CHAPTER 4
ON THE ORIGIN AND HISTORY OF LAW

THE EMERGENCE OF LAW

In Chapter 1 we saw that the word "law" has many connotations. In one important and popular sense, law refers to certain definite *formal* institutions and their processes. It is "legal" to take a case to court; if a tribe or a union-management committee goes to a mediator, if husband and wife take their problems to a minister or marriage counsellor, they are not using "law" in this formal sense. One can ask, then, under what conditions, and when, will a society, or a part of society, decide to formalize dispute settlement and social control. The question can be asked in two ways. First, it can be asked as a historical or evolutionary question. It can also be asked in a second (and more general) form. When and why will a group, a family, a club, or any other system, large or small, decide that it should *formalize* its processes and institutions—that is, create a legal system for itself? In this chapter, we will look briefly at this general question; then we will sketch some of the main strands in the history of legal systems, and the question of legal evolution.

The beginnings of law, in the dim past, are beyond recall. Formal legal systems emerged long before the invention of writing. Law is not easily inferred from pottery shards or arrowheads. Anthropological study of simple societies does offer some clues. Many preliterate cultures have elaborate systems of law; others do not.

A study by Richard D. Schwartz gives us a glimpse of the conditions under which "law" bubbles up from amorphous social rela-

tions.[1] Schwartz compared two Israeli settlements. One of them was a *moshav* (a cooperative), the other a *kvutza* (a more sternly collective community). The *kvutza* had been founded on strict socialist principles. It did not recognize private property. Children were communally raised in the *kvutza*. Members ate their meals in a common dining hall. The *moshav* took a less extreme approach to group living. Each family—parents and children—had its own little bungalow, where they ate and slept by themselves.

The *moshav* had a formal legal structure; the *kvutza* did not. In the *moshav,* a special judicial committee settled disputes that arose among members. Informal pressures—words, gestures, expressions of disapproval or approval—enforced community standards in the *kvutza*. Informal controls had been tried, and abandoned, in the *moshav*. They were too weak to work. When a community, in other words, cannot "adequately" control its members' behavior, through informal group pressures, it will design for itself a system of formal controls.

But why is this so? We can, of course, turn the question around. When will a society be satisfied with informal controls? These controls are strong enough when members of the group generally agree about the rules (what they are) and about their duty to follow them. A society can rely on informal controls, too, when members share common views about the lines of authority. This second condition can sometimes take the place of the first, and vice versa. That is, a group need not agree about rules, if members agree about authority. And if there is strong agreement about rules, agreement about authority is not so vital.

A father, a teacher, a chief rules a family, classroom, or clan. No problem arises, and no one has any particular need for formal "law," so long as no one questions the right of the ruler to rule. Failing that, one would still not need formality—in the little world of the classroom, say—so long as the members agreed about the rules of right conduct. In that case, when someone strayed from the path, he or she might meet swift informal "punishment"—laughter, a sneer, perhaps a beating. E. A. Hoebel describes how Eskimos deal with killers.[2] There is no organized government, but a kind of consensus wells up from the group: the murderer must die. A civic-minded man undertakes the job of killing. No blood-feud follows, however, and the matter ends there. The system works, and without formal structures, because of general agreement about norms. Agreement ensures, first, that people can recognize a deviant; second, that the one who assumes the enforcer's role will find public approval and

1. Richard D. Schwartz, "Social Factors in the Development of Legal Control: A Case Study of Two Israeli Settlements," *Yale Law Journal*, 63: 471 (1954).

2. E. Adamson Hoebel, *The Law of Primitive Man*, Cambridge: Harvard University Press, 1961, pp. 88–89.

public support. A family does not need formal law if its members agree about the rules. Nor do they need it if the children (say) accept father's (or mother's) word as final, that is, accept it as law.

These two conditions, however, imply a third. The informal sanctions must have *power*. That is why they work best in small societies, where people are in face-to-face contact. Disapproval, ostracism, and banishment do not pack enough muscle in a big, bustling society where people come and go, and there is much interaction among strangers. Small societies, where people rub elbows every day, make powerful use of shame. In the American colonies, lawbreaker were put in the pillory or stocks, so that every passerby could see them. Shame loses its force in societies too large for consensus. Informal sanctions only work in a society small and compact enough for these sanctions to sting.

About 250 people live on Tristan da Cunha, a small, barren island in the South Atlantic. They are almost totally cut off from the outside world. The islanders are descended from a handful of English sailors who took mulatto brides from the island of St. Helena. Nominally, the British own the island, but there is virtually no organized government. There are no courts, no "laws," and almost no deviance, as outsiders would understand it. A serious crime has never been committed on the island. There are informal sanctions—public teasing is one—and these sanctions, however mild, are devastating on an island where everyone knows everyone else, and where there is *absolutely no escape* from the neighbors. Tristan da Cunha is "transparent"—"every islander is aware that in all his doings and sayings he is under the Argus-eyed vigilance of the community."[3]

When members of a society cannot agree on essentials, or if they cannot or do not trust each other, they will put their rules and relationships in writing and make formal institutions for themselves. But the shift from informal to formal has many consequences. Formality changes the way laws are made, enforced, and applied; it can revolutionize the authority system. This happened, for example, in British India. According to Sir Henry Maine, writing in 1871, the British, when they established Courts of Justice, had not "the slightest design of altering the customary law of the country." But this change, which they made "without much idea of its importance" was unwittingly quite momentous. Before this, the "body of persons to whose memory the customs are committed" had "probably always been a quasi-legislative as well as a quasi-judicial body;" it had "always added to the stock of usage by tacitly inventing new rules."

3. Peter A. Munch, "Sociology of Tristan da Cunha," p. 305, in *Results of the Norwegian Scientific Expedition to Tristan da Cunha, 1937–1938*, ed., Erling Christopherson, Vol. 1, Oslo: Norske Videnskaps-Akademi, 1946. I am indebted to Professor Walter Weyrauch of the University of Florida for this reference, and for other materials on the informal legal system of the island.

Customary law, reduced to writing, formalized, and given over to Western-style courts to be administered, lost its subtle flexibility. Now, when new rules and doctrines were needed, they were brought in from outside—that is, from English law. Customary law was thereby eroded along with the social structure it implied.[4]

A THUMBNAIL HISTORY OF LAW AND LEGAL THOUGHT

As we have said, the beginnings of law are lost beyond a trace. Countless societies came and went without any surviving evidence of legal life. Pottery fragments, old bones, and the like are not revealing. A few advanced societies—fairly recent, as evolutionary history goes—have left behind some fragments or texts, a clay table here and there, an inscription, a crumbling papyrus. Even the oldest of these is relatively young. In any period, the living law is hard to know. This is true today, and it was even truer in the past. Formal legal documents and codes are preserved; informal practices and customs pass away, without clear records.

Among the earliest legal texts known to scholars is the "code" of Hammurabi, King of Babylon (about 1800 B.C.).[5] When discovered, Hammurabi's code created a stir in the scholarly world. The code added much to our knowledge of the law of the ancient Near East, and it shed light on the (much later) codes preserved in the Old Testament. These codes were now seen as resting, in part, on older legal traditions. The codes of the ancient Near East seem in general to rest on a common fund of legal ideas. Ancient peoples probably borrowed from each other, but we would also expect a good deal of similarity, simply because ancient societies had many points in common.

In the ancient world, rules of law (or what we would now call rules of law) were intertwined with religious norms and taboos. The Hebrews, for example, drew no real distinction between religious and secular norms. The two types were formally identical. A society that believes *all* law comes from God will not treat murder or theft as different from witchcraft, blasphemy, or incest God has forbidden both kinds of acts. The book of Deuteronomy (mainly 7th century B.C.) prescribes death by stoning for those who worship the sun or the moon (Chap. 17); such rules mix freely with rules about buying and selling, and about ordinary crime (theft or murder). Moreover, political authority in the ancient

4. Sir Henry S. Maine, *Village Communities in the East and West*, 2nd ed., London: J. Murray, 1872, pp. 70, 71, 75.

5. On the nature of Hammurabi's laws see G. R. Driver and John C. Mills, *The Babylonian Laws*, Vol. 1, New York: Oxford University Press, 1952, p. 41.

world regarded itself as divine. God, not man, was the author of the law, which God handed down to his servant, Moses. Hammurabi announces in his code that the god Marduk commanded him "to give justice to the people of the land."

The law of Rome also begins with a "code," the so-called *Twelve Tables*. According to tradition, the *Tables* date from the fifth century B.C.; they were engraved on bronze tablets and stood on view in the Roman Forum.[6] Neither the Twelve Tables nor the other ancient law-texts were codes in the modern sense of the word. They were not systematic statements of the whole law, or even of whole branches of law. They could be understood only against the backdrop of customary norms, which they changed or added to in some particular way. Hammurabi considered himself a reformer, not a codifier. His "code" was a patchwork of laws on this or that subject; it spoke only where emphasis or amendment of the old law was needed.

LEGAL THOUGHT IN THE ANCIENT WORLD

In every society with a consciousness of law, people hold opinions about what law is and should be, where it comes from, and what makes it binding. For most people, these ideas are taken for granted. *Formal legal philosophy,* however, is far less general among societies than law itself. Ancient law, *except* for the Romans, "was law without legal science," as J. Walter Jones has put it. The Greeks, for example, had "little interest in legal questions, except when they were political and ethical questions as well."[7] This does not mean that the Greeks had no ideas about law, its nature, and its function; but they did not create a formal legal philosophy or write legal treatises, arranging the laws in some rational system of order.

Of course, formal legal thought—philosophy of law—is not independent of society. Common sense theories of law at large in society, and the nature of the legal profession, determine the nature of formal legal thought, if any.[8]

Without a self-conscious legal (or judicial) profession, a society will

6. The tablets were later destroyed, and no complete text has survived. But references to and quotations from the *Tables* are scattered about in works of Roman authors, so that quite a lot is known about their contents.

7. J. Walter Jones, *Historical Introduction to the Theory of Law*, Clifton, N.J.: Augustus M. Kelley, 1940, p. 1.

8. In totalitarian states, legal theory must follow the official ideology. Soviet jurists *must* be Marxists, and must follow the official line. Those who deviate do so at their peril. Some of the leading Soviet philosophers of law disappeared in the 1930's.

not develop legal theory, or legal science, in Jones's sense. There will be no learned treatises, no Blackstone, no Pothier, no Roscoe Pound, no Hans Kelsen.[9] Even without legal theory, however, a society will have theory about law. In fact, absence of legal theory is itself a theory of law; it is the theory that law cannot be separated from social, ethical, or religious life. A society that treats social norms as legal norms, or that does not divide its single mass of norms into legal and nonlegal norms (or religious and secular norms), will not have legal theory. In hindsight, we can analyze the norms of ancient societies, labeling these norms as legal, those as religious, these as ethical. But we are making a distinction never made by the people of those societies. Hammurabi had ideas about law, but no philosophy of law. Most preliterate societies, too, past and present, have undoubtedly lacked a full, formal theory of law.

In Rome, however, where a true legal profession gradually developed we find the first known books *about* law—the first legal treatises. During the Imperial Period, professional law schools were located at Rome, Constantinople, Alexandria, Athens, and Beirut. Roman jurists wrote text-books, commentaries on particular aspects of law, and also on the law in general. The jurists enjoyed working with legal concepts, analyzing them, and arranging them in a logical and systematic order. On the whole, they were practical-minded and concrete. Gaius (second century A.D.), in his *Institutes* was clearly writing law for those who wanted to solve legal problems, deducing propositions of law from known concepts and principles. Gaius' work is the one text of classical Roman law that has survived largely as written. No other ancient society had anything like it, as far as is known.

POST CLASSICAL LAW

Roman law was unique in its logic and order, and in its sway. Rome was mistress of a vast empire, which had swallowed up all of its rivals and conquered the civilized Western world. The western half of that empire collapsed in the fifth century A.D. In the sixth century, the Eastern emperor, Justinian, from his capital in Constantinople ordered a restatement and reform of the law. By 535, the *Codes of Justinian* had been completed. One part, the *Digest*, gathered together extracts from the works of classical jurists, discarding what was obsolete and unusable. Justinian also republished those older laws he intended to keep in force.

9. Sir William Blackstone (1723–1780), author of *Commentaries on the Law of England;* Robert Joseph Pothier (1699–1772), an influential French jurist and author of treatises; Roscoe Pound (1870–1964), American law teacher and legal philosopher; Hans Kelsen (1881–1973), Austrian philosopher of law.

We owe most of our hard knowledge of classical Roman law to Justinian; the original sources, with rare exceptions (Gaius' *Institutes*) have been lost.

In the West, Germanic kingdoms sprang up on the corpse of Rome. They enacted their own codes of law; typically, these were a mélange of Roman and Germanic elements. The formal unity of classical law fell apart. In the Middle Ages, law was intensely local. Each little center of political power—each barony, each town—had its own legal system. Within a culture-area (say, Germany or France), the local legal systems tended to be similar, though not identical, just as today the laws of North and South Carolina are similar but by no means identical.

In the Middle Ages, too, the voice of the Church was a powerful one; medieval legal thought was the servant of the medieval (Christian) view of the world. The legal philosophy of St. Thomas Aquinas, for example, rested firmly on the teachings of the Church. St. Thomas developed the idea of a "natural law," implanted in human beings as part of their nature. This *lex naturae* (law of nature) was the participation of humanity as rational beings in the eternal laws of God.[10]

The outstanding event in medieval law–and in medieval legal thought—was the rediscovery and revival of Roman law as an object of study. This began in the Italian universities. It spread from there to centers of learning in other parts of Europe. Concepts and rules out of Justinian were "received" in most of Europe. (The major exception was England.) From the time of the "reception" on, European law took on a deeper coloration of Roman law, and European society grew accustomed to the idea that law was an object of scholarship, to be studied at universities and expounded by learned men. But the "reception" did not bring uniformity to European law. The law of France and Germany still lay shattered into fragments. The law of each area or principality was its own unique mixture of "custom" and Rome.

As the political, social, and economic underpinnings of medieval society changed, so did the structure, substance, and culture of its law. The old theories of "natural law" were based on the dogmas of a universal church. The jurists recast them in a more secular form after the Reformation. "Natural" principles of law were derived from innate human reason. This theory of law found it hard to account for, or justify, the localism and variability of legal systems. Human beings were everywhere the same, had the same mind, the same inborn rights, the same reasoning powers. There was no excuse then, for the quirks and foibles of local custom, or for the historical survivals that so strongly colored the various systems of law. Why should the law be so different in two towns a stone's

10. J. W. Jones, *Historical Introduction to the Theory of Law*, Clifton, N.J.: Augustus M. Kelley, 1940, p. 105.

throw away from each other? "Curious, that a river acts as the boundary of the law," said Pascal, "that what is truth on this side of the Pyrenees is error on that side."

Ultimately, the Age of Reason became the age of legal codification. What society needed was a single, rational code. In it, the lawmaker would set out, clearly and distinctly, principles of law flowing from human nature and the nature of life in society. Moreover, such a code would be uniform throughout the land. It can hardly be an accident that the codification movement went hand in hand with the rise of the unitary, powerful, absolutist nation-state. The Code Napoleon in France (1804) was the crowning achievement of the movement. Its influence was felt throughout the civil law world; no modern legal text ever won so great an empire, though the German civil code, adopted almost a century later, has been almost as influential in the twentieth century as the French code was in the nineteenth. Napoleon's armies spread his code, but the later conquests, spearheaded by French legal thought, were longer-lasting. European law today is codified law.

What do the codes contain? Basically, in Western Europe, they set out those principles that make up, in essence, the "lawyer's law" of their respective countries. Legal thought in Europe tends to agree that:

1. The codes are the highest, and in some ways the only valid sources of law; local custom and judicial decisions are second-best, or of no real validity.
2. The codes state *all* of the law. They are gapless—that is, every legal problem finds a solution somewhere in the text of the codes.
3. Law is a science; it is rational and systematic. Scholars develop and use rational principles to explain, correct, and apply the law. The law is certainly not frozen into some mystical and immutable form; on the other hand, it is emphatically not mere public opinion, not to mention naked expediency, interest or whim.

ON LEGAL EVOLUTION

Once a "legal system" exists, does it follow definite patterns of development or growth? Does law evolve? Are there "laws" of legal development? There are among the earliest questions taken up by social scientists looking at law. Evolution, as we normally use the term, means progress from a lower or less complex form to one that is (by some standard) higher, better, or more complex. "Legal evolution" means that legal systems, as they develop or change, pass through definite stages in some definite order. It does not mean that every system will necessarily move from stage 1 to (say) stage 4; after all, there are many "primitive" systems. But the idea means that a system must start at stage 1, and pass through 2 and 3 (in that order) before reaching 4.

Is there such a pattern of growth? Sir Henry Maine, in his brilliant book, *Ancient Law* (1861), thought he saw one. Early law was generally patriarchal. Individuals had few rights or obligations. The basic legal unit was the family, in which the father ruled. A person's rights and duties were more or less determined by status, and they were fixed by the facts of that person's birth. An eldest son, born into a Hindu caste, would grow up to have rights and duties distinctively different from those of a daughter or a member of another caste. Position at birth wrote a fixed and rigid program for many aspects of life. Modern law, on the other hand, is the law of free individuals; people shift in and out of legal relations, voluntarily, through bargain and agreement. In Maine's words, the "movement of the progressive societies has been uniform in one respect. Through all its course, it has been distinguished by the gradual dissolution of family dependency, and the growth of individual obligations in its place. The Individual is steadily substituted for the Family, as the unit of which civil laws take account. . . . We seem to have steadily moved toward a phase of social order in which . . . relations arise from the free agreement of Individuals. . . . The movement of the progressive societies has hitherto been a movement from Status to Contract."

Other social scientists and legal scholars have detected a somewhat similar pattern in history. Emile Durkheim (in his *Division of Labor in Society*), saw a movement from penal law, stressing punishment, to contract law, stressing restitution. Max Weber, too, found modern law distinctively *rational,* compared to older periods of law.[11]

Recently, some scholars have seen a kind of evolution in the way legal ideas develop among children. Children, according to these studies, develop stages of legal consciousness as they grow.[12] First, they feel they must obey rules because of fear of punishment. As they grow older, they learn that obedience to rules is necessary for social order. Still older children *may* come to understand "autonomous moral principles;" they judge rules one by one, testing them against ethical standards. Hence, some attitudes toward law are more childish or primitive than others. Perhaps, then, as humanity grows, its ideas about law change too, moving from lower to higher stages.

Child development, of course, is a complex subject. Scholars do not

11. Max Rheinstein, ed., *Max Weber on Law in Economy and Society,* Cambridge: Harvard University Press, 1954, pp. 61–64. Law making and law finding are "rational," when they follow general principles and rules; they are "irrational" when they depend on magic, oracular utterances, ordeals, or revelation, or when they are wholly based on hallowed tradition. Modern law is rational in authority, and rational in its methods.

12. June Tapp and Lawrence Kohlberg, "Developing Sense of Law and Legal Justice," *Journal of Social Issues,* Vol. 27, No. 2, p. 65 (1971); June Tapp and Felice Levin, "Legal Socialization: Strategies for an Ethical Legality," 27 *Stanford Law Review,* 27: 1 (1974).

agree on whether there are stages of moral or legal development.[13] The studies are studies of attitudes, rather than behavior. Children, as they grow up, learn (among other things) how to express attitudes that society values. In some societies, children are *trained* to respect authority; no one reaches the "higher" stages. The stages, in short, may be learned and culture bound, rather than inborn and programmed.

Whatever the case, it would be rash to project these studies of children onto a broader canvas. Legal systems, to be sure, have changed greatly in historical times. But historical time is a mere speck of evolution. As far as we know, human nature has not changed in recorded history. The evolution of law has been rapid and recent (in evolutionary terms), while inborn structures turn by a much slower clock, whose beat is in millions of years.

Theories of Legal Evolution Assessed

Recent scholarship has been skeptical, too, about theories of legal evolution. Anthropology rejects Maine's "patriarchal" theory, that is, the idea that society was organized in independent households, in which all power was in the hands of one man, the father or grandfather.[14] Durkheim's idea—that early law was largely penal—is either wrong, or unverifiable, or needs to be radically restated; otherwise, it is simply out of line with the facts about preliterate society.[15] Preliterate society was, if anything, more "restitutive" than modern society; often it was possible to pay for a wrong, even murder, and the distinction between tort[16] and crime was blurred.[17] Is "legal evolution" a meaningful concept

13. The methodology of Lawrence Kohlberg (the leading exponent of this school) and his followers, has come under attack. William Kurtines and Esther B. Greif, "The Development of Moral Thought: Review and Evaluation of Kohlberg's Approach," *Psychological Bulletin*, 81: p. 453 (1974).

14. See Robert Redfield, "Maine's *Ancient Law* in the Light of Primitive Societies," *Western Political Quarterly*, Vol. 3, p. 574 (1950). Redfield points out that Maine wrote before there were any sustained studies of primitive societies. Maine based his work on the early Greeks, Romans, Hebrews, and Hindus, whose societies were already quite advanced.

15. See Richard D. Schwartz and James C. Miller, "Legal Evolution and Societal Complexity," *American Journal of Sociology*, 70: p. 159 (1964).

16. A "tort" is a wrong that gives rise to an action for damages, but is not necessarily a crime. If I carelessly run my car into yours, I will not be arrested (unless I was wantonly reckless, or drunk); but I may well be liable "in tort" for the damages I caused.

17. On this point, see Leon S. Sheleff, "From Restitutive Law to Repressive Law: Durkheim's *The Division of Labor in Society Revisited*," *Archives Européenes de Sociologie*, 16: No. 1, p. 16 (1975).

at all? Legal systems are products of society. We expect them to change as society changes; unless we found a single path of evolution, for society in general, we should not expect to find such a path for *legal* evolution.

To be sure, there are fundamental differences between the law of modern nations, and the law of the Trobriand Islanders, or Cicero's Rome, or Charlemagne's France. Rome had no railroads, energy crises, sonic booms, fingerprinting, or computerized tax audits. New technology and new social conditions generate new needs and new problems; society fashions rules and institutions to cope. There is also a difference between the *culture* of modern and nonmodern law. Modern law holds firmly, in the main, to an *instrumental* theory. Ruling opinion, in almost every country, rejects the idea of law as divinely inspired, or based on natural law or immutable tradition. (A partial, striking exception is the hold of classical Islamic law on some conservative Moslem countries, such as Saudi Arabia.) Modern law is "rational" in Weber's sense. This does not mean that modern law is better at its job, or more "effective"[18] than other, older systems of law. But people today see law as a human product, not a product of God or tradition or nature. Law is a means to an end; it is something that society molds and shapes and shifts to suit its purposes. In this sense, law is rational indeed.

Legal evolution remains, in short, an open question. There may be definite patterns of change, as far as the content of law is concerned, or with regard to particular institutions. (A legal *profession*, we have noted, is a late and uncommon development.) Victorian England was capitalist; medieval Germany was feudal; the Soviet Union is socialist. No wonder contractual relations loomed so large in one legal system, status elements in the second, state planning in the third.[19] It is harder to find patterns among more *technical* elements of law, or in the short run, except at a level of abstraction so high as to almost lack meaning.

ON LEGAL DEVELOPMENT

One offshoot or relative of the concept of legal evolution is worth some further mention. This is "legal development." It is a subject of

18. To say that one legal system is more effective than another requires some test of effectiveness. But what would the standard of effectiveness be? It is not easy to see how one would decide that (for example) the law of modern Italy was more (or less) "effective" than the law of Caesar's Rome. Does it bring about more human happiness or satisfaction? Does it "fit" its society better? Is it better enforced?

19. See Robert B. Seidman, "Law and Development: A General Model," *Law and Society Review*, 6: p. 311 (1972).

vigorous debate.[20] Since 1945, old empires have dissolved. Britain, France, Portugal, and other colonial powers have lost or given up their overseas possessions. A hundred or more new sovereignties have come into being. Most new countries have kept part or all of their colonial law. Almost every new country is poor and underdeveloped. Many of them, especially in Africa, have no national traditions. They owe their boundaries to colonial wars. They are a jumble of peoples and languages. Politically, they want national unity; economically, they want to break out of poverty. Everyone talks about economic development and political development. Why not legal development? The older law (colonial or indigenous) must have been somehow underdeveloped; it should be modernized, made more uniform, rational, systematic. To many leaders and scholars, this means stamping out customary law; in all cases, it means somehow leveling regional subcultures.

The basic idea behind legal development is not at all new. The Japanese in the nineteenth century were in a great hurry to catch up with the West in technology and armies. They borrowed great chunks of Western law, to replace their own "backward" system. In the 1930's, Ataturk imposed a new code of family law, mostly Swiss, on Turkey, as part of *his* plan of modernization. More recently, the Ethiopian government called on a French legal scholar, René David, to draft a code for that ancient land. He obliged, without once setting foot in the country. Naturally, his code was European to the core.[21] These instances of borrowings assume, first, that "law" is a kind of technology, second, that it is in essence culture-free, and that it improves or evolves, and third, that "modern" law must be better than "older" law, just as modern medicine is better than leeches and witchdoctors, and a Boeing 747 goes faster and carries more than an ox-cart. If these assumptions are true, then the latest product of France *will* be better for Ethiopian development than a code fashioned out of native traditions.

It is easy to understand why third world leaders want a single, uniform, modern system of law. It would serve as an instrument of unity, like a national language, or a single political party. "Modern" law—

20. David M. Trubek, "Toward a Social Theory of Law: an Essay on the Study of Law and Development," *Yale Law Journal*, 82: 1 (1972); David M. Trubek and Marc Galanter, "Scholars in Self-Estrangement; Some Reflections on the Crisis in Law and Development Studies in the United States," *Wisconsin Law Review*, 1974: 1062 (1974); Lawrence M. Friedman, "On Legal Development," *Rutgers Law Review* 24: 11 (1969).

21. He sets forth his point of view in René David, "A Civil Code for Ethiopia: Considerations on the Codifications of the Civil Law in African Countries," *Tulane Law Review* 37: 187 (1963). The code provided, in Article 3347(1), for the abolition of "all rules whether written or customary previously in force concerning matters provided for in this code." See Kenneth R. Redden, *The Legal System of Ethiopia*, Charlottesville, Virginia: Michie Co., 1968, p. 72.

from France, or England, or Belgium, or Portugal—looks rational, suitable, and scientific. It is free from the influence of local tribes. A single legal system, radiating from the capital might indeed change the life of the law. A legal order of this kind would push aside village elders and chiefs. They would lose their grasp of the law and their authority to govern.[22] Civil servants, or professional judges would replace them. This change in the power structure, however, would not depend on the *content* of the law; any new rules would do, just as any new typewriter keyboard would tend to make older typists obsolete.

The ideas and assumptions of "legal development" are by no means confined to the West.[23] Socialist jurists too are convinced that their law (not only what it *does,* but its techniques and its habits) are better and more scientific than the historical rubbish of old peoples. They agree with the West that there is value in "legal science," of the European type; that modern law will hasten social development. But the traits most admired by "legal science" (uniformity, order and system) are paper traits. They are, in particular, traits of the elegant codes of continental Europe. These codes have had more influence in the Third World than the common law has had, except where Great Britain or the United States actually ruled. The civil law is neat; it is compactly packaged for export. The common law is cumbersome, unsystematic; to import it, is like carrying groceries home in one's hands without a shopping bag or net. In fact, the Code Napoléon teaches us about as much of the living law of France as we learn about Egypt from *Aida*. But this fact is a well-kept secret. It takes enormous pains to find out how law really works in practice; legal scholarship has largely ignored empirical reality. The evidence that economic growth and social development needs "developed" law (in the lawyerly sense) is scanty, to say the least. Little is known about the role of borrowed law in everyday life, in the borrowing countries—or for that matter, in the source countries. What little there is suggests, not unexpectedly, that impact is variable and complex. We have barely begun to understand it.

22. On the relationship between the power of chiefs, and their control of legal authority, in one new nation, see Ian Hamnett, *Chieftainship and Legitimacy, An Anthropological Study of Executive Law in Lesotho*, London: Routledge & Kegan Paul, 1975, especially Chap. 5.

23. In socialist East Germany, for example, after a short period of iconoclasm, jurists turned once more to the familiar concepts of "legal science." See, in general, Inga Markovits, *Sozialistisches und Bürgerliches Zivilrechtsdenken in der DDR*, Cologne: Verlag Wissenschaft und Politik, 1969.