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Law and Anthropology: A Review

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Anthropology And Law

1. Purposes and Scope

The relationship between anthropology and law is often viewed as problematic or tenuous, but it may argued strongly that such a view is at best misleading. In order to sustain this assertion, this paper reviews some of the main themes in anthropological studies of law, dispute processing and social order. In addition it offers a preliminary evaluation of the contributions and limitations of anthropological approaches in relation to legal studies and to the development of social theories of law. It does not aim to present a full survey of the literature. Instead, it concentrates primarily on selected writings in English and to some extent French by scholars in the United States, Britain and continental Europe; the footnotes give references to selected literature from other countries.

2. Anthropology and Academic Law

The influence of anthropological approaches on academic legal studies has so far been marked only in the United States, especially through its elite

1 Professor of European Community Law, European University Institute; Professor of Law, College of Europe, Bruges; Honorary Visiting Professor, University College London. This paper is to appear in Philip Thomas (ed.), *Law and the Social Sciences* (Applied Legal Philosophy Series) (Aldershot: Dartmouth Publishing Company, 1993). It is a revised and updated version of my article entitled 'Anthropology, Dispute Processes and Law: A Critical Introduction', (1981) 8 *Journal of Law and Society* 141.

universities[2], though the importance of the field has recently been recognised institutionally in France.[3] In contrast to trends in sociology and law, the establishment of the anthropology of law as a distinct field of study has rarely resulted in the creation of centres for interdisciplinary research.[4] Anthropologists interested in law, and legal scholars with similar interests, are bound instead by informal networks, loose professional organisations and a handful of specialist journals.[5]

Moreover, collaboration between anthropologists and academic lawyers has always been unusual.[6] This has been ascribed to the technical nature of

2 A comparison of the (American) Law and Society Review with the [British] Journal of Law and Society is instructive in this respect. In addition, anthropologists or scholars with strong interests in anthropological approaches have taught in major American law schools. Not all of these relations stem from anthropologists, of course; and the influence of such links outside the national law schools in the U.S. should not be overstated.

3 The first professorship in Legal Anthropology in France was established in 1988 at the Université d'Aix-Marseille III (Aix-en-Provence) and the second in 1989 at the Université de Paris I. On the situation in the Netherlands, see J. Van Houtte (eds), *Sociology of Law and Legal Anthropology in Dutch-Speaking Countries* (1985) and K. von Benda-Beckmann and F. Strijosch (eds), *Anthropology of Law in the Netherlands* (1986).

4 Among the exceptions is the Laboratoire d'Anthropologie Juridique, Université de Paris I, France. For an early discussion of its activities, see Le Roy, "Reflexions sur une interprétation anthropologique du droit africain: Le Laboratoire d'Anthropologie Juridique" (1972) 26 *Revue Juridique et Politique, Indépendance et Coopération* 427-448. The two major, long-term projects in legal anthropology, one by Max Gluckman and his colleagues and students at the Rhodes-Livingstone Institute and later at Manchester, the other by Laura Nader and her students in the Berkeley Village Law Project, have been based at centres for social science research (excluding lawyers) or at departments of anthropology (and sociology, in the case of Manchester during most of Gluckman's time there).

5 The major umbrella organisation today is the International Union of Anthropological and Ethnological Sciences Commission on Folk Law and Legal Pluralism, established in December 1978 as the Commission on Contemporary Folk Law, which included 275 members from numerous countries as of June 1992; see (1992) 25 *Commission on Folk Law and Legal Pluralism Newsletter*. In addition to individual members, the Commission includes various regional working groups. The Newsletters of the Commission describe other activities involving legal anthropologists and academic lawyers with similar interests. In the United States, the Association for Political and Legal Anthropology (APLA) was established in November 1976, now includes over 200 members and publishes a newsletter. The Laboratoire d'Anthropologie Juridique in Paris also publishes periodically a *Bulletin de Liaison*. The first issue of *Droits et Cultures* (Cahiers du Centre de Recherche de l'U.E.R. de Sciences Juridiques, Université de Paris X, Nanterre), appeared in 1981. Anthropological articles on law and dispute processes are published in the major anthropological and sociolical journals and also form the core of the *Journal of Legal Pluralism*, the successor to African Law Studies.

6 The major exceptions are Llewellyn and Hoebel's collaboration in *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (1941) and J. Comaroff and S. Roberts, *Rules and Processes: The Cultural Logic of Disputes in an African Context*

law as a discipline[7], but more convincing reasons lie partly in differences in the training and objectives of anthropologists and lawyers.[8] In the past, most anthropological studies of law concentrated on small-scale communities in Africa, Asia or Latin America, which academic lawyers in North America and Europe usually considered to be of little relevance to their own domestic legal systems.[9] Today many anthropologists, like some sociologists of law, reject Western jurisprudence as a source of analytic concepts or, more importantly, of guidelines for research.[10] Furthermore, the standard work of many anthropologists has been ethnographic description, with theories often being implicit or formulated at a very low level of abstraction. This has inhibited their making a more significant contribution to social theories of law.[11] In any case, anthropologists often accord a low priority to this theoretical pro-

(1981). On Llewellyn and Hoebel, see W. Twining, *Karl Llewllyn and the Realist Movement* (1973), chapter 8, and Twining, "Law and Anthropology: A Case Study of Inter-disciplinary Collaboration" (1973) 7 *Law and Society Review* 561-583.

7 See D. Riesman, "Toward an Anthropological Science of Law and the Legal Profession" in his *Individualism Reconsidered and Other Essays* (1954).

8 See Roberts, "Introduction" in *Law and the Family in Africa* ed. S. Roberts (1977) and Twining, "Law and Anthropology: A Case Study of Inter-disciplinary Collaboration" (1973) 7 *Law and Society Review* 561. On the relationship between anthropologists and lawyers in Britain in particular, see Campbell and Wiles, "The Study of Law in Society in Britain," (1976) 10 *Law and Society Review* 547-578 at 564, which relies on A. Kuper, *Anthropologists and Anthropology: The British School 1922-1972* (1973).

9 On this view of anthropology, see the two classic descriptions in S.F. Nadel, *The Foundations of Social Anthropology* (1951) and J. Beattie, *Other Cultures: Aims, Methods and Achievements in Social Anthropology* (1964). Different positions concerning contemporary anthropology and law are presented in J. Poirier, "Introduction à l'ethnologie de l'appareil juridique" in *Ethnologie générale*, ed. J. Poirier (1968) and E. Hill, "Law and Underdevelopment: Conceptualising Legal Formations in Peripheral States", presented at the Annual Conference of the British Sociological Association, University of Warwick, 9-12 April 1979. See also Roberts, "Law and the Study of Social Control in Small-Scale Societies" (1976) 39 *Modern Law Review* 663.

10 Thus, Roberts has argued that legal anthropological studies fall into one of two distinct schools: those that draw their basic concepts from Western Jurisprudence and concentrate on law as the subject of study, and those that reject Western jurisprudence as a source of concepts and concentrate on social control, disputing or other social processes deemed to be universal. See Roberts, ibid; and S. Roberts, *Order and Dispute: An Introduction to Legal Anthropology* (1979), chapters 2 and 11.

11 Among the discussions of the role of theory in anthropology, see R.A. Manners and D. Kaplan (eds.), *Theory in Anthropology: A Sourcebook* (1968) and I.C. Jarvie, *The Revolution in Anthropology* (1964). See also J.A. Brim and D.H. Spain, *Research Design in Anthropology: Paradigms and Pragmatics in the Testing of Hypotheses* (1974) and R. Naroll and R. Cohen, *A Handbook of Method in Cultural Anthropology* (1973). On the recent period, see the useful review by S.B. Ortner, 'Theory in Anthropology since the Sixties', (1984) 26 *Comparative Studies in Society and History* 126.

ject; many have considered that dispute processes, for example, are a less ethnocentric, more cross-culturally valid subject of study than law.[12]

Any general impression that anthropological approaches to legal processes have little to offer to academic legal studies is misleading, however, in at least two respects. First, as will be shown later, anthropological approaches today are extremely diverse, and many are concerned with western legal systems and subjects which have also preoccupied academic lawyers. Secondly, anthropological approaches to law and related processes raise certain fundamental questions concerning law and social science. These questions, of which some are posed more starkly by anthropological approaches than by other social sciences, have increasingly been debated by academic lawyers and theorists of law.

3. The Anthropology of Law

The historical separation between anthropology and academic legal studies has been influenced by the contrasting characteristics of the disciplines of law and anthropology, as well as by other institutional forces, such as the development of sociology in different countries[13]. Anthropological ap-

12 The most elaborate theoretical statement of this position is Abel, "A Comparative Theory of Dispute Institutions in Society" (1974) 8 *Law and Society Review* 217. See also Roberts, op. cit. n. 9.

13 The division of labour between sociology, concerned with western societies, and anthropology, focussing on non-western groups, is well-known, though out-dated and generally recognised to be increasingly irrelevant in contemporary studies; its intellectual foundations have always been shaky. Durkheim in France is the major, and exceptional, example of a sociologist whose work had a lasting influence on anthropological studies. See H. Lévy-Bruhl, "L'ethnologie juridique" in *Ethnologie générale*, ed. J. Poirier (1968), p. 1119; S. Lukes, *Emile Durkheim, His life and Work: A Historical and Critical Study* (1973), chap. 20; and D. Goddard, "Anthropology: the Limits of Functionalism" in *Ideology and Social Science: Readings in Critical Social Theory*, ed. R. Blackburn, 1972). Examples of work in other disciplines strongly influenced by anthropological research include M. Barkun, *Law without Sanctions: Order in Primitive Societies and the World Community* (1968) and D. Black, *The Behaviour of Law* (1976). Some anthropological research discussed later in this paper suggests the common concerns and partial convergence of anthropology and sociology.

proaches to law differ from those in psychology[14] (but resemble those in economics or sociology) in that they are usually considered to constitute an established academic field. The anthropology of law is widely recognised as a subdiscipline of anthropology.[15] Its origins have been traced to Montesquieu[16], but its foundations were laid by nineteenth century historical jurisprudence[17] and cemented during the period of European imperialist expansion and colonialism.[18] The anthropology of law reflects this legacy, but none the less its principal development is relatively recent.[19] This development has occurred primarily in the United States and secondarily on the European continent.[20] For a variety of reasons, despite numerous important British contributions to the field,[21] anthropological approaches to law have

14 Compare my discussion of the anthropology of law with S. Lloyd-Bostock, "Psychology and the Law: A Critical Review of Research and Practice" (1981) 8 *British Journal of Law and Society* 1-28.

15 See, e.g., Nader, "The Anthropological Study of Law" (1965) 67 (6) (2) *American Anthropologist* (Special Publication on "The Ethnography of Law", ed. L Nader), 3-32; D.D. Whitney and C. Kobryn, "Ignorance of Legal Anthropology Is No Excuse, or Is It? - A Survey of Introductory Cultural Anthropology Textbooks", Association for Political and Legal Anthropology Occasional Paper No.3 (March 1981), (1981) 5 (2) *APLA Newsletter and Occasional Papers* 1; and C. Greenhouse, "Courses in Political and Legal Anthropology: The APLA Curriculum Survey" Association for Political and Legal Anthropology Occasional Paper No.4 (July 1981), (1981) 5 (2) *APLA Newsletter and Occasional Papers* 1. These sources are useful indications of the general point but nonetheless are limited to English-language literature and the last two papers to the United States and Canada.

16 See Levy-Bruhl, op.cit n. 12, p.1116; and Abel, op.cit. n. 11, p.219.

17 The basic works were H.S. Maine, *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas* (1861) and J.-J. Bachofen, *Das Mutterrecht* (1861).

18 See e.g., Kuper, op.cit. n.7; and Gough, "Anthropology and Imperialism" (1968) 19 (11) *Monthly Review* 12-27. For recent discussions, see D. Hymes (ed.) *Reinventing Anthropology* (1969) and T. Asad (ed.), *Anthropology and the Colonial Encounter* (1975).

19 Thus, Twining recounts Hoebel's difficulty in finding an anthropologist to supervise his postgraduate research on Cheyenne law in the 1930s; see Twining, *Karl Llewellyn and the Realist Movement* (1973), pp. 154-155.

20 On anthropological research elsewhere, see the Newsletter of the IUAES Commission on Folk Law and Legal Pluralism. The first textbook in French is N. Rouland, *Anthropologie juridique* (1988); see also N. Rouland, *L'anthropologie juridique* (1990) and (1990) *Journal of Legal Pluralism*, special issue on 'L'anthropologie juridique francophone', eds. F. Snyder and E. Le Roy. See also the issues of the *Internationales Jahrbuch für Rechtsantropologie*, published by VWGÖ-Verlag, Vienna.

21 A comprehensive list would include not only work discussed later in this paper but also A.R. Radcliffe- Brown, *Structure and Function in Primitive Society* (1952), especially

remained on the margins of both legal and anthropological scholarship in the United Kingdom.[22]

After the publication of Sir Henry Maine's *Ancient Law* in 1861,[23] a small number of classic anthropological monographs provided the baseline for contemporary legal anthropology. Malinowski's *Crime and Custom in Savage Society* (1926) and Llewellyn and Hoebel's *The Cheyenne Way* (1941)[24] had a fundamental effect on methods of research. Malinowski's short study, a small part of the published corpus of his research on the Trobriand Islands,[25] was a radical innovation at the time in being based on extensive fieldwork, which since then has been considered a precondition of any valid anthropological study of law.[26] In addition, Malinowski insisted on the necessity of emphasising function rather than form, and of giving priority to the cultural or ideological categories of the actors themselves,[27] thus partly escaping the

chapter 11 ("Social Sanctions") and chapter 12 ("Primitive Law"); E.E. Evans-Pritchard, *Witchcraft, Oracles and Magic among the Azande* (1937) and *The Nuer* (1940); H. Cory, *Sukuma Law and Custom* (1953); I. Hogbin, *Law and Order in Polynesia* (1934); and M. Douglas, Purity and Danger: *An Analysis of the Concepts of Pollution and Taboo* (1966).

22 See Campbell and Wiles, op cit. n.7; Gulliver, "Preface", in *Cross-Examinations: Essays in Memory of Max Gluckman*, ed. P.H. Gulliver (1978); Roberts, op.cit n.7.

23 The continued influence of Maine's work, until recently, was especially apparent in Max Gluckman's writings. See, e.g, his *Politics, Law and Ritual in Tribal Society* (1965) and *The Ideas in Barotse Jurisprudence* (1965); of the latter, Gluckman wrote that "I am not sure but that 'Footnotes to Sir Henry Maine's Ancient Law' would be a more accurate title for this book" (p.xvi).

24 Llewellyn and Hoebel's book was sub-titled *Conflict and Case Law in Primitive Jurisprudence*.

25 Other well-known works include *Argonauts of the Western Pacific* (1922) and *Coral Gardens and Their Magic* (1935). Malinowski's work is discussed in *Man and Culture: An Evaluation of the Work of Bronislaw Malinowski*, ed. R.Firth (1957), as well as in more recent works which cannot be considered here.

26 And indeed in any valid anthropological study. For discussions of Malinowski's contribution to anthropological methods, see Kaberry, "Malinowski's Contribution to Fieldwork Methods and the Writing of Ethnography" and Leach, "The Epistemological Background to Malinowski's Empiricism" in Firth, ed., op.cit. n. 24, pp. 71-91 and 119-137, respectively.

27 Thus, in *Coral Gardens and Their Magic*, Malinowski argued that "the final goal, of which the Ethnographer should never lose sight... is, briefly, to grasp the native's point of view, his relation to life, to realise his vision of his world" (p.25, E.P. Dutton (New York) edition, 1961). See also Malinowski, "A New Instrument for the Interpretation of Law - Especially Primitive" (1942) 51 *Yale Law Journal* 1237 and his "Introduction" to Hogbin, op.cit. supra n. 20. For criticisms and a discussion of changes in Malinowski's conception of law, see Richards, "The Concept of Culture in Malinowski's Work" and

ethnocentric misuse of Western legal ideas and institutions in analysing social relations elsewhere. *The Cheyenne Way*, for which Llewellyn, an American legal realist, and Hoebel, a cultural anthropologist, elicited oral accounts of nineteenth century disputes, stands as the prime example to date of interdisciplinary cooperation in the anthropology of law.[28] It was the first systematic anthropological attempt to study law by a careful analysis of "trouble-cases", which has since become a standard method of research.

Among other studies published before the mid-1960s, the most significant in the development of the subject in English-speaking countries have been those by Schapera, Hoebel, Gluckman, Bohannan, Pospisil and Gulliver. Schapera's *A Handbook of Tswana Law and Custom* (1938), prepared at the request of the then Bechuanaland Administration, was a clear, precise recording of 'customary' rules, based not only on idealised accounts by informants but also on actual disputes.[29] Hoebel's *The Law of Primitive Man* (1954) sought to arrange various groups in an evolutionary sequence, embracing social organisation, culture and law, and to elucidate the basic jural postulates underlying the law of each group.[30] *The Judicial Process among the Barotse* (1955) by Max Gluckman was the first published anthropological

Schapera, "Malinowski's Theories of Law" in Firth, ed., op.cit. n. 24, pp. 15-31 and 139-155, respectively.

28 See the writings by Twining, op.cit. supra n. 4. A good recent example is J.L. Comaroff and S. Roberts, *Rules and Processes: The Cultural Logic of Dispute in an African Context* (1981). Several scholars have formal training in both law and anthropology.

29 Schapera also provided major studies of legislation in *Tribal Legislation among the Tswana of the Bechuanaland Protectorate* (1943) and *Tribal Innovators: Tswana Chiefs and Social Change 1795-1940* (1970). A select bibliography of Schapera's writings in legal anthropology is given in (1977) 21 *Journal of African Law* 124.

30 A bibliography of Hoebel's writing to 1973 appears in (1973) 7 *Law and Society Review* 787. Another recent evolutionary study is A.S. Diamond, *Primitive Law, Past and Present* (1971). In sociology, see L.T.Hobhouse, G.C. Wheeler and M. Ginsburg, *The Material Culture and Social Institutions of the Simpler Peoples: An Essay in Correlation* (1915, reprinted 1965). For a useful correction of some conceptions of legal evolution, see Moore, "Legal Liability and Evolutionary Interpretation: Some Aspects of Strict Liability, Self-Help and Collective Responsibility" in *The Allocation of Responsibility*, ed. M. Gluckman (1972). See also A. Podolefsky, 'Population Density, Land Tenure and Law in the New Guinea Highlands: Reflections on Legal Evolution', (1987) 89 *American Anthropologist* 581.

analysis, based on observed cases, of judicial reasoning in a non-Western social group, here the remnant of the Lozi state in the Barotse kingdom in Zambia.[31] Analysing dispute cases and concepts of jural processes in an acephalous social group in Nigeria, Bohannan's *Justice and Judgement among the Tiv* (1957) argued persuasively that it was often difficult, if not impossible, to understand other societies in terms of Western conceptions of law.[32] In *Kapa]uku Papuans and Their Law* (1958) and other writings, Pospisil elaborated the notion that every society comprised a multiplicity of legal systems, often hierarchically arranged and always dependent on the number of functioning subgroups in the society.[33] Gulliver's *Social Control in an African Society* (1963) compared forms of out-of-court dispute settlement among the Arusha of Tanzania, emphasising the importance of viewing disputes as part of more general social processes.[34]

Though differing many respects, these studies had certain features in common. All concerned a single ethnic group, which was deemed to be a relatively homogenous unit, capable of being isolated, as a "society", for purposes of analysis. They were mainly ahistorical, ethnographic descriptions, based on inductive empiricism and using some form of the case method. Most relied, explicitly or implicitly, on Western conceptions of law, and they considered disputes as the main index of law or its primary locus. Though con-

31 See also Gluckman, op.cit. n. 21. A select bibliography of Gluckman's extensive writings is given in *Cross-Examinations: Essays in Memory of Max Gluckman*, ed. P.H. Gulliver (1978), pp. 155-157. See also Firth, "Max Gluckman, 1911-1975" in (1975) 61 *Proceedings of the British Academy* 479. On Gluckman's continued influence, see LeRoy, "L'anthropologie juridique anglo-saxonne et l'héritage scientifique de Max Gluckman: Un point de vue français", (1979) 17 *African Law Studies* 53.

32 See also his *Social Anthropology* (1963), chapter 17; "'Land', 'Tenure' and Land-Tenure" in *African Agrarian Systems*, ed. D. Biebuyck, 1963) and "Ethnography and Comparison in Legal Anthropology" in *Law in Culture and Society*, ed. L. Nader (1969).

33 See also his *Anthropology of Law: A Comparative Theory* (1971); *The Ethnology of Law* (1972; Addison-Wesley Modular Publications, 12, pp. 1-40); and "Legally Induced Culture Change in New Guinea" in *The Imposition of Law*, eds. S. Burman and B. Harrell-Bond (1979).

34 See also his *Neighbours and Networks: The Idiom of Kinship in Social Action among the Ndendeuli of Tanzania* (1971).

ducted during the colonial period, by and large they abstracted from the processes of colonial domination, as well as from the profound economic and social changes occurring during that period. They were generally functionalist in orientation and concerned with the maintenance of social order.[35] Except for the works by Malinowski and Gulliver, they considered law primarily as a framework rather than as a process.[36]

These monographs established standards of research method, ethnographic description and limited theoretical generalisation that have profoundly affected contemporary anthropological research. Until recently, however, with the exception of Malinowski's book and several other studies, they had relatively little influence on the European continent.[37] Research in the Netherlands, for example, concentrated mainly on practical and theoretical issues raised by colonial policies in Indonesia. It encompassed an immense literature on legal pluralism and adat law, including the work by Van Vollenhoven in Leiden.[38] In France, anthropological approaches to law were

35 The maintenance of social order has been a continuing theme in legal anthropology. See, e.g., M. Gluckman, *Custom and Conflict in Africa* (1956) and Roberts, *Order and Dispute*, op.cit. n.9. Goddard, op.cit. n. 12 is among the many criticisms of this focus.

36 Nader and Yngvesson, "On Studying the Ethnography of Law and Its Consequences" in *Handbook of Social and Cultural Anthropology*, ed. J.J. Honigman (1973), pp. 884-892. The distinction between framework and process, deriving from Durkheim and Malinowski, has been partly reformulated in terms of a distinction between rights and interests. For different criticisms of these dichotomies, see Hamnett, "Introduction" in *Social Anthropology and Law*, ed. I Hamnett (1977), pp. 8-10; LeRoy, op.cit. n. 30; and Comaroff and Roberts, op. cit., n. 27.

37 Among the exceptions were Radcliffe-Brown, Evans-Pritchard and Douglas, op.cit n.20. An indication of the general situation, however, the converse of Anglo-American neglect of continental research, is Lévy-Bruhl's assertion, written about 1963, that "l'ethnographie juridique est restée relativement peu dévelopée dans les pays de langue anglaise"; see Lévy-Bruhl, op.cit n. 11, p.1118. The proofs of that paper were corrected shortly before his death in 1964; see Poirer, "Preface" in *Ethnologie générale*, op.cit. n. 12, p. xv. In contrast, the bibliography prepared by R. Verdier for a course on legal anthropology at the University of Paris in 1969 included numerous references to recent work in Anglo-American anthropology of law.

38 A translation of part of Van Vollenhoven's work was published as *Van Vollenhoven on Indonesian Adat Law -Selections from Het Adatrecht van Nederlandsch-Indie*, ed. J.F. Holleman (1981). For an earlier discussion of Van Vollenhoven's influence, see Korn, "Past and Future of Indonesian Adat Law" in *The Future of Customary Law in Africa* (1956). In addition to Van Vollenhoven, Schapera and later Llewellyn and Hoebel influenced the work of J.F. Holleman at Leiden; see Holleman, "Trouble-Cases and Troubleless Cases in the Study of Customary Law and Legal Reform", (1973) 7 *Law and*

heavily influenced by Durkheimian sociology and Lucien Lévy-Bruhl's theory of primitive mentality,[39] though their more immediate forebearers are Marcel Mauss, Durkheim's nephew and student,[40] and Henri Lévy-Bruhl, Lucien Lévy-Bruhl's son.[41] French research and teaching on anthropology of law dates at least from the 1930s; but it was Henri Levy-Bruhl's achievement to establish the sociology of law in the Paris law faculty, which led subsequently to systematic courses in African law, including legal anthropology.[42] These (and other) different continental traditions and Anglo-American approaches have begun to converge only since the early 1970s.

Using several earlier reviews of the literature and other partial syntheses[43], one may roughly distinguish four overlapping yet distinct periods in the

Society Review 585. Holleman's major writings include *Shona Customary Law* (1952); *Chief; Council and Commissioner* (1969); and *Issues in African Law* (1974).

39 See Lévy-Bruhl, op.cit. n. 12, pp. 1119-1120. The particular contribution of Lucien Lévy-Bruhl lay not in his specific theories but in posing the question as to the universal validity of Western categories and emphasising the conceptual and symbolic aspects of human thought, according to R. Verdier, "Anthropologie juridique: Sa position dans les Sciences anthropologique. (3) Anthropologie sociale", Cours d'ethnologie juridique, Université de Paris, 1969, p.4.

40 Mauss's lectures were published posthumously as *Manuel d'Ethnographie* (1947; 2nd edition 1967); chapter 7 concerns legal phenomena. Among his most important writings in legal anthropology are *The Gift: Forms and Functions of Exchange in Archaic Societies* (trans. I Cunnison, 1970; orig.pub. 1923-24); "Essai sur les variations saisonnières des societés Eskimos: Etude de morphologie sociale" in *Sociologie et Anthropologie* (1950; 4th edition 1968), pp. 389-476; and (with E. Durkheim) *Primitive Classification* (trans R. Needham, 1963; orig.pub. 1903).

41 See my "Introduction" and "Partial Bibliography of the Works of Henri Lévy-Bruhl" in Lévy-Bruhl, "Juridical Ethnology" (trans C.J. Snyder), Yale Law School Program in Law and Modernization Working Paper No.16.

42 Ibid., pp. iii-iv. M. Alliot, Lévy-Bruhl's successor in the Chair of Juridical Ethnology in Paris, established the Laboratoire d'Anthropologie Juridique in 1964-65. See Ibid., pp. iv-v and the article by Alliot's successor, LeRoy, op.cit. supra n.3. For a more recent discussion of French research, see LeRoy, "Pour une anthropogie du droit" (1978) 1 *Revue Interdisciplinaire d'Etudes Juridiques* 71. Two recent surveys are N. Rouland, *Anthropologie juridique* (1988) and N. Rouland, *L'anthropologie juridique* (1989).

43 Earlier partial reviews of the literature include: Hoebel, "Law and Anthropology", (1946) 32 *Virginia Law Review* 835; Bohannan, "Anthropology and Law" in *Horizons of Anthropology*, ed. S. Tax (1964); Nader, op.cit. n. 14; M. Gluckman, *Politics Law and Ritual in Tribal Society* (1967); Koch, "Law and Anthropology: Thoughts on Interdisciplinary Research",(1969) 4 *Law and Society Review* 11; Moore, "Law and Anthropology" in *Biennial Review of Anthropology*, ed. B.J. Siegel (1969), reprinted in S.F. Moore, *Law as Process: An Anthropological Approach* (1978), chap. 7; J. Poirier, 'The Current State of Legal Ethnology and its Future Tasks', (1970) 22 *International Social Science Journal* 476; Cox and Drever, "Some Recent Trends in the Ethnography of Law", (1971) 5 *Law and Society Review* 407; Nader and Yngvesson, op.cit. n. 35;

development of the field: the publication of the major empirical monographs, mainly in English, before the early 1960s; a shift, especially in the United States after 1965, towards the study of dispute settlement and of law as a process; the gradual elaboration during the 1970s of a plurality of approaches, all marked by more explicit concern with theory and greater attention to the role of the state; and, most recently, the development of a more historical emphasis, on the one hand, and a focus on legal pluralism, on the other hand. In each period, of course, diverse strands and traditions co-existed, and scholars drew selectively on earlier work, often including their own, for elaboration and special emphasis. This crude periodisation gives perhaps too much emphasis to literature in English. However, it also suggests, rightly, that Anglo-American approches have been the main beneficiary of recent trends towards the internationalisation of the subject.

Abel, op.cit. n. 11; Collier, "Legal Processes" in *Annual Review of Anthropology*, eds. B.J. Siegel, A.R. Beals and S.A. Tyler (1975); M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-colonial Laws* (1975), chap. 1; Roberts, op.cit. n. 7; Koch, "The Anthropology of Law and Order" in *Horizons of Anthropology*, ed. S. Tax and L.G. Freeman (2nd ed. 1977); Roberts, op.cit. n. 9, chap. 11; D.H. Dwyer, 'Substance and Process: Reappraising the Premises of the Anthropology of Law', (1979) 4 *Dialectical Anthropology* 309; Snyder, "Law and Development in the Light of Dependency Theory", (1980) 14 *Law and Society Review* 723 at pp. 775-779; J. Starr and J.F. Collier, 'Historical Studies of Legal Change', (1987) 28 *Current Anthropology* 367. Collections of readings on legal anthropology include: Nader (ed), op.cit. n. 13; P. Bohannan (ed.), *Law and Warfare: Studies in the Anthropology of Conflict* (1967); Nader (ed), op.cit. n. 31; Gluckman (ed), op.cit. n.29; (1973) 7 *Law and Society Review*; A.L. Epstein (ed.), *Contention and Dispute: Aspects of Law and Social Controls in Melanesia* (1974); Hamnett (ed.), op.cit. n.35; (1977) 21 *Journal of African Law*; Gulliver (ed.), op.cit. n. 30; L. Nader and H.F. Todd, Jr (eds), *The Disputing Process - Law in Ten Societies* (1978); K.F. Koch (ed.), *Access to Justice*, Vol. IV, *The Anthropological Perspective - Patterns of Conflict Management: Essays in the Ethnography of Law* (1979); P. Sack and J. Aleck (eds), *Law and Anthropology* (1992). See also L. Nader, K. F. Koch and B. Cox, "The Ethnography of Law: A Bibliographical Survey", (1966) 7 *Current Anthropology* 267.

The Study of Dispute Processes

1. A Central Theme

In 1965, Laura Nader summarised previous research and proposed new directions.[44] Building especially on earlier studies by Malinowski, Gulliver, Colson,[45] Turner[46] and Bailey,[47] she suggested that anthropologists should place legal processes more squarely in their social context and aim at empirical and explanatory generalisations. As a basis for achieving these objectives, she proposed the following assumptions: 1) there is a limited scope of disputes for any particular society, 2) a limited number of formal procedures are used in human societies in the prevention of and/or settlement of disputes; 3) there will be a choice in the number and modes of settlement .[48]

These assumptions reflected changes then occurring elsewhere in anthropology, especially by a greater emphasis on processes, transactions and individual choices;[49] but they formed the basis of a substantially new approach in legal anthropology. They underlay a large number of later studies, especially (but not only) those undertaken by Nader's students in the Berkeley Village Law Project between 1965 and 1975.[50]

44 Nader, op.cit. n.14.

45 Especially Colson, "Social Control and Vengeance in Plateau Tonga Society", (1953) 23 *Africa* 199.

46 V.W. Turner, *Schism and Continuity in an African Society: A Study of Ndembu Village Life* (1957).

47 F.G. Bailey, *Caste and the Economic Frontier* (1958) and *Tribe, Caste and Nation* (1960). In these books, Bailey presented ideas that he subsequently developed in a number of works.

48 Nader, op.cit. n. 14, p.23.

49 See especially F. Barth, "Models of Social Organization", Occasional Paper 23, Royal Anthropological Institute of Great Britain and Ireland (1966); M.J. Swartz, V.W. Turner and A. Tuden (eds), *Political Anthropology* (1966); and van Velsen, "The Extended-Case Method and Situational Analysis" in *The Craft of Social Anthropology*, ed. A.L. Epstein (1967). These and other influences, especially Malinowski's work, on legal anthropology are discussed in Nader and Yngvesson, op.cit. n.35 and in Nader and Todd, "Introduction: The Disputing Process" in Nader and Todd (eds.), op.cit n. 42.

50 See Nader, "Preface" and Nader and Todd, "Introduction; The Disputing Process" in Nader and Todd (eds.), op.cit. n. 42. Under Nader's direction, fourteen graduate students completed doctoral dissertations on legal anthropology during this decade; essays by ten of them are included in Nader and Todd (eds.), op.cit. supra n.42. See also K.F. Koch, *War and Peace in Jalèmo: The Management of Conflict in Highland New Guinea*

This approach took dispute settlement or dispute processes as its central theme; the latter term denoted clearly that the outcome of disputes was not necessarily a firm resolution of the issues ostensibly at stake.[51] In this view, disputing displaced law as the subject of study, and the dispute, rather than law, formed the major theoretical concept. Gulliver's 1969 definition of a dispute as the public assertion, usually through some standard procedures, of an initially dyadic disagreement was widely accepted.[52] Within this framework, definitions of law were often considered to be unnecessary, not only because they were frequently thought to be inevitably ethnocentric, but also because this definitional exercise itself was deemed theoretically sterile.[53] Similarly, the study of substantive concepts and rules was of secondary importance,[54] being subordinated to the analysis of procedures, strategies and processes, which obviously were not limited to bureaucratic institutions such as courts.

By analysing disputes as social processes through an extended case method or situational analysis,[55] this approach shifted the main enquiry from

(1974); J. Starr, *Dispute and Settlement in Rural Turkey: An Ethnography of Law* (1978); and C. Witty, *Mediation and Society: Conflict Management in Lebanon* (1980). Nader's own research is presented also in her *Harmony Ideology: Justice and Control in a Zapotec Village* (1990).

51 Though then retaining the expression "dispute settlement", Gulliver was among the first to make this point clearly in his "Case Studies of Law in Non-Western Societies: Introduction" in Nader (ed.), op.cit. n. 31, pp. 14-15.

52 Ibid., p.14. Some of the problems inherent in this definition, especially concerning the requirement that a conflict reach the public arena in order to qualify as a "dispute", are discussed in Epstein, "Introduction" in Epstein (ed.), op.cit. n. 42, p.9 and in Starr, "A Pre-Law Stage in Rural Turkish Disputes Negotiations" in Gulliver (ed.), op.cit. n.30.

53 See, e.g, Gulliver, op.cit. n.50, pp. 12-13; Koch, "The Anthropology of Law: Notes on Interdisciplinary Research", op.cit. n. 42, p. 12; Abel, op.cit. n. 11, pp. 221-224; Roberts, op.cit. n. 9, chapter 2.

54 See, e.g., Abel, "Law and Anthropology" (Review of I. Hamnett, ed., *Social Anthropology and Law*, (1980) 28 *American Journal of Comparative Law* 128 at p. 131. This was primarily an Anglo-American phenomenon; in that literature, the sole major exception prior to 1975 was L.A. Fallers, *Law Without Precedent: Legal Ideas in Action in the Courts of Colonial Busoga* (1969).

55 The case method is often viewed as the standard research method in legal anthropology. Anthropologists' conceptions of this method, however, differ substantially from those of lawyers. In addition, the former are in fact diverse, have changed substantially since the early 1960s and have recently been attacked on the grounds, inter alia, that the study of cases, however defined, is inadequate for some purposes and always needs to be supplemented by other research methods. For discussions of these issues, and especially the important shift in the conception of the case method since the late 1960s, see: Gluckman, "Ethnographic Data in British Social Anthropology", (1961) N.S. 9 *The Sociological*

social organisation to processes and also from groups to networks of individuals. It emphasised the actions of parties in disputes just as much as those of negotiators or adjudicators. Hence it aimed to map the perceptions of individual disputants, identify their options and strategies, and understand the cultural meanings and rationalisations of social action.[56] Especially in the context of underdeveloped countries, this perspective gave special emphasis to the role of political brokers in channelling individual choices, mediating between cultures and maintaining or eroding legal pluralism.[57]

Studies by anthropologists using these and similar approaches to dispute processes were not limited to Africa, Latin America or Asia. Though not concentrating on cases, Spradley used participant observation, formal interviewing and ethnosemantic methods to analyse marginalised urban nomads' perceptions of and relations to courts in Seattle, Washington.[58] Mather briefly reviewed ethnographic studies of American trial courts; she suggested that the utility of an ethnographic approach lay in raising and answering questions about different groups' knowledge and perceptions of law, about informal

Review 1; Gluckman, *Politics, Law and Ritual in Tribal Society*, op.cit. n. 21, pp. 235-242; van Velsen, op.cit. n. 48; Epstein, "The Case Method in the Field of Law" in *The Craft of Social Anthropology*, op.cit. n. 48; Abel, "Customary Law of Wrongs in Kenya: An Essay in Research Method", (1969) 17 *American Journal of Comparative Law* 573; Gluckman, "Limitations of the Case-Method in the Study of Tribal Law", (1973) 7 *Law and Society Review* 611; Holleman, "Trouble-Cases and Trouble-less Cases in the Study of Customary Law and Legal Reform", op.cit. n. 37; Abel, "Reply to Max Gluckman", (1973) 8 *Law and Society Review* 157; Nader and Yngvesson, op.cit. n. 35, pp. 892-902; Hooker, op.cit. n. 42; van Binsbergen, "Law in the Context of Nkoya Society" in *Law and the Family in Africa*, op.cit. n. 7; and Nader and Todd, op.cit. n. 49. Other, complementary methods are discussed in Snyder, "The Use of Oral Data in Legal Anthropology: A Senegalese Example", (1973) 17 Journal of African Law 196; B.E. Harrell-Bond, *Modern Marriage in Sierra Leone: A Study of the Professional Group* (1975), pp. 296-332; and the essays in R. Luckham (ed.), *Law and Social Enquiry: Case Studies of Research* (1981).

56 For example, see J.F. Collier, *Law and Social Change in Zinacantan* (1973), p.244; J. Starr, op. cit. n. 49.

57 See Collier, "Political Leadership and Legal Change in Zinacantan", (1976) 11 *Law and Society Review* 131; Freeman, "Conflict, Law and Lawyers in Chiapas, Mexico" in Koch (ed.), op.cit. n. 42.

58 J.P. Spradley, *You owe Yourself a Drunk: An Ethnography of Urban Nomads* (1970).

social norms and about the relationships between courts and other dispute processes.[59]

While unified by a concern with dispute processes and an emphasis on individual actions and perceptions, this approach tended in fact to be theoretically eclectic,[60] though some writers have tried to place it squarely within an empirical interactionist tradition.[61] It was not surprising, therefore, that developments in the study of dispute processes accentuated differences between various theoretical positions and also gave rise to new distinctions. Perhaps inevitably reflecting changes in the political and economic context of scholarship, these developments fragmented what might have appeared previously to be a fairly uniform approach to dispute processes. In doing so, they clarified the theoretical and political assumptions that underlay earlier work and, sometimes, they resulted in greater theoretical sophistication. Some of these trends may be mentioned briefly.

2. Disputes: Processes and Processing

Despite an emphasis on conflict and disputing as universal processes, anthropological work on dispute processes has been mainly concerned with micro-level studies of the management of conflict and the maintenance of order.[62] Although some legal anthropologists have contributed to the analysis of

59 Mather, "Ethnography and the Study of Trial Courts" in J.A. Gardiner (ed.) *Public Law and Public Policy* (1977).

60 See Nader and Todd, op.cit, n.49, p.3.

61 See Starr, "Different Theories in the Anthropological Study of Law: A Response to Professor Pospisil", (1980) 2 *Zeitschrift für Rechtssoziologie* 253-259 (reply to Pospisil,Review of Starr, *Dispute and Settlement in Rural Turkey: An Ethnography of Law* (1978), 2 *Zeitschrift für Rechtssoziologie* 249); Starr, Review of S. Roberts, *Order and Dispute: An Introduction to Legal Anthropology* (1979), (1981) 9 *International Journal of the Sociology of Law* 120.

62 See Roberts, op.cit. n. 8; Koch, Sodergren an Campbell, "Political and Psychological Correlates of Conflict Management: A Cross-Cultural Study", (1976) 10 *Law and Society Review* 443-466. Recent studies of the creation and maintenance of a moral order, some of which overlap with work on ideology, include C.J. Greenhouse, *Praying for Justice: Faith, Order and Community in an American Town* (1986); D.M. Engel, 'Law, Time and Community', (1987) 21 *Law and Society Review* 605; see also C.J. Greenhouse, 'Just in Time: Temporality and the Cultural Legitimation of Law', (1989) 98 *Yale Law Journal* 1631.

sources of social conflict,[63] most have concentrated instead on the characteristics of disputes as processes and/or of the procedural forms by which disputes are handled. Following Felstiner,[64] I use the expression 'dispute processing' to refer to the latter.

The distinction between dispute processes and dispute processing is useful here, even though procedural forms are often analysed by anthropologists as processes themselves, and even though the course of a dispute and the means by which an outcome is reached are often intimately related. On the one hand, the expressions identify two different aspects of ethnographic and theoretical work in legal anthropology: one concerned with social relationships in processes of conflict, and the other with the more or less standardised procedures for reaching an outcome. On the other hand, the contrast between the dynamic and bureaucratic connotations of the terms "processes" and "processing", respectively, suggests another important point, which raises numerous issues concerning the relationship between scholarship and politics.[65] Though addressed to an increasing variety of issues in anthropological and sociological theory, processual studies have been primarily academic in orientation, usually ethnographic or theoretical in purpose and addressed to a social science audience. In contrast, research on dispute processing has tended to be more instrumentalist, often concerned with the implementation of practical, procedural reforms, and sometimes abstracting politics and social relations from the analysis of procedures.[66] Partly for this reason, they have been generally of more interest than processual studies to academic lawyers.

63 Collier, op.cit. n.42 discusses some studies; see also LeVine, "Anthropology and the Study of Conflict: An Introduction", (1961) 5 *Journal of Conflict Resolution* 3-15; and A. R. Beals and B.J. Siegel, *Divisiveness and Social Conflict: An Anthropological Approach* (1966).

64 Felstiner, "Influences of Social Organisation on Dispute Processing", (1974) 9 *Law and Society Review* 63.

65 Some of these issues are discussed in papers in Luckham (ed.), op.cit. n. 54.

66 See also Abel, "Conservative Conflict and the Reproduction of Capitalism: The Role of Informal Justice" (1981) 9 *International Journal of the Sociology of Law* 245.

Anthropologists' definitions frequently postulated that a conflict became a dispute when placed in the public arena. This definition facilitated research on individual decision-making and strategies. Within a processual framework it also raised questions concerning the effects of prior, pre-dispute relations between parties on the subsequent public confrontation. In exploring these questions, the Berkeley Village Project distinguished three phases in the life history of disputes: the preconflict or grievance stage, the conflict stage and the dispute stage.[67] Though most studies concern the dispute stage, some writers analysed the earlier phases. Yngvesson's study of a Swedish fishing village showed that conflicts involving community members were marked by a "non-action" or "cooling" period during which the circumstances, relations between the parties and others and the consequences of formal reactions were considered.[68] She later argued that such periods of "bracketed structural time" formed part of dispute processes elsewhere, including an American court.[69] Starr's work on rural Turkish disputing elicited many cases of dyadic negotiation, in which grievances were often not brought to a public arena. Analysing the correlations between social rank and forms of settlement, she suggested that in rural Turkey "[p]ublic confrontation ... is the true forum of the powerless". [70] Other work, also emphasising the litigant's perspective, related individual choice-making to broader social changes. Thus, Nader suggested that, in countries such as the United States, individuals often elaborated extra-judicial dispute processes in direct response to the changing functions

67 Nader and Todd op.cit. n. 49, pp. 14-15; see also P.H. Gulliver, *Disputes and Negotiations: A Cross-Cultural Perspective* (1979), pp. 268-270.

68 Yngvesson, "Responses to Grievance Behaviour: Extended Cases in a Fishing Community", (1976) 3 *American Ethnologist* 353; and Yngvesson, "The Atlantic Fisherman" in Nader and Todd (eds.), op.cit. n.42.

69 Yngvesson, "The Reasonable Man and the Unreasonable Gossip: On the Flexibility of (Legal) Concepts and the Elasticity of (Legal) Time" in Gulliver (ed.), op.cit. n.30. These insights on the processual character of disputing have been developed further in W.L.F. Felstiner, R.L. Abel and A. Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming ...', (1980-81) 15 *Law and Society Review* 671; L. Mather and B. Yngvesson, 'Language, Audience and the Transformation of Disputes', (1980-81) 15 *Law and Society Review* 775.

70 Starr, op.cit. n. 51, p.131.

and increasing bureaucratisation of state law and institutions.[71] Using ideal-typical constructs of tribal society and modern society as a basis for hypotheses concerning litigant behaviour, Abel argued that the interaction of social structure institutional structure produces patterns of litigation.[72]

Forms of dispute processing have been the subject of a great deal of research and controversy. This interest formed a natural part of studies of dispute processes, was consistent with lawyers' with courts and administrative agencies and was fuelled by governments' preoccupations with informal alternatives to courts. Theoretical work by anthropologists was stimulated partly by sociological theories;[73] Gulliver's (1963) conception of the political and judicial modes as two ideal, polar types of processes;[74] Bohannan's (1967) distinction between law and warfare as two basic forms of conflict resolution;[75] and Abel's partial synthesis of the literature.[76] It concluded that any typology that distinguishes simply between judicial and political forms of processing was inadequate, because both norms and power are pervasive elements in all dispute processes everywhere.[77]

71 See Nader, "The Direction of Law and the Development of Extra-Judicial Processes in Nation State Societies" in Gulliver (ed.), op.cit. n. 30.

72 Abel, "Theories of Litigation in Society: 'Modern' Dispute Institutions in 'Tribal' Society and 'Tribal' Institutions in 'Modern' Society as Alternative Legal Forms" in *Alternative Rechtsformen und Alternativen zum Recht*, eds. E. Blankenburg, E. Klausa and H. Rottleuthner (1979) (6 *Jahrbuch für Rechtssoziologie und Rechtstheorie*) 165-191; and Abel, "Western Courts in Non-Western Settings: Patterns of Court Use in Colonial and Neo-Colonial Africa" in Burman and Harrell-Bond (eds.), op.cit n. 32. On litigation, see generally J. Griffiths, 'The General Theory of Litigation: A First Step', (1983) 5 *Zeitschrift für Rechtssoziologie* 145 and sources cited there.

73 E.g., Aubert, "Competition and Dissensus: Two Types of Conflict Resolution", (1963) 7 *Journal of Conflict Resolution* 26-42; and Eckhoff, "The Mediator, the Judge and the Administrator in Conflict Resolution", (1967) 10 *Acta Sociologica* 148.

74 P.H. Gulliver, *Social Control in an African Society: A Study of the Arusha, Agricultural Masai of Northern Tanganyika* (1963), pp. 297-301.

75 Bohannan, "Introduction" in Bohannan(ed.). op.cit. n. 42.

76 Abel. op.cit. n.11.

77 The debates concerning this typology may be traced in: Gulliver, loc.cit. n. 73; Moore, "Politics, Procedures and Norms in Changing Chagga Law", (1969) 40 *Africa* 321; Gulliver, op.cit. n. 50, pp. 17-19; Abel, op.cit. n. 10, pp. 232-239; Gulliver, op.cit n. 66, pp. 19-20.

Proposing an alternative typology, Nader in 1969 advocated the comparison of procedural styles based on clusters of contrasting features.[78] However, most scholars preferred typologies based on fewer, more precise and more institutionally derived criteria. Reconsidering Bohannan's conception, Roberts suggested a distinction between fighting and settlement-directed talking as two basic forms, the latter comprising several different types.[79] Danet rearranged Roberts' categories into seven different types. She classified physical violence, appeals to the supernatural and the use of magical procedures and avoidance or ostracism as relatively nonverbal modes of processing disputes; shaming, reconciliation rituals, verbal contests and settlement-directed, fact-oriented talking were relatively verbal modes.[80] Using different criteria, Koch distinguished six types of procedure based on, first, the presence or absence of a third party and the mode of its intervention and, second, the nature of the outcome; avoidance, negotiation and coercion were dyadic procedures, while mediation, arbitration and adjudication were triadic.[81] Gulliver himself, though recognising the existence of other settlement forms, concentrated primarily on elaborating a distinction between negotiation and adjudication as the two most common modes. Viewing the presence (as in adjudication) or the absence (as in negotiation) of a third-party decison-maker as the crucial, distinguishing feature, he presented two complementary theoretical models of negotiation as a process.[82] The role of the third party, or "intervenor", was the conceptual focus of Abel's attempt to construct a theory of dispute institutions in society, which proposed a number

78 Nader, "Styles of Court Procedure: To Make the Balance" in Nader (ed.), op.cit. n. 31. See also her *Harmony Ideology: Justice and Control in a Zapotec Village* (1990).

79 Roberts, op.cit. n.9, chapter 9.

80 Danet, "Language in the Legal Process", (1980) 14 *Law and Society Review* 445 at 493-495.

81 Koch, op.cit. n.49, pp. 27-31; see also Koch, "The Anthropology of Law and Order", op.cit n.42, pp. 307-311; and Koch, Sodergren and Campbell, op.cit. n.62.

82 Gulliver, op.cit. n.66; see also Gulliver, op.cit. n.50; Gulliver, "Negotiations as a Mode of Dispute Settlement: Towards a General Model", (1973) 7 *Law and Society Review* 667; and Gulliver, "On Mediators" in Hamnett (ed.), op.cit. n.35.

of hypotheses concerning the effects of increasing functional specialisation, social differentiation and bureaucratisation on dispute processing.[83] The role of the third party intervenor was also analysed in detail by sociologists of law.[84]

3. Access to Justice and Informal Alternatives to Courts

Beginning in the mid-1970s, anthropological work on dispute processing was often incorporated into the numerous movements concerned with access to justice and informal alternatives to courts. Two factors were especially decisive in this trend. The first was the fiscal and legitimation crises of the state in western countries, especially the United States, in the late 1960s and early 1970s. The second was the loss of anthropology's protected status in newly independent former colonies and its apparent irrelevance to the demands of emerging states. The former directly affected the amount orientation of research funds, led to numerous proposals to reform costly, inefficient and often inaccessible court systems and stimulated a growing interest in grassroots movements and popular justice.[85] In conjunction with decreasing funds, the latter signalled a decline in opportunities for anthropological research in underdeveloped countries. In a period of widespread criticism of traditional anthropological and other social science work,[86] it led to calls for

83 Abel, op.cit. n.11. Collier, op.cit. n.42, p. 134 notes the absence of systematic studies in legal anthropology of the influence on dispute processing of the relationships between the third party and the disputants. See now M.P. Baumgartner and D. Black, *The Theory of the Third Party* (1987).

84 See Black and Baumgartner, op. cit.

85 In the early 1960s, academic lawyers in the United States became especially interested in popular tribunals, mainly in Cuba, China, the then Soviet Union and central Europe; see, e.g., Lubman "Legal Anthropology and Comparative Social Research on Popular Tribunals: The Search for Function", presented at the Conference on "The Relevance of Legal Anthropology to Comparative Social Research on Law", Yale Law School Program in Law and Modernisation, November 1971. For a critical survey by a sociologist, see Brady, "Towards a Popular Justice in the United States: The Dialectics of Community Action", (1981) 5 *Contemporary Crises* 155. A recent study is S. Burman and W. Scharpf, 'Creating People's Justice: Street Committees and People's Courts in a South African City', (1990) 24 *Law and Society Review* 693.

86 See the writings cited in n.17, and Snyder, op.cit. n.42, pp. 725-734. This does not mean however that western scholars have ceased to study dispute settlement in other

"studying up"[87] and for more research on contemporary problems in the United States and Europe.[88] Particularly in the United States, where most legal anthropologists are employed, anthropological research on dispute processing in other countries seemed relevant, though not necessarily directly transferable, to domestic concerns. The ethnography of disputing, among other elements, suggested the utility of preserving or creating informal alternatives to courts and of fostering non-adjudicatory, yet non-political means of handling conflict.[89] The acceptance of this view, which was encouraged by powerful political forces, was facilitated by the largely ahistorical character of anthropological work,[90] its frequent romanticisation of "tribal" societies,[91] its relative lack of general theory and its neglect of legal form.[92]

countries: see G.S. Silliman, 'Dispute Processing the the Philippine Agrarian Court', (1981-82) 16 *Law and Society Review* 89; G.S. Silliman, 'A Political Analysis of the Philippines' Katarungang Pambarangay System of Informal Justice through Mediation', (1985) 19 *Law and Society Review* 279.

87 See Nader, "Up the Anthropologist - Perspectives Gained from Studying Up" in Hymes (ed.), op.cit. n.17.

88 See Nader and Singer, "Dispute Resolution" in *Law in the Future: What are the Choices?*, Supplement to (1976) 51 *California State Bar Journal* 281-286 and 311-320; Boissevain, "Introduction: Towards a Social Anthropology of Europe" and Katz, "Village Responses to National Law: A Case Study from the South Tyrol" in *Beyond the Community: Social Process in Europe*, eds. J. Boissevain and J. Friedl (1975).

89 See, e.g., Cappelletti, "Forward" in Koch (ed.), op.cit. n.42.

90 For discussions of this point, see e.g., Moore, "Archaic Law and Modern Times on the Zambezi: Some Thoughts on Max Gluckman's Interpretation of Barotse Law" in Gulliver (ed.), op.cit n.30; Swartz, "History and Science in Anthropology" (1958) 21 *Philosophy of Science* 59, reprinted in Manners and Kaplan (eds.), op.cit. n.10; Worsley, "The End of Anthropology?" (1970) 3 *Transactions of the Sixth World of Congress of Sociology* 121; I. Meszaros, *Marx's Theory of Alienation* (1970), pp.36-48; and Thompson, "Anthropology and the Discipline of Historical Context", (1972) 1 *Midland History* 41. For a related discussion of anthropological theories of culture, see M. Harris, *The Rise of Anthropological Theory: A History of Theories of Culture* (1968).

91 See e.g, Abel, "Delegalization: A Critical Review of its Ideology, Manifestations, and Social Consequences" in Blankenburg, Klausa and Rottleuthner (eds.), op.cit. n.71, p.29. For a discussion of the romanticisation of liberal democracy in contraposition to 'tribal society', see Abel, "The Problem of Values in the Analysis of Political Order: Myths of Tribal Society and Liberal Democracy" (A review essay on E. Colson, *Tradition and Contract: The Problems of Order* (1974), (1978) 16 *African Law Studies* 132.

92 See, e.g., Cox and Drever, op.cit. n.42; Abel, op.cit. n.53; and Quinney, "Comment" on Lowy, "Modernizing the American Legal System: An Example of the Peaceful Use of Anthropology", (1973) 32 *Human Organisation* 213.

The origins, composition, ideology and consequences of the movements for access to justice and informal alternatives to courts have been extensively described and criticised elsewhere.[93] In the elaboration of these reforms, which were especially ambitious in the United States, anthropologists were usually far less important than other, more powerful, more bureaucratically oriented professionals such as lawyers and administrators. This was due partly to the technical nature of administrative programmes; partly to the different concerns of anthropologists, especially in Europe, and their reluctance to conduct mainly prospective or evaluative research; and partly to the complex web of existing interests at stake in the creation and control of such reforms. Instead, the main contributions of anthropologists were to outline different forms of dispute processing, provide ethnographic data (usually from other countries) and propose limited generalisations.

Among these contributions, one important strand clearly focussed on the influences of social organisation on dispute processing, including informal alternatives to courts. While most of this work concerned countries outside Europe and America, Felstiner's 1974 paper contrasted forms of dispute processing in two ideal types of society. Criticising Danzig's proposal to establish urban American community moots patterned on rural Liberian institutions,[94] Felstiner noted the difficulty of finding mediators who shared the same expe-

93 See, e.g. Friedman, "Access to Justice: Social and Historical Context" in *Access to Justice*, Vol. II: *Promising Institutions*, eds M. Cappelletti and J. Weisner, 1978); Abel, "Delegalization ...", op.cit. n. 9; Legality and Its Discontents: A Preliminary Assessment of Current Theories of Legalization and Delegalization" in Blankenburg, Klausa and Rottleuthner (eds.),op.cit n.71; McGillis, "Neighborhood Justice Centers as Mechanisms for Dispute Resolution" in *New Directions in Psycholegal Research*, eds. P.D. Lippsitt and B.D. Sales (1980); McGillis, "The Quiet (R) Evolution in American Dispute Settlement", (1980) 31 Harvard Law School Bulletin 20; R.L. Abel(ed.), *The Politics of Informal Justice: The* American Experience (1982) and R.L. Abel (ed.), *The Politics of Informal Justice: Comparative Studies* (1982). See also A. Sarat, 'The "New Formalism" in Disputing and Dispute Processing', (1988) 21 *Law and Society Review* 695.

94 Danzig, "Toward the Creation of a Complementary, Decentralized System of Criminal Justice", (1973) 26 *Stanford Law Review* 1. Danzig's model was the Kpelle moot described in Gibbs, "The Kpelle Moot: A Therapeutic Model for the Informal Settlement of Disputes", (1963) 33 *Africa* 1, reprinted in Bohannan (ed.), op.cit. n.42 and in D. Black and M. Mileski (eds.), *The Social Organisation of Law* (1973).

riences as disputants; he argued that, in any case, the widespread use of avoidance was a much cheaper, easier way of ending disputes in countries such as the United States.[95] Another influential article was Galanter's discussion of why the 'haves' come out ahead. In addition to drawing a distinction between regular and sporadic users of courts, it outlined various alternatives to the official court system, including inaction or "lumping it", self-help or "exit" (avoidance), recourse to private settlement systems and the use of processes appended to courts.[96]

A second strand concentrated on individual perceptions of justice and the means of expressing complaints. Reviewing studies by the Berkeley Law Project, Nader suggested in 1973 that access to justice was a key concept if one took seriously the litigant's perspective. She argued that, in evaluating or ascribing a meaning to this notion, one had necessarily to take account of people's feelings and perceptions.[97] Contrary to the conclusions of some other anthropologists,[98] she stated that the view that people in all non-Western societies have access to public forums for resolving grievances "is a romantic one, nothing more".[99] Subsequently, under the aegis of Ralph Nader's Center

95 Felstiner, "Influences of Social Organisation on Dispute Processing", (1974) 9 *Law and Society Review* 63. See also Danzig and Lowy, "Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner", "Avoidance as Dispute Processing: An Elaboration", (1975) 9 *Law and Society Review* 695. On avoidance, see also Greenhouse, "Avoidance as a Strategy for Resolving Conflict in Zinacantan" in Koch (ed.), op. cit. n.42.

96 Galanter, "Why The 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change", (1974) 9 *Law and Society Review* 95. See also Galanter, "Afterward: Explaining Litigation", (1975) 9 *Law and Society Review* 347. This typology was based on A. Hirschman, *Exit, Voice and Loyalty* (1970).

97 Nader, "Forums for Justice: A Cross-Cultural Perspective", (1975) 31 *Journal of Social Issues* 151-170 at p. 163.

98 See Koch, "Introduction. Access to Justice: An Anthropological Perspective" in Koch (ed.), op.cit. n.42, p.2.

99 Nader, op.cit. n.71, p.92. Among earlier studies on which this conclusion was based are Nader and Metzger, "Conflict Resolution in Two Mexican Communities", (1963) *American Anthropologist* 584; Nader, "Choices in Legal Procedure: Shia Moslem and Mexican Zapotec", (1965) 67 *American Anthropologist* 394; and Nader, "Powerlessness in Zapotec and U.S. Societies" in *Anthropological Studies of Power*, eds. R. Fogelson and R. Adams (1977).

for the Study of Responsive Law,[100] she directed a large-scale study of the management of complaints among individuals and between individuals and a variety of organisations.[101]

Two major criticisms have been made of the movements for informal alternatives and of access to justice. First, it has been argued that access involved, in effect, an attempt to de-politicise political struggles by transforming them into legal issues.[102] Second, it was suggested that informal alternatives to courts permit a further, if decentralised, form of state control.[103] In a review of delegalisation movements, Abel showed that delegalisation assumed rough quality between social actors, a high degree of normative consensus and the existence of adequate informal controls. He concluded that, where these assumptions did not hold, delegalisation tended to be detrimental to the already underprivileged and powerless.[104]

These discussions provided points of reference for many anthropologists of law. On the one hand, scholars interested in anthropology of law have been involved in the study and evaluation of mediation and other alternatives to adjudication.[105]. Indeed, in the late 1980s and early 1990s the study of alternatives to courts has been an important growth area in the

100 Some common interests of Laura and Ralph Nader are indicated in Ralph Nader, "Consumerism and Legal Services: The Merging of Movements", (1976) 11 *Law and Society Review* 247.

101 L. Nader (ed.), *No Access to Law: Alternatives to the American Judicial System* (1980).

102 See Lamb, "Marxism, Access and the State", (1975) 6 *Development and Change* 119; Abel, op.cit. n.65.

103 This point was made in 1973 by Richard Quinney, op.cit. n.91. See also Santos, "Law and Community: The Changing Nature of State Power in Late Capitalism", (1980) 8 *International Journal of the Sociology of Law* 379.

104 Abel, "Delegalization...", op.cit. n.90.

105 See, e.g. W.L.F. Felstiner and L.A. Williams, *Community Mediation in Dorchester, Massachusetts* (1980); Witty, op. cit. n. 49; Crowe, 'Complainant Reactions against the Massachusetts Commssion against Discrimination (1978) 12 *Law and Society Review* 217; and two papers in Cappelletti and Weisner (eds.), op. cit. n. 92: Bierbrauer, Falke and Koch, "Conflict and Its Settlement: An Interdisciplinary Study concerning the Legal Basis, Function and Performance of the Schiedsmann", and Falke, Bierbrauer and Koch, "Legal Advice and the Non-Judicial Settlement of Disputes: A Case Study of the Public Legal Advice and Mediation Centre in the City of Hamburg".

subject in Europe.[106] On the other hand, especially in the United States, anthropologists whose field research concerned dispute processes have often drawn on work in other disciplines on ideology and symbolism as a source of ideas. They have used their studies of institutional alternatives to courts as a basis for theories of legal consciousness and legal ideologies.[107]

106 See the *Bulletin de Liaison* of the Laboratoire d'Anthropologie Juridique de Paris. For related work by sociologists and academic lawyers, see Z. Bankowski and G. Mungham, 'Laypeople and Lawpeople and the Administration of the Lower Courts', (1981) 9 *International Journal of the Sociology of Law* 85; S. Roberts , "Mediation in Family Disputes', (1983) 46 *Modern Law Review* 537; J. Effron , 'Alternatives to Litigation: Factors in Choosing', (1989) 52 *Modern Law Review* 480; A. Ogus et al, 'Evaluation Alternative Dispute Resolution: Measuring the Impact of Family Conciliation on Costs', (1990) 53 *Modern Law Review* 57; S. Roberts, "Mediation in the Lawyers' Embrace", (1992) 55 *Modern Law Review* 258. See also A. Yakovlev, 'Preferred Methods of Dispute Settlement in Two Small Georgian Towns in the U.S.S.R.: a Research Note', (1986) 14 *International Journal of the Sociology of Law* 209; M. Thornton, 'Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia', (1989) 52 *Modern Law Review* 733; A. Griffiths, 'The Problem of Informal Justice: Family Dispute Processing among the Bakwena - A Case Study', (1986) 14 *Interntional Journal of the Sociology of Law* 359; Y. Dezalay, 'From Mediation to Pure Law: Practice and Scholarly Representation with in the Legal Sphere', (1986) 14 *International Journal of the Sociology of Law* 89.

107 An influential article was A. Hunt, 'The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law', (1985) 19 *Law and Society Review* 11. See Merry, "Going to Court: Strategies of Dispute Management in an American Urban Neighbourhood", (1979) 13 Law Society Review 891; S.E. Merry, "Law and Justice among Working Class Americans", (1985) 9 *Legal Studies Forum* 59; S.E. Merry, "Everyday Understandings of the Law in Working-Class America", (1986) 13 *American Ethnologist* 253; S.E. Merry, *Urban Danger: Life in a Neighborhood of Strangers* (1987); S.E. Merry, *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans* (1990); B. Yngvesson, "Legal Ideology and Community Justice in the Clerk's Office", (1985) 9 *Legal Studies Forum* 71; B. Yngvesson, "Making Law at the Doorway: The Clerk, the Court and the Construction of Community in a New England Town", (1988) 22 *Law and Society Review* 409; and the following articles in (1988) 22 *Law and Society Review*, special issue on law and ideology edited by the Amherst seminar: B. Messick, "Kissing Hands and Knees: Hegemony and Hierarchy in Shari'a Discourse", (1988) 22 *Law and Society Review* 637; C.B. Harrington and S.E. Merry, "Ideological Production: The Making of Community Mediation", (1988) 22 *Law and Society Review* 709; C.J. Greenhouse, "Courting Difference: Issues of Interpretation and Comparison in the Study of Legal Ideologies", (!988) 22 *Law and Society Review* 687. See also F. Snyder, 'Ideologies of Competition in European Community Law', in *New Directions in European Community Law* (1990).

Some Important Recent Trends

1. General Developments

Until the early 1980s, anthropological studies of legal processes by Anglo-American scholars focussed mainly on a set of research questions arising from previous work but first articulated clearly in the late 1950's and early 1960s. The central concern was to elaborate - in different ways and in a changing economic and social context - the ethnographic, theoretical and (sometimes) political implications of the premises on which these questions were initially based. At the same time, however, anthropological approaches to legal processes developed and were modified. The study of disputes, dispute settlement and dispute processing has been subject of sharp criticism.[108] It has also recently stimulating a rethinking of the meaning of social control.[109] Correlatively, though without a sharp break from earlier work, several different themes have also emerged.

Painting with a broad brush, it is possible to characterise recent work by making six general points. First, today western anthropologists of law are more concerned than their predecessors with the study of their own countries. Second, there is an increasing, though still relatively small, number of scholars in the field from eastern countries, such as Japan,[110] and from developing countries.[111] Third, there is a renewed concern with the state and law (in

108 See especially R. Kidder, "The End of the Road: Problems in the Analysis of Disputes", (1980-81) 15 *Law and Society Review* 717; M. Cain and K. Kulcsar, "Thinking Disputes: An Essay on the Origins of the Dispute Industry", (1981-82) 16 *Law and Society Review* 375.

109 See the important article by M. Strathern, 'Discovering "Social Control"', (1985) 12 *Journal of Law and Society* 111.

110 See in particular M. Chiba (ed.), *Asian Indigenous Law - in Interaction with Received Law* (1986); M. Chiba, *Legal Pluralism: Toward a General Theory through Japanese Legal Culture* (1989).

111 See N. Akbar, 'Africentric Social Sciences for Human Liberation', (1984) 14 *Journal of Black Studies* 395; B. Narokobi, 'Law and Custom in Melanesia', (1989) 14 *Pacific Perspectives* 17; Chief Justice T. Tso, 'The Process of Decision Making in Tribal Courts', (1989) 31 *Arizona Law Review* 225; L. A. Filoiali'i and L. Knowles, 'The Ifoga: the Samoan Practice of Seeking Forgiveness for Criminal Behaviour', (1983) 53 *Oceania* 384.

addition to disputes) as a subject of study.[112] Fourth, the study of legal pluralism, including the relation of state law to other normative orders, has come close to supplanting dispute processing as the main focus of the field. Fifth, reflecting the fact that the small communities which were their traditional concerns now often constitute marginalised social groups, anthropologists have increasingly sought to place legal processes in their broader national and international context. Sixth, even though the strength of this trend should not be over-emphasised, there has been to some extent a gradual movement towards the explicit use of macro-sociological theory as a source of research questions, working hypotheses and potential explanations.

These changes have usually not led to a basic modification of the scale of anthropological research. Anthropologists still tend to concentrate on small groups or groupings amenable to study by individual methods, especially participant observation. It may be suggested, however, that these developments have significantly increased the relevance of anthropologically oriented research to academic lawyers. They have also contributed to the continuing, partial convergence of anthropology and sociology. This may be seen by examining three important recent themes: rules and processes, political economy and historical approaches, and legal pluralism.

2. Rules and Processes

At least since Gulliver's *Social Control in an African Society*,[113] anthropological studies have continually raised questions concerning the role of norms in dispute processes. A distinction between norms and power was the basis of an early (now rejected) typology of dispute processing.[114] This

112 Rosen, 'The Anthropologist as Expert Witness', (1977) 79 *American Anthropologist* 555; Rosen, "The Excavation of American Indian Burial Sites: A Problem in Law and Professional Responsibility", (1980) 82 *American Anthropologist* 5.

113 Op.cit. n. 74.

114 Hamnett proposed the concept of executive law to encompass a particular ethnographic conjunction of political and judicial elements: see I. Hamnett, *Chieftainship and Legitimacy: An Anthropological Study of Executive Law in Lesotho* (1975).

distinction may be viewed as a contextually specific version of the general issue of freedom versus determinism, which is of course fundamental to the social sciences. Though using apparently exotic examples and often couched in professional jargon, the anthropological treatment of this issue closely resembles discussions in both sociology and law of the relationship between freedom and contraint, consent and coercion or substantive and formal justice.[115] In the 1960s and early 1970s, anthropological work concentrated primarily on the processual aspect of disputing, stressing that power was central in all forms of dispute processing including adjudication. Recent studies of rules and processes, however, have examined and thus re-emphasised the importance of norms, whether in triadic processes (e.g., adjudication) or in dyadic ones (e.g., negotiation). In doing so, they have shown that norms do not automatically determine the outcome of a dispute and in fact serve a number of different functions in dispute processes and other social relations.

Legal anthropology has treated the role of norms in several different ways. Two related perspectives represent logical developments of earlier research. One concerns the relationships among concepts, rules and actual behaviour and emphasises the processual nature of all systems of rules. Thus, Moore has analysed the ways in which general concepts are adjusted to specific social circumstances, arguing that legal systems are, necessarily, partially indeterminant orders: the same social processes, such as competition, that prevent total regulation of social life by rules also shape and transform attempts at partial regulation.[116] A second perspective, elaborated especially

115 See, e.g. Dawe, "Theories of Social Action" and Fisher and Strauss, "Interactionism" in *A History of Sociological Analysis*, eds. T. Bottomore and R. Nisbet, (1978); Hunt, "Dichotomy and Contradiction in the Sociology of Law", (1981) 8 *British Journal of Law and Society* 47; Abel, "Delegalization...", op.cit. n.90. See also A. Giddens, Central Problems in Social Theory: Action, Structure and Contradiction in Social Analysis (1979).

116 See, e.g., Moore. "Descent and Legal Position" in Nader (ed.), op.cit. n.30; Moore. "Epilogue: Uncertainties in Situations, Indeterminacies in Culture" in *Symbol and Politics in Communal Ideology*, eds. S.F. Moore and B.G. Myerhoff (1975); and

by Gulliver in work on negotiation, is the conception that norms themselves are a form of power, manipulated and used selectively by parties (and third parties) in disputes.[117] Other writers treated norms as cultural codes, sometimes drawing on Bernstein's work to elucidate the role of brokers in mediating relationships,[118] and sometimes emphasising the ways in which people use norms in re-negotiating the bases of inter-personal and wider social order.[119] Another strand concentrated on the use of norms in argument. Thus, Comaroff and Roberts argue that, in Tswana dispute processes, "express invocation of norms...is associated with efforts to assert control over the paradigm of argument"; they advocated greater attention to factors intrinsic to the process of argument as distinct from extrinsic factors such as political organisation or institutional structure.[120]

These concerns formed part of the increased emphasis in legal (and general) anthropology on the ways in which people conceive, create and sustain definitions of situations, especially through the use of language. While previous anthropological work stressed the phases of disputes and the transformation of social relations and of the issues at stake as a dispute moved from a private context to the public arena, this research paid special attention to the role of language in these processes of situational transformation.[121]

Moore, "Introduction" in S.F. Moore, *Law as Process: An Anthropological Approach* (1978), which includes several of her most important papers; see also my review of *Law as Process* in (1979) 6 *British Journal of Law and Society* 135.

117 See especially Gulliver, op.cit. n.66, pp. 190-194; see also Roberts, op.cit. n.9, p.182.

118 Perry, "Law Codes and Brokerage in a Lesotho Village" in Hamnett (ed.), op.cit. supra n.42.

119 See, e.g., Roberts, "The Kgatla Marriage: Concepts of Validity" in Roberts (ed.), op.cit. n.7; Comaroff and Roberts, "Marriage and Extra-marital Sexuality: The Dialectics of Legal Change among the Kgatla", (1977) 21 *Journal of African Law* 97; and Werbner, "Land, Movement and Status among Kalanga of Botswana" in *Studies in African Social Anthropology*, eds. M. Fortes and S. Patterson (1975).

120 Comaroff and Roberts, "The Invocation of Norms in Dispute Settlement: The Tswana Case" in Hamnett (ed.), op.cit. n.42; the quotation is from p.106. See also J. Comaroff and S. Roberts, *Rules and Processes: The Cultural Logic of Disputes in an African Context* (1981).

121 See Gulliver, op.cit. n.66, p.20 and sources cited there. For recent work, see, e.g., Mather and Yngvesson, "Language, Audience and the Transformation of Disputes", (1980-81) 15 *Law and Society Review* 775; Arno, "A Grammer of Conflict: Informal Procedure on an Island in Lau, Fiji" in Koch (ed.),op.cit. n.42; Arno, 'Structural

Some writers have also analysed the role of language in disputing within the context of wider social relations. Thus, LeRoy discusses legal reasoning by members of rural councils in dispute processes in Senegal.[122] Santos analyses the use of legal reasoning, argumentative discourse and rhetoric in the construction and reproduction of legality in a Brazilian squatter settlement.[123] Seeking to transcend the dichotomy between rule-centred and processual approaches, Comaroff and Roberts emphasise the dialectical relationship between the sociocultural system and individual action. They show how, in Tswana chiefdoms, the former constitutes a set of normative terms within which disputing occurs and has meaning, while, in turn, disputing and other social processes affect and potentially transform the sociocultural framework.[124]

While giving more attention to the role of norms in disputing and other social processes, some anthropologists have suggested that the treatment of norms as a code draws basically into question jural models of social relationships.[125] This assertion has two related aspects that should be distinguished.

Communication and Control of Communication: An Interactionist Perspective on Legal and Customary Procedures for Conflict Management", (1985) 87 *American Anthropologist* 40; and the papers in M. Bloch (ed.), *Political Language and Oratory in Traditional Society* (1975). This emphasis on language and transformation differs from earlier studies of the use of language, either those that merely describe linguistic expressions of cultural concepts or those that aim at more formal ethnosemantic analyses of terms and expressions. See, e.g., P.J. Bohannan, *Justice and Judgement among the Tiv* (1957, reprinted with a new Preface in 1968); S.A. Schlegel, *Tiruray Justice: Traditional Tiruray Law and Morality* (1970); Verdier, "Ontology of the Judicial Thought of the Kabré of Northern Togo" in Nader (ed.), op.cit. n.31; Black and Metzger, "Ethnographic Description and the Study of Law" in Nader (ed.), op.cit. n.13, reprinted in *Cognitive Anthropology*, ed. S.A. Tyler, 1969); and Frake, "Struck by Speech: The Yakan Concept of Litigation" in Nader (ed.), op.cit. n.31. For a review of some studies of the use of language in dispute processes Danet, op.cit. n.79, pp.490-546.

122 See LeRoy, "L'expérience juridique autochtone et le transfert des connaissances jurisiques occidentales en Afrique noire" in *Domination ou Partage?* (UNESCO, 1980), and 'Legal Paradigm and Legal Discourse: The Case of the Laws of French-speaking Black Africa', (1984) 12 *International Journal of the Sociology of Law* 1.

123 Santos, "The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada", (1977) 12 *Law and Society Review* 5; the quotation is from p.92.

124 See Comaroff and Roberts, op.cit. n. 27.

125 See especially Comaroff, "Introduction" and "Bridewealth and the Control of Ambiguity in a Tswana Chiefdom" in *The Meaning of Marriage Payments* (ed. J.L. Comaroff, 1980). See also the debate concerning the Nuer leopard-skin chief in: Gruel. "The Leopard-Skin Chief: An Examination of Political Power among the Nuer", (1971) 73

First, western theories of law are limited or inadequate in analysing dispute processes and the forms of social order or domination elsewhere. This argument usually rests either on cultural grounds, hence refers generally to all non-western 'societies',[126] or on economic/historical grounds, hence refers specifically to precapitalist social formations.[127] Many, if not most, contemporary legal anthropologists would accept at least one of the two quite different versions of this general point. The other aspect is the rejection of anthropological or other approaches that view relatively unambigous rules as the basic constitutive elements in social relationships.[128] This includes both legal rules, whether derived from western jurisprudence or not, and non-legal rules, such as those generally given analytic priority in normative approaches in social science. This second position does not negate a discussion of norms, to the extent that they form part of the repertoire used by individuals in social interaction. It simply views the world primarily as a negotiated order, in which the relationship between rules and processes is always inherently problematic. Taken to its logical conclusion, this view implies a type of anthropological analysis that gives primary, if not exclusive emphasis to the ways in which individuals construct and manage social relations, including not only relationships among individuals but also those underlying broader social processes. These anthropological approaches to legal processes bear a close affinity to the interactionist and phenomenological schools in sociology. They differ, in some cases very sharply, from approaches such as historical materialism, which are often concerned with individual actions and conceptions but

American Anthropologist 1115; Haight, "A Note on the Leopard-Skin Chief", (1972) 74 *American Anthropologist* 1313; and Evens, "Leopard Skins and Paper Tigers: 'Choice' and 'Social Structure' in The Nuer", (1978) N.S. 13 *Man* 100.

126 See, e.g, Roberts, op.cit. n.9.

127 See, e.g., F.G. Snyder, *Capitalism and Legal Change: An African Transformation* (1981).

128 See, e.g., Comaroff, op.cit. n. 124; Comaroff and Roberts, op.cit. n.27; and Comaroff, "Rules and Rulers: Political Processes in a Tswana Chiefdom", (1978) N.S. 13 *Man* 1-20.

emphasise the great extent to which these are shaped, limited or determined by fundamental, supra-individual economic laws or forces.

4. Political Economy and Historical Approaches

Since the mid-1970s, anthropologists have placed greater emphasis on economic factors, social inequality and forms of domination.[129] Especially in research on brokerage, pluralism and legal change, they have also recognised that the village is generally not an appropriate unit of study; Murray, for example, points out that "piece-meal ethnography can only make sense within its full political, economic and social context".[130] These features have often characterised both the work of anthropologists interested in the political economy of law as well as that of anthropologists using a non-materialist historical approach.[131]

Work on the political economy of law was stimulated by the general elaboration of marxist theory since the mid-1960s. It drew particularly on the attempts to elaborate and utilise marxism in French economic anthropology, British writing on precapitalist modes of production, peasant studies, and de-

129 See, for example, the re-evaluation of aspects of Gluckman's work in Moore,op.cit. supra n.89, and Frankenberg, "Economic Anthropology or Political Economy? (I): The Barotse Social Formation - A Case Study" in *The New Economic Anthropology*, ed. J. Clammer (1978). See also Starr and Yngvesson, "Scarcity and Disputing: Zeroing-in on Compromise Decisions", (1975) 2 *American Ethnologist* 533; Collier, "Stratification and Dispute Handling in Two Highland Chiapas Communities", (1979) 6 *American Ethnologist* 305; Dwyer, "Bridging the Gap between the Sexes in Moroccan Legal Practice" in *Sexual Stratification*, ed. A. Schleger 1977); Dwyer, "Law Actual and Perceived: The Sexual Politics of Law in Morocco", (1979) 13 *Law and Society Review* 739.

130 Murray, "High Bridewealth, Migrant Labour and the Position of Women in Lesotho", (1977) 21 *Journal of African Law* 79 at p.79. See also Snyder, "French Colonial Policy, Law, and Diola-Bandial Society, 1815- 1915: Background to Legal Change in Rural Senegal", (1973) 22 *Rural Africana* 69; Snyder, "Land Law and Economic Change in Rural Senegal: Diola Pledge Transactions and Disputes" in Hamnett (ed.), op.cit. n. 42; and Abel, "The Rise of Capitalism and the Transformation of Disputing: From Confrontation over Honor to Competition for Property" (review article on Starr, *Dispute and Settlement in Rural Turkey: An Ethnography of Law* (1978), (1979) *UCLA Law Review* 223; D.H. Levine, "Harmony, Law and Anthropology" (review article on Nader, *Harmony Ideology: Justice and Control in a Zapotec Mountain Village* (1990), (1991) 89 *Michigan Law Review* 1766.

131 On some differences between these two strands, see S.E. Merry, "Review Essay: Law and Colonialism", (1991) 25 *Law and Society Review* 889.

pendency and underdevelopment theory.[132] Legal anthropological research drawing on political economy has been concerned to explore the implications, insights and limitations of different marxist theories and concepts for the study of legal processes. In contrast to other work, it tends to be more interested in general theory and to emphasise the economic bases of political and legal institutions, the relationship of law to class formation, and the connections between changes in legal processes and the development of capitalism as a distinct historical form.

A continuing theme is the relationship between the development of capitalism and processes of legal change. Using the notion of mode of production as an historical/economic category,[133] Snyder discusses the ways in which the subsumption of African peasants within capitalist relations of production influenced legal ideas within a formerly precapitalist social formation. He argues that the apparent continuity of legal concepts hides a profound transformation of both economy and law.[134] Employing the idea of the articulation of modes of production[135], Fitzpatrick argues that in

132 A survey of this literature may be found in Snyder op.cit. n.42. See also Fitzpatrick, "Law, Modernization, and Mystification" and Greenberg "Law and Development in Light of Dependency Theory" in 3 *Research in Law and Sociology,* ed. S. Spitzer (1980). An earlier study is Diamond, "The Rule of Law versus the Order of Custom" in *The Rule of Law*, ed. R.P. Wolff (1971). On marxist theory in anthropology generally, see Copans, "In Search of Lost Theory: Marxism and Structuralism within French Anthropology", (1979) 3 *Review* 45-73; and Kahn and Llobera, "French Marxist Anthropology: Twenty Years After" (review article on D. Seddon, ed., *Relations of Production: Marxist Approaches to Economic Anthropology* (1978), (1980) 8 *Journal of Peasant Studies* 81.

133 Banaji, "Modes of Production in a Materialist Conception of History", (1977) 3 *Capital and Class* 1. See also Bernstein, "Notes on Capital and Peasantry", (1977) 10 *Review of African Political Economy* 60 and Bernstein, "Concepts for the Analysis of Contemporary Peasantries", (1979) 6 *Journal of Peasant Studies* 421.

134 See Snyder, op.cit. n.126; Snyder, "Labour Power and Legal Transformation in Senegal", (1981) 21 Review of African Political Economy 26; Snyder, "Colonialism and Legal Form: The Creation of 'Customary Law' in Senegal", in C. Sumner (ed.), *Crime, Justice and Underdevelopment* (1982), longer version in (1981) 21 *Journal of Legal Pluralism* 26; and Snyder, 'Folk Law' and Historical Transitions: Conceptual and Theoretical Issues" in A.N. Alllott and G.R. Woodman (eds.), *People's Law and State Law: The Bellagio Papers* (1985).

135 These theories are reviewed in Foster-Carter, "The Modes of Production Controversy", (1978) 107 *New Left Review* 47; see also J.G. Taylor, *From Modernization to Modes of Production: A Critique of the Sociologies of Development and Underdevelopment* (1979).

contemporary underdeveloped countries, one of the functions of law is to conserve the traditional mode of production despite economic forces tending towards its dissolution.[136] He emphasises the ways in which state law is used to restrict the formation of indigenous classes and seeks to show how precapitalist law constitutes, and is constituted by, precapitalist modes of production.[137]

These analyses necessarily give special attention to the role of the state; and anthropological approaches have especially emphasised the connections between the state and legal processes in rural and urban communities. Both Fitzpatrick and Paliwala have demonstrated that, despite official pronouncements, the establishment of village courts in Papua New Guinea effectively extended the state apparatus of social control into rural villages and enhanced the formation of class alliances.[138] Fitzpatrick and Blaxter jointly examine the effects of licensing laws on small-scale entrepreneurs and class formation.[139] Discussing Senegalese rural administrative reforms, Le Roy argues that an original form of law, which he calls local law, emerged in certain African countries as a new form of state penetration into rural communities.[140]

136 See Fitzpatrick, *Law and State in Papua New Guinea* (1980); Fitzpatrick, op.cit. supra n.169; Fitzpatrick, "The Political Economy of Dispute Settlement in Papua New Guinea" in Sumner (ed.), op.cit. n.133.

137 See Fitzpatrick, "'Really Rather Like Slavery': Law and Labour in the Colonial Economy of Papua New Guinea" in 3 *Essays in the Political Economy of Australian Capitalism*, eds. E.L. Wheelwright and K. Buckley (1978); Fitzpatrick, "The Creation and Containment of the Papua New Guinea Peasantry" in 4 *Essays in the Political Economy of Australian Capitalism*, eds. E.L.Wheelwright and K. Buckley (1980); and Fitzpatrick, "Transformations of Law and Labour in Papua New Guinea", in *Labour, Law and Crime: A Historical Perspective*, eds. F. Snyder and D. Hay (1987).

138 See Fitzpatrick, "The Political Economy of Dispute Settlement in Papua New Guinea" and Paliwala, "The Law and Order in the Village: Papua New Guinea's Village Courts" in Sumner (ed.), op.cit. n.133. See D. Weisbrot, A. Paliwala and A. Sawyerr (eds.), *Law and Social Change in Papua New Guinea* (1983).

139 Fitzpatrick and Blaxter, "Imposed Law in the Containment of Papua New Guinea Economic Ventures" in *The Imposition of Law*, op.cit. n.32.

140 See Le Roy, "L'émergence d'un droit foncier local au Sénégal" in *Dynamiques et finalités des droits africains*, ed. G. Conac (1980); Le Roy, "Le juge d'instance, le sous-préfet et les paysans: Les détournements de la fonction judiciare dans le règlement de conflits fonciers au Sénégal, presented to the Seminaire interdisciplinaire d'études juridiques, Facultés Universitaires Saint-Louis, Brussels; Le Roy, "Local Law in Black Africa: Contemporary Experiences of Folk Law facing State and Capital in Senegal and

Though sharing with other scholars an interest in legal pluralism, these writers have been especially concerned with the implications of legal pluralism for class formation and the possibility of political action by dominated groups and classes.[141] A symposium on African land systems, in which several legal anthropologists participated, discussed the relationships between small-scale legal processes and independent political action.[142] The same issues have also been considered by Santos.[143] Many themes in this work show the close similarity of concerns between approaches borrowing from neo-marxist theories in legal anthropology and in sociology of law.[144]

Since the mid-1980s a number of anthropologists have adopted historical approaches to the study of legal processes. This work has sometimes involved co-operation with scholars from other disciplines, particularly social historians.[145] It is based on the view that law and dispute processes need to be understood in the context of long-term social change. This view is shared with those interested in the political economy of law, but this more recent work

Some Other Countries", in A. Allott and G.R. Woodman (eds.), *People's Law and State Law: The Bellagio Papers* (1985).

141 See also Snyder, "Legal Innovation and Social Change in a Peasant Community: A Senegalese Village Police", (1978) 48 *Africa* 231; and Snyder, "Droit non-étatique et législation nationale au Sénégal", in Conac (ed.), op.cit. supra n.139.

142 See J.P. Chauveau, J.P. Dozon, E. LeBris, E. LeRoy, G. Salem and F.G. Snyder, "Rapport introducif" in Problèmes fonciers en Afrique Noire: Rapport introducif aux Journées d'études sur les problèmes fonciers en Afrique Noire (Paris, September 1980). This meeting was the first in a series leading to the establishment of the Association pour la promotion des recherches et etudes foncières en Afrique, which, under the aegis of the Laboratoire d'Anthropologie Juridique de Paris, has published several important studies of African land questions: see E. Le Bris, E. Le Roy and F. Leimdorfer (eds), *Enjeux fonciers en Afrique noire* (1983); B. Crousse, E. Le Bris and E. Le Roy (eds), *Espaces disputés en Afrique noire* (1986); and E. Le Bris, E. Le Roy and P. Mathieu (eds), *L'appropriation de la terre en Afrique noire: Manuel d'analyse, de décision et de gestion foncière* (1991).

143 See Santos, op.cit. n. 122; Santos, "Popular Justice, Dual Power and Socialist Strategy" in *Capitalism and the Rule of Law: From Deviancy Theory to Marxism*, eds. B. Fine, R. Kinsey, J. Lea, S.Picciotto and J. Young (1979); Santos, "Law and Revolution in Portugal: The Experiences of Popular Justice after the 25th April 1974", presented at the 4th Conference of the European Group for the Study of Deviance and Social Control, Vienna, September 1976; and Santos, op.cit. n. 112.

144 See also P. Fitzpatrick, 'Is it simple to be a Marxist in Legal Anthropology', (1985) 48 *Modern Law Review* 472.

145 See F. Snyder and D. Hay (eds), *Labour, Law and Crime: An Historical Perspective* (1987); D. Hay and F. Snyder (eds), *Policing and Prosecution in Britain, 1750-1850* (1989). Some other works are reviewed in Merry, op. cit. n. 130.

gives less attention perhaps to economic relations and more to cultural concepts, symbols and political strategies[146]. For example, Chanock has analysed the creation of customary law in Malawi and Zambia.[147] Moore traces the change and development of "customary law" among the Chagga between 1880 and 1980.[148] More recently, Starr has aimed to analyse competition between secular and Islamic elites over law and legal structures and control of the state in Turkey.[149] This work, like that deriving from the political economy, illustrates the borrowing from neighbouring subdisciplines and the fluidity of disciplinary boundaries which is increasingly characteristic of the anthropology of law.

3. Legal Pluralism

The view that any society or social group contains a plurality of legal orders or fragments of legal systems is well-known in jurisprudence and sociology of law.[150] It was re-asserted by Llewellyn and Hoebel in *The Cheyenne Way*[151] and has increasingly been elaborated by legal anthropologists.[152] As Griffiths has shown,[153] legal pluralism starts from the rejection of the notion of legal centralism - that law necessarily is the law of

146 See the introduction and other essays in J. Starr and J.F. Collier (eds.), *History and Power in the Study of Law* (1989); see also J. Starr and J.F. Collier, 'Historical Studies of Legal Change,' (1987) 38 *Current Anthropology* 367.

147 M. Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (1985); see also by review article by Snyder, 'Rethinking African Customary Law', (1988) 51 *Modern Law Review* 252. On the creation of customary law, see also Snyder, "Colonialism and Legal Form", op. cit. n. 133.

148 S.F. Moore, *Social Facts and Fabrications: "Customary Law" on Kilimanjaro, 1880-1980* (1986).

149 J. Starr, *Law as Metaphor: From Islamic Courts to the Palace of Justice* (1992).

150 See the discussion of von Gierke, Ehrlich and Weber in Pospisil, *The Anthropology of Law...*, op.cit. n.32, pp.102-104. See also N. Rouland, *Anthropologie juridique* (1988), *passim.*

151 Op.cit. n.22, especially pp.28, 53.

152 For a survey of the literature from 1978 to 1988, see S.E. Merry, 'Legal Pluralism', (1988) 22 *Law and Society Review* 132; and F. von Benda-Beckmann, "Comment on Merry", (1988) 22 *Law and Society Review* 897. In view of these recent reviews, an extended discussion of this literature is not necessary here.

153 J. Griffiths, "What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism* 1.

the state, is uniform and exclusive and is administered by state institutions. Since Furnivall's early work,[154] three writers have proposed different conceptions of legal pluralism: Pospisil elaborated the idea of a multiplicity of legal systems and the existence of legal levels in a single society;[155] Smith proposed a structural conception of pluralism based on corporate groups;[156] and Moore has advanced a conception of semi-autonomous social fields based on processual characteristics.[157] The last conception has been widely adopted, and it provides a basis for what currently is probably the most dynamic part of contemporary legal anthropology.[158] Griffiths has elaborated a descriptive theory of legal pluralism within a positivist sociological framework, while Fitzpatrick used Moore's notion of semi-autonomous social fields to develop a materialist/structuralist conception of pluralism in underdeveloped countries.[159] Less explicitly theoretical research has taken several directions. Roberts distinguishes between two lines of research, one concentrating on the litigant's perspective, especially the choice between one among several potential dispute-handling institutions; and the other focussing on dispute agencies themselves, including both institutional characteristics and the

154 J.S. Furnivall, *Colonial Policy and Practice: A Comparative Study of Burma and Netherlands India* (1948).

155 Op.cit. n.23.

156 See "Institutional and Political Conditions of Pluralism" in *Pluralism in Africa* (ed. L. Kuper and M.G. Smith, 1969), reprinted in M.G. Smith, *Corporations and Society* (1974); and "The Sociological Framework of Law" in *African Law: Adaptation and Development* (eds. H. Kuper and L. Kuper, 1965). For discussion, see Moore, "Introduction" in S.F. Moore, *Law as Process*, op.cit supra n.131. For criticism of the concept of pluralism, see Legassick, "The Concept of Pluralism: A Critique" in *African Social Studies: A Radical Reader* (eds. P.C.W. Gutkind and P. Waterman, 1977).

157 See Moore, "Law and Social Change: The Semi-autonomous Social Field as an Appropriate Subject of Study", (1973) 7 *Law and Society Review* 719, reprinted in Moore, *Law as Process*, op.cit. n. 115, chapter 2. See also Moore, "Individual Interests and Organisational Structures: Dispute Settlements as 'Events of Articulation'" in Hamnett (ed.), op.cit. n.35.

158 Santos has argued that legal pluralism is the key concept in a postmodern view of law: B. de Sousa Santos, 'Law: A Map of Misreading; Toward a Postmodern Conception of Law', (1987) 14 *Journal of Law and Society* 279.

159 See Griffiths, op.cit. n. 152; Fitzpatrick, "Law, Plurality and Underdevelopment" in *Legality, Ideology and the State*, ed. D. Sugarman (1987).

behaviour of third parties.[160] Members of the Berkeley Law Project were concerned with both strands, as has Keebet von Benda-Beckmann in research on Indonesia.[161] Van Rouveroy has considered similar questions in the Togolese context;[162] the Stratherns and others have examined the relationships between state and non-state institutions elsewhere.[163] In addition to emphasising competition between dispute institutions for cases and other resources, anthropologists have stressed the ways in which brokers mediate between rural communities and state agencies. They have shown that the role of brokers is crucial in maintaining or transforming hierarchies of institutions and processes.[164]

The work on legal pluralism reflects an early debate in legal anthropology that was couched in terms of a discussion of the methodology of description and analysis but in fact concerned the general purposes of research.[165] Mirroring different analytical traditions also, Anglo-American anthropologists have tended to focus on institutional pluralism, while French

160 Roberts, "Introduction" in Roberts (ed.), op.cit. n.6, p.8.

161 On the former, see Nader and Todd (eds.), op.cit. n.42; E. Hunt and R. Hunt, 'The Role of Courts in Rural Mexico' in *Peasants in the Modern World*, ed. P.K. Bock (1969). On the latter, see especially K. von Benda-Beckmann, *The Broken Stairways to Consensus: Village Justice and State Courts in Minangkabau* (1984). See also K. von Benda-Beckmann and F. Strijbosch (eds.), *Anthropology of Law in the Netherlands* (1986).

162 E.A.B. van Rouveroy van Nieuwaal, *A la recherche de la Justice: Quelques aspects du droit matrimonial et de la justice de Paix et du Chef Supérieur des Anufom àMango dans le Nord du Togo* (1976); "Unité du droit ou diversité du droit: Bases juridiques du droit coutumier au Togo", (1979) 12 *Verfassung und Recht in Ubersee* 143; "Chieftaincy in Northern Togo", (1980) 13 *Verfassung und Recht in Ubersee* 115.

163 See, e.g., M. Strathern, *Official and Unofficial Courts: Legal Assumptions and Expectations in a Highlands Community* (1972); A Strathern, "When Dispute Procedures Fail" in Epstein (ed.), op.cit n.42; Lahav, "The Division of Legal Labor in Rural Haiti", (1975) 8 *Verfassung und Recht in Ubersee* 465-481; Roberts, "Tradition and Change at Mochudi: Competing Jurisdictions in Botswana", (1979) 17 *African Law Studies* 37-51.

164 Collier, op.cit. n.57; Freeman, op.cit. n.57; Werbner, "Small-Man Politics and the Rule of Law: Centre-Periphery Relations in East-Central Botswana", (1977) 21 *Journal of African Law* 24-39.

165 A summary of and references concerning this debate are given in Moore, "Comparative Studies: Introduction", Gluckman, "Concepts in the Comparative Study of Tribal Law", and Bohannan, "Ethnography and Comparisons in Legal Anthropology" in Nader (ed.), op.cit. n.31.

research has frequently concentrated mainly on concepts[166]. Many writers have emphasised the continued survival of dispute-processing institutions relatively independent of the state.[167] Others have discussed the frequently profound disparity between the concepts embodied in state law and those held in many cases by the majority of a country's population.[168] More recently, drawing on Foucault Fitzpatrick has elaborated the concept of 'integral plurality': state law is constituted in relation to a plurality of social forms which both support and oppose it.[169]

The study of legal pluralism is perhaps the major area of contemporary research.[170] It has been encouraged in particular by the Commission on Folk Law and Legal Pluralism by its newsletter and regular international confer-

166 See LeRoy, op.cit. n.2; Le Roy, op.cit. n.41; *Sacralité, Pouvoir et Droit en Afrique* (1979). See also (1990) *Journal of Legal Pluralism*, special issue on "L'anthropologie juridique francophone", eds. F. Snyder and E. Le Roy; N. Rouland, *Anthropologie juridique* (1989); N. Rouland, *L'anthropologie juridique* (1990); N. Rouland, *Les rivages du droit: Anthropologie juridique de la modernité* (1992). For different approaches to concepts and cultural precepts, see L. Rosen, including "Equity and Discretion in a Modern Islamic Legal System", (1980-81) 15 Law and Society Review 217; L. Rosen, *Bargaining for Reality: The Construction of Social Relations in a Muslim Community* (1984); L. Rosen, *The Anthropology of Justice: Law as Culture in Islamic Society* (1989); L. Rosen, "Islamic 'Case Law' and the Logic of Consequence", in Starr and Collier (eds.), op. cit. n. 42; F. von Benda-Beckmann, *Property in Social Continuity: Continuity and Change in the Maintenance of Property Relationships through Time in Minangkabau, West Sumatra* (1979); F. von Benda-Beckmann, "Anthropology and Comparative Law", in K. von Benda-Beckmann and F. Strijbosch (eds.), op. cit. n. 160; and Schott, "Le droit contre la loi: Conceptions traditionnelles et jurisdiction actuelle chez les Bulsa au Ghana du Nord" in Conac (ed.), op. cit. n. 139.

167 See, e.g., Roberts, "The Survival of the Traditional Tswana Courts in the National Legal System of Botswana", (1972) 16 *Journal of African Law* 103.

168 See Niang, "Place du droit islamique dans la vie juridique sénégalaise contemporaine: Confrontation des modèles (autochtone, occidental et musulman)", presented at the Second Meeting of the Africanist Network, UNESCO Project on the Transfer of Legal Knowledge, Malta, November 1980; and the papers in (1975) 1 *Kroniek van Afrika* [now *African Perspectives*] on "The Disparity between Law and Social Reality in Africa" (eds. B.E. Harrell-Bond and E.A.B. van Rouveroy van Nieuwaal). See also the review by Snyder in (1976) 1 *African Law Studies* 162.

169 See, e.g., P. Fitzpatrick, 'Law, Plurality and Underdevelopment', in *Legality, Ideology and the State*, ed. D. Sugarman (1983); 'Marxism and Legal Pluralism', (1983) 1 *Australian Journal of Law and Society* 45; 'Law and Societies', (1984) 22 *Osgoode Hall Law Journal* 115; "The desperate vacuum': imperialism and law in the experience of the Enlightenment", (1989) 13 *Droit et Société 347.*

170 See also R Gadacz, 'Folk Law and Legal Pluralism: Issues and Directions in the Anthropology of Law in Modernizing Societies', (1987) 11 *Legal Studies Journal* 126.

ences.[171] Not only has the Commission had a practical impact, particularly in Canada and Australia,[172] but it has also promoted a rethinking of what have often been considered to be universal legal concepts, such as human rights.[173] This approach to the study of disputes, law and social order has yet to reach its full potential: it is likely to be stimulated by current trends towards regionalism, decentralisation and local community power. Indeed, the study of legal pluralism, together with other anthropological approaches, are in some cases only now beginning to be applied to some central fields of academic legal studies, such as European Community law.[174]

Conclusion

This review aimed to introduce some of the major themes in anthropological approaches to law since the early 1960s. Special attention has

171 See H. Finkler (compiler), *Papers of the Symposia on Folk Law and Legal Pluralism, XIth International Congress of Anthropological and Ethnological Sciences*, Vancouver, Canada, 19-23 August 1983, 2 vols; A. Allott and G.R. Woodman (eds.), *People's Law and State Law: The Bellagio Papers* (1985); B. Morse and G. Woodman (eds.), *Indigenous Law and the State* (1988); F. von Benda-Beckmann, K. von Benda-Beckmann, E. Casino, F. HIrtz, G.R. Woodman and H.F. Zacher (eds.), *Between Kinship and the State: Social Security and the Law in Developing Countries* (1988); Harald Finkler (compiler), *Proceedings of the VIth International Symposium on Folk Law and Legal Pluralism*, Ottawa, Canada, 14-18 August 1990, 2 vols. See also K. von Benda-Beckmann and F. Strijbosch (eds.), *Anthropology of Law in the Netherlands: Essays in Legal Pluralism* (1986).

172 See R. Kuppe, M. Wiber and A. Griffiths (eds.), *Group Rights: Strategies for Assisting the Fourth World*, in (1990) 5 *Law and Anthropology: Internationales Jahrbuch für Rechtsantropologie* (Special Issue).

173 See R. Pannikar, 'Is the Notion of Human Rights a Western Concept?', (1982) 120 *Diogenes* 75; A.D. Renteln, 'The Concept of Human Rights', (1988) 83 *Anthropos* 343; E. Le Roy, 'Les fondements anthropologiques des droits de l'homme: crise de l'universalisme et post-modernité', (1992) 17 *Revue de la Recherche Juridique: Droit Prospectif* 139.

174 See F. Snyder, *New Directions in European Community Law* (1990); F. Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques', (1993) 56 *Modern Law Review* 19. See also F. Snyder (ed.), *European Community Law*, 2 vols. (1993).

been given to tracing developments over the whole period, rather than concentrating solely on recent research. The paper has dealt mainly with the literature available in English, though some significant research in France and other countries has also been noted. Within these limitations, the discussion sought to outline the major recent developments and the principal, if sometimes incipient, theoretical strands. The review also indicated the existence of many potentially overlapping interests between proponents of anthropological approaches and either academic lawyers or sociologists of law, though obviously any effective collaboration between people in these groups depends ultimately on factors such as the recognition of common objectives. This conclusion suggests several of the contributions and limitations of anthropological approaches in relation to the study of law and legal processes.

If a review of the literature in a field is to go beyond simply recognising the merits and demerits of specific studies or theoretical positions, it should involve identifying the specific features which distinguish it from its disciplinary neighbours. In the case of anthropological approaches to law, however, this is a difficult if not impossible task. The historical legacy of the initial concern of anthropology (in contrast to sociology) with non-western social groups is still important. But if one takes a broad view of anthropological approaches to law and dispute processes, it may be suggested that little, if anything, distinguishes this work from the similar and equally diverse theoretical strands in sociology.[175] Except for the fact that many of their authors have achieved a PhD in anthropology, virtually all of the studies discussed in this paper could be classified within sociology. The separation between anthropology and sociology is perhaps a useful institutional myth, but

175 This and related points are discussed in Hymes. "The Use of Anthropology: Critical, Political, Personal" in Hymes (ed.), op.cit. n.16. Compare the statement by Kuper, op.cit. n.6, p. 238, that "Whichever theoretical model is used, the distinctive anthropological perspective...is to begin by assuming that the actors' models are part of the data, not useful analyses of the systems being studied".

in intellectual terms it is often arbitrary. It hinders rather than helps collaboration between anthropologists and academic lawyers.

While accepting this point, it is possible to identify some common features of the studies discussed, which for the present purposes may be taken to exemplify contemporary anthropological approaches to the study of law and related matters. Though shared with much sociological research, these features distinguish this work from many academic legal studies.[176] Consequently, they may indicate some ways in which anthropological approaches can contribute to academic studies of law.

It is useful initially to amplify the suggestion made by previous writers that the special contributions of anthropology to academic legal studies lie, first, in research methods and, secondly, in an emphasis on certain aspects of our legal system that academic lawyers sometimes overlook. From the methodological standpoint, anthropological approaches often emphasise micro-analysis and use an extended-case method. Especially when combined with other research methods, the study of extended cases has proved useful in showing the actual uses and functions of norms and procedures in continuing social processes, ranging from the maintenance of order to the mobilisation of classes. Such extended case analysis could prove a useful tool in the hands of academic lawyers. Another contribution of some recent anthropological approaches is to demonstrate the difficulties and limitations inherent in using the 'society' or 'social formation' as a unit of analysis. These approaches often stress processes which are not necessarily or usually bounded by such social units; they demonstrate the worth of a processual method in analysing norms and institutions in the framework of social fields or arenas. With regard to specific themes, those often neglected by academic lawyers in the past have included the existence of numerous modes of dispute settlement in addition to

176 At least if one accepts the useful stereotypes of "the lawyer" and "the anthropologist" set forth by Twining, "Law and Anthropology...", op.cit. n.5, pp. 572-576.

courts, the critical importance of the litigant's perspective and the general social context of law. As shown here, both anthropologists and lawyers have recently dealt with these themes in studies of dispute processing, people's perceptions of access to justice and informal alternatives to courts.

One way in which previous anthropological work has been selectively incorporated into academic legal studies is exemplified by studies of dispute processing. Both lawyers and administrators have drawn on earlier anthropological research on this topic, but they have generally ignored anthropologists' emphasis on the limitations posed by different economic and cultural contexts on the creation of institutions. Despite a greater emphasis on context, few academic legal studies go as far as recent anthropological work in defining precisely the features of this context, whether in terms of the historical specificity of legal ideas, the relationships between a plurality of normative forms, or the importance of setting law in the context of continuing political and economic processes instead of viewing it in isolation.[177]

In addition to its more specific contributions to academic legal studies, anthropological work in the past several decades has raised a number of basic issues concerning the study of legal processes which are of interest to academic lawyers and social theorists. The following may be mentioned briefly. Is the role of the social sciences in relation to legal studies best conceived as that of "under-labourer" or of "master-scientist"? In other words, by whom and how is the subject of study to be defined?[178] How might micro-level studies, such as those common in anthropology, best be integrated with macro-sociological theories of law? To what extent, if at all, are

177 This is commonly viewed by lawyers as the major contribution of anthropology to legal studies; see Hooker, op.cit. n.42, esp. pp. 14, 54.

178 The relationship of social science to philosophy is discussed in these terms by P. Winch, *The Idea of a Social Science and Its Relation to Philosophy* (1958) and T. Benton, *Philosophical Foundations of the Three Sociologies* (1977). For an analogous discussion concerning sociology and law, see Campbell and Wiles, op.cit. supra n. 6, and Abel, "Law Books and Books about Law" (review of M. Rheinstein, *Marriage Stability, Divorce, and the Law* (1972), (1973) 26 *Stanford Law Review* 175-228.

anthropologists' conclusions concerning law or dispute processes in apparently exotic settings applicable to social relations elsewhere? To what extent is the cultural relativism of many anthropologists compatible with social theories of law that claim to be universally valid? Does the frequent insistence by anthropologists on cultural specificity extend not only to jurisprudential ideas but also to conceptions of scientific explanation, including explanations of the origin and role of legal forms?

The extent to which anthropological approaches are likely to be used by academic lawyers is likely to be influenced, however, by four other factors. First, anthropologists have insisted that law and legal processes are not necessarily a monopoly of the state, even in American and European countries. This postulate controverts the statist conception of law commonly held by sociologists of law and usually taught by academic lawyers. As a result, the latter in particular are likely to regard the pluralist conception of law not only as a central feature but also as a major weakness of many anthropological approaches. Anthropologists would contend, however, that the perspective of legal pluralism raises many important questions, especially concerning intra-group regulation and the relationships of powerful groups to the state, that often are not even asked within the terms of academic legal studies.

Second, despite an increasing interest in western legal systems, most anthropological work remains concentrated on small-scale legal processes in other countries. This research is especially pertinent to sociologists of law concerned with underdeveloped countries; but academic lawyers are likely to be deterred by detailed ethnographic data and thus fail to recognise the usefulness of anthropological methods of description and translation[179] in studying their own domestic legal systems.

179 Koch, "Law and Anthropology ...", op.cit. supra n.42, pp. 15-16 emphasises the translation of cognitive categories as an especially important part of legal anthropological studies. See also the sources cited supra n.31 and n.164.

Third, anthropologists have often proclaimed their discipline to be inherently comparative. Except in the very limited sense of concentrating on groups or societies other than one's own, however, very few anthropological studies are genuinely comparative, and therefore they offer only implicit contrasts with our own state and its law. The literature reviewed here and elsewhere, however, provides sufficient examples of comparative research and theory to be of interest to academic lawyers.

Fourth, though concerned increasingly with general social theory, legal anthropologists have so far made relatively few contributions to social theories of law. From the standpoint of both academic lawyers and sociologists of law (and indeed of anthropologists interested in law as an object of study), a particular weakness of many recent anthropological approaches in the past has been a tendency to reduce law to dispute settlement and to view legal and social processes as not simply inseparable but identical. This approach has proved valuable, both methodologically, in avoiding or minimising the use of western legal ideas in studying other societies, and substantively, in analysing social processes, including the role of norms in a broader context. Unfortunately, however, it meant that anthropologists concerned with the colonial period or with contemporary western countries often neglected state law, at least until the recent interest in political economy and history. This in turn has hindered the development of a theories of the relative autonomy of law or of the relationships between plural legal forms.

More broadly, from the standpoint of a genuinely comparative sociology of law, a final limitation of many anthropological studies lies in the ethnocentrism that often appears to be inherent in anthropology, as in other social sciences. Like sociology and economics, the discipline of anthropology is based on Western conceptions of science; it developed as a consequence of particular economic and political processes in European and American history. Although the practitioners of anthropology have often claimed it to

be the universal science of humankind, they have frequently been unable to envisage social processes or legal forms in ways other than those based ultimately on their own historical and cultural experience, even though they have often gone further in this direction than neighbouring disciplines. The internationalisation of the anthropological profession, while raising new issues or posing old dilemmas in new forms, is therefore an extremely salutory development.

Two points can be made in conclusion. On the one hand, the anthropology of law is a myth if conceived as the search for a historical and cross-culturally valid features of law, or, alternatively, as the reduction of historically and culturally specific normative forms to ethnographic descriptions of individual behaviour. The reformulation of legal anthropology as the study of social order merely displaces these problems of theoretical perspectives and in turn raises others, including the difficulty of accounting for the pervasive importance and distinct role of state law. It may therefore be suggested that the task of legal anthropology in the future is two-fold: first, to elucidate the relationships between social action and cultural ideologies, and, second, to grasp the extent to which these relationships and the wider social processes of which they form a part are the product of specific historical and economic conditions. In this respect, anthropological approaches may contribute to and converge with sociology of law.

On the other hand, the study of legal pluralism opens up new possibilities for cross-fertilisation between anthropologists and academic lawyers. In this respect it resembles the earlier focus on disputes. Despite its deficiencies, the study of disputes served for some time as a useful methodological and theoretical bridge between specialists in numerous disciplines. Legal pluralism may operate as a similar device for cooperation. Whether anthropologists and lawyers will grasp this new opportunity remains to be seen.

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