

12-1962

## Culture Patterns and Judicial Systems

Stuart S. Nagel

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Comparative and Foreign Law Commons](#)

---

### Recommended Citation

Stuart S. Nagel, Culture Patterns and Judicial Systems, 16 *Vanderbilt Law Review* 147 (1962)  
Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol16/iss1/7>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

# Culture Patterns and Judicial Systems

*Stuart S. Nagel\**

Comparative law, like comparative government in general,<sup>1</sup> has largely confined itself to unintegrated descriptions of European legal principles.<sup>2</sup> Not only has comparative law traditionally been limited in its subject matter, but it also has rarely, if ever, made use of statistical techniques in accounting for the differences observed. It is the purpose of this paper to analyze statistically the relations between industrialism, democracy, and collectivism on the one hand and the judicial process on the other in ten different societies.

## I. THE RESEARCH DESIGN

It is hypothesized that statistically significant relations might be found between the following cultural and adjudication characteristics:

### I. Cultural Characteristics

1. Manufacturing versus non-manufacturing technology.
2. Mainly dictatorial versus mainly democratic political system.
3. Collectivistic property system versus individualistic property system.

### II. Adjudication Characteristics

#### A. Adjudication Personnel

1. Presence of professional judges or dispute settlers.
2. Selection of judges mainly by chieftains versus selection mainly by the people as a whole in the society.
3. Presence of jurors or lay advisers to professional judges.
4. Frequent presence of lawyers or professional pleaders.

#### B. Sources of Decision-Making Criteria

1. Presence of vigilantism or informal lay trials accompanied by lynching, blood feuds, or other violence parallel to the formal system.
2. Presence of supernatural divinations, ordeals, judicial duels, effective supernatural oaths, or heavy reliance on religious literature.

---

\*Assistant Professor of Political Science, University of Illinois; member of the Illinois Bar.

1. MACRIDIS, *THE STUDY OF COMPARATIVE GOVERNMENT* 1-22 (1955).  
2. See, for example, the methodological discussion and the bibliographic titles in SCHLESSINGER, *COMPARATIVE LAW* xvii-xxi, 144-51, 499-600 (1959).

3. Mainly rigid precedent following or norm following resulting in considerable judicial restraint versus mainly case individualization resulting in considerable judicial discretion.
  4. Presence of norms promulgated by councils or judges versus norms stemming only from evolved custom.
- C. Adjudication Purposes in Criminal Matters
1. Mainly defense oriented versus mainly prosecution oriented.
  2. Primary emphasis on rehabilitation of norm breakers versus primary emphasis on making norm breakers suffer to deter others or satisfy revengefulness.
- D. Techniques Involved in Resolving Controversies
1. Mainly private suits for damages versus mainly public or community handling of norm breakers.
  2. Generally more than two months from settlement initiation to completion versus generally less.
  3. Presence of frequent provision whereby parties of high classes or ethnic groups have greater chance of winning than parties of low classes or ethnic groups.
  4. Frequent or occasional bribery versus seldom if ever any bribery.
  5. Judges frequently summon and interrogate witnesses versus system where judges seldom or just occasionally do so.
  6. Presence of procedures whereby a losing party can generally apply for another hearing.

To test the hypotheses, ten societies were analyzed. Five of the ten societies consisted of the following geographically scattered pre-literate societies:

1. Ashanti Confederation as described in Robert Rattray, *Ashanti Law and Constitution* (1929).
2. Cheyenne as described in Karl Llewellyn and E. Adamson Hoebel, *The Cheyenne Way* (1941).
3. Eskimo as described in Knud Rasmussen, *Intellectual Culture of the Iglulik Eskimo* (1929).
4. Ifugao as described in Roy Barton, *Ifugao Law* (1919).
5. Trobriand as described in Bronislaw Malinowski, *Crime and Custom in Savage Society* (1926).

Secondary source material on these pre-literate societies is available in E. Adamson Hoebel's *The Law of Primitive Man* (1954). The other five societies consisted of the following geographically scattered literate societies:

1. United States as described in Lewis Mayers, *The American Legal System* (1955), and Jerome Frank, *Courts on Trial* (1949).
2. Pre-Communist China as described in William Burdick, *Bench and Bar of Other Lands* (1939), and John Wigmore, *Panorama of the World's Legal Systems* (1936).
3. Pre-Nasser Egypt as described in the Burdick and Wigmore works listed above.
4. French Fourth Republic as described in Robert Neumann, *European and Comparative Government* (1951), and Rene David, *The French Legal System* (1958).
5. Soviet Union as described in Harold Berman, *Justice in Russia* (1950).

Table 1 shows the cultural and adjudication characteristics of the ten societies according to the sources consulted. The symbols used in Table 1 are defined below the table. The selection of judges, presence of jurors (lay advisers to judges), bribery of judges, and the interrogatory role of judges are concepts inapplicable to the Trobriand society in view of the fact that it lacks any personages who can be considered judges, professional or otherwise. The presence of rehabilitation versus deterrence is also inapplicable to the Trobriand society since the emphasis there is in neither direction, but rather in the direction of handling norm breakers so as to provide compensation to those who have suffered from the violation. The presence of judges appointed by chieftains versus judges selected by the people as a whole is inapplicable to the Ifugao society since the selector there is the plaintiff, who picks whomever he wants to judge the dispute.

## II. MANUFACTURING AND NON-MANUFACTURING COMPARISONS

Table 2 shows how the adjudication systems of the manufacturing societies involved differ from those of the non-manufacturing societies. The probabilities in the table represent how many times out of 100 a difference as large as each difference found could have occurred purely by chance, taking into consideration the size of each difference and the number of societies involved.<sup>3</sup> If the chance probability is less than 5 out of 100, it is conventional to attribute the difference found to a real difference rather than to chance. If the chance probability is greater than 20 out of 100, it is conventional to attribute the difference to chance. A finding with a chance probability between 5

3. The Fisher exact probability test is the appropriate test of chance probability to use on this data because it takes into consideration the smallness of the samples and because the societies do not distribute themselves in a bell-shaped manner on the characteristics being measured. See SEGEL, *NONPARAMETRIC STATISTICS FOR THE BEHAVIORAL SCIENCES* 95-104 (1956). The probability of attributing each difference found to chance has been doubled by virtue of the fact that the hypotheses did not specify the direction of the difference. *Id.* at 13-14.

TABLE I. THE CULTURAL AND ADJUDICATION CHARACTERISTICS OF THE TEN SOCIETIES

	United States	Ashanti Confederation	Cheyenne	Pre-Communist China	Pre-Nasser Egypt	Eskimo	French Fourth Republic	Itugao	Soviet Union	Trobriland
<b>I. Cultural Characteristics</b>										
Manufacturing	Y	N	N	Y	N	N	Y	N	Y	N
Democratic	Y	E	Y	N	N	Y	Y	Y	N	N
Collectivistic	N	E	Y	N	N	Y	N	N	Y	N
<b>II. Adjudication Characteristics</b>										
<b>A. Personnel</b>										
Professional Judges	Y	Y	N	Y	Y	N	Y	N	Y	N
Appointive Judges	N	E	Y	Y	Y	N	Y	I	N	I
Jurors	Y	N	N	N	N	N	Y	N	Y	I
Lawyers	Y	Y	N	Y	E	N	Y	N	Y	N
<b>B. Sources of Criteria</b>										
Vigilantism	E	N	N	N	N	Y	N	Y	N	Y
Supernaturalism	N	Y	Y	N	Y	Y	N	N	N	N
Little discretion	Y	N	N	N	N	Y	Y	N	N	E
Promulgation	Y	N	Y	Y	Y	N	Y	N	Y	N
<b>C. Purposes</b>										
Defense oriented	Y	N	Y	N	N	E	Y	N	N	N
Rehabilitation	E	N	Y	N	N	Y	N	N	Y	I
<b>D. Techniques</b>										
Private emphasis	N	N	N	Y	N	Y	N	Y	N	Y
Only short delays	N	Y	Y	N	N	N	N	Y	Y	Y
Discrimination	Y	Y	N	Y	Y	N	E	N	N	Y
Frequent bribery	Y	Y	N	Y	Y	N	N	N	N	I
Adversary system	Y	N	N	N	N	N	N	N	N	I
Rehearings	Y	Y	N	Y	Y	N	Y	N	Y	N

## Symbols Used:

Y (yes) = has the mentioned characteristic to the extent specified in the hypothesis.

N (no) = has the obverse characteristic to the extent specified in the hypothesis.

E = approximately evenly balanced between Y and N.

I = inapplicable in light of other characteristics of the society, (e.g., method of judicial selection is a question inapplicable to a society which has neither professional nor non-professional judges).

U = unrevealed in the sources consulted.

and 20 out of 100 can be treated, where small samples are involved, as being worthy of further consideration and analysis although not worthy of acceptance as a proven relationship.

TABLE 2. HOW THE ADJUDICATION SYSTEMS OF MANUFACTURING SOCIETIES DIFFER FROM THOSE OF NON-MANUFACTURING SOCIETIES

Adjudication Factor	Number of Societies Involved (Mfg. & Non-Mfg.)	% of Mfg. Societies Having the Adj. Factor	% of Non-Mfg. Societies Having the Adj. Factor	Difference (in percentage points)	Probability of the Difference Being Due to Chance
<b>A. Personnel</b>					
Professional judges	4 & 6	100%	33%	+67	.05 to .20
Appointive judges	4 & 3	50	67	-17	Above .20
Jurors	4 & 5	75	0	+75	.05 to .20
Lawyers	4 & 5	100	20	+80	.05 to .20
<b>B. Sources of Criteria</b>					
Vigilantism	3 & 6	0	50	-50	Above .20
Supernaturalism	4 & 6	0	67	-67	.05 to .20
Little discretion	4 & 5	50	20	+30	Above .20
Promulgation	4 & 6	100	33	+67	.05 to .20
<b>C. Purposes</b>					
Defense oriented	4 & 5	50	20	+30	Above .20
Rehabilitation	3 & 5	33	40	-07	Above .20
<b>D. Techniques</b>					
Private emphasis	4 & 6	25	50	-25	Above .20
Only short delays	4 & 6	25	67	-42	Above .20
Discrimination	3 & 6	67	50	+17	Above .20
Frequent bribery	4 & 5	50	40	+10	Above .20
Adversary system	4 & 5	25	0	+25	Above .20
Rehearings	4 & 6	100	33	+67	.05 to .20

In Table 2 there are no relationships which have a chance probability of less than 5 out of 100. There are, however, six relationships which involve differences greater than 60 percentage points and chance probabilities between .05 and .20 in spite of the small samples. Thus Table 2 tends to show that manufacturing societies are more likely than non-manufacturing societies to have adjudication systems in which professional judges, jurors, lawyers, promulgating bodies, and appellate courts are present and in which supernaturalism is relatively absent. Table 3 shows the specific societies which illustrate these relations, excluding those societies for which the positions used are inapplicable or evenly balanced. The disproportionate presence of professional judges, jurors, lawyers, promulgating bodies, and appellate courts among manufacturing societies can probably be partially explained by the fact that increased industrialization brings increased specialization within the economic system of a society which carries

over into the political and adjudicative systems. The relationships can also be partially explained by the fact that increased industrialization better enables a society to have enough of an economic surplus to be better able to support political and judicial officials who are not directly producing food, shelter, or clothing for the society.

TABLE 3. THE SOCIETIES WHICH ILLUSTRATE THE MORE STATISTICALLY SIGNIFICANT FINDINGS WITH REGARD TO INDUSTRIALISM AS A DETERMINANT OF ADJUDICATION SYSTEMS

	Non-Manu- facturing	Manufacturing		Non-Manu- facturing	Manufacturing
Professional Judges	Ashanti Egyptian	American Chinese French Soviet	Much Super- naturalism	Ashanti Cheyenne Egyptian Eskimo	
No Profes- sional Judges	Cheyenne Eskimo Ifugao Trobriand		Little Super- naturalism	Ifugao Trobriand	American Chinese French Soviet
Jurors		American French Soviet	Promulga- tion of Law	Cheyenne Egyptian	American Chinese French Soviet
No jurors	Ashanti Cheyenne Egyptian Eskimo Ifugao	Chinese	Law by evolved custom only	Ashanti Eskimo Ifugao Trobriand	
Lawyers	Ashanti	American Chinese French Soviet	Rehearings	Ashanti Egyptian	American Chinese French Soviet
No lawyers	Cheyenne Eskimo Ifugao Trobriand		No rehearings	Cheyenne Eskimo Ifugao Trobriand	

The disproportionate presence in non-manufacturing societies of divination, trial by ordeal, and judicially supervised duels (in all of which divine intervention is presumed to enable the truth to win out) can possibly be explained by the fact that with increased industrialization there comes a greater emphasis on materialistic explanation of phenomena rather than on supernaturalistic explanation. Both industrialization and a naturalistic or materialistic orientation seem to be co-effects of increased acquisition of knowledge and improved scientific techniques in the physical and biological sciences.

TABLE 4. HOW THE ADJUDICATION SYSTEMS OF DEMOCRATIC SOCIETIES DIFFER FROM THOSE OF DICTATORIAL SOCIETIES

Adjudication Factor	Number of Societies Involved (Dem. & Dict.)	% of Dem. Societies Having the Adj. Factor	% of Dict. Societies Having the Adj. Factor	Difference (in percentage points)	Probability of the Difference Being Due to Chance
<b>A. Personnel</b>					
Professional judges	5 & 4	40%	75%	-35	Above .20
Appointive judges	4 & 3	50	67	-17	Above .20
Jurors	5 & 3	40	33	+07	Above .20
Lawyers	5 & 3	40	67	-27	Above .20
<b>B. Sources of Criteria</b>					
Vigilantism	4 & 4	50	25	+25	Above .20
Supernaturalism	5 & 4	40	25	+15	Above .20
Little discretion	5 & 3	60	0	+60	Slightly above .20
Promulgation	5 & 4	60	75	-15	Above .20
<b>C. Purposes</b>					
Defense oriented	4 & 4	75	0	+75	.05 to .20
Rehabilitation	4 & 3	50	33	+17	Above .20
<b>D. Techniques</b>					
Private emphasis	5 & 4	40	50	-10	Above .20
Only short delays	5 & 4	40	50	-10	Above .20
Discrimination	4 & 4	25	75	-50	Above .20
Frequent bribery	5 & 3	20	67	-47	Above .20
Adversary system	5 & 3	20	0	+20	Above .20
Rehearings	5 & 4	40	75	-35	Above .20

### III. DEMOCRATIC AND DICTATORIAL COMPARISONS

Table 4 shows how the adjudication systems of democratic societies differ from those of dictatorial societies. Two of the relationships relating to defense orientation and judicial discretion are strong enough to have chance probabilities almost below .20 in spite of the small samples. The specific societies which illustrate these relations are shown in Table 5. The democratic system emphasizes the importance of the people sometimes at the expense of the state or the



government. This factor possibly explains why democratic societies tend to place numerous obstacles in the way of finding an accused person guilty of violating the societal norms. In such societies, the philosophy prevails that it is frequently better that no sanctions be enforced at all for a violation of the norms of the collectivity than have innocent people be swept up in the sanctions.

TABLE 5. THE SOCIETIES WHICH ILLUSTRATE THE MORE STATISTICALLY SIGNIFICANT FINDINGS WITH REGARD TO DEMOCRACY AS A DETERMINANT OF ADJUDICATION SYSTEMS

	Dictatorial	Democratic		Dictatorial	Democratic
Defense oriented		American Cheyenne French	Little judicial discretion to individualize		American Eskimo French
Prosecution oriented	Chinese Egyptian Soviet Trobriand	Ifugao		Much judicial discretion to individualize	Chinese Egyptian Soviet

Table 4 also tends to show that societies with a democratic political organization are more likely than societies with a dictatorial political organization to have adjudication systems in which there is relatively little judicial discretion. Just as the economic specialization which is involved in industrialization carries over to a society's adjudication system, the popular restraints on political chieftains which are involved in democracy probably also carry over to a society's adjudication system. One of the major ways to prevent undue discretion on the part of adjudicators is to require through tradition or law that present adjudicators shall apply the rules of past adjudicators without attempting to individualize decisions to the parties.

#### IV. COLLECTIVISTIC AND INDIVIDUALISTIC COMPARISONS

Table 6 shows how the adjudication systems of societies which emphasize collective ownership of property differ from those of societies which emphasize individual ownership. Three of the relationships are below or nearly at the .20 level of chance probability. Table 7 shows the specific societies which illustrate these relationships. All of the societies which have a collectivistic property system emphasize rehabilitation over revenge or deterrence in their criminal proceedings, whereas none of the societies with an individualistic

property system do so. This finding is possibly attributable to the fact that in a collectivistically organized society each member tends to feel more of a responsibility for each other member. Thus when one member becomes a social deviant, there is more of a tendency to blame the environment than to blame the individual. Furthermore, in a collectivistically organized society there is a greater feeling of unity and a lesser feeling of competitiveness. When a member of such a society becomes a social deviant, this feeling of unity discourages his being labeled an outlaw and encourages an attempt to bring him back into the fold through rehabilitation.

TABLE 6. HOW THE ADJUDICATION SYSTEMS OF COLLECTIVISTIC SOCIETIES DIFFER FROM THOSE OF INDIVIDUALISTIC SOCIETIES

Adjudication Factor	Number of Societies Involved (Coll. & Ind.)	% of Coll. Societies Having the Adj. Factor	% of Ind. Societies Having the Adj. Factor	Difference (in percentage points)	Probability of the Difference Being Due to Chance
<b>A. Personnel</b>					
Professional judges	3 & 6	33%	67%	-34	Above .20
Appointive judges	3 & 4	33	75	-42	Above .20
Jurors	3 & 5	33	40	-07	Above .20
Lawyers	3 & 5	33	60	-27	Above .20
<b>B. Sources of Criteria</b>					
Vigilantism	3 & 5	33	40	-07	Above .20
Supernaturalism	3 & 6	67	17	+50	Above .20
Little discretion	3 & 5	33	40	-07	Above .20
Promulgation	3 & 6	67	67	0	No difference
<b>C. Purposes</b>					
Defense oriented	2 & 6	50	33	+17	Above .20
Rehabilitation	3 & 4	100	0	+100	.05 to .20
<b>D. Techniques</b>					
Private emphasis	3 & 6	33	50	-17	Above .20
Only short delays	3 & 6	67	33	+34	Above .20
Discrimination	3 & 5	0	80	-80	.05 to .20
Frequent bribery	3 & 5	0	60	-60	Slightly above .20
Adversary system	3 & 5	0	20	-20	Above .20
Rehearings	3 & 6	33	67	-34	Above .20

As shown in Table 6, collectivistic societies are less likely than individualistic societies to have discrimination present in their adjudication system whereby members of higher classes or ethnic groups have a better chance of winning an adjudication than others do. This finding can possibly be explained by the fact that a collectivistic society is less likely to have sharp property differentials on which

TABLE 7. THE SOCIETIES WHICH ILLUSTRATE THE MORE STATISTICALLY SIGNIFICANT FINDINGS WITH REGARD TO COLLECTIVISM AS A DETERMINANT OF ADJUDICATION SYSTEMS

	Individ- ualistic	Collectiv- istic		Individ- ualistic	Collectiv- istic
Rehabili- tation emphasis		Cheyenne Eskimo Soviet	Frequent income or ethnic dis- crimination	American Chinese Egyptian Trobriand	
Deterrence or revenge emphasis	Chinese Egyptian French Ifugao		Rare factors in deter- mining winners	Ifugao	Cheyenne Eskimo Soviet

	Individ- ualistic	Collectiv- istic
Relatively frequent bribery	American Chinese Egyptian	
Relatively rare bribery	French Ifugao	Cheyenne Eskimo Soviet

economic classes can be based. In addition, the greater feeling of unity and cooperation which tends to exist within collectivistic societies tends to discourage categorizing people for purposes of unequal treatment.

A third finding which Table 6 tends to reveal is the greater presence of bribery of adjudicators in societies with an individualistic rather than a collectivistic property system. The explanation possibly lies in the fact that there is greater competition for material acquisition in an individualistic society than in a collectivistic society. Such material acquisitiveness provides an incentive to adjudicators to solicit or at least accept bribes, which incentive is relatively lacking in most collectivistically organized societies.

These hypotheses, findings, and theories relating to collectivistic and individualistic societies, like those relating to manufacturing and non-manufacturing societies or democratic and dictatorial societies,

are not based on sufficient data to merit acceptance as proven propositions. This exploratory study, however, is readily capable of being expanded into a research design using more societies, more information sources, and more variables. It has been a success to the extent that it throws light on the relationships involved and to the extent that it provokes more expansive studies of the cross-cultural context of adjudicative and other legal processes.

