Some Recent Trends in Ethnographic Studies of Law

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This essay was done as part of a larger bibliographic project on the ethnography of law, begun by Laura Nader and her students at the University of California in the early 1960s. A summary of the results of this project was published in 1966 under the title "The Ethnography of Law: A Bibliographic Survey" (Nader et al., 1966). This work's more than 700 entries surveyed the literature on customary law in seven continental areas–Africa, Asia, the Near East, Europe, Oceania, and the Americas–as they were in 1964-1965. With the help and encouragement of the original compilers, the work of revising and updating the earlier bibliography was begun. This work is still in progress. However, to stimulate further suggestions for the project, we have written this summary of trends in the literature on customary law. The summary retains the division of the earlier bibliography into major continental areas, together with a section on comparative, general, and theoretical works.

AFRICA

Most of the material here is from a small group of journals (*African Law, African Studies, Africa,* and others), series of law textbooks put out by two British legal publishers (Butterworth, and Sweet and Maxwell), publications originating from special study projects at African universities (especially Northern Nigeria and Ethiopia), and a number of anthologies pertaining to

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customary law (Gluckman, 1969; Kuper and Kuper, 1965; Derrett and Duncan, 1965; Poirier, 1965).

There are at least three trends in the study of African law:

(a) an emphasis on either reconstruction of precontact legal systems or description of currently operating customary law;

(b) technical legal discussions of the statutory position, jurisdiction, and authority of customary courts and laws; and

(c) a minor trend, closely related to (a), the consideration of Islamic law as it relates to northern Nigeria, the Sudan, and certain other areas.

(a) This trend is taken to comprise what Poirier (1965) considers two approaches, the sociological ("dynamic process of law") and the ethnological ("cultural salvage work"). Recent books and papers in this field tend to be by indigenous African lawyers (trained in Europe) as well as sociologists and anthropologists. The "sociological" method is the more prevalent, perhaps reflective of methodological difficulties in studying Africa historically; there are, however, a few detailed and carefully executed studies which could best be called "reconstructional ethnography," mostly from French sources (Maquet, 1967; Balard, 1965; Verin, 1965; Dez, 1965; Vansina, 1965; Peters, 1967). The remainder of the studies would fit into Poirier's sociological category, being based on a mixture of traditional fieldwork methods, analysis of court records, and consideration of individual cases; they are concerned with customary law as it is at present, without separating what is indigenous, what has been borrowed, and what has been enforced by colonial and national governments. Perhaps included in this general trend, but certainly related to trend (b), are the various projects of restatement of customary law (Cotran, 1968; Ramolefe, 1969; Salacuse, 1965), which involve axiomatization, formalization, and stabilization, in written form, of customary legal systems; such studies are strictly for purposes of judicial administration, being aimed at defining customary law precisely in terms of received European law and postindependence national law.

(b) Mostly by virtue of the complex legacy of colonialism, legal pluralism (or rather legal division) and indirect rule, there has been of late a large number of studies specifically dealing with the position of customary systems of law in modern African states. Although their emphases are somewhat different, studies of both Roman and common law countries are similar: they express the attitude that customary law is a problem which is eventually to be overcome (for a contrary view, see Van Veslin, 1969). There is a great deal of superficial and somewhat pious theorizing on the need to understand customary law in terms of

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changing legal and social needs. However there is no evidence of any serious attempt to analyze what these legal and social needs are: the underlying assumption is a rather uncritical normative outlook on political and economic issues. Although there has been some criticism of this position (e.g., Vanderlinden, 1966), the necessary understanding of the broader social and historical context is still absent in the majority of studies. As a corollary, one also finds facile theories of "syncretism" of customary and European law leading to "African socialism" (Kouassigan, 1966). The extreme of this trend is seen in the rather naive attempts of scholars to provide legal justification for the politically reactionary regime of Ethiopia, based ultimately on the principle of *chilot,* the legal position of the Emperor as *ancien régime* absolute dictator, with the power to overrule the decision of any court or legislative body (Sedler, 1964; compare with Redden, 1968). Even if this is good legal scholarship, it is appalling social science.

The number of scholarly articles either directly critical of the orthodoxies in the field or presenting an alternative analysis is small. Lewin (1968) quite uncompromisingly views the "customary law" (Natal and Transkei) as the foisting of largely spurious laws and customs on the people in order to divest them of any rights they may have under common or Roman-Dutch law. Also, articles by Munro (1966) and Seidman (1966) in the *Wisconsin Law Review* are unique in discussing the customary law situation in terms of its colonial history; that is, in terms of the colonial policy of protecting the political and economic power of white settlers and the economic interests of European-owned extractive industries. Africans in their indigenous economies were legally isolated, except where required as cheap labor. Munro further warns that a simple conversion to "Western" law in the case of Kenya could serve only to create a large, landless, rural working class. This sort of historical study, which says a great deal about present situations and alternatives, has been ignored by most legal scholars of Africa; they have discussed formal legal history, limited to statutes and precedents, rather than the history of law in its economic and social context.

(c) Although Islamic law in Africa is regarded by some as customary law, it surely presents quite a unique case, in that it was imported, largely by conquering peoples, much in the same manner as English law. Hence, studies by Anderson (1965), Froelich (1965), and Thompson (1966) on the relations among Muslim, customary, and European law seem to be on the right track. There have been a number of studies on Nigeria, especially northern Nigeria, which has one of the more complex systems of legal pluralism, and where Islamic law figures as a very important institution (Muhammad, 1967; Smith, 1965, 1969; Suka, 1966).

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ASIA

The quantity of pertinent material relating to Asia is considerably less than that relating to Africa; however, it is important, in that the trends of study are very different.

(a) One such area which has recently drawn the attention of Western scholars is the history of legal systems in China, Japan, India, and Cambodia. While the few historical studies of the last two have been either sketchy or very specific, there is a definite tendency toward broadly conceived, competent, and detailed studies in the legal history of China and Japan, notably in the work of Bodde and Morris (1967) and Henderson (1965, 1967).

(b) There are numerous sociological studies of law—customary and national—in its local setting, pertaining to Malaysia, Indonesia, India, Taiwan, and Ceylon. Relevant to this field are two published bibliographies, by Galanter (1968-1969) on the Indian legal profession, and by Hooker (1967) on customary, Chinese, and common law in the Malayan peninsula.

(c) The third trend is seen in studies of the development of law in the People's Republic of China, in both Western and Chinese sources. A series of short articles relating to marriage laws are reprinted in translation in Volume I of *Chinese Sociology and Anthropology.* These essays show awareness of the broader social implications of law, particularly in the relation seen between opposition to traditional forms of marriage and greater possibilities for freedom in the society at large (see Liu, 1966; Ning, 1966). This is also seen in Chinese legal theory (Cheng-fa Yen-chin, 1968) where, in opposition even to Soviet scholars, law is seen strictly in terms of class struggle and in close relation to a theory of the state, rather than in terms of abstract principles. Surprisingly, Western and Japanese scholars (Cohen, 1967; Shiga, 1967) are quite sympathetic, regarding the evolving system of Chinese law as much less formal and more pragmatic than its Western counterparts, the emphasis being on the prevention of disputes, methods of criticism and self-criticism, and voluntary reconciliation. There is no indication that the rapid transition of Chinese law from its traditional forms has been fraught with the difficulties experienced by India, Indonesia, or the new African states.

NEAR EAST

Recent literature is quite sparse, but it shows tendencies in two potentially fruitful directions:

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(a) Sociological studies of customary or national law at the village level (Ayoub, 1965; Antoun, 1965).

(b) Historical studies of Jewish law (Elon, 1967-1969) as well as comparative studies of the legal systems of various ancient Near Eastern civilizations (Yaron, 1966; Boyer, 1965).

EUROPE

Apart from formal legal history, there is very little new material; however, several recent historical studies of laws in their social and political contexts represent a hopeful trend (Harrison, 1968; Crook, 1967; Harding, 1966). Such studies are much more conducive to comparison with ethnographic accounts of legal systems than are those of orthodox legal historiography. Legal history, Harding maintains, sees law only as a product of itself.

OCEANIA

There is very little new material and few significant new intellectual trends. Leo Pospisil's (1965) application of the methods of ethnoscience to the study of Melanesian land tenure might form the basis of an important trend. However, so far, there are no attempts to replicate Pospisil's study in other Oceanic societies (see further discussion below).

THE AMERICAS

Again, there is little new material and few significant trends. This is particularly unfortunate in light of recent political events in North America. In both Canada and the United States the very existence of tribally held Indian lands has been called into question (for example, see Chretien, 1969). It is clear that many more studies are needed like Kawashima's (1969) on the legal history of reservations. Unpublished essays by Elizabeth Colson (1968) and Richard Clemmer (1969) make important points about white opposition to special legal status for Indians. The abolition of such special status is likely to have an effect similar to what Munro (1966) predicts for a change to "Western" land law in Kenya—the creation of a landless rural working class.

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COMPARATIVE, GENERAL AND THEORETICAL

There have been a few comparative or cross-cultural studies, a good example of which is Kumagi's (1966) careful comparative study of the development of Japanese and Swedish marriage laws. A large-scale comparative survey by Otterbein and Otterbein (1965; see also Otterbein, 1968) is an interesting attempt, but suffers from methodological difficulties imposed by the uncertainties of the field and the general lack of a theoretical basis for such work.

An uncompleted general work, Gilissen's *Bibliographic Introduction to Legal History and Ethnology,* may become the authoritative source for comparative studies of law of interest to anthropologists.

Legal theory necessary to facilitate such study (either comparative or descriptive) is not being developed by anthropologists. There are as yet no well-established methodological principles. The "ethno-scientific" approach of Black and Metzger (1965) may have the advantage of precision in semantic analysis of a given "terminological subset," but it has at least one disadvantage: it is excessively prolix. It is also very doubtful whether the method is useful in analyzing the extremely complex legal situations of Africa, where a particular extant legal system is only to be comprehended in terms of the concrete history of the indigenous society in its interrelations with the political and economic impositions of colonialism. Also, the important developing field of social history of law is hardly conducive to "monolingual eliciting of native categories." Perhaps all that one need say here is that the ethnographic study of law has many more dimensions than are revealed by this method. As Pospisil's (1965) greatly attenuated componential analysis shows, this method may be a useful tool when its results are not given exclusively cognitive status.

Nader (1965) notes the need for a formal taxonomy of law. Yet this should not, even as an ad hoc measure, be based on Anglo-American legal terminology. Such terminologies have arisen in the context of theories of law which were antihistorical and given to viewing law as the basis of the state rather than as an organ of state power. Austinian and Poundian legal theory are both based on similar ideological underpinnings. The question of legal taxonomy thus cannot be separated from the problem of developing an adequate theory of law.

Nader also remarks on the tendency to eschew history and to treat legal systems as isolated entities. Hopefully, this is changing. Research on the specific functions of law in social change is required. Not only does law serve its well-known conservative function, but it plays a progressive or potentially revolutionary role as well. China is a case in point. Yet present legal research is unable to identify legal factors that make for change. The promise of the new field of Law and Development is as yet unrealized. Hopefully, this will not long remain the case.

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