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Development of Common Law in Civil Law Socieites

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DEVELOPMENT OF COMMON LAW IN CIVIL LAW SOCIETIES

By
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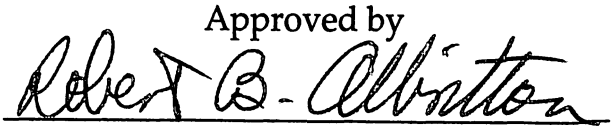

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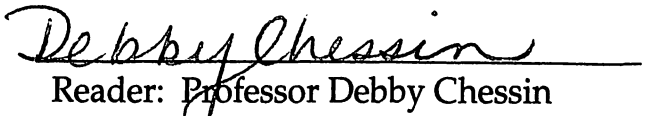

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ABSTRACT
CHASITY SHEA DAVIS: Development of Common Law in Civil Law Societies
(Under the direction of Robert Albritton)

This study examines conflicts that arise when two separate, distinct legal systems clash. The two legal systems at the center of this study are civil law and common law. A brief discussion outlines and defines the origins and usage of these two legal systems. Further discussion offers insights into situations where these two systems clash and conflicts arise.

Civil-law and common-law systems clash when the central government begins to penetrate remote and far-reaching areas of a country. The government and remote communities each have their own form of law embedded within governmental systems. Conflicts arise when the government's system of civil law intrudes on the common-law system of the remote communities and their established practices.

These conflicts are further exemplified by three country studies illustrating the conflicts that arose as a result of intrusions by central governments in the Philippines, Bangladesh, and Kalimantan. Examples of conflicts between these legal systems over environmental issues exemplify the conflicts within Thailand. This study concludes with a look at attempts of the

Thai government to reconcile such conflicts through the inclusion and implementation of customary practices in national environmental laws and policies.

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controversy for a prospective case. The *praetor* therefore held a powerful position due to the fact that he held the control of the solutions available to the parties involved in the controversy. The *praetor* was also responsible for giving edicts. Edicts are pronouncements about the law. These edicts became a primary source of private law due to the fact that there was only one other source of legal information, the legislation.

The second type of civil judge common to the Roman Republic is the *judex*. The *judex* served the traditional role as judge during the trials. The power of the *judex*, however, was even more limited than that of the *praetor*. While the *praetor* served a term of one year, the *judex* served a much shorter term. The *judex* was chosen by the parties to each case for the sole purpose of judging their case alone and was then given the authority to preside over the trial by the *praetor*. The selection of the *judex* was done on an *ad hoc* basis and lasted only as long as the trial over which he was ruling. As a result of the short-term and nonprofessional nature of this judiciary, there was a need for legal advice from competent, well-versed persons. This task fell to the jurists. The jurists prepared their responses to legal questions from *praetors* and *judices* in a written document called a *responsa*. The jurists frequently used specific statutes and statutory phrases from the Twelve Tables and the Edict as the basis for their opinions.

Not only did the jurists provide such important legal and technical advice to the judiciary, but they also filled a second role as legal counselors. Through the responses of the jurists, their *responsa*, the jurists allowed for the development

of a comprehensive philosophy of the law. This jurisprudence was separate from judicial decisions and allowed the Republic to grow with the changing demands of the growing pluralistic society. These facets of the Roman legal system and their results were important for the later development of the modern civil-law system.

The key factor that led to the development of civil law was the lack of consideration that was given as to the value of the decisions made by the judiciary in individual cases. The rulings of the judiciary were not given any significance in the Roman legal system due, in large part, to the short amount of time that each served as a judge. Also arising from the use of two judges, the *praetor* deciding the issues and the *judex* deciding only a particular case, was a division in the judicial process. This split prevented any continuity in the legal system and therefore legal principles that would have been present and applied to various cases across the board, precedents, were not allowed to develop. The decisions handed down by the *praetor* and *judex* were used to resolve a particular case and never again considered.

This lack of judicial precedent can also be seen in the writing of Gaius, the most prominent Roman jurist. In his *Institutes* and *Corpus Juris Civilis*, Gaius does not recognize prior judicial decisions as a basis of Roman law. He goes further in *Corpus Juris Civilis* and states *"non exemplis sed legibus judicandum est."* Translated, this means that "decisions should be rendered in accordance, not

with examples, but with the law."[3] This devaluation of individual decisions in the judicial process served to heighten the importance and the impact that the jurists had with their *responsa*. This, however, was not the only practice that helped to elevate the role of the jurists. The annual Edict that was given by the *praetor* at the beginning of his term became in essence a re-issuance of the Edict from the prior term with only a few changes and/or additions to reflect the newly elected *praetor*. As a result, the Edict became a document that continued to grow but without any continuity in content or texture. Emperor Hadrian, who reigned from 117-138 A.D., ended the practice of the annual Edict.

The removal of the Edict prompted the jurists to turn to another form of legal writing, the *treatise*. The *treatise* covered only particular aspects of Roman law. Caesar Augustus helped to elevate the role of the jurists as well when he began the practice of "patenting" jurists. This meant that certain jurists were singled out and recognized by the government and therefore their opinions were given substantial weight and significance in the legal system, most notably the judicial processes. As this practice evolved, patented jurists were given the power to make rules that were binding on everyone residing within the Empire, including the emperor himself. The jurists eventually assumed the role of imperial advisers due to the importance and prestige awarded their other works.

In later periods of the Empire, the system of law underwent even more changes. Gaius provided his comprehensive work on private law, the *Institutes*.

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[3] Apple and Deyling, *A Primer on the Civil-Law System*, P: 5

The *Institutes* are an extensive collection of legal principles that would now be considered elementary discussions of Roman law. This work was used not only to educate students but also to assist in the practice of law in the resolution of issues of particular cases. Gaius' *Institutes* covered topics ranging from citizenship rights and the rights of slaves to the preservation of estates. The Emperor Justinian ordered that an even more comprehensive manuscript of Roman laws be prepared during the sixth century. The result of this order was the *Corpus Juris Civilis.* The *Corpus Juris Civilis* was a compilation which contained excerpts not only from Gaius' *Institutes* but also works from the *Digest,* which contained the writings of early jurists, the *Code,* the early legislation of the Empire, and the *Novels,* which was Justinian's own legislation. This compilation brought together the legal treatises and principles that reflected the viewpoints and arguments from an array of legal scholars. The *Corpus Juris Civilis* became the building block for the civil-law system as it is known today and supplies many of its substantive provisions.

The *Corpus Juris Civilis* reappeared in prominence during the eleventh through fifteenth centuries in northern Italy. During this time, Italian city-states became prominent throughout Italy and with them came an increase in commerce and trade. The rise in interstate commerce created the need for a legal system that expanded beyond local customs and remnants of the Roman Empire to regulate both the commercial and social needs of the newly emerging Italian states. As a result, a class of jurists almost as prominent as their predecessors

rose to fill this need. These jurists are known as the "glossators of Bologna." A prominent similarity between the Roman jurists and the glossators was that they both provided counsel to the judiciary. However, while the jurists responded to questions in *responsa*, the glossators developed *treatises* (*summae*) in which they answered legal questions. These *treatises* also evolved into complete statements of private law much like many *responsa* of the Roman jurists.

There were several differences however that separated the jurists of ancient Rome with the *glossators* of medieval Italy. For example, the jurists were usually upper-class citizens who performed their services *pro bono*. The *glossators* were members of the general public who taught law at the universities. *Glossators* were also generally referred to by the title of doctor. Their positions as educators at the first law schools and universities of Europe made the *glossators* especially influential. The *glossators* were able to educate students from the entirety of Europe who then carried the system learned from the *glossators* to their homes. Also beneficial to this process was the fact that the first *glossators* were located at the University of Bologna, which was situated at a major crossroads of trade routes. Their teachings, carried by the graduates of the University's law school, helped to influence the development and implementation of local legal systems.

Though the *glossators* rose to fill the same void as their Roman counterparts, their purposes were also very different from one another. As discussed above, the role of the jurists in the Roman Republic and later the

Empire was to develop a new legal system complete with principles, rules, and procedures to meet the requirements of their particular time. The *glossators*, on the other hand, viewed the *Corpus Juris Civilis* as a complete system of private law and so used it to meet the needs of medieval Italy. Though the *glossators* viewed the *Corpus Juris Civilis* as a complete work, they also used many elements of local custom to account for an issue that was not covered within the *Corpus Juris Civilis* or that did not provide them with the information necessary to rationalize their opinions. Thus the *glossators* would make an interpretation or an addition between the lines or in the margins of the *Corpus Juris Civilis*. Accursian, who was the most prestigious glossator of the time, wrote the Accursian *Gloss* that is comparative to Gaius' *Institutes* and the *Corpus Juris Civilis*, in an attempt to create a comprehensive statement of private law. The Accursian *Gloss* consisted of over 96,000 commentaries to the *Corpus Juris Civilis* in its entirety.

Though the law derived from the Roman Empire, more specifically the *Corpus Juris Civilis* as adapted and expanded by the *glossators* of medieval Italy, was the main base to the substantive law that developed during medieval times in Europe there were several other contributors as well. The other sources included local customary law, canon law, and law merchant. These three sources combined together form what is commonly know as the *jus commune*. This law is not to be confused with the English common law. The combination of customary law, canon law, and law merchant form a *jus commune* in the sense that they

applied to a whole kingdom and everyone residing within its jurisdiction. The *jus commune* is characteristic of a continuity and similarity of attitudes and beliefs regarding the law during this time period.

The creation of a comprehensive canon law by the Roman Catholic Church had a significant influence on the content of civil-law systems. The courts of canon law were well-ordered, systematic, and uniform in structure. These courts also employed the use of well-educated judges who were trained specifically in the practice of canon law. The basis for canon law was derived from the *Concordia Discordantium Canonum*, which was written by Gratian, an Italian ecclesiastical jurist, along with several others in a twenty-year span from 1130 to 1150. The influence of canon law was so great due to the enormous influence of the church in nearly all aspects of medieval life. Like the secular courts, canon law also relied upon scholarly writings and expositions of the law by jurists to form the basis for its courts' decisions.

One area in which the ecclesiastical courts had a significant impact was the procedures used in courtrooms. The previous feudal courts often decided cases through battle. The ecclesiastical courts developed a logical system that included the use of documentary evidence and witness testimony, qualified notaries who recorded the proceedings, arguments based on points of a law presented to and decided by an ecclesiastical judge. This system implemented by canonical courts brought orderly and systematic methods to court proceedings and dispute resolutions.

The law merchant was used to address commercial matters. Medieval Italy saw a dramatic increase in the commercial relations both between city-states and with other major trade cities outside its borders. Along with the increase in commerce, there was a rise in the number of maritime commercial activities as well as in the number of fairs and markets used to sell goods on the mainland. The increase in commercial activity gave birth to a number of associations whose purpose was to regulate the safety of goods being transported, financial security, and the quick resolution of disputes that would unquestionably arise. The increased commercial activity also necessitated the creation of rules and statutes that dealt specifically with trade practices and disputes. It was more common for the rules, practices, and customs of maritime law to be codified due to its increased use. Only a few statutes regarding organization, internal policies, and practices of particular trades were codified in land commercial law. This lack of codification was most likely the result of the more common use of precedent among land merchants. However, the fairs and markets used to showcase goods gave rise to informal courts that were used to resolve conflicts. Since these markets were under the jurisdiction of the monarch, the informal courts became official commercial courts. The establishment of courts specifically for commercial issues led to the modern separation of commercial law and procedures from other areas of the law.

Also important to the development of the civil-law system was the codification of its rules and procedures. Codification, like all other aspects of

civil law, went through several stages to reach the formal and comprehensive state that is characteristic of modern civil-law systems. By the fourteenth and fifteenth centuries, the practice of using the various written forms of law to develop a system of law was well established all throughout Europe. The use of such written forms can be seen with the glosses performed by the *glossators* and the use of the *Corpus Juris Civilis* to develop legal systems during medieval times.

The codification of the civil-law system received its influence from three important intellectual movements. The first intellectual movement, humanism, originated in sixteenth century France. During this time, there was an emphasis placed on developing independent nation-states with strong central governments. Ancient Greek and Roman cultures inspired this movement and it therefore placed importance on rational thought and individual achievement. As a result, the humanism movement encouraged an educated examination of the nature and function of law, which in turn gave rise to the science of jurisprudence (the philosophy of law). Out of humanism came the school of natural law.

The development of the natural law school can be traced to Grotius. Grotius is accredited with attempting to develop universal concepts of law that went beyond the boundaries of the state and that would hold true despite the legal system that was in operation. Grotius advocated that the law should be based on human experiences and desires such as the desire for an orderly and

peaceful society. Grotius' main argument was in support of a system of law that was rational and systematic in its arrangement and treatment of legal issues.

The Enlightenment, the third influential intellectual movement, kept the belief in the importance of reason as an underlying and necessary force in the organization of society. The influence of the Enlightenment allowed for the development of modern comprehensive codes for states as well as general legal reform. Scholars and philosophers used the *Corpus Juris Civilis,* specifically Gaius' *Institutes,* as a starting point for codification since it provided a comprehensive, and, most importantly, rational statement of legal principles. This work also provided an excellent starting point because it was already in the legal tradition of most European legal systems. Another important result of the Enlightenment was the simplification and comprehensive coverage of the law so that the general public would be able to understand their rights and duties provided to them under the law.

The modern system of civil law is characterized by the tradition of separation of powers. This tradition resulted from the French Revolution and led to the establishment of the legislature as the principal source of law. The central division in the modern system of civil law is between public and private law. In contrast with private law, public law is generally not part of the characteristic and comprehensive civil codes. Public law consists of statutes that are used to regulate structure and practices of public officials as well as the relationship that exists between public agencies and individuals. One of the reasons that public

law remains so fluid is so that changes can be made to keep up with changing political forces in an efficient manner. Though there is some debate across different countries about how to classify certain areas as public and private law, there are a few areas that remain constant across borders. Areas of the law up for debate include civil procedure, labor laws, and other areas of government regulation. Private law always includes civil and commercial codes. Public law includes such areas as constitutional law, administrative law, and criminal law and has just recently been developed in modern times.

Due to the distinction between public and private law, the courts are divided into separate court systems. Issues of private law are heard in ordinary courts where as issues of public law are addressed in administrative courts. The ordinary courts hear the majority of all civil and criminal cases. These courts evolved from the civil courts of the *jus commune*. Their jurisdiction includes civil and criminal issues as well as ecclesiastical issues and commercial disputes. The ordinary courts and the administrative courts operate under a separate jurisdiction from one another. Administrative courts arose under the same principle of separation of powers, as did the original distinction between public and private law. It was not believed that the judiciary of the ordinary courts were educated enough to handle the legality of administrative action. As a result, a separate body arose initially as advisers to the king and gradually evolved into the fundamental body of assessing administrative action.

Common Law

The common-law system is a system of law that prevails in England and the countries that it colonized. The most distinguishable characteristics of the common-law system are the use of a jury at trial, the system of precedents, and the doctrine of the supremacy of law. The system of common law developed during the same time period as that of civil law. Though England had access to Roman law and canon law, these systems of law proved not to be satisfactory for solving the disputes within the new legal system.

The common-law system evolved shortly after the institution of the jury system. The common law jury system took its origins from medieval France. The jury system was developed in order to determine the lands owned by the king and what rights he had on that land. These early juries were most often comprised of what were considered the trustworthiest men of a district. These juries were often used to resolve conflicts that would have been otherwise resolved through a trial by battle. Juries became a feature of the British government during the reign of William the Conqueror. William made a practice of creating juries of neighbors to solve disputes that usually involved land. It was not, however, until the reign of Henry II that those juries actually became a frequent practice. Henry II decided in 1164 that juries should be an integral part of the judicial process and shortly after issued an order that required a jury trial for all persons with land disputes. By the thirteenth century, the right to a jury, not just in cases involving land but also in criminal cases, was so pervasive that

King John included it in the Magna Carta in 1215. It was also in the thirteenth century that common law, as a set of rules prescribing social conduct, was officially enforced and applied by the royal courts.

There were a total of seven royal common-law courts that were established by the Fleta Treatise. The system of common law today is known for its extensive use of a jury. The role of the jury was to provide the court with the facts of the case. The courts then used the facts provided by the juries and applied to them the appropriate rules of the law to reach a decision on the case.

Common law has also been historically seen as inflexible during its beginning stages. With few exceptions, the early system of common law would not deliver a judgment on a case unless it fell precisely within the confines of a particular writ. The common-law system was most commonly used to resolve disputes regarding land or other real or personal property and the only real solution available was to receive money for damages. As a result of these often-rigid interpretations of the law by the English courts, equity law was developed to counteract the perceived unfairness of the common law courts and to provide solutions for conflicts that did not fall within the jurisdiction of the common-law system. For hundreds of years, England used a system of separate courts similar to the one seen in the system of civil law. The English courts, however, were separated into common law and equity law. It is important to note that when a conflict arose regarding the decisions of these two courts, the decision of the equity court would be held as the proper response. As a result of the gaining

precedence of equity courts, a new branch of law developed within the common-law system known as equity law. These laws and principles were developed with an emphasis on the characteristics of fairness that were associated with the equity courts. Many countries with modern legal systems based on the early system of common law still hold equity-based law. These laws consist of such areas as trusts and mortgages.

David Dudley Field erased the division between equity law and common law in 1848. Field drafted a code of civil procedure for the state of New York that effectively merged equity and common law into a single jurisdiction. The Field Code, as it is known, was adopted by the federal government and the majority of the states of the United States. The Field Code was also adopted and put into practice by the United Kingdom in the Judicature Acts of 1873 and 1875.

The practice of using precedent to decide cases in the common-law system evolved from the case-oriented tradition. The actual doctrine from which precedents draw their powers is the doctrine of *stare decisis*. This doctrine holds that all prior decisions of the highest court in a jurisdiction are binding on all other courts that are also within that jurisdiction. Due to the rapid changes of modern societies, this doctrine has expanded to include the judicial experiences of all of the formerly colonized countries. This doctrine is important in the development and sustainability of the common-law system because it provides stability within the legal system yet also allows for some flexibility, as it is

needed. This ability for the common-law system to be adapted to new conditions is largely responsible for the survival of the common-law system.

As noted above, common law is identified by the use of the doctrine of the supremacy of law. This doctrine is important in the development of the legal system because it originally implied that no governing agency, not even the king, was above the law and was to act accordingly to the established principles under the system of law. The most important concept to evolve from the doctrine of the supremacy of law was that of due process. Due process meant that all governing bodies were subject to examination by the judicial system to determine if established procedures were being followed. The courts then in turn had to follow established procedures while conducting their examination and were responsible for reaching decisions based on the accepted principles and reason rather than on notions.

Similarities and Distinctions

Despite the apparent differences between the civil-law and common-law systems, there are several factors that prove they are not as different as they appear. In fact, there are several systems of civil law that are adapting to changing societies by adopting some procedures from the common law system. For example, Germany has experimented with concentrated trials in simple cases in an effort to become more efficient. There are also differences in the ways in which persons working within it view each system. Persons practicing within the realm of common law generally view the system as a means to reach

resolutions. Even if through the process of searching for aid in a particular case the scholar finds evidence of something new, that scholar is more likely to show an interest in how it will help the case than what it could mean for the entire system. Civil-law systems are often viewed by judges, lawyers, and scholars not just as a means to solve disputes, but also as a science. Practitioners of civil law also believe that, through the study of the civil law, new and more elaborate principles can be discovered and applied to the legislation.

The distinctions between these two systems, however, have begun to blur with the passage of time. The melding of civil and common-law aspects can be seen in the implementation of common-law principles within the traditional legal systems of civil-law countries. For example, a *de facto* system of precedent has become prevalent among civil-law countries. As the decisions of higher courts are published regularly, lawyers cite the decisions in subsequent cases and judges use prior decisions to support their own analysis and rulings. Also blurring are the differences in trial process within the two systems. Common-law systems generally rely on a single-event trial whereas civil law trials consist of a series of hearings to determine admissible evidence prior to the trial. Common-law countries, such as the United States, have developed pre-trial discovery following the lead of civil-law systems. Germany, an archetype of civil law, has begun conducting more concentrated trials for simple cases in an effort to increase efficiency. Though it is certain there will always be significant differences between the two systems as a result of history and the ideals about

the purpose and nature of law, the rapidly changing society of the modern world has created the need for rapid growth to meet its needs.

Civil and Common Law Conflicts

There is an ever-growing conflict between civil-law societies and the traditional cultures that reside within the framework of those societies. The governments of many civil-law societies, especially those in developing nations, are finding a common law embedded in terms of traditional practices within the civil structure. Technological advances have allowed national governments and central civil law to penetrate far-reaching areas that were previously overlooked in the administration of the central civil law and discover these indigenous cultures that have generated their own systems of law. The lack of a central government and law governing these areas resulted in traditional laws and practices of local, indigenous tribes becoming dominant as a form of common law.

The vast majority of Latin and South American countries have dealt with conflicts arising from the infringement on traditional, indigenous rights by practices of the central government. This phenomena, however, is not strictly limited to this region and can be seen easily within countries throughout the Eastern hemisphere. This has been the case for a large portion of Asian countries as a result of limited or no colonization, as well as an elaborate history of

absorption and differentiation among Asian nations. For example, the Indonesian central government has been dealing with internal problems for decades with the Dayak, a tribe indigenous to Kalimantan (formerly Borneo), an outer island of the archipelago. The Indonesian conflict has arisen out of a dispute regarding land ownership and the transmigration policy of the central government.

Another prominent example of such an internal conflict can be seen in Thailand. The Thai government is embroiled in several conflicts with indigenous tribes throughout the country. One such conflict involves the hill tribes of Northern Thailand. This conflict between the indigenous Northern tribes and the Thai central government centers on the development of indigenous forestlands through the plantation farming of eucalyptus and the harvesting of timbers, among other government projects.

The conflict to be discussed throughout this section arises when the previously absent civil law becomes present in areas that are being governed by traditional, localistic law. Local, traditional cultures generally reject the civil statutes of the national government as they rarely are in agreement with the traditional practices of the indigenous peoples. Currently, this conflict is most prominent in environmental issues such as land ownership, deforestation, mining, commercial plantation farming projects, and other government development projects.

Environmental issues are frequently discussed in a public light. As a result, prevalent issues and conflicts between localized cultures and national governments are often brought to the attention of national and international media. The media attention focused on these issues is often influential in helping find resolutions for at least some aspects of the conflict. Environmental issues frequently at the focus for these conflicts consist of development projects that have been commissioned by the national government. The intention of the government agencies in charge of developmental projects is to improve the quality of the country by generating revenue for the government as well as by helping modernize the country through the introduction of new agricultural technology. These intentions, however, often infringe upon the perceived rights of the local tribes that occupy the land. The indigenous peoples that occupy the land being developed and/or harvested believe the land belongs to the tribe and therefore cannot be sold or leased by the government. From the point of view of the local, indigenous community, the government is taking land that does not belong to it and subjecting it to development that strips it of its natural resources.

The impact of the government's intervention into the lives of local, indigenous tribes is multi-faceted. When the government leases or sells the land to an industrial buyer, the members of the indigenous tribes are forced to leave the land that they have occupied throughout a lengthy time span and consider their home. As the resources are stripped from the indigenous forests, local tribes are also stripped of their livelihood and the ability to provide food and

other necessities for their families and community. If the members of the indigenous group choose not to depart their land, they have a second option of becoming employees for the occupying industries in order to sustain their families in their traditional homeland. This second option, however, often leads to more violence than their forced removal.

An illustration of this violence can be seen in Borneo. The government of Indonesia contracted a development project on Borneo with several timber companies. The Dayak, native to Borneo, were forced to leave their homelands due to the clear-cut forestry projects of the aforementioned timber companies. Several of the Dayak refused to leave and took jobs with the timber companies. The lumber companies who were given transmigrant laborers by the Indonesian government treated the Dayak as second-rate workers. In some instances, the Dayak were reduced to bonded laborers as a result of the timber companies inflating the prices of supplies in their company stores forcing the Dayak to use IOUs to purchase their basic necessities. These conditions resulted in several massacres of the transmigrant workers, who were equated with the interests of the timber companies and visible targets for the Dayak.

When opposed, many governments seemingly give in to appease the indigenous tribes. However, it is often the case that such concessions by central governments require a compliance with regulations that are nearly impossible for indigenous tribes to meet. For example, the government can enact a statute that will return the land to the peoples of the indigenous tribes if a title to the

land, or other recognized documentation, can be produced for verification of ownership. Ownership of indigenous lands belongs not only to separate individuals but there are parcels that belong to the community as well. The ownership of such lands is derived from and passed on through an oral tradition. The practice of oral tradition often took the place of Western documentation, such as titles, since there were few attempts made to ascertain and document ownership of indigenous lands. As a result, indigenous tribes are rarely able to provide any legal documentation of ownership of tribal lands. As a result, the government is legally able to continue with the development of indigenous lands according to civil statutes.

Another problem, within these conflicts, is the recognition of indigenous peoples as a separate classification, and the rights afforded them under international law, by national governments. The United Nations, the International Labour Organization (ILO), and the World Bank have all classified "indigenous peoples" in an effort to provide assistance for sustainment of indigenous cultures as well as development. Though the United Nations has not yet adopted a concrete definition for the term "indigenous peoples," it has been guided in practice by a working definition given by UN Special Rapporteur Martínez Cobo in a 1986 report which reads: "Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or

parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems."[4]

The definition of "historical continuity" is just as controversial as that of "indigenous peoples" and as a result, this definition provides a limited view of "indigenous peoples." Therefore, both the ILO and the World Bank have broadened the historical requirement in their working definitions of "indigenous peoples". The ILO historical requirement is not as concentrated and includes a separate, additional category of "tribal peoples." The World Bank has completely disregarded all criteria requiring historical continuity. The World Bank uses a more functional definition of "indigenous peoples" that consists of "groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged."[5] Though the classification of "indigenous peoples" is widely supported and accepted by non-governmental organizations (NGOs) such as the United Nations, the World Bank, and other localized organizations and throughout influential countries such as the United States and the majority of Latin America, there are many countries that do not recognize the classification of minority groups as "indigenous peoples." This is

[4] Kingsbury, *"Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy*, The American Journal of International Law, Vol. 92, No. 3, P. 419
[5] See *id.* at P. 420

particularly true for Asian countries with strong opposition being expressed by China, India, Bangladesh, Myanmar, and the majority of Indonesia.

The opposition to the concept of "indigenous peoples" in Asian countries arises primarily from the requirement of a historical continuity, which consists of a pre-invasion or pre-colonial society established on the land in question. This proposed requirement for "indigenous peoples" arises from the perceptions and experiences of European settlements. To apply the same rules and conditions to other areas of the world would result in a complicating and restricting utility of the "indigenous" concept. More precisely, arguments of Asian governments regarding the concept and classification of "indigenous peoples" are frequently based upon definition, practicality, and policy. Definitional arguments base opposition of classification according to the wording and stipulations of the definitions for "indigenous peoples," which generally require prior occupancy and the association of "indigenous peoples" with the harmful effects of colonialism.

The governments of many Asian countries argue that by imposing the term "indigenous peoples" upon the various regions is in itself a form of neocolonialism since the concept of "indigenous peoples" is a concept of European colonialism. The concept of "indigenous peoples" is generally exemplified as those people who continue to suffer from colonialism because no liberation from European rule was obtained. In reaction to this definition, Asian countries such as China, India, and Myanmar have developed a definition of

"indigenous peoples" that consists of peoples "living on their lands before settlers came from elsewhere; ... descendants ... of those who inhabited a country or a geographic region at the time when peoples of different cultures or ethnic origins arrived, the new arrivals becoming dominant through conquest, occupation, settlement, or other means."[6]

Arguments based on practicality purport that it is impossible and confusing to identify all prior inhabitants of countries and regions with a long-standing history of influx, movement, and blending such as those found in Asia. As a result of centuries of migration, it is often impossible to say with certainty which ethnic group came first. In India, for example, it has been noticed that the majority of indigenous tribes share characteristics with others in the country. The result is that there are millions of people who are in some way distinct from other categories of people. Perhaps the most important argument against the applicability of the concept of "indigenous peoples" to Asia is the policy argument. The government officials of the countries that take the policy standpoint, such as India and Malaysia, argue that the recognition and granting of rights based on prior occupancy for particular groups would result in the growth and legitimization of mobilization and claims by a wide range of "indigenous" groups. The concern of these governments is the possibility that indigenous groups not in need of governmental protection would be included in

[6] Kingsbury, *"Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy*, The American Journal of International Law, P. 434

indigenous policies while groups warranting special protection might be excluded from such protectionist measures. Another prevalent concern is that once indigenousness becomes a legitimate basis for politically and militarily dominant groups, the central government will have more difficulty in restraining abuses of power.

As discussed above, there are several elements that compose the set of conflicts between national governments and local, indigenous tribes. These elements include ownership disputes, environmental issues, and the classification of "indigenous peoples" for the purpose of receiving preferential rights and aid in development from national governments. Each element within the overall conflict is not without its own distinct conflicts and disputes. All of these interior conflicts combine to form controversial issues, which are currently being faced throughout much of Asia.

The following cases provide examples of current conflicts within Asia. These examples are intended to give an overview of the problems faced by the respective nations. The next section will provide a more detailed analysis of the development of conflicts between indigenous tribes and national governments as well as the issues that prevent the conflicts from reaching any resolution.

The Philippines

Indigenous groups in the Philippines face conflicts with the national government. The result of the numerous clashes has been the establishment of indigenous cultural communities (ICC) within Filipino politics. The conflict

began during the Marcos period with resistance by indigenous groups to large development projects such as the Chico dams and the Cellophil pulp and processing operations in Abra. This resistance increased political mobilization of several indigenous groups including the Kalinga, Bontoc, and the Tinggians. Another side effect of the indigenous resistance was a militarization of the region, which resulted in a considerable amount of brutality.

Militancy has been an especially popular route of resistance for the Lumad and Moro groups in Mindanao in response to in-migration and dispossession of land. The Mindanao conflict intensified further with the Muslim separatist movement of the early 1970s. An agreement to end the conflict and grant autonomy to Mindanao was reach during the Islamic Conference of 1976 but was never completely implemented. A later peace agreement in 1996 re-established the framework for a regional autonomy in Mindanao.

The legal and political dynamics have changed since the Marcos period with regard to indigenous peoples. Several effective organizations dedicated to the causes of indigenous peoples have are growing rapidly. Such organizations include the internationally prominent Cordillera Peoples' Alliance and the national organization of the National Federation of Indigenous Peoples of the Philippines. Despite the rise in organizations to stand up for the rights of the indigenous peoples, conflicts over government development projects continue to be faced daily. Currently, the indigenous peoples, as well as the Cordillera groups, are in opposition to the Newcrest and Newmont mining exploratory

operations, which are an operation of the Western Mining Corporation located in Mindanao. Other resistance is being offered in opposition to forced land sales and the omission of indigenous peoples by commercial plantation projects.

Bangladesh

Discussions regarding the concept of "indigenous peoples" in Bangladesh generally relate to the Chittagong Hill Tracts. In the early 1970s, the government enacted a program of transmigration to move large numbers of people to the Chittagong Hill Tracts from other parts of Bangladesh. This policy was strongly resisted by the indigenous tribes who regarded the Chittagong Hill Tracts as their land. These indigenous tribes also foresaw an economic downfall with the replacement of their swidden agriculture by plantation wage labor. This conflict also became heavily militarized. The indigenous tribes of the Chittagong Hill Tracts, however, had more leverage during this conflict than most indigenous groups throughout Asia. The indigenous tribes of this area built a unity among themselves; the collective self-designation is *jumma,* in preparation for dealing with national governments. As a result, a peace agreement was reached in December of 1997. This peace agreement gives recognition to "indigenous" and "tribal" groups within the Chittagong Hill Tracts along with the majority of seats in a new Regional Council. This agreement is a tremendous victory for the indigenous peoples of the Chittagong Hill Tract since the government of Bangladesh previously refused to grant any recognition to local tribes as "indigenous peoples."

Kalimantan

In Kalimantan (Borneo), an outer island of Indonesia, there is a violent ethnic conflict that has sparked such newspaper and webpage headlines as "Borneo Headhunters Slaughter Immigrant Rivals," "Kalimantan's Killing Fields: Local Ethnic Conflicts have Erupted into War," and "Kosovo-like Terror Sweeps Indonesia."[7] The conflicts these headlines portray exist between the Dayak and indigenous groups from the other islands of Indonesia that have been relocated to Kalimantan as a result of government policy. The government of Indonesia enacted a policy of transmigration that moved people from the overcrowded islands such as Java to the densely forested, less populous outer islands. This policy was enacted in 1903 and remained in effect until it was recently suspended due to the increased economic and cultural strain on the indigenous peoples such as the Dayak. The transmigration policy destroyed the forestlands and interfered with the practices of indigenous peoples such as the Dayak. The results of the transmigration policy were devastating for human rights and the environment, as well as culturally, and did not meet its intended goal – to improve the standard of living for the people it migrated to Kalimantan.

The transmigration sites are just one of the many development projects that the government is currently operating on Kalimantan. Other governmental development projects include clear-cut forestry projects by large timber corporations as well as oil drilling and strip-mining operations. The

[7] Szczepanski, *Land Policy and Adat Law in Indonesia's Forests*, 11 Pac. Rim L. & Pol'y J. 231, Introduction

multinational corporations in charge of these development projects experience great benefits as a result of the wealth of the forestlands. The transmigrants also receive tangible benefits in being able to find jobs using the chainsaws or bulldozers required to reap the benefits of the resources from the forests. The Dayak, however, receive no benefits from these projects that ruin their homelands nor do they have any legal recourse against the developers or the government to stop these projects. The perceived marginalization of these traditional adat societies has resulted in violent ethnic conflicts in an attempt to drive out the transmigrants and the timber and mining organizations that have gained ownership of the traditional lands of the Dayak.

The Dayak and other indigenous groups in Indonesia lack any recourse to the confiscation and development of their homelands. This is due, in large part, to the refusal of the Indonesian government to recognize these forest peoples as "indigenous peoples," which would grant them rights as a class recognized by international law. Instead, the Indonesian government considers all Indonesian citizens, except ethnic Chinese, as "indigenous" without giving any significance to way of life. To denote indigenous tribes, the Indonesian government uses the term "isolated communities" and estimates the number of applicable citizens as 1.5 million.

Though the Dayak and other indigenous groups of Kalimantan lack the power to politically or militarily resist or stop government policy, they have resorted to expressing their unhappiness through other means. There has been

an abundance of armed uprisings and protests as well as nonviolent attempts to retain at least some part of their homelands. The violence exhibited by the Dayak and other indigenous groups is usually not focused on the central government, but instead on the transmigrants, which they feel are within their reach. The result has been numerous bloody, ethnic conflicts between indigenous peoples such as the Dayak and the transmigrant workers brought in by the government.

One example of a nonviolent attempt comes in the form of a message sent to the central government from the inhabitants of the Borobudor area that reads in part, "[B]ecause we as the people of this nation understand that the government wishes to carry out developments [sic] in the Borobudor region, as citizens we would like to give support to those plans, the support taking the form of vacant land. When the government has obtained the lands, we the people have a request to the government. We do not wish for money or possessions, but we beg not to be exposed to any harm or we request to be saved from being evacuated or transferred from lands within our villages..."[8]

In response to opposition by the indigenous peoples of Kalimantan, the central government has passed laws to incorporate adat law with Western civil law in order to formulate civil statutes pertaining to land laws and ownership determination. Adat law is broadly described as customary law or traditional, cultural practice. Adat law is a part of the oral history of the indigenous groups

[8] Szczepanski, *Land Policy and Adat Law in Indonesia's Forests*, 11 Pac. Rim L. & Pol'y J. 231, Section II

that adhere to it and so is, for the most part, unwritten and appears most often in the form of positive law or judgments. As a result, adat law changes with society. Generally speaking, adat law is not only a collection of commands as to what should be done in the community, but also a description of what is done in the community. Adat law arose as a result of colonial Dutch scholars trying to control the confrontations between European, Islamic, and local ethnic laws through the codification of *adatrecht*, customary law. One such scholar, van Vollenhoven, believed that a uniform traditional customary law could be permanently established throughout Indonesia. Vollenhoven identified nineteen groups of adat communities and developed a definition of adat that sought to reveal the similarities between the nineteen indigenous groups. Vollenhoven's definition says that adat is "[A] preponderance of communal over individual interests, a close relationship between man and the soil, an all-pervasive 'magical' and religious pattern of thought, and a strong family-oriented atmosphere in which every effort was made to compose disputes through conciliation and mutual consideration."[9]

In coordination with the effort to incorporate adat law into modern civil laws, the Indonesian government passed the Basic Agrarian Law (BAL) in 1960 with the intention of unifying all land laws into a single system. The BAL recognizes four basic land rights such as free and clear ownership, cultivation of

[9] Lindsey, *Square Pegs and Round Holes: Fitting Modern Title Into Traditional Societies in Indonesia*, 7 Pac. Rim L. & Pol'y J. 699, Pg. 3

state-owned land, building, and the collection or use of products from state or private land as long as it is used for a specific purpose. The BAL also recognizes several traditional land rights, which include the right to clear land, catch and breed fish, draw water, and harvest forest products. These traditional rights, however, are unenforceable by the indigenous peoples since legal mechanisms provided to recognize or register their land rights are not available to the indigenous groups.

The BAL does recognize customary adat law as a legitimate system in Article 5 of its text as long as it meets the interests and needs of the Indonesian people as a whole. More expressly, adat law must not be contrary to "the national interests of the state, Indonesian Socialism, the principle of Agrarian Law and other Laws,"[10] and it must not be contrary to religious laws prevalent in Indonesia. Under Article 5, adat rights and laws are subject to state regulation. The BAL is in opposition to adat law mainly in that it emphasizes the registration and titling of land whereas customary law relies on local knowledge of rights to ownership and use that is recorded in oral tradition. Another important effect of the BAL to note, the adat terms traditionally used in land matters have received new meanings through the substantial variation of their original meanings by the government and courts of law. In effect, the BAL allows for the validity of adat law with stipulations that assure the adat law can be preempted according to the needs and desires of the government.

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[10] Szczepanski, *Land Policy and Adat Law in Indonesia's Forests*, 11 Pac. Rim L. & Pol'y J. 231, Sect. V

The conflicts between indigenous cultures and central, national governments can take the form of many different issues and conflicts. The discussion and examples above provide an overview of the conflicts that can occur when traditional, common law cultures are forced to work within the context of a civil-law society. The indigenous peoples and their traditional practices are devoid of meaning in a civil-law society since they have no legal statutes or documentation to uphold indigenous traditional laws. Conversely, the central government and its system of civil law are also in a compromised position since there is no legal precedent for the government to look to in an effort to resolve the disputes. Even so, the national government retains the legal authority to pursue its development projects regardless of indigenous protests. As a result, several non-governmental organizations have joined forces with the indigenous tribes and are working on behalf of their cause in an effort to gain legal standing and make progress at resolving the dispute in a manner that allows consideration for the indigenous peoples' traditional way of life. As times progress and more conflicts arise without the resolution of previous disputes, national governments are searching for ways to resolve peacefully indigenous conflicts. The willingness to compromise on behalf of national governments coupled with the services provided by NGOs have resulted in an increasing recognition of indigenous tribes by national governments and, with increasing recognition, comes an increased amount of rights and protection afforded to indigenous tribes and their traditional practices.

Conflicts within Thailand

The previous two sections have been devoted to creating a basic, working knowledge of the elements required to examine the current political and environmental situation in modern Thailand. The first section provided an overview of the two main systems of law: civil and common. It is important to note that Thailand is governed under a civil-law system. This contributes in part to conflicts between the central Thai government and localized groups of citizens who most often follow a system of "common law" generally construed from customary practices. Conflicts of this nature, and similar to those that will be discussed regarding Thailand, are often exemplified in the form of environmental issues.

The second section provided some insight as to how environmental conflicts can arise between a central government under a system of civil law and local, often indigenous, groups of people that follow a system of law based on local and traditional customary practices. Several examples were given highlighting the different types of environmental conflicts that have arisen in Southeast Asia that are, at least in part, due to the conflicts of two different legal systems. One of the examples given in the previous section discussed adat law

found in Indonesia, which provides an excellent example of a system of law derived from traditional customary practices.

This third and final section will attempt to provide an in-depth look into the environmental conflicts within Thailand and the measures that have been taken to reconcile these issues. A general background of the politics and environmental programs of Thailand will be given to show the development of the current issues that will be discussed throughout this section. To further the understanding of the nature of the conflicts, a discussion will be presented on some of the most prominent customary practices and their use as a form of common law. Finally, this section will attempt to provide a description of a situation parallel to the recognition of adat law in Indonesia that has arisen in Thailand, where the central Thai government has recognized the traditional law of a specific group of people, the Muslims of southern Thailand.

Thailand is representative of many other Southeast Asian countries. Southeast Asian countries were founded on ancient traditions and beliefs. These countries, including Thailand, are caught in a crossroads between the rapid economic development sweeping this region and the ancient traditions upon which the countries of the region were founded.[11] Such rapid economic and environmental development throughout this region has given rise to the numerous conflicts between the central government and localized groups of people. Just as the cases of Thailand can be used to provide an example of

[11] Tookey. *Southeast Asian Environmentalism at its Crossroads.* Sec. VII. Conclusion

Southeast Asian governments' approach to environmentalism, Thailand also provides an excellent example of how these divisive issues and conflicts can be reconciled.

For the past several decades, Thailand, like its neighboring Southeast Asian countries, has experienced repeated conflicts between the Thai central government and local populations regarding environmental issues. The most frequent conflicts have arisen over environmental issues such as deforestation and forestlands ownership, mining and mineral rights, and riparian rights.

The modern Thai government, under the direction of Prime Minister Thaksin Shinawatra, has begun passing legislation that is not only aimed at providing a remedy for the continuous environmental degradation but also to reconcile the conflicts between the central government and local populations within Thailand. Many of these policies have been, and continue to be, instituted in the name of King Bhumibol and the Royal Family.

King Bhumibol and the rest of the Royal Family have been instrumental in setting up and funding environmental projects. For example, in 1989 King Bhumibol made a speech regarding devastating floods and landslides from the previous year resulting from the widespread deforestation of Thailand. As a result of this announcement, it has become a tradition for lots of trees to be planted throughout Thailand on all of the national holidays and commemorative ceremonies to promote the reforestation of Thailand. It is noted in the Office of the Royal Development Projects Board, 50 Years of Development Work

According to the Initiatives of His Majesty King Bhumibol Adulyadej of Thailand 22 that the environmental philosophy of the King and Royal Family includes "reforestation by allowing the forest to regenerate itself; integrated farming; appropriate technology; moderation in living and agricultural development; belief that local villagers are best suited to maintain and benefit from the forest in which they live; use of natural methods to fight pollution such as using water hyacinth to treat polluted water," and an "aversion to using chemical fertilizers and insecticides." On top of implementing political policies and laws aimed at environmental conservation, the Thai government has more recently began incorporating Buddhism, animism, and local knowledge into environmental laws and policies.[12]

Buddhism is the main religion in Thailand with 94.2% of Thais claiming Buddhism as their religion in The 2000 Population and Housing Census conducted by the National Statistical Office Thailand. The form of Buddhism practiced in Thailand is Theravada Buddhism. Theravada Buddhism has been practiced throughout Thailand since the Sixth Century A.D. This form of Buddhism became the national religion during the Thirteenth Century under King Sukothai. Buddhism teaches that all things in life are interrelated. These teachings are especially relevant to the environmental conflicts found in Thailand because they focus on the connections between society and the environment. Buddhist teachings also "contain 'elements for the construction of an

[12] Tookey. *Southeast Asian Environmentalism at its Crossroads.* Sect. I Introduction.

environmental ethic'; some of Buddhism's 'basic principles parallel those in ecology'; it has 'a long history of mutualistic relationships with forests'; and 'Buddhism and culture in Thailand reinforce one another'."[13] There are also contrary views to these statements that claim the Buddhist texts and teachings do not offer anything substantial regarding the environment except in the vaguest of terms.

Regardless of the facts of the situation, Thai culture is emotionally linked with the ideas that Buddhism promotes conservation. As a result, environmental policies and initiatives in modern Thailand have an increasing connection with Buddhism. The majority of these Buddhist-related initiatives are perpetuated through the work of monks, such as community farming activities, forest management, and education about environmental and conservation issues.

Animism is also an avenue the Thai central government is exploring in an effort to meet successfully the present environmental challenges. Animism coexists with Buddhism and in many ways the two religions complement one another. Animism is a system of beliefs most commonly held by Thai peasants and rural villagers. The teachings of animism focus on treating nature and natural phenomena with respect. Animists believe that there is a hierarchy of spirits, which can control the individual, the family, the community, or nature in general. The *phi* is a class of spirits that are believed to wield power over, and are able to control, humans. The *phi* consists of all types of spirits ranging from

[13] Tookey. *Southeast Asian Environmentalism at its Crossroads*. Sect. VI (A)

those who are believed to have a permanent existence to those who are reincarnations of other humans. Respect for nature is therefore extremely important as the spirits of the *phi* exist in all natural things including the "trees, hills, water, animals, [and] the earth."[14] Animists believe that such things as illness, conflicts within family and community, and crop failures for whatever reason are due to an imbalance between the human and spirit worlds.

Animistic beliefs have been key in promoting environmental protection throughout Thailand due to their importance and every day usage in the lives of rural villagers and peasants. One such example of the use of animism can be found in the indigenous tribe of the Karen, located in eastern Thailand. The Karen show their respect for nature and all things contained within by paying homage to the spirits in farming-related ceremonies. Indigenous tribes, such as the Karen, have been able to keep their environments mostly intact throughout the centuries. This conservation can be attributed to "an inherent understanding of the natural ecosystem and wildlife-forest interaction" and the "innate spirituality that pervades these beliefs actually keeps the natural ecosystem undisturbed."[15]

The modern Thai government is also beginning to incorporate local knowledge into environmental laws and policies. Local knowledge consists of local and traditional customs and rules regarding the environment and, more

[14] Tookey. *Southeast Asian Environmentalism at its Crossroads.* Section VI.
[15] See *id.*

specifically, how to manage and maintain resources. Examples of local knowledge that is being used within environmental policies include methods of traditional farming and irrigation, land classification systems, as well as, the practices of traditional medicine.

The environmental laws and policies of Thailand are made through several institutions set up by the central Thai government under the Prime Minister. The main institution responsible for the development of environmental law and policy is the Ministry of Science, Technology and Environment. This institution was originally established in 1979 and expanded its duties to include environmental matters in 1992. The Ministry of Science, Technology and Environment (MOSTE) and its thirteen agencies implement law and policy in an effort to "(1) develop local technology for production and marketing, and assist with the domestic and international transfer of technology; (2) establish plans and policies to address current and future environmental issues, and control and supervise their execution in cooperation with governmental and other agencies; and (3) formulate and implement measures for energy conservation and the development and promotion of safe and sustainable energy resources."[16]

Another important policy-making entity is the National Environmental Board. The National Environmental Board was formed under the Enhancement and Conservation of National Environmental Quality Act of 1992. This board is

[16] Tookey. *Southeast Asian Environmentalism at its Crossroads.* Section III. The most prominent agencies included within the Ministry of Science, Technology and Environment consists of the Pollution Control Department, the Department of Environmental Quality Promotion, and the Office of Environmental Policy and Planning.

comprised of several ministry heads whose ministries deal with environmental issues. For example, the heads of the ministries of defense, education, industry, and agriculture and cooperatives all sit on the National Environmental Board along with several others.

It is also important to note that, though Thailand had numerous laws relating to the environment, there were no primary environmental laws prior to 1992. The first primary laws for conservation and pollution came into effect with the passing of the Enhancement and Conservation of National Environmental Quality Act and the expansion of the Ministry of Science and Technology to include environmental matters, both in 1992. The National Environmental Quality Act was passed under Prime Minister Anand Panyarachun. This act abolished all earlier acts with regard to the environment and, in turn, created a new framework for environmental progress and outlined the environmental rights and duties of Thai citizens.

Thailand's regional and international involvement also greatly impacts its environmental laws and policies. Thailand, along with Indonesia, Malaysia, Singapore, and the Philippines, formed the Association of Southeast Asian Nations (ASEAN) under the Bangkok Declaration of 1967. While the goals of ASEAN originally focused on regional peace, economic, and social issues, these goals soon expanded to include environmental issues. The ASEAN Senior Officials on the Environment (ASOEN) meet at least once a year to recommend environmental policy guidelines in the areas of "(1) marine environment; (2)

environmental economics; (3) nature conservation; (4) environmental management; (5) transboundary pollution; and (6) environmental information, public awareness and education."[17]

The ASEAN Environment Ministers meet at least every three years at the ASEAN Ministerial Meeting on the Environment. The ASEAN Environment Ministers initiated a plan in 1977 known as the ASEAN Environment Programme. This plan was designed to protect the environment and is currently in its fourth phase called the ASEAN Strategic Plan of Action on the Environment. The objectives of the ASEAN Environmental Programme are to "promote institutional development that encourages the integration of environmental factors in all developmental processes; establish long term goals on environmental quality and work for harmonized environmental quality standards in ASEAN; harmonize policy directions on environmental matters; and integrate sound trade policies with sound environmental policies" as defined under Article 21 of ASEAN.[18]

Thailand also has several current and potential international obligations stemming from international environmental conventions. Current agreements under which Thailand has obligations include the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Convention on Climate Change, the 1987 Montreal Protocol and all of its subsequent

[17] Tookey. *Southeast Asian Environmentalism at its Crossroads.* Section IV(A).
[18] Tookey. *Southeast Asian Environmentalism at its Crossroads.* Section IV(A).

amendments and adjustments in 1990 and 1992, and the Ramsar Convention on Wetlands. Potential conventions that Thailand has yet to ratify include the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, the Convention on Biological Diversity, the Convention to Combat Desertification, and the Protocol Relating to the Convention for the Prevention of Pollution from Ships.[19]

The environmental issues that currently embody the greatest challenges in modern Thailand are pollution, conservation, and the enforcement of environmental laws and policies. According to the Thailand State of the Environment Report 2001 issued under the Office of Environmental Policy and Planning, problems with pollution have expanded past the areas of air quality and surface and coastal water pollution into solid waste, hazardous wastes and all other toxic substances. One reason for the growing contamination and pollution of Thailand's resources was the rapid urbanization that swept through Thailand during the economic boom of the 1980s. During this decade, the industrial and manufacturing sectors of Thailand's economy increased much faster than the more traditional agricultural and mining sectors. The dramatic increase in industrial production brought with it an influx of rural migrants into urban areas, such as Bangkok. The urban areas of Thailand quickly became

[19] Tookey. *Southeast Asian Environmentalism at its Crossroads.* Section IV(B). This section contains the list of the above-mentioned environmental conventions to which Thailand has or potentially has environmental policy obligations. More information regarding each convention can be found through the Thai Royal Government web site at www.thaigov.go.th.

overcrowded without any policies to regulate the pollution of their new citizens and corporations.

The heightened pollution problem began having devastating impacts on the health, safety, welfare, and quality of life of Thailand's citizens, not only in urban areas but in local villages as well. As a result, Thailand enacted four main pollution laws in 1992. The Energy Conservation Promotion Act, otherwise known as the Energy Act, promotes energy conservation and increased efficiency in factories, buildings, and machinery and equipment.[20] The Hazardous Substance Act regulates all hazardous and toxic substances which can potentially cause harm to "persons, animals, plants, property, or environments."[21] The Public Health Act is the third of Thailand's main pollution laws. The Public Health Act requires ministerial regulations the appointment of public officials, to be issued by the Minister of Public Health, in an effort to promote the public health of Thailand.[22] The fourth, and final, main pollution law in Thailand is the Factory Act. This Act requires environmental regulations for businesses that

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[20] Tookey. *Southeast Asian Environmentalism at its Crossroads.* Section III(B)(a). The Energy Conservation Act established the National Energy Policy Council. The National Energy Policy Council proposes measures and makes recommendations to the Cabinet regarding energy conservation. The Council also creates guidelines for the use of the Fund for Promotion of Energy Conservation, which provides money for the completion of conservation projects.

[21] Tookey. *Southeast Asian Environmentalism at its Crossroads.* Section III(B)(b). The Committee on Hazardous Substances oversees the actions of the Hazardous Substance Act. This committee, under the Act, advises the Minister of Industry and the public on issues of hazardous substances, as well as, hears grievances from those persons who have received injuries as a result of exposure to hazardous and toxic substances.

[22] Tookey. *Southeast Asian Environmentalism at its Crossroads.* Section III(B)(c). The Public Health Act also established a committee to carry out and oversee its initiatives, the Public Health Committee. The Public Health Committee, in conjunction with the Act, provides improvements in public health laws and regulations such as disposal of sewage and sanitation buildings. Advice is also given to local officials by the Committee, which also grants them power to issue licenses and confiscate anything that is unhygienic or could harm the public.

employ seven or more workers and all vehicles that use five horsepowers or greater.

The second of Thailand's current environmental challenges is conservation. Conservation remains a tremendous challenge to the people of Thailand due to the ever-increasing demand for natural resources and the lack of effective resource management. The largest conservation issues include water rights and quality, land quality, deforestation and forestland ownership issues, and mining rights.

Water shortages have become an increasingly common problem for modern Thailand. The shortages result in large part from the rapid economic development in Thailand and the subsequent population growth. A corresponding problem is the low quality of the water that is available for use. Low water quality generally results from the lack of ability to store enough fresh water combined with the inability to utilize available ground water. There have also been growing conflicts over the amount of water consumed among the different sectors of agriculture, industry and service. The management regulations, coupled with the uncertain water usage, have begun to cause serious problems such as droughts and floods.

The mineral resources of Thailand have also been inappropriately used and managed for the past several decades. Thai officials have realized the negative impacts that mining can have on the quality of the environment. This realization comes with only a few, degraded mineral resources remaining and

lower economic returns for previously mined resources. As with the other issues, there is growing conflict between resource conservation and development. According to the Policy and Prospective Plan for Enhancement and Conservation of National Environmental Quality, this increasing conflict between development and conservation of Thailand's resources is a result of the lack of cooperation within and among governmental agencies, as well as, a lack of enforcement for environmental laws and policies.

According to Tookey, there are several factors that have attributed to the deforestation of Thailand including "the basic needs of expanding rural populations (housing, furniture, etc.), land clearance for crop production, commercial logging, shifting cultivation and illegal logging."[23] The National Forestry Policy, however, has set a goal of keeping forty percent of the nation forested. Fifteen percent of those forestlands are protected for recreation, conservation and environmental quality protection. The remaining twenty-five percent of those forestlands are used as production forests to produce timber and other forest products. These production forests are created by the Thai government's commercial reforestation program, which generally consist of large eucalyptus plantations. These eucalyptus plantations can be easily found throughout Thailand and are created under the "Khor Jor Kor" program. This program forcibly takes the forestlands from local villages and relocates the villagers.

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[23] Tookey. *Southeast Asian Environmentalism at its Crossroads.* Section III(B).

No concrete solutions have been proposed to help in the conservation of Thailand's environment. Thailand does, however, have four main conservation acts that were enacted in the early 1990s. The Wild Animal Reservation and Protection Act, enacted in 1992, is supervised by the Minister of Agriculture and Cooperatives. The Wild Animal Reservation and Protection Act provides for the protection of certain wild animals and the formulation and maintenance of wild animal conservation areas. The Minister of Agriculture and Cooperatives also oversees the Wildlife Conservation Act, the National Park Act, and the Forest Reserves Act, all enacted in 1991. The Wildlife Conservation Act was passed in compliance with the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and is designed to regulate the trade and possession of endangered species. The National Park Act provides for the establishment of national parks. Similarly, the Forest Reserves Act allows for the designation of any area of forest as a national forest in an effort to "preserve a forest, timber, forest products, or other natural resources."[24] Together, these Acts designate land that is protected from the possession or ownership of any citizen.

Increasingly, the Thai central government is formulating and passing environmental laws and policies that hinge on the concept of local involvement. One example of the government's desire for local involvement in environmental issues can be found in the Policy and Prospective Plan for Enhancement and Conservation of National Environmental Quality. According to the concepts and

[24] Tookey. *Southeast Asian Environmentalism at its Crossroads.* Section III(B).

principles of this plan designed to prioritize and resolve environmental problems throughout Thailand, the development of "roles for local organization at all levels to participate in administration and management of resources, and promotion of environmental quality, monitoring, and increasing local awareness"[25] is instrumental in the implementation of this twenty-year plan.

As the central government of Thailand continues to include local knowledge and involvement in environmental laws and policies, traditional and customary practices of Thai villagers will become more prominent as common law. Two examples of customary practices that have become common law include tree ordination and *muang faai* irrigation. Villagers throughout Thailand have used these traditional practices for several decades or longer. More recently, these traditional practices have gained recognition and elevated from customary practices to a form of common law.

Tree ordination is a concept derived from Buddhism, animism and local knowledge directed towards environmental protection, and most importantly, the end of deforestation. Tree ordination is a ceremony performed by Buddhist monks in which the monks place their saffron robes around the tree trunks. Once the robe has been placed around the tree, a picture of the King and the symbol of the local tribe are attached to the robe in prominent positions. The premise behind the ordination ceremony is that a sacred connection is formed

[25] *Thailand: Policy and Prospective Plan for Enhancement and Conservation of National Environmental Quality, 1997-2016*, Section 1:Concepts and Principles

between the monks and the tree and, since monks are revered by the Thai people, they will respect and preserve the forest. Tree ordination is important not only because it helps in the preservation of the forests and everything living within its ecosystem, but it is also an important cultural tool used to teach younger generations the customs and traditions of their tribe.

Muang faai irrigation is another traditional practice used to promote environmental conservation and protection. *Muang faai* irrigation is traditionally practiced in northern Thailand and has been used for approximately the last thousand years. A *muang faai* irrigation system is usually composed "of a small reservoir which feeds an intricate, branching network of small channels carrying water in carefully calibrated quantities through clusters of rice terraces in valley bottoms . . . " and the "fundamental principle of water rights under *muang faai* is that everyone in the system must get enough to survive." According to Tookey, it is estimated that *muang faai* irrigation systems are still dominant in as much as 80% of agricultural areas. There have been several challenges to the *muang faai* system of irrigation in the past through forms of "government sanctioned logging, increased cultivation of cash crops on mountain slopes, and replacement of traditional *muang faai* wooden water barriers with concrete structures." [26]

The principle of water rights under *muang faai* is an example of how traditional practices of these remote communities become a form of common law. The central, civil law previously has not governed certain issues of remote

[26] Tookey. *Southeast Asian Environmentalism at its Crossroads.* Section VI(C).

communities. As a result, such practices and principles as *muang faai* developed to govern environmental issues. These traditional practices have gained recognition by the central government and elevated from customary practices to common law. Other examples of traditional practices that have been elevated to a form of common law include traditional medicine techniques, farming practices and land classification systems. These traditional practices and other forms of local wisdom are being incorporated into the central, civil law in the form of environmental laws and policies. An example of traditional, common law incorporated in the central, civil law is the National Forestry Policy. Thailand's National Forestry Policy promotes community forestry projects through the Community Forest Act with the application of local wisdom to the management of local and national forests.[27]

The traditional, customary practices of local villages are becoming more prominent as environmental protections as the concern for the environment continues to grow. As traditional and customary practices are used more frequently by the Thai national government in environmental policies, local customs will gain a greater amount of autonomy. One such ethnic group, the Muslims of southern Thailand, have already been granted such a high level of freedom in their self-governance through customary and traditional practices. The Muslims in Thailand are primarily concentrated in the four southern provinces bordering Malaysia (Yala, Narathiwat, Pattani, and Satun). The vast

[27] Tookey. *Southeast Asian Environmentalism at its Crossroads.* Section VI(C).

majority of Thai Muslims claim Muslim-Malay as their custom, language, and religion.

The Muslim provinces were claimed as a vassal state by Thailand during the 13th century. After the fall of Ayuthia to Burma, the Muslim provinces declared themselves independent of Thai rule. Later, when Thai rule was re-instated throughout the area, the Muslim-Malay rulers were reduced to governors of the provinces. During the 18th century, the province of Pattani was absolved by Thailand and further divided into seven districts. The new Pattani and the other six new provinces were placed under the governorship of a Malay ruler and several other Muslims. Revolts ensued as the Muslims tried to regain their independence from the central Thai government. The Thai government tried to quell the rebellions by appointing Thais as governors. However, these appointments quickly led to more violence and the subsequent re-appointment of Muslim-Malays as governors of Muslim provinces.

As these provinces were geographically far from the center of government, the Muslim provinces were able to exercise independence in their local administration with only a few constraints (mostly taxes) from the central Thai government. For example, although the King officially appointed the governors, the Muslim-Malays followed the customary practice of the hereditary principle in choosing their next governor. The quasi-autonomous state of the Muslim provinces also served to strengthen the socio-political structures within

the Muslim provinces and the Muslims of southern Thailand enjoyed much governmental freedom.

At the end of the 19th century, the Thai central government underwent reorganization. This reorganization resulted in the removal of the majority of the Muslim autonomy and continual and severe conflicts between the Muslims and Thais in an effort to regain that autonomy. In 1938, the Thai government again tried to impose Thai civil law and practices over the traditional Muslim-Malay practice of Shari' a law. The results of so many attempts to forcibly assimilate the Thai-Muslims into Thai culture have been the rise of numerous separatist movements throughout southern Thailand. Throughout all of the assimilation attempts by the Thai national government, the Muslim-Malays were still able to maintain their separate Muslim identity.

After decades of unresolved fighting and several secession attempts, the Thai national government enacted some general policy guidelines based on the principles of freedom of religion and an improved education with emphasis on the Thai curriculum to facilitate Muslim integration into Thai society. Policies were enacted in 1946 to safeguard the Islamic religion for the Muslim-Malays. These policies allow the Muslim-Malays to utilize Islamic law in inheritance and other familial cases. Other Islamic policies also allow Muslims the right to have an Islamic representative as the assistant judge in such cases. These are some of the most prominent examples of the movement toward the creation of a *dar al-Islam,* an independent Islamic state. The Thai policies of Islamic law recognition

strengthen the desire for an autonomous Islamic state for the southern Muslim-Malays.

The Thai-Muslims in southern Thailand practice much of the same autonomy that the tribes and villages of the north also practice. However, in the case of the Muslim-Malay, much of their semi-autonomous state was given to them and is recognized by the national government. The situation of the Muslim-Malays is slowly becoming a reality for the villages of the north. As the Thai national government increasingly includes local knowledge and practices in environmental laws and policies, the local villages will be given more autonomy to continue with their traditional practices as a form of common law recognized by the national government. As these villages gain more independence, they in turn will be able to exert more power and force in the termination of environmental degradation, most notably deforestation and industrial pollution, within their surrounding area.

Summary

The development of a traditional, common-law system within civil-law societies is not a recent phenomenon. In fact, the development of a traditional common law as a substitute for the central civil-law system has been prevalent until the past several decades. Up until the past several decades and the invention of more modern and efficient technologies, the central system of law was unable to penetrate the remote areas of Southeast Asian nations. As a result, a traditional common law system developed locally in the areas that were beyond the reach of the central civil-law system. These traditional, local systems of common law developed as the only way to maintain order in remote areas. Traditional common law systems remained in affect, however, because the central government in essence deferred the handling of local affairs to local communities beyond the reach of the central government. As a result, traditional common law communities have been integrated into the greater civil law society.

Conflicts began to arise as the central system of civil law began to reach into the previously untouched, remote areas of nations. During the past several decades, there have been a rising number of conflicts between central governments and local population groups. These conflicts arise from the clash of

the two distinctly separate systems of law - civil and common-law legal systems. Though both of these systems are based on rule of law, they differ greatly in their administration of justice.

The central government follows a system of civil law, which is fundamentally different from the common law systems being employed by local populations. The civil law system of the central government functions according to codified laws and statutes. The civil law tradition is the oldest and most widespread legal system, which has its origins in the *jus civile* and ancient Rome. The two systems also differ markedly in that the development of civil law gave no value to the judicial decisions of individual cases. This principle of judicial precedent, however, is the foundation of common-law legal systems. The system of common law developed by local communities is based on traditional practices and for most purposes, is an oral tradition. The fact that traditional common law systems are based on oral traditions has sparked conflicts in such areas as forestlands ownership. Local landowners are unable to produce land titles that satisfy the civil-law requirements of land ownership since title is passed down through the communities orally. The local communities have no form of written registration or titled ownership within the community. Consequently, disputes arise when the central government claims land that seemingly belongs to the local communities but which is un-owned and unclaimed according to the system of civil law followed by the government.

In contrast to the system of common law developed and utilized by indigenous groups throughout Thailand, Shari' a provides another alternative to the central system of civil law. Shari' a is a form of religious law based on the teachings of Islam. Shari' a has its roots in the Middle East from Arabic and old Islam. Shari' a is often referred to as "Islamic law;" however, this is at best an approximation of the definition of the term. Shari' a is defined in one article as "not simply law but also as a set of processes and practices married to specific institutions...held by scholars to be distinctive because it was associated with a specific process for deriving law and another for adjudicating disputes."[28]

The Malay-Muslims in the southern regions of Thailand practice Shari' a. In recognition of Shari' a as an alternative to the civil system of law, the Thai government has given the Malay-Muslims jurisdiction over domestic matters such as marriages. As a result, the Malay-Muslims are able to continue practicing their traditional form of law in conjunction with the greater, central system of civil law.

Adat law is another form of traditional common law found in Southeast Asian countries. More specifically, adat law is the traditional form of law practiced throughout local communities in Indonesia. Adat is derived from the Dutch word *adatrecht,* which means customary law. *Adatrecht* stands for a uniform traditional and customary common law created from a combination of

[28] Brown, *Sharia and State in the Modern Muslim Middle East,* International Journal of Middle East Studies Vol. 29, No. 3: P 363. Brown also notes that Shari'a is a "jurists' law" (P. 365) as it was uncodified and resulted from jurists rather than state texts of laws.

European, Islamic, and local Indonesian ethnic customs. Adat law, like the traditional and customary common law of Thai indigenous groups, is also an oral tradition. As there are no written laws, adat law becomes visible in the form of positive law (judgments) made by local authorities within the communities. The Indonesian government of Kalimantan has passed laws to incorporate adat law, if in name only, into the central system of civil law through civil statutes regarding land laws and land ownership determination. One example of adat incorporation into the system of civil law is the Basic Agrarian Law passed in 1960.

Conflicts between the central civil law of a nation and the traditional common law of remote communities arise when the local practices of remote communities do not coincide with the civil codes of the central government. Legal system conflicts are evidenced throughout Southeast Asia in numerous environmental conflicts. As discussed throughout the paper, environmental issues such as mineral rights and deforestation show evidence of the clashing legal systems. These conflicts receive international attention because they are made public by the non-governmental and other representative organizations that step in to represent the common law rights of the local communities, as well as because of the overall international awareness of environmental issues.

The present state of affairs in Thailand is not an easy state to define. The local communities are committed to their traditional practices and continue to use them as a form of common law. However, as the government continues to

expand and increase its presence throughout the entirety of the nation, there is a growing commitment to the central civil law within the society as a whole to preserve a sense of overall unity within the nation. The growing acceptance of the system of civil law relies in part on the actions of the government to incorporate traditional practices into environmental legislation such as traditional irrigation practices and other areas of local knowledge in the preservation of the national environment. The incorporation of these local, customary elements into national civil law is for two reasons. First, the declining state of the environment in Thailand needs to be revived through means other than those being utilized at present. The traditional practices and techniques of local communities have preserved their ecosystems for decades. The implementation of these customary practices nationwide can help to alleviate the environmental degradation rampant in Thailand. The second, and perhaps most important, reason for the incorporation of the traditional practices of local communities is to overcome conflicts that have developed in environmental areas between the nation and its people.

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