionality enshrined in the UN Universal Declaration of Human Rights. However, since the Kogi community is physically isolated and Kogi and western justice are structurally incompatible, and given that social harmony among the Kogi is arguably higher than among the rest of Colombians, one wonders if

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21 Supra note 56, at 169.
the interest of Justice (with capital J) is not better served by maintaining a complete separation between these two incompatible spheres.

CHAPTER 7. CUSTOMARY JUSTICE AMONG THE URBAN POOR IN LOW AND MIDDLE-INCOME COUNTRIES

Cross-country data on urban usage of customary justice systems in low and middle-income countries

The vast majority of the literature on customary justice systems concerns with the operation of these systems in rural settings, where they are most frequently employed and even thrive in many places of the world today. Formal justice is generally weaker or completely absent in most rural settings in low and middle-income countries, and with varying degrees of strength, customary justice continues to be the main face of justice in these settings. Yet, what about the billions of urban poor that are currently left out of the formal system of justice (as explained in Part 3 of this dissertation)? Do they also enjoy access to customary justice, as many of the rural people do?

Reliable cross-country data about the usage of customary justice systems in cities is very scarce. One source is the general population poll of the World Justice Project, which measures perceptions and experiences of ordinary citizens in a large sample of countries, about a variety of issues including access to justice and dispute resolution choices of ordinary citizens in close to 300 cities around the world. One of the questions included in this survey asks respondents whether someone in their households experienced a conflict trying to enforce a contract or to collect a debt in the past three
For those answering affirmatively, the follow up question asked about the mechanism used to solve the conflict. The answer choices for this particular question were: court lawsuit; small-claims court or procedure; commercial arbitration procedure; chief or traditional ruler; direct renegotiation; no action; other. The following table provides the % of respondents who reported having resorted to a chief or traditional ruler in a sample of nine low and middle-income countries. The table also provides the % of urban population in these countries in 2012.

<table>
<thead>
<tr>
<th>Country</th>
<th>Income level</th>
<th>% of urban population in 2012*</th>
<th>% use of traditional leader in three largest cities**</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bolivia</td>
<td>Middle</td>
<td>67</td>
<td>26</td>
</tr>
<tr>
<td>Colombia</td>
<td>Middle</td>
<td>75</td>
<td>1</td>
</tr>
<tr>
<td>Ghana</td>
<td>Low</td>
<td>52</td>
<td>6</td>
</tr>
<tr>
<td>Kenya</td>
<td>Low</td>
<td>24</td>
<td>10</td>
</tr>
<tr>
<td>Nigeria</td>
<td>Low</td>
<td>50</td>
<td>9</td>
</tr>
<tr>
<td>Pakistan</td>
<td>Low</td>
<td>36</td>
<td>16</td>
</tr>
<tr>
<td>Philippines</td>
<td>Middle</td>
<td>66</td>
<td>11</td>
</tr>
<tr>
<td>South Africa</td>
<td>Middle</td>
<td>62</td>
<td>4</td>
</tr>
<tr>
<td>Turkey</td>
<td>Middle</td>
<td>70</td>
<td>3</td>
</tr>
</tbody>
</table>

Sources: *United Nation, population dataset. **The WJP Rule of Law Index 2010.

The figures in the last column of the table are difficult to interpret, as it is not possible to know exactly how many of those respondents who indicated having resorted to a traditional leader to enforce the contract or recover the debt, actually used a customary justice system. There are a number of sources of error in a question like this.

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1 Exact wording: “During the past three years, have you or someone in your household had a conflict with someone who refused to fulfill a contract or pay a debt?” Full questionnaire available at Botero and Ponce, Measuring the Rule of Law.
2 Exact wording in the questionnaire was: “Which one of the following mechanisms was used to solve the conflict? (SINGLE ANSWER): A. Filed a lawsuit in court. B. Used a small-claims court or procedure. C. Used a commercial arbitration procedure. D. Sought help from a chief or traditional ruler (wording adapted to each country). E. Renegotiated the contract or debt directly with the other party. F. No action was taken. G. Other (DON’T READ). H. DK / DNA [Do not know or do not answer] (DON’T READ).” Full questionnaire available at Botero and Ponce, Measuring the Rule of Law.
3 Survey research, as all forms of social sciences research, seeks to minimize but can never eliminate error. “Surveys are designed to produce statistics about a target population. The process by which this is done rests on inferring the characteristics of the target population from the answers provided by a sample of
including language barriers and translation problems, sampling error,\(^4\) nonresponse error,\(^5\) question design error,\(^6\) interviewing error,\(^7\) coding and data processing error,\(^8\) among other sources of error.\(^9\) Even though the survey was administered in all local languages, there are a number of language variations in these countries, including many dialects. Not all people living in the three largest cities speak fluently one of the official languages of the country, and there is room for misunderstanding. Nonetheless, language as a source of error is relatively minor problem in this case, because the word for ‘chief’ or ‘traditional leader’ was carefully selected in each country after the completion of a pre-test in a relevant sub-sample of respondents; the main problem is not language per se.

The main source of error in this question comes from the multiplicity of possible interpretations of the concept of traditional leader. First, respondents may have been confused between formal and customary justice—this risk is very small, given the wording of this question.\(^{10}\) More importantly, the notion of ‘traditional leader’ may have different interpretations. Let us consider, for example, the case of Colombia: One percent of the respondents indicated having resorted to a traditional leader to enforce a

\(^4\) Id. at 45.
\(^5\) Id. at 66.
\(^6\) Id. at 111.
\(^7\) Id. at 142.
\(^8\) Id. at 152.
\(^9\) “The quality of the sample (the frame, the size, the design, and the response rate), the quality of the questions as measures, the quality of data collection (especially the use of effective interviewer training and supervising procedures), and the mode of data collection constitute a tightly interrelated set of issues and design decisions, all with the potential to affect the quality of the resulting survey data.” Id. at 175.
\(^{10}\) The answer choices for this particular question were: Court lawsuit; small-claims court or procedure; commercial arbitration procedure; traditional or local leader; direct renegotiation; no action; other.
contract or to recover a debt. This one percent of respondents may include, among
others, the following people:

a) An Arwaco or Paez (or a member of any of the other 78 indigenous groups
still alive in Colombia), who took her dispute to customary justice authorities
in certain ghetto-like urban communities. In this case, we are speaking about
customary justice proper.

b) A descendant of indigenous people who, having lost all contact with his
indigenous community, nonetheless resorts to the “Indio Amazonico” (witch
doctor), sorcerers, or ‘charlatans’\(^{11}\) to deal with conflicts. In this case, these
‘traditional leaders’ are not customary justice authorities under Colombian
law, even though they are not so different from the ‘witch doctors’ who
administered the sassy-wood to 1000 Gambian villagers, according to the
BBC News report transcribed in Chapter 4 of Part 4.

c) A person who contacted one of the various criminal gangs active in
Colombian cities (including guerrilla, paramilitaries, the mafia, and ordinary
gangs), seeking ‘protection’ to enforce the contract. In this case these
‘traditional leaders’ are really criminals. Yet, these gangs often operate like
legitimate authorities. For instance, in the “Comunas” (slums) of Medellin,
they enact legislation, collect taxes, and enforce the law, very much in the
same way that tribal customary justice authorities exercise these tasks today in

\(^{11}\) Such as the person described in the BBC News report about the legality of a “Shaman rain contract” in
Bogota, transcribed in Chapter 6 of Part 4 of this dissertation.
rural Afghanistan, Pakistan, or Cameroon, as described in Chapter 1 of Part 4 of this dissertation.

d) Someone who resorted to legitimate ‘community leaders,’ such as the “Juntas de Accion Comunal” (community boards), or “comites de convivencia” (good neighboring committees) of building complexes or enclosed communities which are very common in Colombian cities. In this case these ‘traditional leaders’ are not customary justice authorities proper under Colombian law, yet they may have some jurisdiction in certain cases, and they operate very much in the same way as proper customary justice authorities in other latitudes.

The problem is that, the concepts of “traditional ruler” or “customary justice” have very little meaning beyond a very specific local context; these concepts are not useful units of analysis at the national or international level.

Yet, in spite of all these limitations, the numbers in the last column of the table are very useful for purposes of this dissertation, as they strongly support its central argument.

First, it is important to clarify that despite all their methodological limitations, these figures about usage of traditional justice systems also have very significant methodological strengths. They reflect the answers to carefully tailored questions administered by a professional pollster to a ‘simple random sample’¹² of ordinary citizens.

¹² “Random samples are most likely to yield a sample that truly represents the population and lets a researcher statistically calculate the relationship between the sample and the population—that is, the size of the sampling error. The sampling error is the deviation between sample results and a population parameter due to random processes.” Neuman, Social Research Methods, at 227. See also Fowler, F. Survey Research Methods, at 24.
in these countries. This means, any person living in one of the three largest cities of these
countries had the same probability of being interviewed in this survey, and thus, the
results of the survey may be extrapolated to the population of the three largest cities
within a reasonable margin of error. In other words, they provide a fairly accurate
assessment of the perceptions and experiences of the population of the three largest
cities of these countries.

Secondly, while these figures are not useful for cross-country comparisons (due
to the multiplicity of possible interpretations of the concept of ‘chief’ or ‘traditional
ruler’, as explained above), they are nonetheless very useful and meaningful for
analytical purposes within a specific country context.

In the case of Colombia, this figure strongly supports the notion that virtually
nobody (including the urban poor) uses customary justice systems in Bogota, Medellin,
and Cali. Since only one percent of the relevant respondents identified this answer
choice (and since this one percent also includes witchcraft, charlatans, and criminal
gangs), it is clear that the urban poor in Colombia are unlikely to keep their traditions
and ancestral dispute settlement mechanisms alive in big cities.

The distribution of answers to this survey among the various dispute resolution
choices in Colombia was as follows: Court lawsuit (including small-claims court or
procedure), 30%; commercial arbitration procedure, 5%; traditional leader, 1%; direct

13 A detailed description of the methodology employed to collect these data is available in Botero and
Ponce, Measuring the Rule of Law. An explanation of the process of drawing inferences from the sample to
the population is provided in Neuman, Social Research Methods, at 242.
14 “Reliability of composite indicators depends upon the quality of the conceptualization, and the rigor of
the data collection, aggregation, imputation, weighting, and normalization methods employed to produce
them.” Botero, J., Nelson, R., and Pratt, C., Indices and Indicators of Justice, at 153 (emphasis added).
renegotiation, 39%; no action, 24%; other, 1%. It is worth noting that the percentage of respondents who indicated having taken no action to enforce the contract or to collect the debt, is almost as high as for those who resorted to the formal court system. In other words, facing a simple commercial dispute, less than one third of Colombians used the formal courts, 5% used commercial arbitration mechanisms (which are indeed relatively effective in Colombia), and the rest (63%) had to either renegotiate the debt or resign themselves to losing the money.16 These figures support this dissertation’s central argument that in Colombia the urban poor are unable to keep their traditions and ancestral dispute settlement mechanisms alive in big cities, while they are also unable to understand and utilize what to them are abstruse legal procedures of the formal courts.

In Bolivia we find the largest percentage of users of customary justice among the countries included in the table. Some 26% of respondents reported having resorted to a chief or traditional ruler to enforce a contract or collect a debt in the past 3 years.17 Again, interpretation of this number must be done in context.18 Bolivia is essentially an indigenous country—including an indigenous President and mostly indigenous government—. Approximately 57% of the population identify themselves as Indians

15 For a discussion of comparability of justice indicators across countries, see, Botero, J., Nelson, R., and Pratt, C., Indices and Indicators of Justice, at 164-165.
16 Of course, the answer choice ‘renegotiate the debt’ does not necessarily imply failure of the system—a creditor may have a variety of reasons to voluntarily reduce the amount of money owed to her. However, in the context of this question, which is a follow up to a previous question about “a conflict with someone who refused to fulfill a contract or pay a debt,” the option of renegotiation almost certainly implies a surrender of rights on the part on the creditor—when litigation is not a cost-effective option, creditors prefer to give up part in order to minimize losses.
17 In Bolivia, the distribution of answers to this survey among the various dispute resolution choices were as follows: Court lawsuit (including small-claims court or procedure), 28%; commercial arbitration procedure, 17%; traditional leader, 26%; direct renegotiation, 24%; no action, 5%. Mediation and arbitration mechanisms in Bolivia appear to be comparatively strong, and court usage is about average for the level of development.
(mostly Quechua, 30% and Aymara, 25%), and another 30% reports to be mestizo (mixed white and Amerindian ancestry). The white (European ancestry) population is about 15%. Moreover, both Quechua and Aymara are official languages, together with Spanish, and these indigenous languages are the main language for over 35% of the population (Quechua, 21% and Aymara 15%). Spanish is spoken by only 60% of the population of the country—in sharp contrast to most other countries in Latin America, where this language is close to universal.¹⁹

In this ethnic, cultural and linguistic context, the figure of 26% of customary justice users seems very small. Even in the one country in South America where indigenous traditions and culture are absolutely prevalent, the use of customary justice in the urban centers of La Paz, Santa Cruz and Cochabamba is relatively marginal.

Kenya is a particularly interesting country because urban population is only 24% of the total population, including 10% in the three largest cities of Nairobi, Mombasa and Nakuru. Kenya is among the countries with the lowest urban density in the world. Yet, this tendency is rapidly changing—the average annual urbanization rate is 4.2%,²⁰ and the share of urban population grew from 21% to 24% in the past two years.

According to the table above, in Kenya out of all the urban population who experienced a contractual conflict, only 10% resorted to customary justice to solve it. In Kenya, the distribution of answers to this survey among the various dispute resolution choices was as follows: Court lawsuit (including small-claims court or procedure), 18%; commercial arbitration procedure, 3%; traditional leader, 10%; direct renegotiation, 27%;

no action, 42%. In other words, facing a simple dispute, only a small minority of urban Kenyans use the “Wig and Gown” or the “Sassy-Wood” faces of justice; most people (70%) had to either renegotiate the debt or resign themselves to losing the money.

Figures in Ghana and Nigeria are very similar to those from Kenya. The distribution of answers to this survey among the various dispute resolution choices in Ghana (Accra, Kumasi, and Tamale) was as follows: Court lawsuit (including small-claims court or procedure), 23%; commercial arbitration procedure, 8%; traditional leader, 6%; direct renegotiation, 33%; no action, 29%; other, 1%. In Nigeria’s three largest cities (Lagos, Kano and Ibadan), the distribution of answers was as follows: Court lawsuit (including small-claims court or procedure), 21%; commercial arbitration procedure, 6%; traditional leader, 9%; direct renegotiation, 31%; no action, 31%; other, 2%. Again, most urban people in Ghana (72%) and Nigeria (62%) had to either renegotiate the debt or resign themselves to losing the money.

The distribution of answers to this survey among the various dispute resolution choices in Pakistan (Karachi, Lahore and Faisalabad) was as follows: Court lawsuit (including small-claims court or procedure), 22%; commercial arbitration procedure, 20%; traditional leader, 16%; direct renegotiation, 11%; no action, 31%; other, 0%. Alternative dispute resolution mechanisms are comparatively strong in Pakistan, and they are used more frequently in part because of the relative weakness of the formal court system.21 The relative strength of customary justice in Pakistan, and the higher percentage of urban users of customary justice (16%) as compared to other countries in

20 Id.

this sub-sample, are consistent with the literature presented in Chapter 1 of Part 4 of this dissertation. Yet, as in the case of Bolivia, 16% seems as a very low number when considered in the broader ethnic and linguistic context of Pakistan. In a country with very low income per capita and very high ethno-linguistic fractionalization, as Pakistan, one would expect a larger role of customary justice in the urban centers.

The cases of South Africa and Turkey are more difficult to interpret, as they are much more developed nations, with relatively strong, accessible and efficient judicial systems. Income per capita and the level of institutional development of these two countries is very similar to that of Colombia. Not surprisingly, the reported level of use of customary justice in the urban centers of South Africa and Turkey is only marginally higher than that of Colombia. Customary justice in urban centers of higher-middle income countries is marginal or not available at all, even in those multi-ethnical countries—like Colombia and South Africa—where customary justice is strongly protected by the Constitution and where it remains vibrant among rural communities.

The figures presented above support this dissertation’s central argument that even in countries with very strong customary justice traditions, such as Kenya, Nigeria, Ghana, South Africa, Colombia, and Pakistan, the urban poor are unable to keep their traditions and ancestral dispute settlement mechanisms alive in big cities, while they are

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21 This conclusion is based on conversations with dozens of attorneys and judges in Pakistan, including members of the highest court, as well as on data from the WJP Rule of Law Index 2010, 2011 and 2012-2013 (in particular, sub-factor 7.7 measures the extent to which ADRs are accessible, impartial and effective).
22 “Ethnic groups: Punjabi 44.68%, Pashtun (Pathan) 15.42%, Sindhi 14.1%, Sariaki 8.38%, Muhajirs 7.57%, Balochi 3.57%, other 6.28%. Languages: Punjabi 48%, Sindhi 12%, Saraiki (a Punjabi variant) 10%, Pashtu 8%, Urdu (official) 8%, Balochi 3%, Hindko 2%, Brahui 1%, English (official; lingua franca of Pakistani elite and most government ministries), Burushaski, and other 8%” Central Intelligence Agency, 2013. The World Factbook. Visited March 21, 2013.
23 4% in South Africa and 3% in Turkey, as presented in the table above.
also unable to understand and utilize what to them are abstruse legal procedures of the formal courts.

**Cultural diversity and equality before the law**

A second set of issues related to the use of customary justice systems in urban centers, relates to the interaction between cultural diversity and equality before the law. The key question seems to be how to ease the inevitable tension between acculturation under a single nation which must provide equal laws and dispute resolution channels for all, on the one hand, and respect for cultural diversity on the other. According to Auerbach:

> Among the most committed practitioners of non-legal dispute settlement were immigrant ethnic groups. From the Dutch in New Amsterdam to the Jews of the Lower East Side of Manhattan, in a wide geographical arc that encompassed Scandinavians in the Midwest and Chinese on the West Coast, some newcomers from other cultures and traditions tried to place their disputes as far beyond the reach of American law as possible. Aliens in a hostile land, they encountered a society whose legal institutions were overtly biased against them or, at best, indifferent to their distinctive values. Their own indigenous forms of dispute settlement, centuries old in some instances, shielded them from outside scrutiny and enabled them to inculcate and preserve their traditional norms [as long as they remained together]. Ethnic-group dispute settlement often demonstrated a strong preference for community justice over legal due process, which was significantly less benevolent for new immigrants than government officials and legal professionals proclaimed.

> Yet for immigrants, as for religious utopians and businessmen, there was persistent tension between courts and their alternatives. The legal system, which ultimately was the arm of the state, discouraged autonomous pockets of resistance to its process. Law was one of the primary instruments of acculturation; its rapid extension to immigrant communities was a national imperative. This made law appealing to some ethnic groups, as a vehicle to hasten their absorption into American society. But it threatened others, who feared loss more than they anticipated gain. If some immigrant groups (the Chinese, for example) retained their own dispute-settlement institutions to preserve cultural distinctiveness, so others (Jews in New York) modified theirs to facilitate acculturation. The pattern was as intricate as the American ethnic mosaic itself.\(^\text{24}\)

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\(^{24}\) Auerbach, *Justice Without Law?*, at 6.
This tension between cultural diversity and equality before the law gives rise to situations of conflict of laws and jurisdiction, when individual members of the community decide to opt-out of the communal system, as well as when disputes arise between a member and a non-member of the community over issues closely guarded by the community (such as marriage and divorce). These problems were discussed in detail in the previous chapter (Chapter 6 of Part 4 - State-customary interface and the problem of enforcement of culturally conflictive decisions). While there is no fully satisfactory answer to this problem, countries often tie the outcome to territorial boundaries—customary justice tends to prevail in rural areas and indigenous territories, while state justice (and law) tends to prevail in urban centers.

**Customary Justice in Self-Isolated Urban Communities**

A related issue is that of cultural norms about dispute resolution forums, such as the culturally accepted—although often not legally binding—requirement among several religious groups to take certain disputes only to religious courts (Bet Din, Sharia, and others):

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**Bet Din:** The Hebrew term applied to a Jewish religious or civil court of law. The bet din, literally translated as "house of judgement," originated during the period of the Second Temple, and was known as the Sanhedrin…. A bet din is still used today voluntarily by Jews to settle disputes within the community, for conversion, and the validation or nullification of marriage and divorce documents. In Israel, an elaborate network of bet dins were established under the Supreme Rabbinical Court in Jerusalem. The State of Israel has taken over this system, giving the bet din exclusive jurisdiction over the Jewish population in matters of personal status such as marriage, divorce, and inheritance; however, secular courts oversee all non-balahic legal issues.25

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A key element of the modern Bet Din is its ‘voluntary’ nature: “A Bet Din in our
day in the United States, is a voluntary arbitration court in the Jewish community for
settling disputes.” However, this ‘voluntary’ nature is in practice a function of the
strength of the community bonds. Among the orthodox Jews in New York, for instance,
the sense of community is so strong, that the duty to take certain disputes to the Bet
Din, as opposed to the US courts, is interiorized by most members of this community as
a legal obligation. As community ties dilute over time in these and similar self-isolated
communities in cities around the world, the usage and effectiveness of ‘voluntary’
community-based and ethnic-based dispute settlement systems dilute as well.

**Community Pressure, Judicia Dei, and ‘Empty-vessel’ Customary Justice in
Urban Settings**

In Chapter 3 of Part 4 of this dissertation we saw that for analytical purposes, all
customary justice systems may be grouped in two camps: a) Mechanisms of social
control through **community pressure**, and b) Systems of social control through the
**intervention of the supernatural** world. While most customary justice systems tend to
involve elements of both, one of these natures tends to predominate in each case.

The implications of these two natures of customary justice are significant for the
endurance of these systems in generally hostile urban settings. As we saw above, even in
countries with very strong customary justice traditions, such as Kenya, Nigeria, Ghana,

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27 Very complex issues are related to voluntary jurisdiction of religious courts, particularly with respect of
religious minorities in high-income countries. This complex topic exceeds the scope of this dissertation. A
thorough approximation to this topic is available in Ahmed, *Islam Today*, at 163 to 236.
South Africa, Colombia, and Pakistan, the urban poor are normally unable to keep their traditions and ancestral dispute settlement mechanisms alive in big cities.

When customary justice is based on community pressure, such as in the Pakistani *Jirgas* or the Colombian Wayuu *Palabrero* (see Chapters 1 and 3 of Part 4), the strength of these customary justice systems in the cities is in practice a function of the strength of the community bonds; just as with the Bet Din religious courts, when community ties remain strong among some ghetto-like urban communities, their community-based customary justice systems remain strong as well. And when these community ties dilute over time, the usage and effectiveness of community-based customary justice systems dilute as well. When rural Pakistanis move to big cities they tend to lose contact with their original communities and ancestral dispute resolution methods very rapidly—as illustrated by the fact that among a random sample of urban Pakistanis who faced a simple dispute in the last three years, only 16% of them reported using customary justice to resolve the dispute. The same applies to members of the Wayuu community when they move to the urban centers of Colombia.

Secondly, when the intervention of the supernatural plays a defining role in customary justice systems, such as among many Amazonian and Sub-Saharan African tribes, the binding power of customary justice tends to disappear almost instantly in the cities, and be replaced by ‘charlatans.’ This process was explained in detail in Chapter 4 of Part 4, with respect to the sassy-wood justice in Liberia. Similarly, in poor neighborhoods in Bogota and other Colombian cities it is common to find the “Indio Amazonico” (witch doctor) and other sorcerers who, in addition to heal physical
sickness and expel evil spirits from their patients, deal with family and other conflicts through the intervention of the supernatural. In most cases these individuals are simply ‘charlatans’ extracting rents from incautious citizens. But even when these sorcerers are fully trained shamans, the services they provide are but a distant shadow of the customary justice system from which they come. Most importantly, once they move to the urban centers, even these fully-trained shamans fail to perform the community harmonizing function of justice. They may perform their divination procedures and resolve individual disputes; they may also heal their patients in body and spirit, but they lose the community healing element which is at the core of all effective customary justice systems.

Stoning and communal lynching of child witches in DRC,29 Nigeria,30 Uganda, Tanzania,31 Kenya32 and other places in Sub-Saharan Africa are increasingly frequent in urban settings. This may be a reflection of the rapid urbanization process of these countries, but this may also reflect the internal decay of customary justice systems. Like the ‘empty-vessel’ phenomenon described by Liberian chiefs (Chapter 4 of Part 4), when rich customary justice traditions are moved from their original, mostly rural community settings, much of the community healing power of old is lost.

28 See detailed explanation at the beginning of this chapter.
Last visited: July 31, 2012.
31 http://www.bbc.co.uk/news/world-africa-17138958
32 http://news.bbc.co.uk/2/hi/africa/8119201.stm
In sum, customary justice no longer works in urban settings in the 21st century, and even when it does, it rarely delivers the community healing power which is at the core of its long lineage.
PART FIVE
SYNTHESIS: THE THIRD FACE OF JUSTICE

The central argument of this dissertation, as presented in the Introduction, is that the urban poor in developing countries (including newly arrived migrant peasants and members of indigenous communities), are unable to keep their traditions and ancestral dispute settlement mechanisms alive in big cities (Premise 1), while they are also unable to understand and utilize what to them are abstruse legal procedures of the formal courts (Premise 2).

Part 4 of the dissertation provides evidence in support of the first premise, i.e., that the urban poor in developing countries are unable to keep their traditions and ancestral dispute settlement mechanisms alive in big cities. As we saw, the “Sassy-Wood” face of justice is no longer effective among the urban poor in many (perhaps most) low and middle-income countries today.

Part 3 of the dissertation provides evidence in support of the second premise, i.e., that the urban poor in developing countries are unable to understand and utilize what to them are abstruse legal procedures of the formal courts. As we saw, there is a fundamental mismatch between the “Wig and Gown” face of justice of the colonizers and their heirs, and the real-life needs and aspirations of ordinary citizens in many (perhaps most) low and middle-income countries today.

Increasing internal migration and urbanization over the last few decades have further eroded the ability of large segments of society to have their disputes resolved in
both formal and informal\textsuperscript{1} judicial institutions. As Auerbach points out, “how people dispute is, after all, a function of how (and whether) they relate. In relationships that are intimate, caring and mutual, [as those among people living in a village], disputants will behave quite differently from their counterparts who are strangers or competitors [as the same villagers when they migrate to big cities].\textsuperscript{2} Social and ethnic tensions are often concomitant to the uneasy interaction and clashes between traditional and “modern” legal and judicial institutions, which are often perceived by large segments of society as a foreign “transplant.”\textsuperscript{3}

These two faces of justice are increasingly misaligned with the changing reality of a globalized yet multicultural world. A third face of justice appears to be needed.

\textsuperscript{1} Informal justice systems in this context includes both customary justice and community-based non-state dispute settlement systems. It does not include formal (state-based) mediation and arbitration systems.

\textsuperscript{2} Auerbach, \textit{Justice without Law?} Page 7.

\textsuperscript{3} \textit{See, supra} note 29, at 85.
This last part of the dissertation is a rudimentary attempt to answer the question: *What can we do about it?* This exercise is first and foremost, a search for common ground in a globalized yet multicultural world.

This part is divided in four chapters. Chapter one states the assumptions in which this search is based. Chapter two proposes a revised version of Damaška’s framework of justice and state authority, expanding it beyond the narrow view of Western dispute resolution in order to incorporate within the model the holistic understanding of Justice in other latitudes. Chapter three discusses well-established principles of procedure and analyzes some underlying assumptions of formal and customary justice systems in light of these principles of procedure. Chapter four revisits the shortcomings of the ‘judicial equilibrium’ model introduced in the first part of the dissertation, and proposes a revised theoretical model that may be used to assess dispute resolution systems for the urban poor in low and middle-income countries. Chapter five concludes.

**CHAPTER 1. EFFECTIVENESS OF THE LAW, JUSTICE DELIVERY, VIOLENCE AND INJUSTICE**

According to one of the giants of procedural law of the 20th century, J. A. Jolowicz, the narrow focus of legal operators in both civil-law and common-law countries on understanding civil procedure only as a method to resolve a particular dispute between two individuals, has lost sight of the fact that, while individual disputes are important, procedural law has broader ends. The most important of them is to ensure the effectiveness of the law:

*In a country whose law is well developed the law is, by most people for most of the time, simply accepted as being there. They act on the hypothesis that the civil law is*
self-executing, they respect the legal rights of others and they comply with their legal obligations. This is not, however, universally the case, and in the past the effectiveness of the law in this sense was much less. Primitive man’s reaction to injustice appears in the form of vengeance… The first impulse of a rudimentary soul is to do justice by his own hand. Only at the cost of mighty historical efforts has it been possible to supplant in the human soul the idea of self-obtained justice by the idea of justice entrusted to authorities. [Couture, ‘Judicial Process’, p. 7. (original footnote)]

Civil procedural law cannot afford to overlook the tendency of some people even today to take the law into their own hands. It cannot be safely assumed that, whatever the failings of civil justice, the criminal law can always take care of those who resort to violent self-help, but there is more to it than that. There have always been, and there always will be, victims of injustice – or of supposed injustice – who are quite incapable of resort to self-help for the simple reason that their adversary is much the stronger. The civil action must be not only civilisation’s substitute for vengeance, it must also be civilisation’s substitute for injustice.

It is this kind of thinking which leads to the development of legal aid and other devices aimed at opening the doors of the court to those who cannot afford to finance their litigation from their own pockets, and also to the perennial modern concern with cost and delay. It is, however, essential to maintain balance. If litigation is too costly and if the resolution of litigated disputes is too long delayed, the law will not be effective; self-help and injustice may result. On the other hand, if litigation is too easy – if, to all intents and purposes, there is no disincentive to litigation – then the volume of litigation will rise and delays, if not also cost, will once more increase and law’s effectiveness will be correspondingly reduced.¹

Professor Jalowicz’s proposal is of interest to this dissertation for two reasons. The first of these reasons is the connection made between the effectiveness of the law, the systemic failure of justice delivery, people’s tendency to take the law into their own hands, and the problems of vengeance, violence and injustice. Professor Jalowicz’s proposal may be summarized and restated as follows: If justice delivery fails, or if litigation is too expensive and lengthy that ordinary citizens cannot afford it, people may have a tendency to take justice in their own hands and resort to violent self-help. However, this option is not available when the adversary is much the stronger; in these cases people have no other option than to resign themselves to suffer injustice.

This simple formulation, although apparently self-evident, has enormous practical significance. As we have seen in this dissertation, customary justice no longer works in urban centers in low and middle-income countries, and formal courts do not serve the needs of the urban poor either. The consequence of this systemic failure of justice is that people resort to violence or are forced to endure injustice. This is consistent with the empirical evidence presented in the previous chapter (Chapter 7 of Part 4): facing a simple dispute, only a small minority of urban people in low and middle-income countries use the “Wig and Gown” or the “Sassy-Wood” faces of justice; most people (72% in Ghana, 70% in Kenya, 63% in Colombia, and 62% in Nigeria) have to either renegotiate the debt or resign themselves to losing the money.

The second reason why Professor Jalowicz’s proposal is of interest, is the starting point of his argumentation, i.e., Couture’s assertion—quoted by Jalowicz—that “Primitive man’s reaction to injustice appears in the form of vengeance.” This basic formula—that each member of society gives away its capacity for violence in exchange for the same renunciation from all other members of society, in order for the monopoly of violence to be reserved to the hands of a democratically elected sovereign—is the cornerstone of the “Social Pact” of Rousseau, Montesquieu, Hobbes, and Locke, in which all modern civilization is based, including modern civil and criminal judicial systems. Couture’s assertion is of particular importance to this dissertation not because it is right or wrong, but because it relates to the struggles between the traditional and the ‘civilized’ forms of justice.

From the ‘BBC News Perspective’ of customary justice (Chapter 1 of Part 4), the ‘tar and feather’ justice of Cameroon, the stoning of child witches in Nigeria, or the
gang- raping of Mukhtar Mai in Pakistan, are examples of the primitive man’s exercise of justice in the form of vengeance. From this perspective, the modern legal process—proud child of the fight between the trial by ordeal of the dark ages and the rational legal thinking of the enlightenment—is a monumental achievement: “Only at the cost of mighty historical efforts has it been possible to supplant in the human soul the idea of self-obtained justice by the idea of justice entrusted to authorities.” Yet, from the perspective of the Kogi (Chapter 5 of Part 4), the “primate man” is the one who invented the atomic bomb and the one that is destroying the natural resources and killing the planet—the “younger brother,” i.e., all of us.

The point, however, is not to determine who the “primitive man” really is. The point is to show that both, the “Wig and Gown” and the “Sassy-Wood” justice authorities believe that the assumptions in which the edifice of Justice of the other is based, are fundamentally flawed. Based on my interaction with formal and customary justice operators in developing countries in four continents, I have come to the conclusion that customary justice authorities in general have as much (or as little) respect and appreciation for the formal judicial system, as western barristers have for the colorful ways of the ayahuasca-drenching Amazonian shamans.² Mutual respect and appreciation are not possible without the previous step of mutual understanding. It is my hope that this dissertation may contribute a bit to bridge this abysmal gap.

² See supra Chapter 1 of Part 4.
CHAPTER 2. THE MULTIPLE FACES OF JUSTICE

Damaška’s model

Professor Damaška’s leading comparative analysis of the legal process, The Faces of Justice and State Authority, presents a theoretical model to understand two forms of dispute resolution—the Policy-implementing and the Conflict-solving procedures—and two forms of state authority—the Hierarchical and Coordinate ideals.

While these “faces of justice” are based on the historical development of procedure in common-law and civil-law countries since Roman times, they do not aim to describe the evolution in any particular country but rather at creating “a framework within which to examine the legal process as it is rooted in attitudes toward state authority and influenced by the changing role of government.” Professor Damaška uses this model to present two faces of justice and state authority:

Two distinctive styles of administering justice will thus emerge, capturing much of the observed difference between common-and civil-law systems apart from the customary contrast of contest/inquest form or the adversarial/inquisitorial modes… the two styles will be constructed against the background of models of authority which exaggerate or stylize contrasts among judicial organizations in Continental and Anglo-American states (such as attitudes toward hierarchization or toward lay decision makers). In consequence, the two styles will also intensify or magnify trends and features of existing procedures. Actual Anglo-American and Continental procedures will be seen to belong to one or another mode, as buildings can be said to belong to one or another architectural style.3

Damaška’s model includes a two by two matrix that facilitates a broader conceptual understanding of the interaction between the express or implied definition of State objectives, and the concrete operation of legal and judicial institutions in any given

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1 Damaška, The Faces of Justice and State Authority, A Comparative Approach to the Legal Process.
2 Id. at 12.
3 Id. at 10.
society at different points in history. The matrix thus enables the classification of the wide variety of civil-law and common-law procedures into a single box.

The horizontal axis of the matrix presents two ideals of officialdom: Hierarchical and Coordinate ideals:

*The conceptual elements needed for this framework correspond to three questions often asked in confronting an organization of authority; the first concerns the attributes of officials, the second, their relationship, and the third, the manner in which they make decisions. Thus separated out, these three aspects of authority have long been suspected of influencing the shape of the legal process, and I shall use them as dimensions along which to define our categories. On the first dimension, the usual focus is on the distinction between professionalized, permanent officials and those who are untrained and transitory. On the second dimension, two lesser configurations deserve special consideration: under the first, officials are locked under a strict network of super and subordination; under the second, they are rough equals, organized into a single echelon of authority. On the third dimension, the critical distinction is between decision making pursuant to special or ‘technical’ standards, and decision making informed by undifferentiated or general community norms….*

Variables from each dimension could be assembled in a great number of ways, and their implications for procedural form explained in a complex classificatory scheme. But such extensive taxonomic exercises are not required: our theme permits selection of only two composite structures of authority from a larger number of possibilities. The first structure essentially corresponds to conceptions of classical bureaucracy. It is characterized by a professional corps of officials, organized into a hierarchy which makes decisions according to technical standards. The other structure has no readily recognizable analogue in established theory. It is defined by a body of nonprofessional decision makers, organized into a single level of authority which makes decisions by applying undifferentiated community standards. The first structure I shall call the hierarchical ideal or vision of officialdom, and the second I shall term the coordinate ideal.4

The vertical axis of the matrix offers two faces of adjudication: Conflict-solving and policy-implementing justice.

*The legal process can be affected by two contrasting dispositions of government: the disposition to manage society and the disposition merely to provide a framework for social interaction5*

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4 *Id.* at 16 (emphasis in the original).
5 *Id.* at 71.
Two ways of conceiving the office of government have now been outlined, which generate two contrasting ideas about the objective of the legal process. According to one, the process serves to resolve conflict; according to the other, it serves to enforce state policy. I have shown these contrasting ideas to be pregnant with implications for the choice of procedural form: while the one favors the contest morphology, the other prefers the morphology of inquest. Common opinion to the contrary, then, a process organized around the key image of contest and another organized around the key image of inquest are not in fact structural alternatives for achieving the same objective. Each, in pure form, is directed to a separate end.

Serious doubts must be anticipated at this point, especially in America, as to whether a process devoted to implementation of state policy qualifies as an adjudicative engagement... But it would be parochial to assume that this narrow concept of adjudication covers activities that are perceived as instances of 'judging' or even activities that are thought to be quintessentially judicial, in all legal cultures of the world. In old China, for example, the enforcement of imperial regulation was at the heart of the administration of justice, and in contemporary communist systems the identification of adjudication with dispute resolution is dismissed as a mystification of reality, especially with respect to criminal justice... It is true that earlier, the twelfth century schoolmen who founded Western procedural theory tended to associate court proceedings with an interaction of trium personarum and with a contest. But this view began to lose ground on the Continent quite early on, owing to rapid expansion in the thirteenth century of self-initiated investigations by courts of law. A judex who launched an inquiry into a suspicious event without a complaint, or who decided a criminal case on the basis of an unilateral inquiry, continued to be regarded as engaged in an eminently adjudicative activity. This is still the prevailing view on the Continent: the idea that to adjudicate need not necessarily imply resolution of contested matters continues to appear natural to lawyer and layman alike.6

The conflict-solving type of proceeding... [is] a mode of legal proceeding that conforms to the ideology of a radically laissez-faire government. Expressed in conventional terms, this project entails the search for a pure adversarial process.7

The policy-implementing type of proceeding... [is] a process organized around the central idea of an official inquiry and is devoted to the implementation of state policy.8

These two diverging goals of the adjudicative process have a number of practical implications in terms of procedures. The two main legal traditions of the world roughly match in this matrix9 as follows:

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6 Id. at 89 (emphasis in the original).
7 Id. at 97.
A similar approximation applies to the conflict-solving process and coordinate authority of the early period of classical Rome, and the policy-implementing process and hierarchical authority of the late Imperial Rome. "The student of the English forms of action is naturally struck by their similarity with the Roman formulary system of classical times… both English and classical Roman jurists received a practical training, without theoretical grounding or state examinations… English common-law and classical Roman law were based on experience, [while] medieval Roman law [which influenced continental civil law] was based on books."\(^{10}\)

### Table

<table>
<thead>
<tr>
<th>Conflict-solving proceeding</th>
<th>Policy-implementing proceeding</th>
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<tbody>
<tr>
<td>Hierarchical authority</td>
<td>Civil-law</td>
</tr>
<tr>
<td>Coordinate authority</td>
<td>Common-law</td>
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<tr>
<td>Imperial Roman law</td>
<td>Classical Roman law</td>
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</tbody>
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Instead of two boxes (civil-law and common-law), Damaška’s model has four. Judicial procedures from civil-law and common-law countries in various areas of the law, have moved back and forth among these four boxes during the last millennium. While the upper left box seems to be more akin to civil-law, and the lower right box to common-law, there are thousands of variations within these two families that the traditional two-box model\(^{11}\) has been unable to take into account.

**Multiple faces of Justice (revised analytical model)**

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8 Id. at 147.
9 Id. at 181.
11 The 'two-box model' refers to the traditional divide between Civil Law and Common Law, which is presented in Chapter 2 of Part 2 of this dissertation.
The revised model proposed here includes a four by four matrix that facilitates an even broader conceptual understanding of the interaction between the express or implied definition of State objectives, and the concrete operation of legal and judicial institutions in any given society at different points in history. The matrix thus enables the classification not only of the wide variety of civil-law and common-law procedures, but also of the alternative views of justice described in this dissertation, from the Tibet to Liberia and from Pakistan to the Amazon jungle, into a single box:

<table>
<thead>
<tr>
<th>Supernatural authority</th>
<th>Hierarchical authority</th>
<th>Coordinate authority</th>
<th>Collective authority</th>
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<tbody>
<tr>
<td>Conflict-solving</td>
<td>Policy-implementing</td>
<td>Community-harmonizing</td>
<td>Holistic/universal healing</td>
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**Four ideals of adjudication**

The vertical axis of the matrix offers four faces of adjudication, depending on the ultimate goal of the process. These are: Conflict-solving, policy-implementing, community-harmonizing, and holistic/universal healing justice. The first two correspond to Damaška’s model (described above), and the other two are explained below:

In the community harmonizing ideal of justice the ultimate goal of the process of adjudication is not to resolve a particular dispute between two individuals—as in the conflict-solving ideal—or to ensure proper enforcement of imperial regulation—as in the policy-implementing ideal. The ultimate objective of the community harmonizing ideal of justice is to reestablish the broken social harmony. This distinctive goal has a number of practical implications; it implies, for instance, that two identical fact-patterns may not necessarily receive the same treatment, as the boundaries and ultima ratio of decision
making are not defined by the specific facts of the case, but rather by the broader community context in which this case occurs.

This form of justice evidently may come into conflict with the purest version of the principle of impartiality, which Damaška associates with the conflict-solving ideal of justice and the common-law tradition. In its purest form, the community harmonizing adjudicator is not bound by the facts and the circumstances of the parties to the dispute; the adjudicator must analyze them in the context of the community needs, and thus may even sacrifice the parties or their family members if this is what it takes to restore harmony in the community. The unit of analysis is not the level of adequacy of specific facts of the dispute to a narrow definition of individual rights and duties—as in the conflict-solving ideal—or to a specific state policy—as in the policy-implementing ideal. The unit of analysis is the dispute’s impact on the level of social harmony prevailing in the relevant community. Specific facts and personal circumstances of individual litigants are relatively unimportant; the key is the contextual interpretation thereof.

In this context it is possible to intuit the underlying notion of justice in the heinous case of Mukhtar Mai. In the ‘eye for an eye’ context of this rural village of Pakistan, a ‘rape for a rape’ in the presence of several hundred local residents as well as some members of the local police, may be seen as a way to prevent war—to restore

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12 Irfan, *Honor Related Violence Against Women in Pakistan*, supra note 22, at 125. (“An incident that gained much international media coverage was that of Mukhtar Mai, a 30 year old woman from the province of Punjab. Mukhtar Mai’s 12 year old brother was found guilty by a local tribunal of having illicit relations with an older woman belonging to the Mastoi tribe, a more influential tribe in the village. The tribunal ordered that as compensation for the alleged illicit relationship and as punishment for the boy’s family, members of the Mastoi tribe would gang-rape a woman from the boy’s family and the tribunal picked Mukhtar Mai. This sentence was passed in the presence of several hundred local residents as well as some members of the local police, and no one intervened to stop the heinous crime, which was carried out there and then by four men, including a member of the tribunal. Mukhtar, in her biography tells of her ordeal,
harmony—between the tribes. Admittedly, this is a radical interpretation for an extreme case of injustice; the purpose here is not to justify it but only to use it as an instrument to explore the implications of adopting the community harmonizing ideal in its purest form.

Examples from other latitudes are available. Sam Muller\textsuperscript{13} recounted to me a case that he witnessed about a decade ago of an Israeli soldier who allegedly abused a Palestinian girl. Strong winds of war blew in the community after this incident. When a new intifada seemed all but inevitable, the Israeli soldier was quickly handed to the Palestinian authorities and summarily judged; within two hours the alleged transgressor was executed. No DNA tests or further inquest about possible attenuating circumstances were necessary. Due process of law was sacrificed in the interest of social harmony, and peace was restored to the community. In the same vein, laws of amnesty and post-conflict reconciliation, such as the \textit{Ley de Justicia y Paz}\textsuperscript{14} in Colombia, which entail partial or total impunity,\textsuperscript{15} may be seen as manifestations of community harmonizing justice.

However, all of the above cases are relatively extreme examples; they risk missing the forest for the tree. In the overwhelming majority of cases the clash between community harmonizing justice and the principle of impartiality is more nuanced.\textsuperscript{16} The Cheyenne conference of tribal chiefs considers not only the specific facts of the case but also its broader individual and tribal context, and based on these considerations it may

\footnotesize{that she says she shares with millions of other women in Pakistan. In her case the story became public after a journalist visiting the village heard of the incident from the local maulvi at the mosque\textsuperscript{15}).

\textsuperscript{13}Sam Muller is the Director of the Hague Institute for the Internationalization of Law (www.hiiil.org).


\textsuperscript{15}Vivanco

\textsuperscript{16}The community harmonizing ideal of justice is exemplified by the ‘African Tree’, see supra ch. 2 of pt. 4.
assign similar fact patterns a lenient punishment in one case and exile in the next. Similarly, the Sub-Saharan chief or the Wayúu palabrero may propose a rather significant compromise—say, five cows—in one case, and a rather small one in another case with factually identical circumstances. Consistency of adjudication is not the survival imperative of itinerant royal judges trying to win the favor of the locals and to control an immense territory, as in the early times of the common-law tradition. Some degree of consistency across cases is necessary in customary justice, to be sure, but the tunnel vision and the tabula rasa requirements of the stylized common-law are not imperatives of the community harmonizing ideal of justice. Damaška describes these requirements as follows:

The Virtues of Tunnel Vision. The pure conflict-solving process demands more from the decision maker than neutrality as between the parties; he must also be blind to any considerations that transcend the resolution of the dispute before him. The Ideal of Tabula Rasa. If in the conflict-solving process the decision is to emerge from the dialectic of party debate, ideally the decision maker must enter the case unprepared, unaware of all matters specifically related to the issue. He should have a ‘virgin mind,’ to be tutored only through the bilateral process of evidentiary presentation and argument.

Again, in the words of the US Supreme Court (Ginsburg, J.):

In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present… as a general rule, “our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.” [Castro v. United States, 540 U. S. 375, 386 (2003)] (SCALIA, J., concurring in part and concurring in judgment). As cogently explained: “[Courts] do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide only questions presented by the parties…”

17 Llewellyn and Hoebel, The Cheyenne Way.
18 See detailed description in Part 2, Chapter 1, above.
19 Damaška, The Faces of Justice and State Authority, at 140.
20 Id. at 138.
United States v. Samuels, 808 F. 2d 1298, 1301 (CA8 1987) (R. Arnold, J., concurring in denial of reh’g en banc).\

In the United States “justice” means “fair play,” the judicial process is a contest, and the judge is an umpire. The function of the American judge—heir of the itinerant royal court of England—is to guarantee an efficient and impartial process. In contrast, in civil-law countries the judge is the good old Roman pater familias, who has a say and becomes involved in every dispute within the family. The function of the civil-law judge is to ensure a fair outcome. However, there is a fundamental difference between Damaška’s policy-implementing Franco-German version of the civil-law, and the stylized form of the community-harmonizing ideal of justice exemplified by the Japanese criminal justice system.

In Japan justice is represented by the Buddha of Compassion; “the Japanese criminal law system has harmony as its goal.” In this civil-law variant the function of the judge is to restore social harmony within the community. The handling of investigation, confession, prosecution, sentencing and punishment in the criminal system of Japan offers one of the best examples of community harmonizing justice in modern societies.

Prosecutors in Japan frequently determine that they will not prosecute a case. The number of cases each year in which suspension of prosecution is used to dispose of the matter runs into the hundreds of thousands... By 2004, the percentage of cases that were not prosecuted even though the prosecutor believed there was sufficient evidence of guilt had risen to 52%... The devise of suspension of prosecution is considered an important weapon in the fight against crime in Japan. By giving the defendant a second bite at the apple, the prosecutor is attempting to restore the defendant to a state of harmony with and return him/her to society. It is felt that the shame of having gone through the initial process will serve the accused in good stead and result in his turning

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22 Goodman, Carl, The Role of Law in Japan, at 504.
from crime to a restored position in society. Rehabilitation is the goal of suspension of prosecution. Of course, suspension is not a 'free ticket'. To return to society the accused must demonstrate his rehabilitation through contrition, apology, restitution, remorse, and acceptance of responsibility. Moreover, not all accused are deemed worthy of suspension. If the prosecutor feels that there is likelihood that the defendant will commit additional crimes, suspension is not called for. Thus, letters from family, from an employer, from a respected community member attesting to the defendant’s understanding and agreement to change as well as letters demonstrating employment and a good work ethic are important factors in the decision. The view of the victim is also very important and thus it is important to get written confirmation of the victim’s acceptance of defendant’s apology and the victim’s agreement to a suspension of prosecution. Having a good family or other support system that will watch over the defendant to assure that he/she will not commit future crimes is also significant.

Because suspension of prosecution is tantamount to conviction in the minds of the public and the judicial system, it can have serious effects on the defendant, the defendant’s family and the defendant’s opportunity to raise in the corporate ladder, although it does not raise to the same level of social ‘outcast’ status as a formal conviction. Nonetheless, facing the virtual certainty of conviction should the prosecutor decide to proceed to trial, the defendant wants the suspension remedy.

Note that the factors that may influence a prosecutor to suspend prosecution are the very factors that point to defendant’s guilt. Thus a defendant, who refuses to accept responsibility will find suspension unlikely; a defendant who refuses to pay restitution, is unlikely to get a favorable suspension determination, etc. The suspension of prosecution remedy backed by virtual certainty of conviction at trial places the defendant in the position of having to concede his wrongdoing to be excused from his wrongdoing.24

All other stages of the criminal process in Japan, from the initial police inquiry to the handling of correctional facilities, are ultimately geared towards restoring social harmony, including rehabilitation of the criminal and compensation to the victims.25 The ultimate backbone of the Japanese criminal justice system is local policing and strong community bonds, which enable a more nuanced and intimate knowledge of the particular circumstances of each crime and of each criminal.

The police also have a discretionary justice function… Under the Code of Criminal Procedure the police, operating under standards established by Japanese prosecutors, have authority to close simple cases or cases involving petty offenses (bizai

24 Goodman, The Rule of Law in Japan, at 416.
25 A detailed account in Id.
shobun). It is estimated that anywhere from 20% to 40% of all suspects arrested by
the police are released under this authority. Many of these cases are resolved through
negotiation between the victim and the suspect in which restitution is made, the suspect
admits his/her responsibility, shows remorse, apologizes and accepts the need to change
so that he/she will not commit future crimes. It is expected that the criminal suspect
will write an appropriate letter of apology and contrition that will be kept in the police
station but not be made part of any official file. Efforts are made to avoid arrest, if
possible, in minor cases. If the suspect is a juvenile, the parents may be made parties to
the process and reminded of their responsibility to supervise their child. In essence,
many criminal suspects are given a 'second bite at the apple' on the theory that once
having been caught and having been through the process of rehabilitation they will not
commit future crimes.26

From a conflict-solving ideal perspective this case-by-case treatment of criminals
would be unequal and thus unfair, as one criminal may go to jail while another one who
commits the exact same offense in roughly the same circumstances may avoid
punishment altogether. For an itinerant royal court who needed to gain the populace’s
favor precisely by demonstrating that all cases were handled equally27 (as opposed to the
manorial system in which cases were handled at the whims of the local lords),28 this
unequal outcome would be unacceptable. Yet, from a community-harmonizing ideal
perspective, the Japanese approach is not only more efficient, it is also more “fair.” If
low crime rates, incarceration rates and recidivism rates are any measure of overall
effectiveness (including fairness) of the system, the criminal justice system of Japan
certainly outperforms its American counterpart by far.29 Just like in the Amazon jungle,30
healing, not punishment, completes the circle of justice in Japan.

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26 Id. at 401.
27 Id. at 9 and 10, and text accompanying supra note 24, at 32.
28 See, supra ch. 1 of pt. 2, at 41-4.
29 Japan has among the lowest crime rates, incarceration rates and recidivism rates in the world, while the
USA has the highest incarceration rate in the planet—about twice as much as the second highest—and
among the highest crime rates of all developed nations. For crime and recidivism rates, see WJP Rule of
30 See, supra ch. 1of pt. 4, at 121.
There are two reasons why the community-harmonizing justice rejects the common-law virtues of tunnel vision and tabula rasa. First, the ultimate goal of the adjudicative process is not to ascertain the facts and punish the transgressor, as in the conflict-solving justice, but to heal the broken community bonds. And second, the ultimate source of truth is not the public disclosure of facts and evidence at trial, as in the conflict-solving justice, but rather lies in the adjudicator’s intimate knowledge of his/her community, and the watchful eye of family, employer, community members and friends over everything that happens in the community. Like the Catholic priest who regularly hears his folk in confession is able to appreciate and understand what may not be apparent to the public eye, the African medicine man and the Amazonian shaman are healers; they have an intimate knowledge of their communities and they may ‘know’ that someone is trustworthy and someone else is not. Moreover, they may ‘know’ that someone ‘deserves’ a harsher punishment. What is the need for modern discovery in a community where the adjudicator (say, the Kogi Mama) has intimate knowledge of every action and every thought of every member of the community?

What lies underneath the customary justice’s apparent disregard for objective truth-finding is not, as it has been suggested, the absence of technical tools to ascertain facts (such as DNA tests and modern forensics). The itinerant royal courts of fourteenth century England did not have DNA tests either. It is rather a fundamentally different understanding of the source of truth; indeed, one may argue that itinerant royal courts developed the modern trial precisely because they did not have the intimate knowledge

31 Posner, *The Economics of Justice*, at 176 (“the ability of primitive tribunals to find the facts is limited because of the absence of police and other investigatory machinery and techniques (such as autopsies)”).
of the community that customary justice authorities all over the world have today. Modern justice may be, from this perspective, a second-best necessity which became popular only because it stood against the arbitrariness of the local manorial courts. But English legal history was forgotten and a fable about unpolluted impartial truth-finding emerged, which continues to be preached at American law schools and handed down like the gospel by international development experts advising judicial reforms throughout third world nations today.\footnote{A reform trend from inquest to contest proceedings appears to be taking hold among several civil-law countries in Latin America, including Colombia and Mexico. Initial evaluations of these reforms show results which are mixed at best. \textit{See, e.g., Corporación Excelencia en la Justicia, Balance de los primeros cinco años de funcionamiento del sistema penal acusatorio en Colombia.}}

It makes perfect historical sense that both the American and the English legal systems “retain as the objective of their interlocutory procedures the same ultimate end – the determination of litigation by a judgment based upon material presented, and mainly presented orally, at a single session trial.”\footnote{Jolowicz, \textit{On Civil Procedure}, at 69.} Itinerant royal courts in the early times of the common-law, and American itinerant judges in the early times of American law,\footnote{“American judges also traveled on circuit in the early days of the Federal Judiciary.” \textit{Goodman, The Rule of Law in Japan}, at 9. State courts had the same practice of traveling from town to town to administer justice within their vast jurisdictions.} did not have time to hold lengthy conversations with the defendant’s family, his/her employer, and other members of the community about the defendant’s character, the circumstances of his/her personal life, possible explanations of his actions, and other attenuating or aggravating circumstances of the context surrounding the specific case. It was much more efficient for them—as well as for the lay juries\footnote{“The existence of a jury has profoundly affected the form of civil proceedings in the common-law tradition. The necessity to bring together a number of ordinary citizens to hear the testimony of witnesses and observe the evidence, to find the facts, and to apply the facts to the law under instructions from a judge, has pushed the trial into the shape of an event. The lay jury cannot easily be convened, adjourned, and reconvened several times in the course of a single action without causing a great deal of}}
in a single trial (Damaška’s “Ideal of Tabula Rasa”), but more importantly to limit the inquiry as much as possible to the facts of the case (Damaška’s *Virtues of Tunnel Vision*); because of their itinerant nature, royal courts had the physical necessity to stick to the facts of the case and the evidence presented at trial, decide the case, and move on to the next town of the Circuit.

So the common-law system was conceived around the notion that all evidence must be disclosed at once, in a single event (the trial) to which the judge arrives virgin of all knowledge (aka bias) about the litigants, and the truth emerges from the battle between the parties. The nuances of the community context were provided by the lay jurors; indeed, this is precisely the reason why itinerant royal courts needed a jury. The institution of the jury kept proceedings in close contact with the lay citizen. “In the English courts… the jury of ordinary people from the neighborhood was, and remained, an essential and on points of fact, decisive element of Common law process; it was an antidote for growing technicality and pleading in esoteric French law.” But with the passing of time the common-law system gradually lost its jury, and thus its nexus with the community, and it turned into a scientific inquiry about facts without regard for the community context of the same facts.

While this *single event/stick to the facts* arrangement may be a perfectly reasonable one, it is important to recognize that this is not the only—and possibly not even the

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36 Damaška, The Faces of Justice and State Authority, at 138.
37 Id. at 140.
best—way to gather evidence and decide cases. When the local police officer knows everybody in the neighborhood, including the defendant’s family, employer and friends, as in modern-day Japan, and when the system’s ultimate goal is not to extend the King’s rule in a vast and newly conquered kingdom (as in old England) but rather to maintain social harmony within a community that has coexisted for thousands of years (as in Japan), the facts of the case are still important determinants of the outcome, but they are not absolute determinants. That is precisely why the Japanese policemen have the leeway to close simple cases and the prosecutors have the power to suspend prosecution. Under the community harmonizing ideal of justice, a blind commitment to impartiality (which essentially defines the conflict-solving ideal of justice represented by the blindfolded Lady Justice holding the scales) makes little sense; the community harmonizing adjudicator is not fatally bound by the facts of the case as Lady Justice is; the adjudicator must analyze them in the context of the community, including “letters from family, from an employer, from a respected community member attesting to the defendant’s understanding and agreement to change as well as letters demonstrating employment and a good work ethic,” and “written confirmation of the victim’s acceptance of defendant’s apology,” in order to be able to restore harmony in the community.

The unit of analysis is not the level of adequacy of specific facts of the dispute to a narrow definition of individual rights and duties—as in the conflict-solving ideal—or to a specific state policy—as in the policy-implementing ideal. The unit of analysis is the dispute’s impact on the level of social harmony prevailing in the relevant community.
In the same vein, and despite all its shortcomings, there are specific elements of the community-harmonizing customary justice system of Afghanistan that may be critical to ensure peace and stability in that tumultuous country. An example of these peace-building traditions is the nanawate, “which means seeking forgiveness/pardon and the obligatory acceptance of a truce offer. This happens when the tribal jirga makes a prikra (decision) that relatives of the par (guilty party) send a ‘delegation’ to the victim’s house. This consists of a group of people that include elders, a female relative of the offender holding a copy of the holy quran, and a mullah (Muslim priest), alongside the offender's other close relatives (and sometimes the offender himself) who bring a sheep and flour to the victim’s house. The sheep is often slaughtered at the door of the victim’s house. Once inside the house, the delegation seeks pardon on behalf of the offender. As it is against the tribal code of behaviour to reject a nanawate, the victim’s relatives pardon the offender and the two parties are reconciled. This reconciliation is called rogha. Thus unlike formal state justice, which often labels offenders as different, evil, and excludes them from the community, nanawate reintegrates them into the community.”

The sassy-wood ordeal of Liberia (Chapter 4 of Part 4) and the Cheyenne ceremony of ‘purifying the arrows’ (Chapter 3 of Part 4), may also be seen as manifestations of the community harmonizing ideal of justice, as they are both highly ritualized forms of community healing. While in both cases the intervention of the supernatural is important, the ultimate objective of these ceremonies is not to reestablish cosmic balance (as it is among the Kogi) but rather to heal the broken bonds within a

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39 Exemplified by the Mukhtar Mai’s case, supra note 22, at 125.
40 Wardak, Building a post-war justice system in Afghanistan, at 319–341.
specific community. These forms of dealing with transgressions of the law (the Liberian and Cheyenne methods) have little in common with the procedures of the Afghan Jirga or the Japanese *bizai shobun*, yet they are similar to the Afghan or Japanese methods in terms of the ultimate goal of the process of adjudication.

Attempts to implement the community harmonizing ideal of justice are present in many other countries around the world. For instance, the ‘Casas de Justicia’ (Houses of Justice) in Colombia were clearly inspired in a holistic notion of justice, where the ultimate goal of the legal process is not retribution and punishment for crimes and transgressions of the social order, but rather rehabilitation and community healing. The Houses of Justice “are interinstitutional units for the provision of information, orientation, referral and delivery of services for the resolution of conflicts, where both formal and informal justice mechanisms are employed. It unites under one roof national and local institutions of justice. It enables to join efforts of formal and informal justice institutions, of the Special Indigenous Jurisdiction and other manifestations of justice of ethnic groups that conform our Nation, and of community justice.”41 Over 17 different kinds of national, local, communal, ethnic and indigenous entities, may come together in a House of Justice, and collaborate among them to solve particular conflicts not only for the litigants involved but also in the broader context of community harmony, including, sometimes, applying mechanisms to delay or attenuate prosecution of crimes which are very similar to those used in Japan (described above). The Houses of Justice are a

relatively recent initiative and implementation has been slow. Coverage of the program is still limited and it may be too early to assess how much real impact these Houses of Justice—and the *community harmonizing* ideal of justice behind them—have had in transforming the perspective of ordinary citizens about the delivery of justice in Colombia.\(^4\) However, at the same time that the Houses of Justice initiative has been expanded, Colombia adopted a wholesale reform of the criminal justice system which was inspired on the American accusatory criminal system.\(^3\) Thus, the conflicting objectives and messages of subsequent legal and institutional reforms implemented during the past decade in Colombia make very difficult (if not impossible) to assess the extent to which the *community harmonizing* ideal of justice has ever been tried in practice—beyond the progressive text of the 1991 Constitution.

The *community harmonizing* approach has been attempted in the United States in a criminal justice setting,\(^4\) even though such approach does not appear to be compatible with fundamental principles in which the U.S. criminal justice system is based.\(^5\) The *community harmonizing* approach is also present among the native-American tradition.\(^6\)

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\(^4\) Detailed information about the Houses of Justice is available at: [www.casasdejusticia.gov.co](http://www.casasdejusticia.gov.co)

\(^3\) See, e.g., Corporación Excelencia en la Justicia, *Balance de los primeros cinco años de funcionamiento del sistema penal acusatorio en Colombia*.

\(^4\) Bader, "Forgive Me Victim for I Have Sinned": Why Repentance and the Criminal Justice System Do Not Mix - *A Lesson from Jewish Law*, at 69 (“At a recent conference on this topic at Fordham Law School, I had the pleasure of learning about the extraordinary work of the Georgia Justice Project (‘GJP’), a criminal defense organization with a practice philosophy grounded in Christian theology. The GJP maintains a central mission of redirecting the lives of its clients to achieve moral religious redemption.’ A central feature of this practice is the GJP’s encouragement of client confession, in the form of letters written to victims and their family members, whereby clients seek forgiveness prior to the adjudication of their criminal cases.”); cf. Anderson, *Double Jeopardy: The Modern Dilemma for Juvenile Justice*. (presenting the related concept of ‘restorative justice’ as an alternative to ‘retributive justice’ in America). See generally [http://www.restorativejustice.org/](http://www.restorativejustice.org/) for a searchable library including over 10,000 publications on “restorative justice.”

\(^5\) Bader, "Forgive Me Victim for I Have Sinned": Why Repentance and the Criminal Justice System Do Not Mix - *A Lesson from Jewish Law*, at 69 (“Unfortunately, the criminal justice system is not an ideal setting to pursue religious redemption, as our secular courts are not designed to advance a criminal defendant’s potential..."
Finally, we turn our attention to the fourth ideal of justice in this revised model. In the holistic/universal healing ideal of justice the ultimate goal of the process of adjudication is not to resolve a particular dispute between two individuals—as in the conflict-solving ideal—or to ensure proper enforcement of imperial regulation—as in the policy-implementing ideal—or to restore social harmony within the community—as in the community harmonizing ideal. The ultimate goal of the holistic/universal healing ideal of justice is to bring everything into conformity with the invisible laws of the cosmos.  

While the goal of holistic conformity with the cosmos is present in many indigenous traditions around the world, from the Amazonian tribes to the Cheyenne, this ultimate goal tends to fade away when the system is confronted with particular adjudicative facts—such as a crime or a civil dispute. The universal healing goal remains only as a distant background of the process; the clear and direct focus of attention always seems to be the adjudication of the specific dispute, in order to restore harmony within the community. This approach corresponds to the community harmonizing ideal of justice discussed above. 47 To my knowledge, the only case which stands apart is that of the Kogi Indians of Sierra Nevada. Among them the specific dispute is almost irrelevant and the community itself is relatively unimportant; quite truly, the only goal is to find “acuerdo,” i.e., to restore balance with the entire Cosmos. In the words of Wade Davis, 46

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46 E.g., Ulrich, Widenig the Circle.
47 It may well be that my limited understanding or limited access to information fails to see this ultimate universal healing goal among the Cheyenne or the Amazonian tribes, or many other indigenous groups around the world, and that the distinction between the community harmonizing and the universal healing ideals...
“what is important, what has ultimate value, is not what is measured and seen but what exists in the many realms of meanings and connections that lie beneath the tangible realities of the world, linking all things.”

Famous millenary texts, including the Chinese *Tao Te Ching* and Rumi’s Sufi teachings, may be read to mean that specific facts, specific disputes, and specific communities are all unimportant aspects of an endlessly interconnected and multilayered web of reality; the only task of the ruler (the judge) is to act in a way that is most appropriate to bring all into conformity with the Tao. Similarly, the ideal of justice in the Tibet has been said to exhibit characteristics that would resemble those of the holistic/universal healing ideal of justice. Whether this is true or not exceeds my current understanding. However, this question is ultimately unimportant given that, as Damaška warns, actual “procedures will be seen to belong to one or another mode, as buildings can be said to belong to one or another architectural style.” It suffices to find one tribe (the Kogi) among which this universal healing ideal of justice has taken form.

Among the Kogi the process of delivering justice means to harmonize or reach agreement (“acuerdo,” as they call it) between the individual person, animal or plant, and the entire Universe at the spiritual level. What we, the ‘younger brothers’ perceive as

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49 *Tao Te Ching*. Furthermore, “To the ancient Daoists, existence was a multi-faceted network of inter-related energies. Rather than restricting their view of life to the three-dimensional, physical world with which Western thought usually concerns itself, Daoists attempt to understand and work with the subtle elements of existence which sit within various overlapping realms” Mitchell, *Daoist Nei Gong: The Philosophical Art of Change*, at Chapter 2.
50 See, e.g., Rumi, *The Mathnawi*, at 178 (“This world and that world are for ever giving birth: every cause is a mother, the effect is born (from it as) a child. When the effect was born, that too became a cause, so that it might give birth to wondrous effects. The causes are generation on generation, but it needs a very well illuminated eye (to see all the links in their chain)”).
51 Damaška, *The Faces of Justice and State Authority*, at 10.
isolated facts, are only manifestations of an all-encompassing spiritual reality. This search for ‘acuerdo’ is not exclusive of the process of adjudication; it applies equally to a dispute between neighbors and to the problem of global warming. When reality itself is an endless succession of intertwined facts, which influence one another within various overlapping (visible and invisible) realms, dispute resolution becomes a process of harmonizing the antagonizing elements in order to restore the material/spiritual balance. There is no ‘cause’ and ‘effect’ or ‘crime’ and ‘punishment’ as such. Justice is an endless search for universal balance and harmony.52

Four ideals of officialdom

The horizontal axis of the matrix presents four ideals of officialdom: supernatural, hierarchical, coordinate, and collective ideals of officialdom. The hierarchical and coordinate ideals are included in Damaška’s model and were explained above. The other two are as follows:

The supernatural ideal of officialdom is best characterized by mother Seinekan and father Seiyankua. As explained in detail above (ch. 5 of pt. 4), a salient feature of the Kogi notion of justice is that judgment is not passed by the priests or Mámas (they are only ‘advocates’). Judgment is passed by the supernatural, and such judgment manifests itself in the visible world in different ways. In its purest form, the supernatural ideal of officialdom does not even require intermediaries (priests or shamans); the supernatural official is omniscient and administers justice regardless of human requests or actions, and also enforces such judgment in the material world directly.

52 Full description at Chapter 5, Part 4, above.
Milder forms of the *supernatural ideal* of officialdom are present throughout the world:

*Every single primitive society without exception postulates the existence of spirit beings and supernatural powers. Each of them attributes emotional intelligence to the spirit beings and holds to the belief that they respond with favor or disfavor to specific acts of men. They hold that in some or most of the important aspects of life man is subordinate to the wills of the spirit beings and that life must be made to harmonize with their dictates. Such presumptions are universal. Their influence is universally felt in the legal realm with the result that the elemental postulations of the supernatural also appear as jural postulates in all the types of systems analysed in the earlier chapters. In Eskimo, Trobriand, Cheyenne, Kiowa, and Ashanti society their effects is direct and powerful. In Comanche, which is a highly secularistic society, they are weak.*

Finally, the last box of the matrix belongs to the *collective ideal* of officialdom, in which all members of the community are empowered to adjudicate disputes and to enforce collective judgments. This is best exemplified by mob and vigilante justice systems.

**The multiple faces of justice**

The following table is a rough attempt to map various types of procedures discussed in this dissertation, in the four by four matrix of the ‘multiple faces of justice’ model. This is evidently an extremely simplified sketch, but one that hopefully may be helpful to understand how diverse the landscape really is.

<table>
<thead>
<tr>
<th>Conflict-solving proceeding</th>
<th>Policy-implementing proceeding</th>
<th>Community-harmonizing proceeding</th>
<th>Holistic/universal healing proceeding</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Supernatural authority</strong></td>
<td>Kogi</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Hierarchical authority</strong></td>
<td>Franco-German Civil-law; Imperial Roman law</td>
<td>Liberian Chief; Japanese criminal prosecution</td>
<td></td>
</tr>
<tr>
<td><strong>Coordinate authority</strong></td>
<td>Anglo-American Common-law; classical Roman law</td>
<td>Cheyenne; Afghan Jirga; Wayúu</td>
<td></td>
</tr>
<tr>
<td><strong>Collective authority</strong></td>
<td>Tar and feather; Witch hunt</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

CHAPTER 3. THE ‘BLACKBOXING’ OF HISTORICAL POLITICAL COMPROMISES WITHIN GENERALLY ACCEPTED PRINCIPLES OF PROCEDURE

This chapter analyzes some generally accepted principles of procedure using the matrix presented in the previous chapter as a background. Some underlying assumptions of formal justice systems are seen through the lens of these principles of procedure in historical context. My point is to stop looking at what is (a bundle of principles and procedures, artifacts of forgotten history), and start focusing our energy on what may become.

Western law focuses on two relations: a dispute between two individuals (as in thirteen century England), and the relation between one individual and the state (as in Imperial Rome or the Kingdom of France). In contrast, customary justice focuses on the multiple relations which are coexisting and evolving over time within a specific community. By bringing to the surface the underlying—and often ‘blackboxed’—assumptions of both systems (formal and customary justice), it is possible to find a common fertile ground based on general principles of adjudication. This inquiry is case specific; it varies from country to country or even from one village to the next.

The underlying assumptions of the civil-law and common-law procedures are blackboxed in the same sense that Bruno Latour defines “blackboxing” of scientific discoveries. According to Latour, blackboxing is “an expression of the sociology of science that refers to the way scientific and technical work is made invisible by its own success. When a machine runs efficiently, when a matter of fact is settled, one need

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1 Bruno Latour defines “blackboxing” as “an expression of the sociology of science that refers to the way scientific and technical work is made invisible by its own success. When a machine runs efficiently, when a matter of fact is settled, one need focus only on its inputs and outputs and not on its internal complexity.
focus only on its inputs and outputs and not on its internal complexity. Thus, paradoxically, the more science and technology succeed, the more opaque and obscure they become.”

Similarly, a variety of highly contested institutions and principles of procedures were developed in England and in the Continent to respond to very specific historical needs, and later became settled and ultimately ‘blackboxed’ with the passage of time. For instance, the facts-obsessed, single-event trial of the common-law was developed to serve the needs of itinerant royal courts in their struggles to bring the King’s writ to a vast and newly acquired kingdom, while competing for the people’s favor with the local courts of the manorial system and against the worldview that sustained the trial by ordeal of the old ages. With the passing of centuries the institutions of procedure settled, and the process became an undisputed matter of fact—just as the internal operation of a clock is no longer questioned by a clock-user. Few now remember the historical reasons for the common-law’s “strict requirement that all information in the dispute be presented to the decision maker in the presence of the litigants, and that it be immediately—before the dust has settled—subject to their argumentation.” All actors of the judicial system began focusing only on the system’s inputs and outputs and not on the original historical needs that gave birth to the particular institutions of process. Eventually, notions such as the *Virtues of Tunnel Vision* and the *Ideal of Tabula Rasa*

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2 Id.


4 "The Virtues of Tunnel Vision. The pure conflict-solving process demands more from the decision maker than neutrality as between the parties; he must also be blind to any considerations that transcend the resolution of the dispute before him.” Damaška, *The Faces of Justice and State Authority*, at 140.
became ‘blackboxed’ within the legal process of the common-law. It became an uncontested fact that Justice is a blindfolded (radically impartial) lady with the scales in one hand and the sword in the other. The lay jury gradually receded, and with it the communitarian perspective of justice faded away as well. While this development makes

5 “The Ideal of Tabula Rasa. If in the conflict-solving process the decision is to emerge from the dialectic of party debate, ideally the decision maker must enter the case unprepared, unaware of all matters specifically related to the issue. He should have a ‘virgin mind,’ to be tutored only through the bilateral process of evidentiary presentation and argument.” Id. at 138.

6 Throughout the common-law world, civil juries have been steadily receding for decades. Juries are not employed in small-claims courts and other specialized courts, such as landlord-tenant tribunals (e.g., Tenancy Tribunals in New Zealand, described in text accompanying supra note 22, at 19), which handle the overwhelming majority of civil litigation (see e.g., Ostrom and Kauder, Examining the Work of State Courts).

Civil juries for High Court trials were abolished in England by Section 69 of the Senior Courts Act of 1981, except on the request of a party in cases of fraud, libel, slander, malicious prosecution or false imprisonment (text of the Act is available at: http://www.legislation.gov.uk/ukpga/1981/54/section/69 Last visited: May 27, 2013). In State courts of the United States, “[j]uries in the 75 largest counties disposed of 12,000 tort, contract, and real property cases during the 12-month period ending June 30, 1992. Jury cases were 2% of the 762,000 tort, contract, and real property cases disposed by State courts of general jurisdiction in the Nation’s most populous counties.” (De Frances, Civil Justice Survey of State Courts, 1992, Civil Jury Cases and Verdicts in Large Counties). According to the latest available data from the Civil Justice Survey of State Courts (CJSSC) at the Bureau of Justice Statistics of the U.S. Department of Justice, by 2005 jury trials had fallen below 2% of all cases disposed of by State courts: “State courts of general jurisdiction disposed of approximately 26,950 general civil cases—tort, contract, and real property—through a jury or bench trial in 2005. These trials were a small percentage of the reported 7.4 million civil claims filed in all unified and general jurisdiction state courts nationwide.1 Among jurisdictions that provided totals for both trial and non-trial general civil dispositions in 2005, trials collectively accounted for about 3% of all tort, contract, and real property dispositions in general jurisdiction courts. Civil bench and jury trials are rare but important events… A jury decided almost 70% of the approximately 26,950 general civil trials disposed of in 2005…Civil trials involving tort claims of personal injury or damaged property were most often heard before a jury (90%), rather than a judge (10%).” (Langton, Civil Justice Survey of State Courts, 2005, Civil Bench and Jury Trials in State Courts). In Canada the presence of the civil jury is even weaker—accounting for 23% of all trials, which represent only a small fraction of all cases disposed. (Osborne, Civil Justice Reform Project, Summary of Findings & Recommendations, at 53. “In 2005 –2006, there were 6,839 civil trials heard. Of these trials heard, 1,598 or 23% were jury trials. The vast majority of these jury trials involved litigation arising from motor vehicle accidents (1,186 or 74% of civil jury trials heard)” (footnote omitted)). There is growing opposition against the jury trial in Canada, coming mostly from the bench (Osborne, Civil Justice Reform Project, Summary of Findings & Recommendations, at 53. “The issue whether there should be any change that would affect a party’s right to a jury trial was controversial. Some advocated no change. Others, mainly judges, advocated the abolition of civil juries.”). Civil juries are rare in common-law jurisdictions throughout the developing world, where customary justice systems often handle the bulk of litigation (see, ch. 2 of pt 4).

7 The institution of the jury kept proceedings in close contact with the lay citizen. “In the English courts… the jury of ordinary people from the neighborhood was, and remained, an essential and on points of fact, decisive element of Common-law process; it was an antidote for growing technicality and pleading in esoteric French law.” Caenegem, History of European Civil Procedure, at 24.
perfect historical sense, it is critical to keep in mind that this particular arrangement (a product of history) is but one of the multiple faces of justice that are possible.8

The process was even more severe on the Continent. With the wholesale reception in Germany of the Justinian Roman law of the late imperial period, principles and institutions of procedure which were ‘blackboxed’ two thousand years earlier by the Romans were adopted without question; they were also adopted in France, and then passed onto French and Spanish colonies with just about as much understanding about the internal political compromises that gave birth to those Roman institutions, as the explanations given by Moses when he descended from the Mount with the Ten Commandments. The law of procedure was given to the people throughout the civil-law world with the historical assumptions and political compromises of the late Roman times already ‘blackboxed’ deep in the stones of the Roman ruins. As we saw above (Part Two of this dissertation), from the XIII century, and all the way until the XIX century, “[t]he law of Rome stood for reason, organization, and administrative efficiency under central

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8 Critics may argue that centering the legacy of the British Common Law on the mechanics of court administration constitutes an unduly reductionist view. I contend, however, that the opposite approach leads to the same conclusion. For instance, according to Hayek, “Individual liberty in modern times can hardly be traced back farther than the England of the seventeenth century. It appeared first, as it probably always does, as a by-product of a struggle for power rather than as the result of deliberate aim. But it remained long enough for its benefits to be recognized. And for over two hundred years the preservation and perfection of individual liberty became the guiding ideal in that country, and its institutions and traditions the model for the civilized world” Hayek, F.A., The Constitution of Liberty, Chapter 11. Even if one approaches the legacy of the Common Law from a philosophical perspective, as the origin of individual liberty, as Hayek does, the conclusion remains the same, i.e., that the Common Law choice of principles (individual freedom over equality or community harmony), and institutions to embody those principles, reflect a struggle for power in a specific historical context, as Hayek also recognizes. Thus, whether the conflict-solving ideal of justice of the Common Law reflects a particular form of court administration (narrowly, the need of itinerant courts), or a broader systemic commitment to the value of individual liberty, as Hayek proposes, the implications for the process of legal transplantation in low and middle-income countries during the 19th and 20th centuries are the same: the outcome of the struggle for power in a particular historical context—12th to 17th century England—may not fit the needs of other societies or other times. In other words, the Common Law’s understanding of “Justice” (with capital J) as
control. Embodied in the superb bodies of the *Corpus Juris Civilis*, it was rediscovered and studied as a revelation, the lawyer’s *ultima ratio*. The universities were born and with them a newfound passion for theory” dominated the life of the law in continental Europe. Roman law stood for reason in the context of the obscure ordeals of ancient times. But this Roman law was not the law of the lay judge of the classic period, but the Byzantine codification of the Roman law of the late period, when procedure had experienced a fundamental shift from private to public and official; from adversarial to inquisitorial; from oral to written; from public to secret; from single-layered into multi-layered; from simple (understandable by lay people) to sophisticated (the realm of professional experts).

Roman law also stood for imperial power. The great diversity of substantive and procedural law across various regions of France posed a challenge to the unification of power under one King, and Romano-canonic law became a vehicle for the unification process. The same imperial needs for systematization, centralization, and political control, which led to the highly sophisticated procedure of the Roman Empire, served European monarchs well in their quest for bringing order and consistency to the law—from the XIII century French Kings to Napoleon. This *policy implementing* understanding of justice, which may be traced back to the XII century, largely stem from the revolutionary France’s deeply rooted concern with the “tyranny of justice.” In eighteen-

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*Caenegem, History of European Civil Procedure*, at 11.

*Damaška, The Faces of Justice and State Authority.*

See detailed historical account in Part 2 of this dissertation. *See also, Caenegem, European Law in the Past and the Future; Caenegem, History of European Civil Procedure; Damaška, The Faces of Justice and State Authority; Caenegem, An Historical Introduction to Private Law; Caenegem, Judges, Legislators and Professors.*
century France’s the judge shall be “no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigor.”\textsuperscript{12}

Justice can be achieved only through strict adherence to the “words of the law.”

This procedure, of course, also served well the needs of the colonizers and their heirs throughout civil-law countries in low and middle-income countries, as they could keep control of the system of dispute resolution in just about the same way that the Catholic Church used for centuries to keep control of knowledge by maintaining the message captured in the Latin language.\textsuperscript{13}

We will now turn our attention to some generally accepted principles of procedure in light of the expanded Damaška model of the previous chapter—the Multiple Faces of Justice—and in particular of the community harmonizing ideal of justice presented there. There is of course no universally accepted list of principles of procedure, so the following list is merely illustrative.

i. Principle of Party Autonomy [Principle of Passivity of the Judge] (Principe Dispositif) (France, Germany)

ii. Principle of Contradiction (France, Belgium, Netherlands)

iii. Principle of Equality of the Parties (France, Italy)

iv. Principle of Form (Italy)

v. Principle of Courts Free of Charge (France, Netherlands)

vi. Principle of Publicity (UK, Sweden, Belgium, Netherlands, Germany)

\textsuperscript{12} Montesquieu, \textit{The Spirit of Laws}, Book XI, ch. 6, \textit{infra} note 4, at 47.
vii. Principle of Two Instances (France, Netherlands, Italy) 
viii. Principle of Orality (UK, Sweden, Germany, Italy—but not really due to 1950 reforms) 
ix. Principle of Written and Oral Consideration (Belgium) 
x. Principle of Immedicacy (Sweden, Germany, Italy) - Internal accessibility or Simplicity (Netherlands) 
xi. Principle of Concentration (Sweden, Italy) 
 xii. Principle of Motivation of Decisions (France, Belgium, Netherlands, Italy) 
 xiii. Principle of Mandatory Legal Representation (France, Netherlands) 
xiv. Principle of Reasonable Time (Belgium, Netherlands) 
xv. Principle of Independency and Impartiality (Belgium, Netherlands, Italy) 
xvi. Principle of Parties Adducing the Facts (Germany) 
xvii. Principle of Free Evaluation of the Evidence (Germany) 
xviii. Principle of Procedural Efficiency (Germany) 
xix. Principle of Due Notice (UK) 
xx. Principle of Pre-trial Disclosure (UK) 
xxi. Principle of Protection Against Spurious Claims and Defenses (UK) 

13 Until Vatican II the Catholic mass was still given in Latin, and thus it was beyond understanding for virtually all laymen. Some parishes still maintain the mass in Latin today.
xxii. Principle that Justice is not to be Evaded (UK)

xxiii. Principle of Accelerated Justice (UK)

xxiv. Principle of Promoting Settlement (UK)

xxv. Adversarial Principle (UK)

Specific procedural devises have been established by the various legal families to further these principles. For instance, the institution of summary judgment in common-law countries advances the principle of accelerated justice. Similarly, the hearsay rule advances the principle of contradiction in common-law countries, while the principle of free evaluation of the evidence is furthered in Germany by granting the judge ample powers for fact gathering. Some of these principles reflect the conflict-solving ideal of justice and some others the policy-implementing ideal. As Damaška has demonstrated, no country fully embodies either of them; procedures in both England and the Continent fluctuated between these two ideals of justice throughout history.

It should be clear by now that all these principles of procedure are not really ‘universal’; they are simply distilled expressions of legal history. They embody the evolution of the civil-law and the common-law from Roman times—indeed, most of these principles were taken directly from Rome. If one treats them as ‘generally accepted’ principles about the nature of the legal process in specific historical context, they are indeed very helpful guidelines. In this context it is then possible to see the Devis Echandia’s quote about the “Principle of the Two Instances” in a different light:

In order to make the right to challenge the decisions of judges effective, so that the defendant may adequately contradict the plaintiff’s claims and the later the exceptions of the former, the universal doctrine (jurisprudence) and legislation have
established the hierarchical organization of the administration of justice; thus, as a general rule, every proceeding shall be known by two judges of different hierarchy if the parties so demand through a timely recourse of appeal, or through mandatory consultation in some cases.

It is fundamental in the procedure that all the judge’s actions which could harm the interests or rights of one of the parties, be subject to revision, that is, that there must be a recourse against them, so that any mistakes or vices may be corrected.\footnote{Devis Echandia, Compendio de Derecho Procesal, at 55 (emphasis added).}

The requirement of two judges knowing every case and the condition that all the judge’s actions be subject to revision, are not “universal” imperatives of the legal process, as Devis Echandia would have us believe; the “Principle of the Two Instances” is simply a distilled expression of the Imperial Roman and Continental European need to control the judge under the policy-implementing ideal of justice. It is not a sine-qua-non element of the very notion of process but rather an expression of a political compromise which was ‘blackboxed’ deep inside the system during the late Roman Imperial times and conveniently maintained by the European Continental crowns. This ‘universal’ principle is just a convenient tool; a device, like a hammer or a refrigerator, not a piece of ‘revealed wisdom’ descended from Heaven —as eminent jurists of procedure in low and middle-income countries would have us believe.

While these principles are still useful guidelines, they are not more than that. “No system of law can be understood without some knowledge of the history of the society for whose use it was evolved and whose relationships it was intended to regulate.”\footnote{Kolbert, “General Introduction” in Justinian, The Digest of Roman Law, at 9.}

Claiming the ‘sanctity’ of procedure to justify structural inefficiencies of the legal process on the name of safeguarding Justice (with capital J), is to a large extent a mechanism to
perpetrate existing power arrangements which favor the heirs of the colonizers and facilitate rent-seeking by legal elites in low and middle-income countries.16

**CHAPTER 4. THE MULTICULTURAL JUDICIAL EQUILIBRIUM MODEL**

Part 1 of this dissertation proposed a novel theoretical model to analyze and compare the overall effectiveness of dispute resolution systems to deliver *fair*, *accessible* and *efficient* justice in developed and developing countries. However, this model is not really ‘novel’—this is basically the way western culture perceives dispute resolution. More importantly, this model appears to be too narrow for a globalized yet multicultural world.

From the point of view of a hypothetical worldwide ordinary user, the overall effectiveness of a multicultural dispute resolution system encompasses five (not only three) dimensions. The system must be:

a. **Accessible** (free of procedural, financial and other hurdles)

b. **Efficient** (produce enforceable results within reasonable time)

c. **Impartial** (deliver unbiased adjudication)

d. **Community harmonizing**

c. **Protective of vulnerable groups**

While there are multiple definitions of these concepts throughout the world—from the Anglo-American ‘umpire’, to the *policy-implementing* bureaucrat (judge) of Turkey, to the African community chief—“justice” everywhere is the outcome of the process of adjudication. State and customary dispute resolution systems everywhere face the

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16 As it was explained in Part 3 of this dissertation.
challenge of guaranteeing the widest possible access to justice, maintaining speed and cost of litigation within reasonable limits, ensuring a fair and enforceable outcome which not only takes into account the dispute between the litigants but also its broader impact on the community, while simultaneously preserving effective alternatives to litigation.

This revised formulation of the ‘judicial equilibrium’ maintains two of the original elements\(^{17}\) (accessibility and efficiency), and disaggregates the third (fairness) into three different dimensions: The first one is impartiality, which roughly corresponds to the Western notion of unbiased adjudication (akin to the conflict solving ideal of justice explained in Chapter 3 of Part 5 of this dissertation). Customary justice authorities around the world would not disagree in principle with the notion that the Jirga, the Council of Elders, the Mama, the Shaman, or the Chief, should be impartial and unbiased. The problem does not arise at the conceptual level but in practice, and hence the need for the fifth requirement (protection of vulnerable groups) which is discussed below.

The second dimension of fairness which is required by a multi-cultural formulation of the ‘judicial equilibrium’ model is the need for the process and the decisions to be community harmonizing. Customary justice is holistic all over the world, from Ghana to Kenya, from Guatemala to Peru, from Papua New Guinea to the Philippines. In many instances there are no separate systems for criminal and civil cases. The concepts of justice, crime, punishment, and dispute resolution cannot be properly understood in isolation; they are intrinsically related to a broader understanding of

\(^{17}\) From the model presented in Part 1 of the dissertation.
community harmony, social and individual healing, and equilibrium with the natural and supra-natural worlds.  

As discussed above, the monumental fight between the trial by ordeal of the ancient times and the modern rational legal process became the silent backdrop against which the West came to see its enlightened institutions of justice. The western world has come to define the concepts of ‘justice’, ‘law’ and ‘reason’, as the opposite of trial by ordeal, which represent ‘darkness’, ‘arbitrariness’ and ‘madness’. Europe experienced a fundamental transformation around the 13th century which left a profound impact on the Western notions of law and justice. Roman law was rediscovered and embraced wholeheartedly, and the blindfolded and sword-wielding Lady Justice slowly came to replace the Christian cross as the prevailing image of justice in the community. The law of procedure became the scales of justice, the tool through which Justice (with capital J) materializes in the world. However, something else was lost in translation in this epic battle. This ‘something’ is precisely the African tree. The idea that justice is not a sword used by a powerful judge to cut and remove the transgressors of the law, but rather a friendly meeting place around which the community may unite once again, to heal and reestablish the bonds that were broken.

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18 As explained in Part 4 of the dissertation.
19 The Roman Goddess of Justice represented as an austere and impartial (blindfolded) woman, holding a sword in one hand and the scales in the other.
20 The most important weapon in this battle, particularly in England, was the development of the notion of Justice as the impartial (blindfolded) adjudicator, who is blind to anything else but the particular facts of the specific dispute before her (the ‘Virtues of Tunnel Vision’ and the ‘Ideal of Tabula Rasa,’ Damška, The Faces of Justice and State Authority, at 378 and 379). “As presently written, the English rules and those of many other countries scarcely seem even to contemplate that more than one case will be proceeding at any one time, let alone that more may be at stake than the interest of the parties to each case” J. A. Jolowicz, On Civil Procedure, at 70.
21 In the Cheyenne variant “the tribe, after ridding itself of the murderer’s presence through banishment, could purify itself by the sacred ritual of renewing the Medicine Arrows.” Llewellyn and Hoebel, The Cheyenne Way, at 133.
Community harmonizing justice entails a compromise between the Sword of Justice (the principle of legality, which demands uncompromising equal treatment of all under the law) and the Tree of Justice (the holistic pursuit of community harmony). Community harmonizing justice implies that not only the facts of the case and the particular circumstances of the litigants must be taken into account; the concerns and contextual needs of the litigants’ families and those of the community at large may also be fundamental determinants of the process or the decision. There are endless variations of possible ways to reach this compromise.

The third dimension of fairness which is required by the revised ‘judicial equilibrium’ model is the protection of vulnerable groups. In my view, this is just the other side of the coin of the community harmonizing principle.

Let us consider again the case of Mukhtar Mai. In the ‘eye for an eye’ context of this rural village of Pakistan, a ‘rape for a rape’ may be—for the sake of argument—perfectly acceptable. It may even be highly legitimate among the two tribes involved, and seen with favorable eyes by the several hundred local residents and some members of the local police who witnessed it. It could even be agreeable to Mukhtar Mai’s family and even—in the most bizarre of all possible circumstances—to Mukhtar Mai herself. Even

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22 Irfan, Honor Related Violence Against Women in Pakistan, supra note 22, at 125. (“An incident that gained much international media coverage was that of Mukhtar Mai, a 30 year old woman from the province of Punjab. Mukhtar Mai’s 12 year old brother was found guilty by a local tribunal of having illicit relations with an older woman belonging to the Mastoi tribe, a more influential tribe in the village. The tribunal ordered that as compensation for the alleged illicit relationship and as punishment for the boy’s family, members of the Mastoi tribe would gang-rape a woman from the boy’s family and the tribunal picked Mukhtar Mai. This sentence was passed in the presence of several hundred local residents as well as some members of the local police, and no one intervened to stop the heinous crime, which was carried out there and then by four men, including a member of the tribunal. Mukhtar, in her biography tells of her ordeal, that she says she shares with millions of other women in Pakistan. In her case the story became public after a journalist visiting the village heard of the incident from the local maulvi at the mosque”). Quote repeated here to facilitate reading.
in this extreme case, this judgment would not be compatible with the ‘multicultural judicial equilibrium’ model, for the reasons explained below.

The goal of this dissertation, as stated from the outset, is not to recommend the need to change dispute resolution practices in the most remote rural villages of the world.23 It is rather to explore a way to address the enormous justice gap affecting billions of people in low and middle-income countries today, particularly the urban poor. The goal is to explore the conditions that would make possible the development of this alternative face of justice in a globalized yet multicultural world, especially for the urban poor.

Well, if this be the goal, it becomes apparent that the Mukhtar Mai case would not be compatible with the ‘multicultural judicial equilibrium’ model even if Mukhtar Mai herself came to bless the decision. The reason is that this decision is incompatible with fundamental notions of fairness prevailing among all major religions and ethical systems in the world, from East to West, so it can hardly be acceptable in a multicultural model. But the reason why the Mukhtar Mai case is incompatible with the model is not normative but purely statistical. It is not because I think it is wrong, or because the Buddha, Abraham, Muhammad, Jesus, Confucius, Lao Tse, Aristotle, or mother Seinekan and father Seiyankua said so. It is because billions of people around the world find it unacceptable, thus making it incompatible with an exercise which consists in the search for common ground.

We have suggested that one of the main barriers impeding the delivery of accessible, efficient, effective and culturally competent justice for billions of people
today, is that both formal legal elites and customary justice authorities around the world use the excuse of the legacy of colonization to justify their hold on power. Even if one could argue, as most customary justice authorities today do, that the “Universal” human rights are mere artifacts of the West and not truly universal (see chapter 6 of Part 4 above), the fact remains that the western discourse of law and justice has so deeply permeated all corners of the planet (especially but not exclusively in urban areas), that the core element of this discourse—the protection of the individual from abuses of the majority rule—cannot be left out of a modern ‘multicultural judicial equilibrium’ model.

Let us consider a newspaper account of a recent statement issued by some customary authorities (khap panchayats) in India:

Across the nation, a woman is raped every 20 minutes, according to the National Crime Records Bureau. These frightening figures have risen steadily in recent years: in 2010, 24,206 rapes were reported, an almost 10% increase over 2001. The number of unreported rapes is without a doubt greater.

Compounding the problem is the fact that many still view rape as personal shame, not a violent crime, and male aggression is routinely excused as a mundane fact of life. After Haryana’s 17 rape cases in October, some informal village councils, called khap panchayats, suggested that girls should be married off early to prevent sexual violence. The state’s former chief minister, Om Prakash Chautala, endorsed the bizarre and archaic diktat. “In the Mughal era, people used to marry their girls to save them from Mughal atrocities, and currently a similar situation is arising in the state,” he said. “I think that’s the reason [the] khap has taken such a decision and I support it.” (He later retracted his statement.)

Experts say blaming survivors of sexual assault is common in India. Rather than prosecute perpetrators, many say the fault belongs to rape survivors, who are shamed for, say, daring to walk alone, taking public transportation or wearing certain clothes.24

23 While this may as well be a worthy endeavor, it is beyond the scope of the present exercise.
Even in the hypothetical case that all village councils in India came together and unanimously supported this view, this broad agreement among customary justice authorities would not annul the fact that a recent gang-rape outraged millions throughout the country, and thousands of women (and men) marched in the streets to protest against it.\textsuperscript{25} Thus, in this search for common ground the \textit{protection of vulnerable groups} becomes an imperative companion\textsuperscript{26} to the \textit{community harmonizing} principle, and as such, an essential requirement of the \textit{multicultural judicial equilibrium} model.

Does this imply that the whole edifice of human rights must be included as well? Not quite. The vast majority of the academic and international development literature on customary justice existing today claims, in one way or another, that if customary justice institutions are to play any role in the XXI century, they must adapt to universal human rights standards\textsuperscript{27}. For instance, Sassy-wood poisoning in Liberia must be abolished, not because the sassy-wood tree is not really magical or because witches indeed can fly above it,\textsuperscript{28} but \textit{because} the sassy-wood poisoning ordeal does not abide by due-process-of-law imperatives under Universal Human Rights standards.\textsuperscript{29} I tend to agree with this perspective, but I also recognize that an ‘universalist’ due-process-of-law discourse is probably the least effective way to engage with Liberian chiefs. Customary justice authorities around the world, as mentioned above, tend to have as little respect and


\textsuperscript{26} It is my opinion that one of the conditions that would make possible the development of an alternative face of justice in a globalized yet multicultural world, would be the assessment of the extent to which customary justice systems around the world protect vulnerable groups of the community.

\textsuperscript{27} \textit{See, supra} note 12, at 182.

\textsuperscript{28} See personal narratives of customary justice in Liberia, in Chapter 4 of Part 4 above.

\textsuperscript{29} Gienanth and Jaye, \textit{Post-Conflict and Peacebuilding in Liberia}. 
appreciation for the formal judicial system, as western barristers have for the colorful ways of Amazonian shamans. They frequently loathe each other.

An honest search for common ground, which is the essence of the *multicultural judicial equilibrium model*, should not be centered around the Western discourse on ‘universal’ human rights. It would be much more effective to focus on the narrow principle, which is accepted by all major religions today, of the *moral imperative to protect the weak and most vulnerable members of society*. Again, the reason for this choice is not normative but simply statistical. It is because billions of people around the world find it acceptable (at least in theory if not in practice), thus making it more compatible with this search for common ground.

Having thus established the conceptual basis of the *multicultural judicial equilibrium model*, let us now consider how it can be operationalized in practice. The first step is to develop a working map of its implications. The following graphs trace various proceedings analyzed in this dissertation against the five dimensions of the revised judicial equilibrium model. These graphs do not claim to be precise; they are only intended as tools to construct a ballpark view of the model in practice.

*The Afghan Jirga*
The dark blue area in the graph represents the hypothetical scores obtained by the Afghan or Pakistani Jirga in each one of the five dimensions of the revised judicial equilibrium model, from the perspective of a hypothetical Western evaluator (the “BBC News perspective” discussed in Chapter 1 of Part 4 above). The light blue depicts the hypothetical scores obtained by the same system from the perspective of the average user (Chapter 2 of Part 4). Again, scores are not based on actual data.

According to this hypothetical BBC News perspective assessment, the Afghan Jirga scores 5 (highest possible score) in terms of accessibility and efficiency, as customary justice proceedings are perceived in the West to be widely accessible and extremely efficient. However, it scores 0 (lowest score) in terms of protection of vulnerable groups, given that the BBC News perspective suspects a strong gender bias is this form of adjudication—as exemplified by the Mukhtar Mai case. These ratings would not match those of hypothetical users of the system. Available evidence suggests that common citizens in Afghanistan and Pakistan, including women, would rate the Jirgas much higher in terms of impartiality and protection of vulnerable groups (say, a score close to 3), and lower in terms of accessibility (a score of 4).

*The Liberian Chief*
Similarly, in Liberia the hypothetical *BBC News perspective* (dark blue in the graph) would diverge greatly from that of the hypothetical user of the customary justice system (noted with light blue). The Western perception of this system is far more negative about the Chiefs’ treatment of vulnerable groups, than actual users of the system (including members of various minorities) report them to be.

**The judge of justice**

While these graphs are not based on actual data, they provide a ballpark picture of how diverging these two perspectives (explained in Chapters 1 and 2 of Part 4 of this dissertation) may be about the extent to which customary justice systems actually conform in practice to the five requirements of the *multicultural judicial equilibrium model*. The critical question is who shall be the appropriate judge to assess the conformity of any particular judicial process or customary justice system with these five requirements of the model.

The actual and potential users of the service are the best suited to assess whether a particular system or procedure complies with these requirements in practice. All other options of potential evaluators are less fitting: international development experts often fail to understand or to give proper credit to the holistic nature of customary justice systems; formal judges and state officers tend to favor the status quo; customary justice authorities frequently despise formal courts and see them as instruments of conquest; lawyers and legal elites benefit from the system and often act in the interest of maintaining monopoly control over dispute resolution; NGOs and civil society organizations often have strong ideological biases; and religious authorities have lined up
with tradition for too long. All of these potential evaluators have shortcomings. The users of the system of adjudication must be the ones who tell whether it delivers an accessible, efficient, and culturally competent service.

The mechanism to implement this assessment in practice already exists. A variety of organizations regularly collect data on the actual operation of formal and informal justice around the world, including the World Bank, UNDP, The World Justice Project, The Hague Institute for the Internationalization of Law, the American Bar Association’s Rule of Law Initiative, IDLO, and the Open Society Justice Initiative, among others. It is not inconceivable that one of these organizations may include additional questions about these five requirements of the multicultural judicial equilibrium model in their future instruments.

A combination of out-of-court surveys and assessments of the general population would be most effective; the first ones measure the opinions and experiences of actual users of the system, while the second ones are needed to ascertain why potential users do not in fact resort to it. Stratification and oversampling of vulnerable groups could be employed to measure the last requirement of the model, and to assess, for instance, whether average male and female users of the Afghan Jirga agree on their assessments, or whether Americo-Liberians and indigenous populations share on their opinions about Liberian Chiefs and formal courts. Finally, a combination of quantitative and qualitative methods would be ideal to carry out these evaluations, including opinion polls and users’ focus groups.
CHAPTER 5. CONCLUSION: THE ‘WIG AND GOWN’ AND THE ‘SASSY-WOOD’
JUSTICE IN COMPARATIVE PERSPECTIVE

In Part One of this dissertation we explored a theoretical model to compare the
delivery of justice across countries of different legal traditions and levels of economic
development. We argued that countries around the world have designed judicial systems
and procedures in search for the most effective balance between the social need for
accessible and speedy mechanisms to resolve disputes, and the procedural and
substantive guarantees necessary to ensure that these systems deliver “fair” decisions; we
labeled this compromise as the “judicial equilibrium,” and used it as a tool throughout
the dissertation to assess different formal and informal systems.

Part Two provided conceptual and empirical confirmation of the enduring
impact of the “legal traditions” in day-to-day dispute resolution in high income
countries. We saw that legal comparativists have shown that the civil-law and the
common-law traditions have developed significantly different “judicial equilibriums.”
Cross-country data supports this conclusion.¹ Common-law chose comparatively more
efficient and independent justice, while civil-law opted for more accessible and
protective or “equalizing” justice. In other words, the tenant-friendly procedure of
France, Germany and Japan discussed in the first chapter of this dissertation largely
reflects a different (not necessarily better or worse) notion of “fairness” than the
landlord-friendly procedure of the USA, Australia and New Zealand.

However, we also discussed that the evolution of procedures in all countries not
only responds to a genuine search for the most effective “judicial equilibrium”; it also

¹ Chapter 4 of Part 2.
reflects the struggles for allocation of power among groups of the society in specific historical and cultural contexts. The *single event/stick to the facts* arrangement of the *community-harmonizing* ideal of justice of the Anglo-American common-law fitted the historical needs of itinerant royal courts who had to compete with manorial courts in a wide and newly conquered territory in England; the same arrangement also suited well itinerant circuit judges needing to cover a wide and wild newly conquered territory in America. But history was forgotten and a fable about unpolluted impartial truth-finding emerged, which continues to be preached at American law schools and handed down like the gospel by international development experts today. While this *single event/stick to the facts* arrangement may be a perfectly reasonable one, it is important to recognize that it is not the only—and possibly not even the best—way to gather evidence and decide cases. It was a second-best option developed in response to very precise historical needs of itinerant courts.

Similarly, the *procedure intensive/control the judge* approach of the *policy implementing* ideal of justice of the Franco-German civil-law responds to very particular historical needs of imperial Rome for “bureaucratization” of justice—procedure experienced a fundamental shift, from private to public and official; from adversarial to inquisitorial; from oral to written; from public to secret; from a regime of immediateness to mediateness; from concentrated into desconcentrated; from single-layered into multilayered; from direct and free examination of evidence into a system of legal tariff. This *procedure intensive/control the judge* approach also served well the historical needs of French Kings and revolutionaries, as well as of unifying Germans, for different reasons explained above. But history was forgotten as well. It is equally important to recognize
that this *procedure intensive/control the judge* approach may not be the best way to gather evidence and decide cases either.

Finally, a third piece of history was forgotten: European procedures in both England and the Continent were developed amidst a power struggle against the shadows of the trial by ordeal of the old ages—a fight between the rising central authority and the decaying manorial courts which had exercised such power for centuries. This epic struggle between ‘good’ and ‘evil’ left a deep scar on the Western ideal of justice, which obscures our understanding of customary justice systems today.

In Part Three of the dissertation we argued that the search for the “judicial equilibrium” is one step further removed in “transplant” countries—Latin America, Africa and others. As a consequence of the process of transplantation of legal systems by the colonizers, there is often a wider gap between legal institutions and local reality in most developing countries. Cross-country data suggests that core policy choices within legal families have not effectively migrated from “mother” to “transplant” countries. Other factors beyond the legal architecture or the level of resources—such as the prevalence of corruption—explain the overall effectiveness of civil and criminal justice across low and middle-income countries. Professor Merryman was wrong; the legal tradition does not “relate the legal system [of a particular country] to the culture of which it is a partial expression.” Outside of the “metropolis” (i.e., high-income countries), the legal tradition only relates the legal system to the culture and needs of the colonizers. For the vast majority of the population of developing countries the legal system often remains a distant and even frightening “transplant,” not an integral part of their culture.
As the old say goes, “all roads lead to Rome.” In this case, it applies quite literally. All roads journeyed in this dissertation—literature review, anecdotal evidence, and cross-country quantitative analysis—suggest that the ‘Wig and Gown’ face of justice, and the Justinian heirs, are seriously underperforming their duty to deliver accessible and effective justice to large segments of the population in low and middle-income countries today. The ‘judicial equilibrium’ is seriously broken in low and middle-income countries.

In Part Four we proposed the idea that the justice gap—the inadequacy of formal courts to answer the needs of billions of poor people—used to be filled in low and middle-income countries by customary justice institutions. But increasing internal migration and urbanization in developing countries have eroded the ability of large segments of society to have their disputes resolved in both formal and informal judicial institutions. Newly arrived migrant peasants and members of indigenous groups are often unable to keep their traditions and ancestral dispute settlement mechanisms alive in big cities, while they are also unable to understand and utilize what to them are abstruse legal procedures of the formal courts. The traditional “Wig and Gown” and “Sassy-Wood” faces of justice are increasingly misaligned with the changing reality of a globalized yet multicultural world. Billions of people are left out of both systems. Something needs to be done.

Finally, in Part Five we saw that the principles of procedure developed by the conflict-solving and the policy implementing ideals of justice (which correspond to the historical common-law and civil-law traditions), are not really ‘universal’; they are simply distilled (‘blackboxed’) expressions of legal history. We also attempted a critical revision of these

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2 *I.e.*, the civil law version of the ‘Wig and Gown’ justice of common-law countries.
principles of procedure, based on the community-harmonizing ideal of justice—which is more akin to the holistic ancestral dispute resolution tradition of low and middle-income countries. We searched for a more culturally competent understanding of the needs of these billions of left-out urban poor. A new proposal was made for a revised multicultural judicial equilibrium model: In a globalized yet multicultural world, justice must comply with five requirements: to be accessible, efficient, impartial, community harmonizing and protective of vulnerable groups. We also proposed a methodology to measure the extent to which any system of justice complies with these requirements in practice.

There are an infinite number of possible combinations to harmonize these five requirements of justice. The only way to do it properly is contextual—it varies across countries and even from one village to the next. Some elements of the “tutela” proceeding in Colombia may constitute a good example of this approach for a largely secularist society where traditional methods of customary justice have been long forgotten in the urban centers. Conversely, the use of paralegals (dispute resolution professionals which are not lawyers) may be a suitable approach in the more traditional and rural Sierra Leone.3 The framework proposed in this dissertation is only a starting point for the conversation.

**Policy implications for judicial reform**

The corollary of this research is not that billions of urban poor who are currently left out of the two faces of justice (formal and customary), should learn how to “borrow the eyes of the cougar,”4 to administer the “sassy-wood,”5 or to interpret the guidance of

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3 Koroma, *Timap for Justice and the Promise of Paralegal Initiatives*, at 49.
4 As in the Amazon jungle, as described in Part 4, Chapter 1, of this dissertation.
“Nukabindo” (the hill of ‘understand thinking’ in Sierra Nevada).6 These approximations to the Supernatural have little relevance for dispute resolution among the urban poor in low and middle-income countries today.7 Yet, the community harmonizing ideal8 of Justice (with capital J), which is at the core of most customary justice systems around the world, cannot be ignored in the globalized, post-colonial and multicultural world of the XXI century.9

Integration between formal and customary justice is an effective solution in some cases.

I began this study with the expectation that a deeper and more effective integration between the formal and customary justice systems would emerge as the solution to the defective delivery of justice for the poor in Colombia, and possibly other developing countries. After five years of extensive research, it has become apparent that further integration between formal and customary justice may be an effective solution, but only in some cases.10 The integrative approach between formal and customary justice is not a one-size-fits-all solution. The very notion of “customary justice” as a catch-all

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5 Explained in Chapter 4 of Part 4 of this dissertation.
6 As it is described in Chapter 5 of Part 4, when a Kogi commits the ‘crime’ of “Equitamale” (to go against authority), “he/she is taken to a place ‘Nukábindo’—a hill called ‘understand thinking’—so that he/she may listen there to this other hill which ‘guides’.” Perafán Simmonds, Sistemas Jurídicos Paez, Kogi, Wayúu y Tule, at 139.
7 As discussed in Chapter 7 of Part 4 of this dissertation.
8 As described in Chapter 2 of Part 5 of this dissertation.
9 Sophisticated legal elites in low and middle-income countries, as well as many rule of law practitioners from international organizations and donor agencies, continue to use the colorful ways of the shamans and the poisonous concoctions of the chiefs, as an excuse to disregard the community harmonizing ideal of Justice that constitutes the essence of dispute resolution in customary justice systems throughout the world. Just as the “BBC News Perspective” (Chapter 1 of Part 4) sees customary justice through the eyes of the European ordeal of the Dark Ages, and misses the rich cultural tradition of community harmonizing justice, many judicial reformers of today simply do not want to see this tradition either.
term to describe all ‘primitive’ systems of dispute resolution is dangerously reductionist.\textsuperscript{11} The integrative approach of state-customary interplay has very limited potential in an increasingly urban world, as explained in Chapter 7 of Part 4 of this dissertation.

\textit{Judicial reformers should go back to the drawing table}

The European notion of Justice has deeply permeated—through conquest, colonization and acculturation—the ideal of Justice all over the world. For many people in developing countries, ‘justice’ is the blindfolded lady with the scales and the sword. At the same time, for vast segments of the population, including urban dwellers, ‘justice’ is the African tree—the friendly meeting place where the community comes together to amend the broken social bonds. The philosophical gap between formal and customary justice (\textit{e.g.}, the Kogi justice described in Ch. 5 of Pt. 4) is often so deep, that it impedes integration. Yet, integration is not the only option.

A key policy implication of this research is that low and middle-income countries should go back to the drawing table of judicial reform, and examine whether their current methods of dispute resolution (formal and customary) were actually designed to serve the needs of their increasingly urban, multicultural, globalized, better informed, and increasingly assertive populations.\textsuperscript{12} Countries should let go of the centuries-old,\textsuperscript{11} Variations among customary justice systems within and across countries are very big. Is there anything in common among the procedures of ‘borrowing the eyes of the cougar’ in the Amazon, drinking sassy-wood in Liberia, stoning child witches in Nigeria, and being taken to the \textit{Eguitánale} mountain in Sierra Nevada? From a narrow but still common perspective (which we called here the ‘BBC News perspective’), all these procedures are the same, \textit{i.e.}, primitive magic, superstition, and ‘Judicia Dei’. Many seasoned international development experts share this view and use the thick prism of the trial by ordeal of the European ‘dark ages’ as the framework to understand modern day customary justice and even Sharia law. This perspective is too narrow, to the point of reducing an extraordinarily diverse and complex cultural phenomenon to caricature.

\textsuperscript{12} It would be a good start, for instance, to recognize that it is not possible or even desirable to adjudicate disputes in a country like Malawi, through British Common Law procedures (which are based on the conflict solving ideal of justice and as far distant as they could possibly be from the community harmonizing ideal of
‘blackboxed’ assumptions of the civil-law and common-law traditions—such as the right to an appeal for everyday disputes—as well as of some of the manifestations of rapidly decaying customary justice systems—such as the trial by ordeal—and unreservedly examine whether the mechanisms of justice (formal and customary) currently in place are fit for purpose. The actual and potential users of the service—in particular the urban poor—are the best suited to assess whether a particular system or procedure complies with these requirements in practice.

The ultimate goal of judicial reform shall be to adapt the legal instruments and procedures to the needs and aspirations of the population, not vice versa.

Much judicial reform of the past few decades appears to put the cart in front of the horse, *i.e.*, it tries to adapt existing institutions to pre-defined molds. The most important policy implication of this research is to flesh out the fact that there is nothing sacred about the conflict solving ideal of justice of the Anglo-American common-law, or the ‘virtues of tunnel vision and tabula rasa’ that were ‘blackboxed’ deep within it hundreds of years ago.

...
years ago. Similarly, there is nothing sacrosanct about the policy implementing ideal of justice of the civil-law tradition; the requirement of two judges knowing every case and the condition that all the judge’s actions be subject to revision, are not “universal” imperatives of the legal process.\(^\text{17}\) The “Principle of the Two Instances” is simply a distilled expression of the Imperial Roman and later the Continental European need to control the judge. It is not a \textit{sine-qua-non} element of the very notion of process but rather an expression of a political compromise which was ‘blackboxed’ deep inside the system during the late Roman Imperial times and conveniently maintained by the Continental crowns. This ‘universal’ principle is just a convenient tool; a device, like a hammer or a refrigerator, not a piece of ‘revealed wisdom’ descended from Heaven—as eminent jurists of procedure in low and middle-income countries would have us believe.\(^\text{18}\)

In the same vein, there is nothing sacred about the community harmonizing ideal of justice which is proposed in this dissertation. The main conclusion of this research is not that more community harmonizing justice is needed; it is rather that the institutions and procedures of justice shall adapt to the needs and aspirations of the people—and it so happens that the community harmonizing ideal of justice seems to fit better in most countries with long customary justice traditions. But there is nothing sacred about it either.

It is pertinent to transcribe again the quote from Metzger about dispute resolution in Classic Rome:

\begin{quote}
Roman litigation in the classic period combined private initiative with modest public oversight. Most of the initiative was the plaintiff’s: he brought his opponent to
\end{quote}

\(^\text{17}\) See Chapter 2 of Part 5.

\(^\text{18}\) See, e.g., Devis Echandia, \textit{Compendio de Derecho Procesal}, quoted in text accompanying \textit{supra} note 8, at 106.
the court, informed him of the action he intended to bring, showed him the evidence he intended to rely on at trial, questioned him about facts affecting the action, determined the amount of bail, if any, to demand, and eventually selected an action from the choices the magistrate gave him. Some of the initiative was on the defendant’s: he raised his own defences, he disclosed the evidence to support those defences, and his participation in the final act before the magistrate, ‘joinder of issue’ (litis contestatio), was voluntary. The magistrate’s oversight was small by modern standards. He usually involved himself in the specific facts of a case only to the extent of determining whether the requested actions and defences ought to be allowed or denied, and even here the extent of his involvement is controversial. He sometimes himself posed a question to the defendant to establish a fact, and sometimes undertook a more extended enquiry of a controverted matter. His main job was to see to it that, when an action was granted, the parties went away with a written formula: a statement of the action and any defences, to be used by the judge at trial.19

This quote describes the application of the conflict solving ideal of justice in its purest form—keep in mind that the ‘judge’ was really a lay arbitrator.20 History shows that the conditions on the ground in the most diverse places and times (the Italian peninsula of the second century, England of the 13th century, the ‘wild west’ (USA) of the 19th century, and the Democratic Republic of Congo21 of the 21st century), may all share in common certain characteristics that call for the implementation of the pure conflict solving model of justice. Low and middle-income countries should consider this as well. Whenever conditions on the ground are appropriate, this model may be a viable alternative; for instance, when there is no deeply rooted popular understanding of Justice as community healing; when ethno-linguistic fractionalization is high and intra-communal bonds low (Kenya today, perhaps); when resources are scarce and state control of the territory is incomplete.

19 Metzger, Ernest. Litigation in Roman Law, at 3.
20 See detailed presentation of procedure in Rome in Chapter 1 of Part 2.
21 Maya, Michael, Mobile Courts in the Democratic Republic of Congo.
Judicial reform is like finding the perfect spot for a camping trip—some people prefer to camp close to drinking water, others like the highlands, and others prefer the beach. The role of judicial reformers is to find what people’s preferences really are (not what international experts want them to be), and locate the perfect camping spot in the following map:

There are profound differences among societies on fundamental social values, which have impacted the role assigned to law and justice in them. One of the natural consequences of the recognition of these differences is that certain balance in the allocation of power and responsibilities between the state, the community, and the individual that may be perfectly suited to a particular society in a particular time, may not fit another society or a different time. The conflict-solving model of justice favors the individual; the policy-implementing model favors the state, and the community-harmonizing model favors the community. Effective judicial reform is the art of finding
the balance among these models that most perfectly fits the needs and aspirations of the people—the users of the system—in a particular place and time.

Camping conditions are changing rapidly: increasing globalization and integration of markets; growing migration and urbanization; exponential expansion of access to communication technologies; unprecedented universal access to information for all segments of the population; growing cultural self-assertiveness; and growing awareness among marginalized populations about their own rights (and decreasing tolerance to abuses and exclusion). The Arab Spring should serve as a reminder of the cost that countries pay in today’s world for failing to adapt to these changing camping conditions, as the Chinese leader, Xi Jinping, reminded us recently.²²

Effective judicial reform must address both the supply (inaccessibility and bureaucratization) and demand (lack of cultural competency) sides of the problem. There are no universal solutions; this search must be driven by context.

²² The New York Times, November 19, 2012. New Communist Party Chief in China Denounces Corruption in Speech. By Edward Wong: “In recent years, the long pent-up problems in some countries have led to the venting of public outrage, to social turmoil and to the fall of governments, and corruption and graft have been an important reason,” Mr. Xi said, according to a version of the speech posted online. ‘A mass of facts tells us that if corruption becomes increasingly serious, it will inevitably doom the party and the state. We must be vigilant.’”
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APPENDIX 1

QUANTITATIVE ANALYSIS OF THE DELIVERY OF JUSTICE IN 66 COUNTRIES

This appendix presents a statistical analysis of cross-sectional data on the delivery of justice in a large sample of countries. This analysis compares the overall effectiveness of the judicial system in delivering impartial, efficient and accessible justice (the judicial equilibrium) across legal families for a large sample of high-income and middle-income countries. The analysis includes civil and criminal justice, and private arbitration.

This analysis was originally developed by the author for this SJD dissertation. It was subsequently presented by the author at the Conference on Law and Development of Middle-Income Countries at The University of Chicago Law School (April 20-21, 2012).¹ This analysis has been accepted for publication by Cambridge University Press as a separate paper entitled “The Delivery of Justice in Middle-Income Countries,” as Chapter 11 of the volume entitled Law and Development of Middle Income Countries, edited by Randy Peerenboom and Tom Ginsburg.²

The purpose of this analysis is to determine whether: (i) the overall effectiveness of the judicial system in delivering impartial, efficient and accessible justice, is determined by policy choices inherent to the legal architecture of the main legal traditions of the world - the civil law and the common law. (ii) These policy choices have effectively migrated from mother to transplant countries within legal families, and/or (iii) other factors beyond the legal architecture or the level of resources - such as the prevalence of

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¹ The paper presented at the conference as well as an audio recording of the presentation are available from the web page of the University of Chicago Law School, at: http://www.law.uchicago.edu/audio/middleincome6-042112
² http://www.cambridge.org/aus/catalogue/catalogue.asp?isbn=9781107028159
corruption - explain the overall effectiveness of civil and criminal justice across
countries.

**Methods**

Eight new indicators (*civil access, civil efficient, civil impartial, criminal efficient, criminal
impartial, ADR\(^3\) access, ADR efficient, ADR impartial*) are produced based on the
components of the *WJP Rule of Law Index 2011* that measure justice.\(^4\) These new
indicators measure the judicial equilibrium presented in the first section of this paper, for
a large sample of countries.

The *WJP Rule of Law Index*\(^\circ\) rankings and scores are built from more than 400
variables drawn from two new data sources: (i) a general population poll (GPP), designed
by the WJP and conducted by leading local polling companies using a probability sample
of 1,000 respondents in the three largest cities of each country; and (ii) a qualified
respondents’ questionnaire (QRQ) completed by in-country experts in civil and
commercial law, criminal law, labor law, and public health. To date, more than sixty-six
thousand people and two thousand experts have been interviewed in sixty-six countries
and jurisdictions.

A full description of the methods employed to collect, weight, aggregate, and
normalize, the data, as well as the precise definition of the more than one hundred and
fifty variables employed to construct the relevant judicial components of the *WJP Rule of

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\(^3\) ADR stands for Alternative Dispute Resolution systems, and in this context refers to civil and commercial
arbitration. It does not include customary justice systems.

\(^4\) Factor 7, civil justice, and Factor 8, criminal justice. The *WJP Rule of Law Index* provides new data on nine
dimensions of the rule of law: limited government powers; absence of corruption; order and security;
fundamental rights; open government; effective regulatory enforcement; access to civil justice; effective
criminal justice; and informal justice. These factors are further disaggregated into 52 sub-factors. Together,
they provide a comprehensive picture of rule of law compliance. Agrast et.al., *WJP Rule of Law Index 2011*.
The dependent variables included in this analysis are constructed through the aggregation of relevant sub-factors of the *WJP Rule of Law Index 2011*. These variables are:

- **Civil Access**: This variable measures the accessibility of the civil justice system. It is coded as the average of sub-factors 7.2 and 7.3. Sub-factor 7.2 measures whether people can access and afford legal advice and representation, and sub-factor 7.3 measures whether people can access and afford civil courts.

- **Civil Impartial**: This variable measures the impartiality of the civil justice system. It is coded as the average of sub-factors 7.4, 7.5 and 7.6. Sub-factor 7.4 measures whether civil justice is free of discrimination; sub-factor 7.5 measures whether civil justice is free of corruption; and sub-factor 7.6 measures whether civil justice is free of improper government influence.

- **Civil Efficient**: This variable measures the efficiency of the civil justice system. It is coded as the average of sub-factors 7.7 and 7.8. Sub-factor 7.7 measures whether civil justice is not subject to unreasonable delays, and sub-factor 7.8 measures whether civil justice is effectively enforced.

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5 Saisana, and Saltelli, *Rankings and Ratings: Instructions for Use*, at 247-268; and Statistical Test of the *WJP Rule of Law Index*, available at Agrast et.al., *WJP Rule of Law Index 2011*, at 123.
• **Criminal Impartial:** This variable measures the impartiality of the criminal justice system. It is coded as the average of sub-factors 8.4, 8.5, 8.6 and 8.7. Sub-factor 8.4 measures whether the criminal justice system is impartial; sub-factor 8.5 measures whether the criminal justice system is free of corruption; sub-factor 8.6 measures whether the criminal justice system is free of improper government influence, and sub-factor 8.7 measures whether the criminal justice system accords the accused due process of law.

• **Criminal Efficient:** This variable measures the efficiency of the criminal justice system. It is coded as the average of sub-factors 8.1, 8.2 and 8.3. Sub-factor 8.1 measures whether crimes are effectively investigated; sub-factor 8.2 measures whether crimes are effectively and timely adjudicated, and sub-factor 8.3 measures whether the correctional system is effective in reducing criminal behavior.

• **ADR Access:** This variable measures the accessibility of the private arbitration mechanisms available in the country. It is coded as sub-factor 7.9.1, which measures whether commercial arbitration mechanisms are accessible.

• **ADR Impartial:** This variable measures the impartiality of the private arbitration mechanisms available in the country. It is coded as sub-factor 7.9.3, which measures whether commercial arbitration is free of improper influence (corruption).

• **ADR Efficient:** This variable measures the efficiency of the private arbitration mechanisms available in the country. It is coded as the average of sub-factors 7.9.4 and 7.9.5, which measure whether commercial arbitration is not subject to unreasonable delays, and if it is effectively enforced.
Independent variables employed are legal origin, GDP per capita, and absence of corruption. Legal origin is taken from [2007]. Income groups follow the World Bank standard classification - upper and lower middle-income countries are grouped together. Absence of corruption is taken from the overall score of Factor 2 of the WJP Rule of Law Index 2011, which measures absence of corruption.6

First, bi-variate analyses are conducted by legal origin and income-level group. Secondly, multi-variate analyses are conducted for civil and criminal justice indicators by legal origin, controlling by per-capita income and prevalence of corruption. For each variable of civil or criminal justice effectiveness, three models are analyzed for a sub-sample of all high and middle-income countries. In the first model only legal origin is included; common law is used as comparison category against French and German legal origin. In the second model GDP per capita is introduced in the analysis, under the rationale that the overall level of resources available in society may determine the effectiveness of justice delivery across countries, regardless of legal architectures derived from policy choices of the civil and common law traditions. In the third model absence of corruption is included. Corruption is included as a proxy for other variables. The rationale is that other characteristics of the judicial system, which are independent of the design of the system per-se, such as the prevalence of corruption, may determine the

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6 There is a partial overlap between one of the dimensions of Factor 2 (Absence of Corruption) and one of the dimensions of impartiality of civil and criminal justice (subfactors 7.5 and 8.5). In the WJP Rule of Law Index 2011, Factor 2 includes data for three subfactors: 2.1. Government officials in the executive branch do not use public office for private gain; 2.2. Government officials in the judicial branch do not use public office for private gain, and 2.3. Government officials in the police and the military do not use public office for private gain.
effectiveness of the delivery of justice beyond the policy choices of the legal families and the level of resources available in society.

The analysis was conducted with SPSS 20. Inclusion criterion was to be listed in the *WJP Rule of Law Index 2011*. No country was excluded. Results of these analyses are presented in the next table.

*Legal traditions*

The following table shows the country scores obtained by the 23 high-income countries\(^7\) included in the sample, grouped by legal tradition. Scores range from 0 to 1, where 1 signifies higher degree of access, impartiality or efficiency of justice, as compared to a global sample of countries.

<table>
<thead>
<tr>
<th>Country</th>
<th>CIVIL ACCESS</th>
<th>CIVIL IMPARTIAL</th>
<th>CIVIL EFFICIENT</th>
<th>CRIMINAL IMPARTIAL</th>
<th>CRIMINAL EFFICIENT</th>
<th>ADR ACCESS</th>
<th>ADR IMPARTIAL</th>
<th>ADR EFFICIENT</th>
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<td><strong>0.74</strong></td>
</tr>
</tbody>
</table>

---

\(^7\) The table includes 22 high-income countries and one jurisdiction, Hong Kong SAR China. Income groups are classified according to the World Bank’s standard classification, among high, middle and low-income countries, based on their per capita gross domestic product. See: [www.worldbank.org](http://www.worldbank.org)
<table>
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<td>0.64</td>
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<td>0.66</td>
<td>0.67</td>
<td>0.89</td>
<td>0.78</td>
</tr>
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<td>0.70</td>
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<td>0.80</td>
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<td>0.64</td>
<td>0.69</td>
<td>0.89</td>
<td>0.75</td>
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<td>0.76</td>
<td>0.61</td>
<td>1.00</td>
<td>0.90</td>
</tr>
<tr>
<td><strong>High-income countries (avg)</strong></td>
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<td>0.57</td>
<td>0.80</td>
<td>0.69</td>
<td>0.66</td>
<td>0.88</td>
<td>0.76</td>
</tr>
</tbody>
</table>

The following table presents the results of independent sample T-tests comparing high-income countries by legal family.

<table>
<thead>
<tr>
<th></th>
<th>CIVIL ACCESS</th>
<th>CIVIL IMPARTIAL</th>
<th>CIVIL EFFICIENT</th>
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<th>ADR ACCESS</th>
<th>ADR IMPARTIAL</th>
<th>ADR EFFICIENT</th>
</tr>
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<td><strong>Common law Vs. Civil law</strong></td>
<td>-3.98**</td>
<td>-0.32</td>
<td>2.62*</td>
<td>0.45</td>
<td>2.33*</td>
<td>0.45</td>
<td>0.81</td>
<td>-0.59</td>
</tr>
<tr>
<td><strong>Common Vs. French</strong></td>
<td>-2.80*</td>
<td>0.28</td>
<td>2.06†</td>
<td>0.50</td>
<td>2.82*</td>
<td>0.94</td>
<td>1.86†</td>
<td>0.11</td>
</tr>
<tr>
<td><strong>Common Vs. German</strong></td>
<td>-2.92*</td>
<td>0.15</td>
<td>2.56*</td>
<td>0.93</td>
<td>2.17*</td>
<td>-0.08</td>
<td>0.31</td>
<td>-0.19</td>
</tr>
<tr>
<td><strong>Common Vs. Scandinavian</strong></td>
<td>-1.69</td>
<td>-2.79*</td>
<td>-0.53</td>
<td>-1.80</td>
<td>-0.09</td>
<td>0.18</td>
<td>-2.33*</td>
<td>-2.60*</td>
</tr>
</tbody>
</table>

† p<0.1, * p<0.05, **p<0.01, *** p<0.001,

These analyses support the notion that the civil law and common law traditions have developed different judicial equilibriums. Among high-income countries in both traditions justice appears to be equally impartial. However, there are statistically significant differences between common law and civil law countries in terms of the trade-off between access and efficiency of justice. The delivery of civil justice in
common law countries appears to be more efficient (T-stat 2.62*), and less accessible (T-
stat -3.98**) than in civil law countries. Scandinavian countries, on the other hand,
outperform both civil and common law countries in terms of judicial efficiency, while
also providing as much access to civil justice as the French and German origin countries.
They also obtain significantly higher scores in terms of the impartiality of the civil justice
system.

In terms of criminal justice, the numbers suggest that both civil and common law
countries deliver equally impartial justice. However, criminal justice is statistically
significantly more efficient in common law countries (t-stat 2.33*). Unfortunately, no
measure of access to criminal justice is available. Finally, there appears to be no
significant difference in the efficiency, accessibility and impartiality of alternative dispute
resolution mechanisms available in civil and common law countries.

Legal traditions among transplant countries

When the same comparison is applied to middle-income countries, results are
very different. The following table shows the country scores obtained by 35 middle-
income countries included in the sample, grouped by legal tradition.

<table>
<thead>
<tr>
<th>Country</th>
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<th>CIVIL IMPARTIAL</th>
<th>CIVIL EFFICIENT</th>
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<th>CRIMINAL EFFICIENT</th>
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<th>ADR IMPARTIAL</th>
<th>ADR EFFICIENT</th>
</tr>
</thead>
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<td>0.58</td>
<td>0.28</td>
<td>0.56</td>
<td>0.45</td>
<td>0.65</td>
<td>0.62</td>
<td>0.60</td>
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<td>Jamaica</td>
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<td>0.37</td>
<td>0.63</td>
<td>0.36</td>
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<td>0.44</td>
<td>0.50</td>
<td>0.55</td>
<td>0.72</td>
<td>0.86</td>
<td>0.63</td>
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<td>0.48</td>
<td>0.32</td>
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<td>0.73</td>
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<td>0.60</td>
<td>0.30</td>
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<tr>
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<tr>
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<td>0.49</td>
<td>0.45</td>
<td>0.47</td>
<td>0.73</td>
<td>0.60</td>
<td>0.64</td>
</tr>
<tr>
<td>MICs (avg)</td>
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<td>0.41</td>
<td>0.50</td>
<td>0.41</td>
<td>0.63</td>
<td>0.66</td>
<td>0.60</td>
</tr>
</tbody>
</table>

The following table presents the results of independent sample T-tests comparing middle-income countries by legal family.
Results are very interesting. When only middle-income countries are taken into account, the differences across legal families observed among high-income countries disappear. There are no statistically significant differences between civil law and common law countries in terms of the efficiency and impartiality of civil and criminal justice, or in the accessibility, efficiency and impartiality of private arbitration. Only a statistical trend is noted in the case of accessibility of civil justice, where civil law countries appear to be more accessible than their common law counterparts (t-stat -2.00†). This stands in sharp contrast to the strongly significant variations across legal families found among high-income countries.

Income groups - 66 countries

The following table presents the results of independent sample T-tests comparing 66 countries (23 high-income, 35 middle-income and 8 low-income), by income levels.

Table 5. Independent sample T-tests by income level

<table>
<thead>
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<th>CIVIL ACCESS</th>
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<th>CIVIL EFFICIENT</th>
<th>CRIMINAL IMPARTIAL</th>
<th>CRIMINAL EFFICIENT</th>
<th>ADR ACCESS</th>
<th>ADR IMPARTIAL</th>
<th>ADR EFFICIENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>High-income v. Middle-income</td>
<td>3.72***</td>
<td>9.30***</td>
<td>5.38***</td>
<td>13.45***</td>
<td>8.34***</td>
<td>0.50</td>
<td>4.92***</td>
<td>5.77***</td>
</tr>
<tr>
<td>High-income v. Low-income</td>
<td>5.00***</td>
<td>8.47***</td>
<td>2.96**</td>
<td>10.48***</td>
<td>6.35***</td>
<td>-0.51</td>
<td>4.65**</td>
<td>4.23***</td>
</tr>
<tr>
<td>Middle-income v. Low-income</td>
<td>3.15**</td>
<td>2.95**</td>
<td>-0.41</td>
<td>1.92</td>
<td>0.08</td>
<td>-0.83</td>
<td>2.83**</td>
<td>0.54</td>
</tr>
</tbody>
</table>

† p<0.1, * p<0.05, **p<0.01, *** p<0.001,
When countries are grouped by income level, income appears to be a defining factor for all justice effectiveness variables, except one. The delivery of justice in high-income countries significantly outperforms middle and low income countries in all dimensions, with the only exception of the accessibility of private arbitration.

Middle-income countries significantly outperform low-income countries in the delivery of accessible and impartial civil justice, and impartial private arbitration. Interestingly, the justice gap between high and middle-income countries appears to be wider than that between middle and low-income countries, particularly with regard to criminal justice outcomes. The efficiency of civil justice, as well as the efficiency and impartiality of criminal justice in middle-income countries, are not higher than in low-income countries.

**Legal origin, income level, and corruption**

The following tables present the results of a series of linear regression analyses of the five variables of civil and criminal justice effectiveness, among 23 high-income and 35 middle-income countries.

<table>
<thead>
<tr>
<th></th>
<th>High Income</th>
<th>Middle Income</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>β</td>
<td>β</td>
</tr>
<tr>
<td>Legal Origin Common Law</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Comparison category</td>
<td>β</td>
<td>β</td>
</tr>
<tr>
<td>Legal Origin French</td>
<td>.602 **</td>
<td>.632 **</td>
</tr>
<tr>
<td>Legal Origin German</td>
<td>.625 **</td>
<td>.697 **</td>
</tr>
<tr>
<td>GDP per capita</td>
<td>.178</td>
<td>.169</td>
</tr>
<tr>
<td>Absence of Corruption</td>
<td>.053</td>
<td>.434 *</td>
</tr>
<tr>
<td>(Constant)</td>
<td>***</td>
<td>***</td>
</tr>
</tbody>
</table>

Table 6. Civil Access

<table>
<thead>
<tr>
<th></th>
<th>High Income</th>
<th>Middle Income</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>R²</td>
<td>β</td>
</tr>
<tr>
<td></td>
<td>.423</td>
<td>.452</td>
</tr>
<tr>
<td>(Constant)</td>
<td>.118</td>
<td>.118</td>
</tr>
</tbody>
</table>

† p<0.1, * p<0.05, **p<0.01, *** p<0.001.

8 Upper and lower middle-income countries are grouped together in this analysis. While there are some variations among these two subgroups of countries, they are comparatively smaller than those between high, middle and low-income countries.
Among high-income countries both French and German civil law countries deliver more accessible justice than their common law peers. These results hold after introducing GDP per capita and absence of corruption in models 2 and 3. Among middle-income countries, however, results are different. When GDP per capita is taken into account, civil law countries do not deliver more accessible justice than their common law peers. Interestingly, legal origin turns significant when absence of corruption is introduced.

<table>
<thead>
<tr>
<th>Table 7. Civil Efficiency</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>High Income</strong></td>
</tr>
<tr>
<td>β</td>
</tr>
<tr>
<td>Legal Origin Common Law</td>
</tr>
<tr>
<td>Legal Origin French</td>
</tr>
<tr>
<td>Legal Origin German</td>
</tr>
<tr>
<td>GDP per capita</td>
</tr>
<tr>
<td>Absence of Corruption</td>
</tr>
<tr>
<td>(Constant)</td>
</tr>
<tr>
<td>R²</td>
</tr>
</tbody>
</table>

† p<0.1, * p<0.05, **p<0.01, *** p<0.001,

Among high-income countries, common law countries deliver more efficient justice than their civil law (French and German) peers. These results hold after introducing GDP per capita. However, when absence of corruption is taken into account, differences across legal families disappear. Among middle-income countries there are no statistically significant differences across legal families in the efficiency of the civil justice.
Legal origin and GDP per capita are not significant predictors of impartiality of civil justice among high-income countries or middle-income countries. As expected, absence of corruption is a strong predictor of impartiality of civil justice among both income groups.

Among high-income countries, legal origin and GDP per capita are not significant predictors of impartiality of criminal justice. Among middle-income countries, legal origin is not significant when taken alone (model 1), but it becomes significant when GDP per capita is introduced (model 2). As expected, absence of
corruption is a strong predictor of impartiality of criminal justice among both income groups.

<table>
<thead>
<tr>
<th></th>
<th>High Income</th>
<th>Middle Income</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>B</td>
<td>β</td>
</tr>
<tr>
<td>Legal Origin Common Law</td>
<td>Comparison category</td>
<td></td>
</tr>
<tr>
<td>Legal Origin French</td>
<td>-.490 *</td>
<td>-.489 *</td>
</tr>
<tr>
<td>Legal Origin German</td>
<td>-.525 *</td>
<td>-.525 *</td>
</tr>
<tr>
<td>GDP per capita</td>
<td>.000</td>
<td>-.102</td>
</tr>
<tr>
<td>Absence of Corruption</td>
<td>.612 **</td>
<td></td>
</tr>
<tr>
<td>(Constant)</td>
<td>***</td>
<td>***</td>
</tr>
<tr>
<td>R²</td>
<td>.290</td>
<td>.290</td>
</tr>
</tbody>
</table>

† p<0.1, * p<0.05, **p<0.01, ***p<0.001.

Legal origin is a significant predictor of criminal efficiency among high-income countries when taken alone and when GDP per capita is considered (models 1 and 2), but it loses significance when absence of corruption is introduced in model 3; it only remains as a trend for French origin countries. Among middle-income countries legal origin and income per capita are not significant predictors of criminal efficiency. Absence of corruption is significantly associated with criminal efficiency in both income groups.

**Legal origin - 66 countries**

The following table presents the results of independent sample T-tests comparing by legal family, 66 countries of all income levels. Individual country scores for low-income countries are presented below.
Independent sample T-tests

<table>
<thead>
<tr>
<th></th>
<th>CIVIL ACCESS</th>
<th>CIVIL IMPARTIAL</th>
<th>CIVIL EFFICIENT</th>
<th>CRIMINAL IMPARTIAL</th>
<th>CRIMINAL EFFICIENT</th>
<th>ADR ACCESS</th>
<th>ADR IMPARTIAL</th>
<th>ADR EFFICIENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Common-law Vs. Civil-law</td>
<td>-3.84***</td>
<td>0.45</td>
<td>0.80</td>
<td>1.32</td>
<td>1.37</td>
<td>0.02</td>
<td>-0.13</td>
<td>-0.03</td>
</tr>
<tr>
<td>Common Vs. French</td>
<td>-2.80**</td>
<td>1.68†</td>
<td>1.35</td>
<td>2.70**</td>
<td>2.29*</td>
<td>0.24</td>
<td>0.66</td>
<td>1.01</td>
</tr>
<tr>
<td>Common Vs. German</td>
<td>-4.55***</td>
<td>-1.33</td>
<td>-025</td>
<td>-1.04</td>
<td>-067</td>
<td>-086</td>
<td>-1.45</td>
<td>-1.56</td>
</tr>
<tr>
<td>Common Vs. Scandinavian</td>
<td>-2.42*</td>
<td>-2.50*</td>
<td>-1.61</td>
<td>-6.44***</td>
<td>-1.44</td>
<td>0.10</td>
<td>-1.59</td>
<td>-2.42*</td>
</tr>
</tbody>
</table>

† p<0.1, * p<0.05, **p<0.01, *** p<0.001,

When countries of all income levels are taken into account, common-law countries appear to deliver less accessible justice than civil-law countries, and more impartial and efficient criminal justice than the French variant of the civil-law family. However, these findings have little practical significance, as they must be considered in light of the relatively higher income of German-origin and common-law countries. Scandinavian countries outperform civil and common-law countries, but these results have no practical relevance, as this legal family does not include any middle or low-income countries.

Low-income countries

The following table shows the country scores obtained by the 8 low-income countries included in the sample.

<table>
<thead>
<tr>
<th></th>
<th>CIVIL ACCESS</th>
<th>CIVIL IMPARTIAL</th>
<th>CIVIL EFFICIENT</th>
<th>CRIMINAL IMPARTIAL</th>
<th>CRIMINAL EFFICIENT</th>
<th>ADR ACCESS</th>
<th>ADR IMPARTIAL</th>
<th>ADR EFFICIENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bangladesh</td>
<td>0.50</td>
<td>0.37</td>
<td>0.30</td>
<td>0.48</td>
<td>0.50</td>
<td>0.75</td>
<td>0.30</td>
<td>0.55</td>
</tr>
<tr>
<td>Cambodia</td>
<td>0.51</td>
<td>0.23</td>
<td>0.37</td>
<td>0.37</td>
<td>0.42</td>
<td>1.00</td>
<td>0.00</td>
<td>0.36</td>
</tr>
<tr>
<td>Ethiopia</td>
<td>0.49</td>
<td>0.48</td>
<td>0.58</td>
<td>0.41</td>
<td>0.44</td>
<td>0.75</td>
<td>0.58</td>
<td>0.47</td>
</tr>
<tr>
<td>Ghana</td>
<td>0.54</td>
<td>0.65</td>
<td>0.47</td>
<td>0.67</td>
<td>0.39</td>
<td>0.83</td>
<td>0.75</td>
<td>0.78</td>
</tr>
<tr>
<td>Kenya</td>
<td>0.47</td>
<td>0.33</td>
<td>0.44</td>
<td>0.52</td>
<td>0.44</td>
<td>0.53</td>
<td>0.71</td>
<td>0.71</td>
</tr>
<tr>
<td>Kyrgyzstan</td>
<td>0.63</td>
<td>0.27</td>
<td>0.45</td>
<td>0.34</td>
<td>0.38</td>
<td>0.67</td>
<td>0.33</td>
<td>0.57</td>
</tr>
<tr>
<td>Liberia</td>
<td>0.25</td>
<td>0.42</td>
<td>0.37</td>
<td>0.37</td>
<td>0.21</td>
<td>0.33</td>
<td>0.00</td>
<td>0.48</td>
</tr>
<tr>
<td>Uganda</td>
<td>0.45</td>
<td>0.44</td>
<td>0.41</td>
<td>0.47</td>
<td>0.50</td>
<td>0.73</td>
<td>0.45</td>
<td>0.71</td>
</tr>
</tbody>
</table>

Low-income (avg) 0.48 0.40 0.42 0.45 0.41 0.70 0.39 0.58