Michigan Law Review

Volume 79 | Issue 4

1981

Where Two Worlds Meet: A Time for Reassessment in the Anthropology of Law

Simon Roberts
London School of Economics and Political Science

WHERE TWO WORLDS MEET: A TIME FOR REASSESSMENT IN THE ANTHROPOLOGY OF LAW

*Simon Roberts**

DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE. By *P.H. Gulliver*. New York: Academic Press. 1979. Pp. xxii, 293. $19.

THE DISPUTING PROCESS — LAW IN TEN SOCIETIES. Edited by *Laura Nader* and *Harry F. Todd Jr.* New York: Columbia University Press. 1978. Pp. xx, 372. Cloth $28.10; paper $12.50.

THE IMPOSITION OF LAW. Edited by *Sandra B. Burman* and *Barbara E. Harrell-Bond*. New York: Academic Press. 1979. Pp. xiv, 324. $22.

The past couple of decades have seen a notable increase in writings on the anthropology of law. What was at the end of the 1950s a rather small, select literature[1] concerned mainly with stateless groups has become a teeming industry directed at problems across the whole field of social order. By any reckoning, P.H. Gulliver and Laura Nader have made very important contributions to this development, both in terms of their own work and through what they have stimulated others to do. For that reason alone, their most recent books offer a good moment to reflect on the subject as a whole. Beyond that, both works represent the culmination of major projects in which their authors had long been engaged, and thus have a flavor of the summing up, the accounting. The feeling that a watershed has been reached is reinforced if one looks at the contemporary literature of legal anthropology as a whole: established techniques — often those pioneered by Gulliver and Nader — are repeated in nu-

* Senior Lecturer in Law, London School of Economics and Political Science. LL.B. 1962, Ph.D. 1968, London School of Economics; Adviser on Customary Law to the Government of Botswana, 1968-1971.

1. The books which stand out from this earlier period are relatively few: B. MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY (1926); I. SCHAPERA, A HANDBOOK OF TSWANA LAW AND CUSTOM (1938); K. LLEWELLYN & E. HOEBEL, THE CHEYENNE WAY (1941); M. GLUCKMAN, THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA (1955); V. TURNER, SCHISM AND CONTINUITY IN AN AFRICAN SOCIETY (1957); P. BOHANNAN, JUSTICE AND JUDGMENT AMONG THE TIV (1957).

merous ethnographies. There is some evidence, in both books, that this watershed is no more than a pause for breath and that both authors will be off in new directions shortly. Meanwhile, what has been achieved, and what should come next?

Two features of Gulliver's work are representative of general advances noticeable in the best "legal" ethnographies published since 1960. First, the case histories relied on in *Social Control in an African Society* (1963), and in *Neighbours and Networks* (1971), offer a far greater depth of detail than previous scholars managed to achieve.[2] Second, Gulliver carefully fills in the socio-cultural background to provide a proper context within which the observed dispute processes can be understood.

Alongside these general advances, three crucial departures from the pre-1960s literature are visible in Gulliver's writing. First, the strong "transactional" flavor marks a sharp contrast with earlier rule-centered studies like those of Isaac Schapera, Max Gluckman, and Paul Bohannan.[3] Here we are no longer confined to discussion of rules and exposition of structure, but are confronted with the activities of living men; we cannot but admire the way in which Gulliver leads us through the successes and failures of Ndendeuli "notables" as they attempt to manage the settlement process. His work thus represents a shift from a "normative" to an "interpretive" paradigm. Second, there is Gulliver's effort to introduce greater rigor and analytical clarity into the study of different forms of process. In doing so he breaks with the tradition of viewing third-party intervention in disputes as entirely adjudicatory in character. In *Ancient Law* (1861) and subsequent writings, Sir Henry Maine postulated a great leap from fighting to adjudication with the onset of social life. From the senior male agnate right through to the Victorian high court judge he saw the mode of decision-making as one of third-party adjudication;[4] the only difference was that, as successive stages of civilization were reached, different kinds of people did the "judging" and different criteria underpinned their judgments. Underlying this view is the idea, stretching far back in political theory,[5]

2. An exception must be made in respect of the case histories in Turner's *Schism and Continuity in an African Society* (1957).

3. *See* note 1 *supra*.

4. In brief asides in both ANCIENT LAW 220 (1861) and DISSERTATIONS ON EARLY LAW AND CUSTOM 170 (1883), Maine hints at adjudicatory processes being preceded by processes of arbitration; but this suggested sequence is not elaborated.

5. At least to T. HOBBES, LEVIATHAN (1651). The same position was shared by J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832), and, perhaps surprisingly, by J. BENTHAM, *Anarchical Fallacies*, in 2 THE WORKS OF JEREMY BENTHAM 500-01 (J. Bowring ed. 1843).

that order is conceivable only if there are strong men in positions of authority ready to tell others what to do. This position was still held by some anthropologists as late as the 1950s,[6] and came under systematic attack only after Gulliver formulated a typology of "structurally different modes" of dispute settlement which distinguished negotiation from adjudication. His interest in this problem, which first appears in *Social Control in an African Society* (1963) and continues in his subsequent work, is taken still further in the book under review. These efforts have greatly influenced other scholars, and mark the starting point of a considerable literature. Third, there is Gulliver's work in the area of "pluralism." While earlier studies had to some extent explored the problems inherent in the co-existence of parallel dispute settlement institutions within a single "law district,"[7] Gulliver broke new ground in focusing upon the selective use of adjacent settlement institutions by disputants. In the Arusha study, he explored the circumstances under which disputants might resort to procedures located in lineage, age-set, and parish, as well as in local agencies of the national administration.

Disputes and Negotiations pushes forward the second of these three areas of Gulliver's interest by reassessing, expanding, and concluding his earlier work on negotiatory modes of dispute settlement. This work began with his field-studies of settlement processes in some East African societies. His efforts to generalize then led him to the studies by social scientists of similar questions in Western societies, and to a specific focus on industrial negotiations. His concern is thus deliberately cross-cultural: "to show that patterns of interactive behaviour in negotiations are essentially similar despite marked differences in interests, ideas, values, rules, and assumptions among negotiators in different societies" (p. xv). The outline of much of what he writes is familiar from previous publications; but at almost every point there are important modifications of earlier positions. Particularly in chapters four and five, where he lays out what he describes as his "processual models of negotiation," much is entirely fresh. As in Gulliver's earlier work, the strength lies in his robustly empirical approach, and in his stated reluctance to invoke theory where it cannot be grounded in, or related to, his data. For those already familiar with his earlier writing, the most interesting aspect of this book surely will be his tantalizingly brief concluding remarks

6. *See, e.g.*, L. POSPISIL, KAPAUKU PAPUANS AND THEIR LAW (1958).

7. *See, e.g., id.* Among the problems of this type are those associated with the clash of indigenous institutions and agencies of central government in the colonial context.

about future directions which the study of negotiation might take. I return to these later.

* * * *

Nader's contribution to the anthropology of law has taken quite different forms. While she has published some important ethnographic studies,[8] much of her most valuable work consists of the unselfish but essential tasks of drawing together and rationalizing the writings of legal anthropology, and of coordinating large-scale research projects. In three major surveys of the literature,[9] she has identified issues she saw as central and directions that future work might valuably take. One theme she has returned to repeatedly is the use of anthropological findings and methods in the study of contemporary Western societies. It is much too early to assess just how influential these efforts will be, for this is presently a rapidly expanding field. Equally notable have been her efforts to reach people in other disciplines (especially lawyers) through seminars and conferences, as well as through her writing. Nader's major achievement, however, must be the Berkeley Village Law Project, the successful completion of which is documented in her latest book, *The Disputing Process*.

This ambitious project involved sending out graduate students over a ten-year period (1965-1975) to study disputes in a wide variety of societies. Fourteen students went into the field: two in Asia; four to Europe; one to an American Indian group; three to the Middle East; two to Africa; and two to Latin America. All completed doctoral research, and ten contribute papers to this volume. The idea was to achieve, through coordinated research, greater consistency of method and a focus on more closely comparable levels of organization than had been achieved in ethnographies published previously. Each study was to concentrate on "disputes between people of the same culture, disputes between people who for the most part know each other and who expect to interact in some fashion in the future regardless of the outcome of the dispute" (p. ix). On the assumption that there would be a range of dispute-handling procedures in any society (implying a degree of disputant choice), and that the avail-

8. *An Analysis of Zapotec Law Cases* (1964), 3 ETHNOLOGY 404 (1964); *Talea and Juqila: A Comparison of Zapotec Social Organisation*, 48 U. CAL. PUBLICATIONS IN AM. ARCHAEOLOGY & ETHNOLOGY 195 (1964); *Styles of Court Procedure: To Make the Balance*, in LAW IN CULTURE AND SOCIETY 69 (L. Nader ed. 1969).

9. *The Anthropological Study of Law*, in 67 AM. ANTHROPOLOGIST (Special Publication) 3 (1965); *The Ethnography of Law: A Bibliographic Survey*, 7 CURRENT ANTHROPOLOGY 267 (1966) (with K. Koch & B. Cox); *On Studying the Ethnography of Law and Its Consequences*, in HANDBOOK OF SOCIAL AND CULTURAL ANTHROPOLOGY 883 (J. Honigman ed. 1973) (with B. Yngvesson).

able procedures would differ from one society to another, Nader and her collaborators were "interested in understanding the conditions that defined the presence and use of specific dispute-resolving procedures" (p. x). In doing so, they tried to go "beyond the static, equilibrium model of structural-functionalist studies, toward a more dynamic, processual one" (pp. 4-5). Like Gulliver, they shift away from analysis of rules and structure toward the activities of living men.

The Disputing Process certainly reveals what a remarkable achievement the Berkeley Village Law Project has been. As one reads through the chapters, each devoted to a single field-study, it is impossible not to be impressed with this exercise in systematic intersocietal comparison. The quality of the dispute data is good, and the processes are carefully related to each other and to an overall context. Similarly, the concern with living men and women, and with the way in which these actors perceive and utilize the available procedures, brings the studies to life. All this is very good; and it is certainly true, as Nader and Todd claim in their introduction, that these advances have been achieved through a paradigmatic shift from a rule-centered approach to a processual one. The same shift, I have already noted, is noticeable in Gulliver's work and in many of the best legal ethnographies appearing over the past twenty years. But how far ahead has the claimed escape from a "rule-centered" to a "processual" paradigm really taken us? Does it enable us to address the difficult questions concerning the relationship between rule and action, particularly those which center upon the relationship between behavioral change and changes in the normative repertoire?

I shall argue here that the contemporary opposition between rule-centered and processual approaches,[10] which is now visible right across the social sciences,[11] represents a serious barrier to further advance in the anthropology of law. Work within the rule-centered paradigm tends to underplay the transactional element in social life, suggesting too mechanical a relationship between rule and behavior. On the other hand, processual studies typically place too little emphasis on the operation of normative constraints. These two worlds, the domain of rules and the domain of action, have got to be related to each other more closely if either is to be fully understood.

This problem is not confined to the small, relatively homogenous

10. The origin of which may be traced at least as far back as Bronislaw Malinowski's writings in the 1920s. *See, e.g.*, CRIME AND CUSTOM IN SAVAGE SOCIETY (1926).

11. *See* A. GIDDENS, CENTRAL PROBLEMS IN SOCIAL THEORY: ACTION, STRUCTURE AND CONTRADICTION IN SOCIAL ANALYSIS (1979).

groupings with which Gulliver and Nader have been principally concerned. But the acephalous character of such groupings and their lack of explicit rule-making and rule-changing procedures make it possible to construct a preliminary model of normative change which may be used as the starting point of discussion. The model suggested here may seem a simplistic one; and it is certainly not new, for it would have presented no surprises to Maine. But in the isolation of the two paradigms to which I have referred, and in the struggle for more sophisticated analysis, scholars have lost sight of some basic relationships. Although I retain a focus on disputes here, I do not wish to suggest any sharp distinction between instances of conflict and the regularities of everyday life. It simply is that a dispute offers the observer privileged access to rules; an occasion upon which the continual process of articulation and reformulation takes its clearest form. Rules spend most of their time in the heads of men and women; they are most likely to be brought out into the open and formulated in the context of dispute.

Let us take as an example a small, relatively autonomous group like the Ligomba community that Gulliver describes in *Neighbours and Networks*. All the members are linked by ties of kinship or affinity, and all share knowledge of and access to a loosely constructed, not very clearly articulated, repertoire of rules relating to marriage, inheritance, land exploitation, and so on. It does not matter for our purposes where these rules come from; they are simply "there." We also assume, along with most anthropologists, that men and women formulate and pursue strategies in pursuit of their interests which take into account the likely actions and rule constructions of adjacent individuals and groups. To a given actor at any moment, some rules will seem advantageous, some irksome, and the actor will arrange the rules and articulate them in a manner which best fits his own objectives. Some of the time the actor will arrange his affairs so as to avoid confrontation with other people; but sometimes a clash will necessarily arise. Where this happens, third parties will become involved, aligning themselves with the respective sides. The respective positions and actions will be recounted, explained, perhaps explicitly justified by reference to rules; each side formulating the rules so as to place its own conduct in the most appropriate light. Eventually some agreement will be hammered out, after kinsmen and supporters on both sides bring pressure to end the quarrel. But in the course of that quarrel rules will have been reformulated. These reformulations will remain in the minds of the participants, and the re-

formulated rule will be consciously or subconsciously taken into account when future objectives are formulated and actions taken.

Such a picture invites us to see interplay between rule and behavior in the process of normative change. Thus, as life is experienced, changes in the content of the rule base take place which will themselves have consequences for future behavior as actors develop their strategies in the light of the reformulated rule. That subsequent action will itself lead to further confrontation and further normative reformulation. The interplay is a continuing process, in which each sphere repeatedly reacts to the other.[12]

A picture of change very much along these lines is hinted at by Gulliver in the closing pages of *Disputes and Negotiations* (pp. 274-275). There he suggests that in addition to "perceiving a social relationship in terms of roles, rules and content, we can also perceive it as the ongoing, cumulative results of more or less constant negotiation." Such negotiations and their outcomes "modify and direct the relationship." He then concludes:

> Indeed, it should prove possible to perceive a dialectic between the rules (and norms and values) and interactional problem-solving. On the one hand, there is no need to conceive of everything as up for grabs, plastic and almost without form at all; on the other hand, we should not ignore the inherent quality of plasticity nor the processes of problem solving and their continuing effects on the relationship.
>
> With this idea that particular social relationships involve recurrent negotiations that affect and in part determine and change their form and content, it is a logical extrapolation to the conception that negotiations, both private and public, contribute to and perhaps largely determine a whole social order involving many persons and the ongoing organization of an interconnected set of social activities.

Of course, it is a big jump which Gulliver suggests from the development of a single relationship to the development of a whole social order. It is also a considerable leap from the small, relatively homogeneous groups that Gulliver has spent most of his time studying to large, stratified, centralized societies like our own. Assuming we could accept such a picture of normative change in a small, acephalous grouping where disputants feel their way toward a settlement with the advice and urging of third parties, has it any application where some third party is in a position to hand down a decision — to state what the rules are and to formulate new ones? What about the society characterized by a high degree of differentiation

12. I am not addressing here what some might regard as the more important question: what conditions bring about the most frequent and intense disputes likely to result in the more rapid reformulations of rules.

and specialization? Here many members of the group no longer understand and manipulate the rules themselves, and these skills have largely fallen into the hands of a specialized elite. Despite these differences, it is certainly possible to view some areas of legal change which take place through Western courts in very much the terms Gulliver suggests: successive disputes involve reformulation of rules by the disputants' specialists, restatement by the adjudicator, and then a process through which the restatement is fed back again into action through channels provided by the specialists. The growth of certain aspects of revenue law through the successive responses of the legislature and taxpayers, for example, may be seen in this way. Perhaps the model is strained most if we try to apply it to a legal system operating in a colonial or post-colonial context, where legislative changes conceived at the center are designed to apply throughout the diverse, formerly autonomous groupings that make up the new state. Nevertheless, the image of social life as negotiation is a powerful one, provided that we recognize and allow for the operation of normative constraints.

* * * *

Despite the extent to which processual approaches have dominated recent work in the anthropology of law, studies which focus on the operation of a national legal system frequently remain within the rule-centered paradigm. That should not surprise us, perhaps, as this perspective matches the view of the specialists operating the system: rules are "there" to constrain behavior. The very terminology used to discuss national legal systems reveals the degree to which this folk model has been allowed to dominate theory: studies consider the "impact" and examine the "imposition" of law. The direction is all one way, from law toward behavior. The possibility of a two-way, interactive flow, along the lines suggested earlier in this review, is often ignored.

A similar criticism can be made of work that postulates, and then examines, the "gap" between law and behavior. By definition such studies reject any mechanical fit between the two — and that is clearly a fruitful starting point. But insofar as the "gap" concept presupposes discontinuity and lack of connection between law and behavior, it is unhelpful. It was with such reservations that I approached Sandra Burman and Barbara Harrell-Bond's *The Imposition of Law*, a collection of essays based upon a conference held in April 1978 under the title of "The Social Consequences of Imposed Law." In fact there was no need to worry, for as the editors indicate in a terse, sensible introduction, the participants at the conference

seem to have realized almost from the outset that "imposed law" is an "elusive concept" (p. 2) of little use for analytical purposes. The phrase "imposed law" immediately conjures up notions of involuntary submission, oppressive governmental action, and injustice; but it does not help us to understand legislative processes or the ways in which people react to the laws enacted.

The Imposition of Law is a catholic range of essays, some concerned with modern industrialized countries and others with the third world, all touching upon aspects of legislation that seek social change. In several the phrase "imposed law" is loyally retained in the title or tactfully introduced in the first paragraph; but mercifully the concept does not inform much of the analysis. Many of the essays are good; two seem particularly important. In the first of these, Richard Abel examines how the introduction of Western-type settlement institutions into tribal settings in Kenya affects litigation patterns. Theorizing that "[s]ocial structure and institutional structure do interact to produce patterns of litigation" (p. 196), Abel links a sharp drop in civil litigation rates to the westernization of the local courts. He concludes:

> [P]eople choose whether or not to use the westernized courts, and the strategies they will employ if they do litigate. The exercise of these choices has very significant consequences. It determines the law that will be applied and thus influences the outcome of the dispute; in this sense people make law and decide cases. It affects the future relationships of the parties and settings; people embedded in tribal social structures and therefore possessed of alternative forums for airing interpersonal disputes will increasingly shun modernized courts . . . . [Pp. 195-96.]

There is, of course, a further sense in which "people make law" under circumstances like those described by Abel. When people fail to use westernized agencies, the corresponding strengthening and expansion of other forums for disputes in the tribal setting will "get back" to the legislator, and a further stage in the cycle of legislative action and litigant response is thus initiated. The approach Abel outlines seems extremely promising, particularly because the actors in the tribal setting are seen as reacting, innovative agents, rather than static recipients of rules as suggested by the concept of imposition. One point at which caution seems required concerns the rather stark distinction Abel draws between "tribal" and "modern" society. This contrast is probably adequate for Abel's purposes; but, as he is aware, the types of society which he labels "tribal" are quite varied, and the concept requires elaboration in other contexts.

In a second important essay, Robert Kidder squarely faces the

theoretical difficulties of the concept of imposition. Kidder notes at the outset of his piece the diverse responses which members of indigenous groupings have offered to the legal regimes introduced by colonial powers. These responses have varied from abject submission to daring and successful manipulation. Consequently, Kidder rejects "the static, hypodermic model of imposition" (p. 296), and replaces it with an "interactional model" that treats law as "an arena for the promotion of interests" (p. 291). There is here an echo of Gulliver's conception of social life as one of continuing negotiation, and the value of this approach lies in its attempt to establish a two-way relationship between legislative activity at the center and the behavior of living men and women on the periphery.

Kidder replaces the concept of imposition with a distinction between "internal" and "external" law (pp. 296-97). A legal system is external when it represents "interests, institutions, or values extending beyond the community within which conflict is occurring"; and the degree of externality may be measured by the layers of organizational complexity between lawmakers and the governed (p. 297). Kidder also asserts that "the more external the legal system, the more any conflict introduced into it or induced by it will take on meanings not originally relevant to the conflicting parties," and that "[e]xternal law offers alternatives to those whose interests conflict with indigenous norms" (p. 297). This last point is certainly true. It emphasizes the obvious but crucial fact that legislation does not arrive in a vacuum; actors on the periphery necessarily have prior mental pictures of the normative constraints confronting them, and any new rules thrown into the pool will be added to and adjusted to those existing pictures. The legislator has no control over this process; but his "success" may well depend upon his understanding of what existing pictures are like and his sensitivity to them.

Kidder's concept of externality may well prove valuable; but it will require much more extensive development than is attempted in his essay. I would also question the extent to which externality can be measured solely in terms of institutional layers separating the lawmaker and the governed. From the perspective of the actor on the periphery, the degree of externality must in part be measured in terms of any analogy which may be developed between existing practices and the newly enacted provisions; this will itself depend to some extent upon the sensitivity of the legislator to what is going on and to how things are perceived on the periphery. This final point reveals the value which we must always attach to empirical investigations of the kind which Gulliver has undertaken with such distinc-

tion. From now on, one way forward lies in closer analysis of what is said and done in the context of disputes;[13] what people say when they quarrel offers one of the few available keys to a better understanding of the relationship between rule and action.

13. *See generally* LANGUAGE AND POLITICS (J. O'Barr & W. O'Barr eds. 1976); POLITICAL LANGUAGE AND ORATORY IN TRADITIONAL SOCIETY (M. Bloch ed. 1975).