# CERTAINTIES UNDONE: FIFTY TURBULENT YEARS OF LEGAL ANTHROPOLOGY, 1949-1999*

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This article reviews the broadening scope of anthropological studies of law between 1949 and 1999, and considers how the political background of the period may be reflected in anglophone academic perspectives. At the mid-century, the legal ideas and practices of non-Western peoples, especially their modes of dispute management, were studied in the context of colonial rule. Two major schools of thought emerged and endured. One regarded cultural concepts as central in the interpretation of law. The other was more concerned with the political and economic milieu, and with self-serving activity. Studies of law in non-Western communities continued, but from the 1960s and 1970s a new stream turned to issues of class and domination in Western legal institutions. An analytic advance occurred when attention turned to the fact that the state was not the only source of obligatory norms, but coexisted with many other sites where norms were generated and social control exerted. This heterogeneous phenomenon came to be called 'legal pluralism'. The work of the half-century has culminated in broadly conceived, politically engaged studies that address human rights, the requisites of democracy, and the obstacles to its realization.

What legal domains have anthropologists examined in the fifty years we are considering? How much have their topics changed? How much do the changes in topic reflect the shifting political background of the period? The big picture is simple enough. What was once a sub-field of anthropology largely concerned with law in non-Western society has evolved to encompass a much larger legal geography. Not only does legal anthropology now study industrial countries, but it has expanded from the local to national and transnational legal matters. Its scope includes international treaties, the legal underpinnings of transnational commerce, the field of human rights, diasporas and migrants, refugees and prisoners, and other situations not easily captured in the earlier community-grounded conception of anthropology, though the rich tradition of local studies continues along a separate and parallel track.

This expansion and change has involved a shift in methodology and theoretical emphasis. For a long while, dispute-processing was the centre of the field, with insight into local norms and practices as an essential adjunct. Now, though looking at disputes remains a favoured way of entering a contested arena, the ultimate objects of study are immense fields of action not amenable to direct observation. The nature of the state today, and the transnational and supra-local economic and political fields that intersect with states, are the

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intellectually captivating entities now. Here, we will be looking at the issues legal anthropology addressed fifty years ago and will trace its gradual progress towards these new questions. Of necessity this will be a selective account, one which, where it can, takes note of the resonance of background political events.

Changes in the empirical focus of legal anthropology have been accompanied by disagreement about how to approach and answer the question of how and why the legal acquires a particular form in a particular social setting. To simplify, one could say that three general interpretations have prevailed.

## Law as culture

The first suggests that law is tradition-driven, particularly outside the West but sometimes within it. Culture is all. However, culture is simply a label denoting durable customs, ideas, values, habits, and practices. Those who treat law as culture mean that law is a particular part of that package, and that the combined totality has internal systemic connections.

The stress on the constraining power of 'the traditional' can be found in colonial conceptions of the 'customary law' of subject peoples, and is deeply embedded in Durkheim's (1961) vision of what I might call 'the elementary forms of social unanimity'. It is also found in Weber's (1978: 226-40) conception of 'traditional authority'. This view is reiterated in some of Habermas's (1979: 78-84, 157) evolutionary writings about law and society. A powerful version of the cultural argument is found in Geertz's (1983: 232-3) commentary on law. Tradition also looms large in Rouland's (1988) textbook overview.

Cultural context once supplied some anthropologists with an apparently innocent descriptive explanation of variations in values and styles of life (see Hoebel 1954). But culture has lost its political innocence. Today, when cultural difference is offered as a legitimation for and explanation of legal difference, cultural context often comes up as an aspect of a consciously mobilized collective identity in the midst of a political struggle, and it arises in relation to constitutions, collective inequalities, insiders and outsiders, and other aspects of national and ethnic politics.

## Law as domination

The second common explanation of legal form is that everything in law can be understood to be a mask for elite interests, both in the West and elsewhere. Thus, law purports to be about furthering the general interest, but really serves the cause of the powerful, generally capitalists and capitalism. (The conservative counterpart, the law and economics argument about efficiency, has not entered the anthropological literature.)

The 'elite interests' argument is Marxisant in style. A version of it is found in Bourdieu (1987: 842), in the work of the Critical Legal Studies Movement (Fitzpatrick 1987; Fitzpatrick & Hunt 1992; Kelman 1987), and elsewhere. For example, consider Snyder's (1981*a*: 76) comment concerning Senegal: 'Produced in particular historical circumstances, the notion of "customary law" was an ideology of colonial domination'.

### Law as problem-solver

The third explanation offered by some anthropologists (and many lawyers) is a technical, functional one. Law is a rational response to social problems. That is the explanation enshrined in many appellate opinions as well as in sociological writings. In this explanation, law is a problem-solving, conflict-minimizing device, consciously arrived at through rational thought in the West and elsewhere. Ann Marie Slaughter, Professor of International Law at Harvard Law School, was recently heard to express succinctly what is a commonplace in law schools, 'I see law as a problem-solving tool' (pers. comm.).

This rationalist framework is widely used in the legal profession, and appears as one of the keys to modernity in Weber's sociology. Conceptions of law as essentially problem-solving were also embedded in the essays of the well-known legal realist, Karl Llewellyn, who was interested in anthropology and wrote a book on the Cheyenne (Llewellyn & Hoebel 1941; for a brief critique, see Moore 1999). Importantly, however, Llewellyn did not make the Weberian assumption that Western society (and modernity in general) had a monopoly on sophisticated juridical thought. In fact, he attributed this mode of thinking to the Cheyenne.

These three scholarly explanations of law – as culture, as domination, as problem-solving – recur throughout the fifty years we will review, frequently mixed together. My review will emphasize fieldwork studies and the general political background of legal anthropology. Anglophone contributions will be given most attention, but they are by no means the whole story. Reasons of space limit what I can discuss. Not only must I omit the contribution of French, Dutch, and other writers, but much anglophone material also must be excluded.[1]

My approach is partly chronological, partly conceptual. Themes will be cited as they emerged historically, but subsequent traces of the same ideas will sometimes be tracked forwards as they reappear. That messes up the chronology, but illuminates continuities in the sub-discipline.

## *Gluckman and the rationales of judges: reasoning, reasonableness and rules*

Gluckman was the dominant personality in law and anthropology studies at the half-century and beyond (for assessments, see Gulliver 1978; Werbner 1984), and he stood astride the divide between the colonial and the post-colonial in Africa. He did fieldwork in Africa in the colonial period, but went on publishing influential work on a variety of topics well into the first decades of independence.

In the classical manner of British social anthropology of the time, he was interested in discovering what had been the shape of pre-colonial society, the 'true' Africa. Yet no one was more aware than Gluckman that what actually surrounded him were African societies that had experienced decades of colonial rule, labour migration, Christian influence, alterations of economy and organization, and more. He tried to understand the two Africas at once, the historical past and the living present. Furthermore, he was the first anthropologist systematically to study a colonial African court in action, to listen carefully to the stories of complaint and the arguments as they unfolded.

Hitherto, law in Africa had generally been reported as a set of customary rule-statements elicited from chiefs and other authorities. These so-called customary rules were then supposed to be used as guidelines in the colonial courts (see e.g. Gluckman 1969). But customary law was, in fact, so altered a version of indigenous practice that it must be recognized as a composite colonial construction. That began to be acknowledged in Fallers's (1969) discussion of Soga law, and in Colson's (1971) writings on land rights, and was made unmistakably explicit by Snyder (1981*a*; 1981*b*), Chanock (1985 [1998]), and Moore (1986*b*).

In Gluckman's time, customary law was assumed to be largely an expression of indigenous tradition, and when Gluckman listened to disputes and heard decisions, he focused on rules and reasoning. He tried to figure out what rule the judges were applying, what standard of reasonable behaviour was being used. This was not always easy or straightforward since the several judges in the highest Lozi court often disagreed with each other.

Gluckman distinguished Lozi norms from the logical principles used by judges to decide which norm to apply, and how and when to apply it. His argument was that, while Lozi norms were special to their society, Lozi juridical reasoning relied on logical principles found in all systems of law. Some subsequent commentators saw this as a falsifying Westernization of Lozi law. However, critics did not see that this universalist interpretation embodied a political position (Gluckman 1955: 362). Gluckman wanted to show that indigenous African legal systems and practices were as rational in the Weberian sense as Western ones. Their premises were different because the social milieu was different, but the logic and the process of reasoning were the same. To demonstrate that Africans were in every way the intellectual equal of Europeans, he showed at tedious length (e.g. 1955: 279-80) what he saw as the comparabilities between African and Western juridical thought. Embedded in his gloss on Lozi ideas was a splendid message about racial equality.

Ten years later, in a series of lectures, Gluckman (1965) commented on Barotse constitutional conceptions, ideas of property, notions of wrongdoing and liability, and conceptions of contract, obligation, and debt. However, again he had a distinct preoccupation, comparison. He argued that certain Barotse concepts were characteristic of societies with a simple political economy: simple economy, low levels of technology, rudimentary political-social order. His comparative orientation merits more exploration but, until recently, work of this sort had all but disappeared, partly because of serious methodological problems.[2] However, before these problems were recognized, Nader pursued the possibility that comparing the techniques of dispute management of different societies could lead to fruitful insights (see Nader 1969; Nader with Todd 1978). In time, legal anthropologists finally decided that they could not resolve the issues of form, function, and context that these sorts of comparisons raised. However, such questions are again being asked.

What strikes one today is the extent to which Gluckman (esp. 1955; 1965) was preoccupied with a racially egalitarian interpretation of African logic, and an evolutionary interpretation of African political economy. These preoccupations display the reasoning of an anthropologist who was politically on the side of Africans, yet who interpreted their social systems and legal concepts

as containing a substantial residue of an earlier, pre-capitalist economy. It seems not insignificant that, between the date of the first book and of the second, the colonial era had ended in most African countries. In his opinions, Gluckman had managed to identify simultaneously with Marx and Maine.

The main point about my hasty summary of a few of Gluckman's arguments about law is that he began a revolution in field method with his attention to cases in court. Ever since, local dispute-watching has been the principal form of social voyeurism in legal anthropology (for a recent illustration, see Caplan 1995). What has been said here may suggest why Gluckman not only was the founder of the Manchester department but was also the initiator of many durable controversies, which was very good for academic business.

## *Law as an expression of basic, and often unique, cultural premises*

One of the major criticisms immediately levelled against Gluckman's universalist notions about legal logic was Bohannan's (1957) counter-contention that in law, as in everything else, every culture is unique, and that, for anthropology, its uniqueness is what is important about it. Bohannan contended that even translating the legal concepts of another society into English terms was a distortion. His is one of the more extreme versions of the non-political 'law as culture' argument. His contentions were the object of a heated debate with Gluckman at a conference in the 1960s (see Bohannan in Nader 1969: 401-18).

Many years later, a similar argument was offered by Geertz, in which he took 'his distance' from Gluckman (Geertz 1983: 169). Geertz contended that three major cultural traditions – the Islamic, the Indic, the Malaysian – each had different legal 'sensibilities'. He sought to demonstrate this by choosing two central concepts in each tradition and comparing them. He chose to translate all of these paired concepts as 'fact and law'. But of course, in each of the three traditions the scope of reference of these concepts was not identical. The result was a *tour de force* in part because Geertz used 'fact and law' as the translation for all three, and because he defined 'fact' as 'what is true' and 'law' as about 'what is right'. That is not what the distinction between fact and law means in Anglo-American law, but Geertz's recasting of these terms into philosophical and moral ones is not accidental. He was not taking up conventional questions of comparative law, he wanted to place these terms in a grand scheme of cultural thought. He argued (1983: 232), in a now much-repeated phrase, that law is 'a species of social imagination' and that comparisons should be drawn in those terms. He says (1983: 232) that 'law is about meaning not about machinery'. He saw comparative law as an opportunity to shed light on cultural difference, and he identified the analysis of cultural difference as the central purpose of anthropological work (1983: 233). So much for Gluckman's universals.

The emphasis Bohannan and Geertz put on the importance of cultural difference preceded today's full-blown politics of identity, but their approach certainly resonates with many current forms of multiculturalism, as well as with Taylor's (1992) ideas about the importance of a politics of recognition. Today, cultural difference is a sectoral political cause in many parts of the

world. No wonder that culture as the source of legal form remains a live proposition (see Greenhouse & Kheshti 1998). It serves those who have their own political reasons to emphasize collective boundaries, and to distinguish themselves from others.

Rosen has generated another version of the 'law as culture' thesis. A lawyer-anthropologist, he was at one time a student of Geertz, and has adopted much of the Geertzian package in his work. He has written on an Islamic village court in Morocco that deals largely with family law, the court he studied being restricted by statute to such matters. He is concerned to show that, despite its lack of precedents and records, the court does not make arbitrary decisions, that it does *not* dispense what Weber called 'kadi justice', even though the judge has a great deal of discretion (Rosen 1980-1). Rosen (1989: 18) says: 'the regularity lies ... in the fit between the decisions of the Muslim judge and the cultural concepts and social relations to which they are inextricably tied'.

Another instance of 'legal form as cultural product' is French's sketch of Tibetan law as it was in the period from 1940 to 1959, a project of historical reconstruction. She calls her work a 'study in the cosmology of law in Buddhist Tibet in the first half of the twentieth century as reconstructed', characterizing her effort as 'an exercise in historical perspective and imagination' (1995: 17). She concludes that in dealing with dispute cases, Tibetan jurists did not make decisions according to a prescribed set of rules, but made complex discretionary judgements. They approached each case as a unique combination of features, a perception which she attributes to Buddhist philosophy, to a way of thinking about 'radical particularity' (1995: 343).

The link between a system of case-by-case rulings and the Buddhist background seems less certain when one looks at comparative materials. After all, there are many societies and institutional settings in which hearing agencies that are not Buddhist make decisions case by case and emphasize situational uniqueness, such as the Islamic court described by Rosen. Decentralized institutional arrangements seem to be the crux of the matter. Are these the consequence of religio-philosophical conceptions, or social-structural history?

That brings us to questions derived from the Weberian construction of legal rationality in the modern West. To what extent are Western judges' decisions in fact governed by mandatory rules, and how much is left to judicial discretion? Posner has provided some marvellously candid American answers. Posner is the eminent founder of the law and economics movement, Professor of Law at the University of Chicago, and sometime commentator on legal anthropology, who now sits as a judge on the Court of Appeals of the Seventh Circuit in the US. Though not all judges would admit, as Posner (1998: 235) does (and Justice Holmes did), to using a 'puke' test of disgust as a way of deciding when to use discretion rather than to apply existing rules, his acknowledgement of his own reactions and the importance of judicial discretion is neither new nor revolutionary in American law.

However, with the exception of Rosen (1980-1) anthropologists of law have usually paid little attention to judicial discretion in both Western and non-Western systems. Of course, discretion can be difficult to detect if it is masked by an allusion to rules. Equally, acknowledging the importance of discretion undermines a purely culture-driven analysis. The problem-solving rationale of

legal form is congruent with the use of discretion, but invites a question: in whose interest are decisions made? Where is the rule of law when judges can decide as they see fit? Here we have an example of the way all three of the modes of accounting for legal form mentioned at the outset of this article can become entwined in contradictory ways in the project of explaining juridical thought.

## *Ways of using law: litigant interests and strategies*

Since the 1960s and 1970s, anthropologists became less and less likely to see behaviour as being overwhelmingly driven by pre-existing cultural patterns and social rules. Even in Bourdieu's Marxisant conception of social reproduction, the idea of the 'habitus' (1977: 78) had to take improvisation and invention into account.

The connection between the emerging anthropological interest in choice and change and the socio-political background of the 1960s and 1970s is difficult to prove but impossible to ignore. Challenges to authority were prominent features of public life, with substantial repercussions in universities. With the end of colonial rule in the 1960s, the ex-colonized peoples were, at least formally and legally, in charge of themselves. Retrospective complaints about the colonial period were actively voiced. In the US the Vietnam War elicited enormous popular resistance, with legal repercussions for the protesters. The civil rights movement was launched. Legislative and social changes were demanded and a lengthy struggle ensued. The women's movement started its task of consciousness-raising in a milieu in which a new technology of contraception altered sexual behaviour, moral consciousness, and many gender-oriented laws. There were analogous social hurricanes in Europe.

In view of all of this contemporary political activity, there was not much place for an anthropology of law focused on conformity. Agency came into its own. Cases were heard and read in terms of litigants' motives. Law was seen as a representation of social order, but it was understood to be usable in a great variety of ways by people acting in their own interest. The strong and powerful could, of course, further their interests more effectively than the weak.

Early examples of ethnographic work that intimated some of these changes in analytic attitude towards normative justice appeared in Gulliver's (1963; 1969) writings. In his fieldwork among the Arusha, in colonial Tanganyika, he observed that they often managed their legal disputes, not by going to existing (colonial) Native Courts, but through a system of 'informal', non-official, negotiated settlements. Lineage representatives of the contending parties assembled and bargained solutions on behalf of the principals. He concluded that the winners of these negotiated settlements were always the more politically powerful parties. The discourse involved in these negotiations referred to norms, but he contended that norms did not determine the outcome. He contrasted this negotiation process with judicial decisions, in which he assumed that the outcome was normatively determined. Thus he was still assuming not only that a normative system existed, but that it was systematically enforced in formal tribunals.

The analytic scenario changed even further in the direction of agency a few years later. Law began to be treated as a set of ideas, materials, and institutions that were being used as a resource by people pursuing their own interests. For example, Collier's ethnographic work among Maya-speaking Mexicans treated Zinacanteco legal categories and concepts 'as a set of acceptable rationalizations for justifying behavior' (Collier 1973: 13). Her central objective was to identify the Zinacantecos' way of conceiving the world and their handling of transactions and disputes in the light of these ideas. However, Collier also made it clear that the Zinacanteco world was far from completely autonomous, far from impervious to the interventions of Mexican state institutions. Collier showed that the Zinacanteco legal system was neither static nor insulated from the outside world.

The early Gulliver challenge to Gluckman about whether power or norms determined the outcome of disputes remained lively in England for a time. A conference of the Association of Social Anthropologists even carried this as its theme (Hamnett 1977). Definitively putting the lid on that ASA discussion, and supporting their argument with convincing empirical materials, Comaroff and Roberts (1981) produced a well-known and widely read book that made the point that, even in judicial tribunals, rules did not always rule. Using case material collected among the Tswana of southern Africa, they showed that many types of dispute-processing could exist in the same system. Rules and the social relations of litigants, as well as their interests, appeared within the same universe of litigation. The cases demonstrated that Tswana often took the opportunity to use arenas of litigation to renegotiate personal standing, to obtain recognition of social relations that were being contested (1981: 115). This kind of confrontation occurred as if it were an argument about norms: the language in which the arguments were presented was 'culturally inscribed and normatively encoded' (1981: 201). They speak of 'dualism in the Tswana conception of their world, according to which social life is described as rule-governed yet highly negotiable, normatively regulated yet pragmatically individualistic' (1981: 215). 'Disputes range between what are ostensibly norm-governed "legal" cases and others that appear to be interest-motivated "political" confrontations ... The point, however, is not simply that these different modes co-exist in one context ... but that they are systematically related ... transformations of a single logic' (1981: 244).

Is this accommodation of contradictory ideas special to the Tswana, or more general? I would argue that this situation is commonplace. In keeping with this view, on a number of occasions in the 1970s I argued that the sociology of causality was ill served by a conformity-deviance model of the place of rules of law in societies, as if there were a single set of rules, clearly defined, totally discrete, and without contradictions or ambiguities (Moore 1970; 1973; 1975*a*; 1975*b*; 1978). 'The social reality is a peculiar mix of action congruent with rules (and there may be numerous conflicting or competing rule-orders) and other action that is choice-making, discretionary, manipulative' (1978: 3). What also matters is that the choices and manipulations are not only made by the litigants in dispute situations, they are also made by the authorities who decide what the outcome shall be, and who make reference to norms and normative ideologies in other contexts.

Allusions to rules or ideologies with normative implications often characterize the behaviour of authorities in and out of dispute contexts. The place of moralizing statements by authorities and leaders is an issue as important to the analysis of the relationship between legal rules and behaviour as is the understanding of litigant manipulations. The organization of authority and its relation to the representation of normative ideas is a major piece of the framing, presentation, and implementation (or non-implementation) of law. By focusing on dispute, anthropologists have gained some access to the status of that putatively normative body of ideas, but what the authorities and others actually do with them is something else again.

## *Questioning authority: issues of class and domination in the interpretation of law*

Given their lack of doctrinal and technical legal expertise, it is often assumed that anthropologists studying industrial societies are best off observing 'informal' legal processes analogous to those found in small-scale village communities: negotiation and mediation, informal institutions such as small claims courts, internally generated neighbourhood arrangements, family law, and the like. A number of anthropologists have done successful fieldwork and case analysis in just such settings. They contribute to our understanding of social and cultural issues other than those which would turn up in more formal settings: popular attitudes towards litigation and towards legal institutions, conceptions of law as part of the culture of community, the actual practices of officials in interaction with lay people, and the like (Abel 1982; Conley & O'Barr 1990; Greenhouse 1986; Greenhouse, Yngvesson & Engel 1994; Merry 1990; Yngvesson 1993; Yngvesson & Hennessey 1974).

However, in the 1970s a curious test of the anthropological taste for informal institutions appeared when informality was officially embraced by the American judicial system. When the courts added Alternative Dispute Resolution (ADR) to options open to litigants, anthropologists were not pleased. ADR was publicized as a response to the needs of the poor and of those who had minor claims that would otherwise have gone unheeded.[3] However, the judiciary embraced the programme because their court calendars were overloaded. Less felicitously, some judges remarked that they wanted to get 'garbage cases' out of their courts (Nader 1992: 468).

Nader, being passionately public-interest minded (see Nader 1999), argued that, in fact, the courts themselves should be made more accessible to the poor. She (1980: 101) asserted that the legitimacy of a legal system in a democracy depends on providing access to the courts for all. This resonated with her earlier work on dispute settlement in two rural Zapotec villages in Mexico, work which began in the 1950s (see Nader 1990). When Nader first started this project there were no lawyers in these villages, and the position of judge rotated among the senior men, each one serving a fixed term. The judges evidently saw themselves as mediators, trying to work out compromise solutions between persons in conflict. Nader described her experience in Mexico when she lectured at American law schools, and she reproached her audiences for not trying to provide less expensive, more accessible

compromise solutions to the everyday problems that were commonplace in the United States. From the start, she used her ethnographic work to comment on what she saw as the shortcomings of American society.

But when many jurisdictions actually established ADR, Nader's reaction was negative. She contended that the question was what was just and what was unjust under the rule of law, not whether people could be forced to compromise in mediatory settings as if it were some kind of therapy. Nader (1993: 4) asked what this coercive 'harmony ideology' signified in relation to the inequalities in American life. Here we have one of the three recurrent themes about legal form mentioned earlier, the representation of the law as serving elite interests when it should be solving problems for rich and poor alike. Nader (1992: 468) is clear about what she sees as the connection with the politics of the period. 'Trading justice for harmony is one of the unrecognized fall-outs of the 1960s ... In an effort to quell the rights movements (civil rights, women's rights, consumer rights, environmental rights) and to cool out the Vietnam protestors, harmony became a virtue extolled over complaining or disputing or conflict'.

Other critics of the ADR movement also argued that such mediatory measures reduced social conflict that might reform society (e.g. Abel 1982). That seems to me a big and not altogether warranted interpretative leap, but for some it seemed a certainty. Thus, Merry (1990: 9) also speaks of mediation as 'a process of cultural domination exercised by the law over people who bring their personal problems to the lower courts'. But in her fieldwork, the many individual troubles brought to mediation seem to be only tangentially connected with social class, and indeed seem to be the sort of personal grievances between individuals who know each other well which might appear in any class, disputes between neighbours, husbands and wives, parents and children.

What is plainly attributable to social class is the fact that Merry's people find themselves in a public mediation process, rather than using private lawyers to negotiate for them. In mediatory settings they subject themselves to a considerable dose of patronizing advice, often psychological. But the question that remains is whether what transpires has much to do with a 'harmony ideology' that keeps major social confrontations in check.

Nader also applies her 'harmony ideology' thesis to her history of disputing in a Mexican-Zapotec mountain village. Her current vision of the village's history is that the people presented themselves as resolving all disputes harmoniously as part of a political strategy to keep colonial authorities from meddling in village affairs (1990: 310). She says that harmony ideology was the price of village 'autonomy and self-determination' (1990: 321).

The work of Nader, Merry, and Abel illustrates how some people drew an analogy between the situation of colonial people and the poor in industrial countries. Obliquely drawn into the same model in other works is the predicament of women in asymmetrically gendered situations, often in ex-colonial settings. What motivates these writers is the idea that law should mean equal rights and treatment for everyone. Obviously, it often does not, either because of lack of access, judicial bias, or other obstacles (Griffiths 1997; Hirsch 1998).

Thus, for some anthropologists the theme of domination and resistance emerges as the principal aspect of their interpretation of law, and their writing

implies that latent, unrealized major social protests and revolts are just waiting to happen. But that is probably a great exaggeration, and has little to do with domestic disputes, fights between neighbours, landlord-tenant arguments, and consumer complaints. There may well be a lot of resentment embedded in these disputes, but does it represent potential mobilization for social reform? It seems plain that an unnuanced domination-resistance model is too simple a framework to capture the diversity of sites of control and the sources of social movements. Hirsch (1994; 1998) and Griffiths (1997), concerned with gender, illustrate the complexities revealed by detailed studies, and show the considerable difference between using the idea of resistance on the one hand and, on the other, imputing resistance in more generalized critiques of domination.

The complexities involved in analysing how law, economy, and socio-political change are interconnected are particularly evident in longitudinal, historical studies. A few anthropological works have combined detailed legal-historical material with ethnographic fieldwork. In the 1980s, Snyder (1981*b*) wrote a Marxist account of capitalism and legal change among the Diola of Senegal, and Gordon and Meggitt (1985) traced changes in government authority in New Guinea from colonial times. In the first wave of ethnographic-historical studies of law, I wrote an ethnography-cum-history of the people of Kilimanjaro from 1880 to 1980 (Moore 1986*b*). This interweaves the story of the lives and legal disputes of living individuals (and that of their lineage ancestors) who gave accounts of their own experiences with the documented record of economic, demographic, and institutional change on the large scale.

A few years after Nader published her historical Zapotec study, Lazarus-Black (1994) followed the uses of the courts in Antigua and Barbuda that bore on slavery. She shows how the law was used to restrict slaves and protect slave-owners, but also how slaves were, at times, able to use the courts for their own advantage. Most recently, the Comaroffs have included some remarks about law in their history of missionary and colonial activities in southern and central Africa. Their general approach to history is encapsulated in the idea that 'the European colonization of Africa was often less a directly coercive conquest than a persuasive attempt to colonize consciousness, to remake people by redefining the taken-for-granted surfaces of their everyday worlds' (Comaroff & Comaroff 1991: 313). Some ideas basic to English law are inconsistent with the indigenous life world and become instruments in the colonization of consciousness. They remark on the way ideas of private property and possessive individualism, lawful wedlock, and other legal conceptions, fit into the project of revising the way Africans thought about the world they lived in (Comaroff & Comaroff 1997: 366-404; see also Comaroff 1995).

The historical particulars of each of the colonial experiences studied in the works mentioned above differed greatly. Each area was involved in (or made peripheral by) the world economy in a distinctive way, colonized in a different way. Each had a distinctive social and cultural formation, which shifted over time, both before and after colonization. That the common European background of the colonizers gave the colonized a stock of similar legal ideas is no surprise. What is striking is the remarkable variation in the way these

ideas were received and used by the dominated populations (for a reconsideration of some legal-historical issues, see Moore 1989*a*; Roberts & Mann 1991; Starr & Collier 1989).

## *Legal pluralism: disassembling the moving parts of the state*

The concept of the state as a unified entity has been more than slightly revised in the past half-century. Cultural pluralism and political divisions have long been recognized as basic and durable features of many polities (Furnivall 1948; Smith 1965); governments dealing with culturally distinct collectivities have often acknowledged such differences in legal terms (Hooker 1975). In the 1960s, the early period of independence, the legacy of colonial pluralism loomed large in intellectual debate (e.g. Kuper & Smith 1969; Moore 1989*b*).[4] There was much contention about whether the newly independent states of Africa would succeed in becoming unified nations, given that they were internally divided and had a history of being ruled by colonial governments that often reinforced the boundaries between ethnic groups.

That ethnic and racial pluralism posed profound political, constitutional, and other legal issues was evident not only in Africa but elsewhere (Kuper & Smith 1969: 438-40). These issues spelled trouble ahead, and Maybury-Lewis (1984) addressed this by asking what might be the political consequences of official policies based on ethnicity.[5] Recent events in the Balkans provide a gloomy answer. In this kind of political literature the term 'pluralism' is repeatedly used to refer to societies which incorporate a diversity of institutionally distinct collectivities. It is, for example, used in that sense by Tambiah (1996) in his book on ethnic violence in Asia.

But in legal anthropology these days, 'pluralism', or more precisely 'legal pluralism', is often used in an entirely different sense. One relatively new use dates from an article by Griffiths (1986: 3), who attacks 'legal centralism', the idea that law is 'an exclusive, systematic and unified hierarchical ordering of normative propositions' emanating from the state. One is hard put to imagine what social scientist supports such a contention today, but it makes a nice springboard for his further argument. Griffiths asserts that the legal reality anywhere is a collage of obligatory practices and norms emanating both from governmental and non-governmental sources alike. He (1986: 39) says 'that ... all social control is more or less legal'. The whole normative package, of whatever provenance, is what he calls 'legal pluralism'.

Shortly after Griffiths's article was published, a symposium was held on 'Legal pluralism in industrialized societies', in 1988, and Griffiths's paper was reviewed and publicized by Merry (1988: 879) in a much-cited article summarizing the literature (see Greenhouse & Strijbosch 1993; Teubner 1992). Following Griffiths, some writers now take legal pluralism to refer to the whole aggregate of governmental and non-governmental norms of social control, without any distinctions drawn as to their source.

However, for many purposes this agglomeration has to be disaggregated. For reasons of both analysis and policy, distinctions must be made that identify the provenance of rules and controls (Moore 1973; 1978; 1998; 1999; 2000). To deny that the state can and should be distinguished from other rule-

making entities for many practical purposes is to turn away from the obvious. And if one wants to initiate or track change, it is not only analytically useful but a practical necessity to emphasize the particular sites from which norms and mandatory rules emanate. To make such distinctions is not necessarily to adopt a 'legal centralist' view.[6]

It is clear that much of the debate that surrounds legal pluralism is not just an argument about words, but is often a debate about the state of the state today, one that asks where power actually resides. The discourse on this topic gets mixed with arguments about current transformations of the state through the empowerment of sub-national collective entities, through transnational phenomena, and 'globalism'. Today, 'pluralism' can refer to: (1) the way the state acknowledges diverse social fields within society and represents itself ideologically and organizationally in relation to them; (2) the internal diversity of state administration, the multiple directions in which its official subparts struggle and compete for legal authority; (3) the ways in which the state itself competes with other states in larger arenas (the EU, for one instance), and with the world beyond that; (4) the way in which the state is interdigitated (internally and externally) with non-governmental, semi-autonomous social fields which generate their own (non-legal) obligatory norms to which they can induce or coerce compliance (see note 6); (5) the ways in which law may depend on the collaboration of non-state social fields for its implementation; and so on.

Wilson (2000) has made a persuasive ethnographic case for the appropriateness of such an intricate view of legal pluralism in his discussion of human rights in South Africa. He shows the simultaneity of diverse ideas of justice, as well as the procedures and performances through which these contradictory ideas, emanating from different sources, are given practical form, from reconciliation to public beatings. His is a subtle, complex, historically and ethnographically grounded, picture of the struggles implied when one talks about legal pluralism.

## *Asking about obstacles to democracy: three very recent works*

Anthropologists presently are using their interest in the legal to engage with political questions, addressing them more directly than ever. And no wonder: the 1980s and 1990s have seen as much political upheaval as the previous twenty years. We live now in a post-socialist, post-Cold War, post-apartheid period in which many governments have been overturned and replaced. Questions are raised about the new regimes and whether they are or will be 'democracies', and about what 'democracy' means. Building new regimes and reforming old ones occur in many parts of the world. The legal dimensions of these processes are beginning to attract new kinds of anthropological attention. However, the construction of national governments is not a process that can be divorced from transnational matters. Global concerns inevitably enter the discussion.

The academic debate that surrounds these issues is uneasy, but it has begun to consider large-scale context in novel ways. This can be illustrated by three strikingly different anthropological approaches to the legal domain, all

published in the past two years and all concerned with civil rights. I shall describe the books very briefly to give a sense of the way the field of legal anthropology is now giving voice to new forms of direct political commentary. Theoretically, all three have to do with the idea of democracy and what to make of it. All three analyse legal events framed in the context of mass communication in a world conceived globally.

I begin with Coombe (1998), concerned with trademark law. Coombe is both a lawyer and an anthropologist, and in her hands 'trademarks, protected indicia of celebrity personas, and marks of governmental authority' (1998: 286) become the occasion for a remarkably interesting and often funny set of essays on emblems in the mass media and the cultural life of intellectual properties. The insignia of Coca Cola, the image of Marilyn Monroe, and certain badges of governmental office are recognizable to everyone, but they cannot be used freely by all.

Coombe argues that our environment is filled with these manufactured symbols. The production of demand through the advertising of commodities and the publicizing of celebrities fills our environment and stuffs our consciousness. She says that 'such images so pervasively permeate all dimensions of our daily lives that they are constitutive of the "cultures" in which most people in Western societies now live' (1998: 52). She is right. They furnish our native thought and our natural world. And this inventory of images and names is being extended through mass communication to the rest of the world. Batman lives in New York, Hong Kong, and Dakar.

Coombe's heart is obviously with those who use these symbols illegally to satirize them (1998: 271). She contends that, because the symbols are ubiquitous, the 'practices of appropriation or "recoding" cultural forms are the essence of popular culture' (1998: 57, see also 285). In effect, she is asking us to pay more attention to our commercially constructed symbolic environment and to who owns it and controls its content and deployment. Expressive activity, she argues (1998: 186, 194), should generally be unfettered, to permit the construction of a dialogic democracy. I question whether restrictions on the freedom to copy MacDonald's Golden Arches trademark directly interferes with democratic dialogue, but that does not detract from Coombe's many other insights into our trademark-infested symbolic environment and its commercial control. Plainly, communication is not altogether free, when our symbolic vocabulary is supplied under these conditions.

The second book is a collection of essays edited by Wilson, which presents a number of studies of human rights situations, some of extreme persecution. But the orientation of the book is not only on what happened, but also on discourse, on the way these situations have been reported and discussed. Wilson (1997: 13) describes the collection of essays as 'an exploration of how rights-based normative discourses are produced, translated and materialised in a variety of contexts'. Each chapter confronts 'the tension between global and local formulations of human rights' (1997: 23). What interests the contributors is the way that struggles in a local field of action are 'structured by transnational discourses and practices' (1997: 24). These are, of course, very diverse, as are the situations described.

Fieldwork concerned with human rights is by definition carried out in an arena of conflicting reports and representations, often at terrible moments of

crisis. What can anthropology add to what other disciplines have to say about such matters? Wilson's collection candidly addresses what anthropologists can and cannot do, and that is one of its distinctions. Contributors willingly acknowledge the limits of anthropological competence. The problematic that contributors address has obviously broadened beyond the accumulated knowledge of one profession, beyond one locale, and often beyond one moment in time. Now anthropologists are tangling with international law, with transnational political relations, with the aftermath of national political persecution, and with the way events in these arenas are being reported.

The third book, by Borneman (1997), embodies just such material. He describes the public demands for justice that were heard after the fall of the Berlin Wall and the beginning of German unification. East Germans who had been denounced or suffered in other ways under the socialist government were demanding that wrongs be set right, that some means be found to restore their lost dignity, names, or reputations. There also were demands that members of the East German elite be prosecuted and that property be returned or redistributed. Various institutional forms were invented to satisfy these demands, and Borneman did fieldwork in some of them.

Borneman describes the prosecution of an important lawyer who was an intermediary between East and West Germany in the days of the Wall, a case that raises the issue of the retrospective criminalization of acts which were legitimate when carried out. He also tells us about the hearings set up within the radio and television industry to deal with social injuries experienced there. Borneman (1997: 99) argues that all of these proceedings were (and are, for they are not over) efforts to establish the state as a moral agent. The new state tried to dissociate itself from the crimes of the past. For the state, recognizing injustices was both a practical act of redress and a symbolic act of ritual purification. Within this framework, Borneman affirms the importance of official recognition of suffering. He argues that such recognition points to a reassessment of the nature of the citizen. Suffering is reincorporated 'into the identity of the national subject' (1997: 134).

He ends with summaries of data from other East and Central European countries in the first four years after regime changes. At its broadest his argument throughout the book is that failure to engage in retributive justice leads to cycles of retributive violence and, most importantly, that there can be no democracy without political and personal accountability realized through law (1997: 3, 145, 165).

All three of these books depart from an earlier, narrower anthropology. All deal with contested political principles, with law in action, and with transnational questions. All take explicit positions on the issues they address. All are concerned, not with charming native customs, but with tragic possibilities glimpsed in the fieldwork scene.

## *Conclusion*

It is obvious that legal anthropology has been saturated with political messages in the past fifty years. At mid-century, the anthropological project was to elaborate on the rationality of the 'indigenous' legal practices of

non-Western peoples, most of them under colonial domination. Law was addressed as a technique for managing disputes, as a local problem-solving method, its style the product of culture and history. For obvious reasons, at the time there was little direct critique of colonial rule.

In the post-colonial world, the practices of colonial governments were attacked as never before. Attention also turned to Western legal institutions and governments, and law both in former colonies and in the West was seen as a rule imposed by some on others, often with systematic distortions (Abel 1982; Burman & Harrell-Bond 1979; Chanock 1985 [1998]; Fallers 1969; Galanter 1989; Moore 1986*a*; 1986*b*; Nader 1980). For some, domination and resistance were the analytic preoccupation. But at the same time, the culture-minded continued with their own form of legal analysis, attending to the variety of ways that people conceived the world, themselves, and their situations, and continued to presume that these cultural conceptions were causative.

In the United States this was the period of the Vietnam War, with its accompanying protests, of the civil rights movement, the women's movement, and overshadowing all, the Cold War. It is not surprising that there should have been an accompanying anthropological critique of legal authority. And on the theoretical plane, with the attribution of agency to the anthropological subject, the importance of action and choice modified the earlier dominant vision of normative rules as the central concern of cultural and legal analysis.

A broadened definition of reglementary control emerged. Control came to be seen as exercised in and by multiple social fields. The perception that many sites of control existed simultaneously redefined the state as only one among many sources of mandatory obligation. Debating the concept of semi-autonomous social fields and the idea of legal pluralism, legal anthropology redefined its object and itself.

Could one identify the newest concern in legal anthropology today? As I see it exemplified in the three studies I have just described, that concern is with a very much wider vision of the political milieu in which law is imbricated. They inspect the legal data for inputs and events in the global political turbulence of the day. Whether it is the law-related control of intellectual property, the definition of human rights, or the accountability of persons for the policies of regimes, it is evident that nothing is merely local in its formation or in its repercussions.

As I see it, their commentary, direct and indirect, on the possibility of realizing democracy is profoundly important and innovative. They are using their fieldwork to show the negative political implications of actions they have witnessed. They are saying that if what they have described continues, open democratic discourse is unachievable, human rights will be trodden underfoot, cycles of violence may well repeat themselves.

This approach is important because it involves a newly selective use of fieldwork data to comment on the large cultural and political entities which the fieldwork describes. Within the mixed and miscellaneous aggregations that are the state and that compose the global scene, this approach focuses on the elements that are willed legal creations. It is the potential future of that intentionally constructed dimension that these three works address.[7] They involve small-scale fieldwork, but comment on large-scale issues. The two levels

are harnessed when the writer asks whether the field work data show that there are major obstacles that stand in the way of realizing the freedoms and accountabilities that are part of the ideal of a liberal democracy.

These works ask, 'What kind of a world is it in which these particular events are actually happening? Is democracy possible?' They use fieldwork on legal issues to identify legal and non-legal practices that stand in the way. In the process they redefine the scope and direction of anthropological inference. They ask what kind of a political totality could accommodate what they describe.[8] Coombe, Wilson, and Borneman directly confront the legal production of political consequences. That is the way they have framed their analyses.

They are not just talking about what is going on. They also are talking about what could go on. They are willing to consider the democratic ideal, while pointing out how far short people are of realizing it. They are treating their own critical commentary as a form of social action. They are moved to question the damaging effects of many laws and legal institutions. But they are also mindful that in some countries and in some international institutions, law is being used for reconstructive purposes. It can make social disasters, but in some situations it can help to prevent and repair them.

When anthropologists are moved to ask under what conditions legal institutions can contribute to democratic practice, they are inadvertently showing some small signs of optimism about the possibilities for intentional action. Such enquiries demonstrate that even a habitually sceptical profession can acknowledge that perhaps things could be better. At the very least, situations could be better understood. To this end, anthropology has expanded the scope of its own scholarly analysis by contextualizing legal field materials more extensively and more deeply. It has always known that law is a major political instrument, and it has always had something to say about the way law has been used. But in recent decades it has gone further, it has aspired to alter the way law is conceived.

## NOTES

This was originally presented as the Huxley Memorial Lecture at the University of Manchester in 1999 at the opening session of a symposium celebrating the fiftieth anniversary of the founding of Manchester's department of anthropology.

[1] There are two domains that I do not have space to discuss, but which are so important that they must at least be mentioned here. One is the study of property, the other is the sociolinguistics of law.

**Property.** There is a vast body of rich material dealing with the idea of property, not amenable to brief characterization. It touches on everything from kinship to inheritance, from collective to individual 'ownership' of land, from the redistribution of land to economic development, and beyond (see Low 1996 on worldwide attempts to redistribute land; Peters 1994 on dividing the commons).

In the context of economic development, systems of land tenure have often received attention from anthropologists. Four institutions in particular are associated with this work. The Laboratoire d'anthropologie juridique in Paris, directed by M. Alliot and E. Le Roy, and the Centre Droit et Cultures at the University of Paris X-Nanterre, founded by R. Verdier, have produced studies on African property systems. The Land Tenure Center at the University of Wisconsin is concerned with the comparative study of land tenure systems all over the world. At the Agricultural University of Wageningen in the Netherlands, F. von

Benda Beckmann focuses on property in Indonesia. Together with K. von Benda Beckmann, he has produced an important series of publications (1979; 1985; 1994; & with H. Spiertz 1996).

**Sociolinguistic approaches to law.** A number of illuminating, relatively recent publications use sociolinguistic techniques to analyse legal materials (e.g. Conley & O'Barr 1990; 1998; Mertz 1994; O'Barr 1982). The analysis of the form of legal texts, attention to the verbal disciplines used in legal proceedings, and the treatment of speech as text have been significant methodological additions to the tool kit of legal anthropology.

A particularly clear and subtle recent work that shows what can be done is Hirsch (1998). She uses detailed linguistic analysis to show the effect of gendered speech in litigation in East Africa. She shows that the language used by women to describe their situation, to make claims, and to carry on legal disputes, at once describes and illustrates their predicament and how they feel about it.

Attention to the linguistic dimension of the legal will doubtless grow. After all, it is the law that gives many performative statements and written acts their ultimate authoritative efficacy.

[2] There are a few exceptions to the abandonment of comparison. For example, Newman (1983) uses a Marxisant approach combined with Murdock-like quantitative comparisons. For new kinds of comparison, see Greenhouse (1996) and Bowen and Petersen (1999). Of course, comparative law continues as a specialty within the legal profession and involves some of the same theoretical problems relating to what is being compared that anthropologists have addressed (see Moore 1986*b*; Riles 1999).

[3] In the same period, a major international survey was undertaken to inspect the general problem of access to legal institutions (Cappelletti & Garth 1978-9; Cappelletti & Tallon 1973). Alternatives to the courts were sought in many countries.

[4] There was an earlier, non-ethnic conception within anthropology of the multiple sites where law could be generated, Pospisil's theory of legal levels. He postulated that every social sub-group had its own internal 'law', and he alluded to groups such as families, clans, and communities. He (1971: 273) said: 'We have to ask whether a given society has only one consistent legal system ... or whether there are several such systems'.

[5] See Moore (1989*b*) on the production of pluralism as a process; Greenhouse (1996) on democracy and ethnography.

[6] See Moore (1973) on semi-autonomous social fields, a paper from which Griffiths drew inspiration and which he cites with approval.

[7] I have tried to address this issue in various ways in my own recent writings (e.g. Moore 1998; 1999; forthcoming).

[8] These questions that revolve around 'What kind of a world is this?' are paraphrasing the tragic, sardonic cry of Ken Saro Wiwa when he was brought to the gallows to be hanged and the mechanism failed, and he was brought back again, and again, and he said 'What kind of a country is this?' Packed in those words is a commentary not only on the incompetence of the hangmen, but on the judges and the prosecutors and the Nigerian state, the whole apparatus that condemned him to death (see Soyinka 1996).

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## Certitudes détruites: cinquante années turbulentes d'anthropologie légale, 1949-1999

*Résumé*

Cet article passe en revue l'extension du domaine des études de l'anthropologie juridique entre 1949 et 1999, et considère les façons dont l'arrière-plan politique de cette période est reflété dans les perspectives universitaires anglophones. Au milieu du siècle, les idées et les pratiques juridiques des peuples non-occidentaux, et plus spécialement leurs modes de gestion des conflits, étaient étudiées dans le contexte de l'autorité coloniale. Deux écoles de pensée principales ont émergé et supporté le passage du temps. L'une accorda une place centrale aux concepts culturels dans l'interprétation de la légalité. L'autre donna plus d'importance

au milieu politique et économique, ainsi qu'à la poursuite des intérêts personnels. Les études juridiques dans les communautés non-occidentales continuèrent ensuite, mais à partir des années 60 et 70 un nouveau courant se tourna vers les questions de classe et de domination dans les institutions légales occidentales. Une avance se produisit dans l'analyse quand l'attention fut portée sur le fait que l'État n'était pas la seule source de normes obligatoires mais coéxistait avec beaucoup d'autres sites où les normes trouvaient leur origine et où le contrôle social était exercé. Ce phénomène hétérogène reçut l'appellation de 'pluralisme légal'. Un demi-siècle de travaux culmine dans des études larges de conception et engagées politiquement, qui se préoccupent des droits de l'homme, des conditions préalables à la démocratie, et des obstacles à son implémentation.

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