1. *The Study of Dispute: Anthropological Perspectives*

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For a long time anthropologists who studied disputes in other cultures showed most interest in institutions and processes within small, local groups; many paid little attention to the larger units within which these groups had been incorporated by the time they came to observe them. Often there was, for reasons discussed later, even a conscious effort to stop thinking about people like kings and governors, or such features as centrally organized sanctions. But the picture has changed, and anthropologists are now showing greater interest in relations between the centre and the localities, especially at those moments when government is being consolidated and expanded. Many are looking directly at the points where institutions of central government and those of local communities come into contact, at the efforts of rulers to establish themselves, and at the effects which such efforts have upon those at the periphery. This shift of focus leads to a close community of interest with those social historians whose work John Bossy has collected here, as the concerns I have mentioned show themselves repeatedly in the chapters which follow.

I begin by outlining the directions which anthropological studies of order have taken. Social historians will perhaps recognize some of the debates as having counterparts within their own discipline. They should certainly feel sympathy with the struggles of anthropologists to prevent domestic preconceptions upsetting the picture obtained of other people's arrangements, and with their concern to see action through the eyes of those involved in it. They will probably be perplexed by the extent to which 'rule' and 'action' somehow got separated, and by the difficulties which have been experienced in putting them together again. If they explore the literature they may also be surprised by the strong 'private law' flavour of many studies, concerned primarily with family, property and inheritance disputes, and with wrongs which appear only as the

affair of those immediately involved. For social historians the 'public' aspect, control from the centre, and therefore the question of the criminal law, must nearly always have appeared important. Before considering some of the special problems which legal proceedings and their records may present, I say something about the efforts which anthropologists have made to distinguish different kinds of dispute processes, and particularly the different forms of third-party intervention. Here it is essential to recognize the considerable diversity of forms which recent studies have revealed; we can no longer identify all informal processes under the general head of 'arbitration'. As the contributors show, there are a number of different ways in which it is possible to intervene in a quarrel, and the attempt to distinguish between them must be made if we are to see where power is located and how it is exercised in different cultural contexts.

I. DIRECTIONS IN LEGAL ANTHROPOLOGY

If we look at anthropological studies of order from a distance, three more or less distinct phases may be identified. The first began with Maine in England and some distinguished contemporaries on the Continent and in America.[1] They worked within a broad comparative, evolutionary framework upon the development of social organization, government and law. This tradition continued in the writings of scholars like Vinogradoff and Hobhouse roughly until the First World War.[2] The arrival of the second phase was secured in publications of Radcliffe-Brown and Malinowski during the 1920s, though its beginnings may be traced back earlier than that. In this work interest in larger questions to do with change and historical development receded to be replaced by a much less ambitious programme which centred on very detailed studies of particular cultures, even individual communities, deliberately cut off from their surroundings and viewed as working wholes. Only now, over the last decade, have anthropologists drawn back from

[1] Alongside H. S. Maine's writings we should note particularly J. Bachofen's *Das Mutterrecht* (Basle, 1861); and L. H. Morgan's *Ancient Society* (New York, 1877).

[2] In America the tradition proved much more durable, with continuing interest being shown in legal-evolutionary themes: see, for example, E. A. Hoebel, *The Law of Primitive Man* (Cambridge, Mass., 1954); M. H. Fried, *The Evolution of Political Society* (New York, 1967); and latterly, R. Cohen and E. R. Service (eds.), *Origins of the State* (Philadelphia, 1978).

these minute studies, and begun to examine the relationship between these small groups and the larger states within which they are now encapsulated. Armed with more extensive ethnographic material, they are also returning to those large questions which preoccupied scholars in the nineteenth century.

The retreat to more painstaking and detailed studies which followed the exciting start under Maine was closely linked to a new research technique. Instead of relying on accounts prepared by missionaries, traders and administrators, or at best the brief and severe cross-examination of a few 'native' informants, anthropologists went into the field to see for themselves what other societies were like; and stayed there for sustained periods. This new style of work was epitomized by Malinowski pitching his tent in a Trobriand fishing village and observing closely over a period of months what was going on around him. Thereafter, participant observation rapidly became the accepted, indeed the obligatory, starting-point of anthropological work. In this way researchers came to look in great detail, and in isolation, at those small-scale, relatively simple cultures with which their discipline has come to be associated. Outside influences, such as agents of the colonizing power or contact with adjacent indigenous groups, tended to be ignored or blocked out as contaminating the purity of the sample. The view obtained was thus typically of one culture at a particular moment, leading to a rather flat, ahistorical account, strong on the here and now but weak on change. It is understandable that under these circumstances the comparative and historical concerns which had been central in the earlier period should have fallen away. But beyond that there was an explicit reaction against trying to understand particular features of the culture under observation as survivals from some earlier 'stage'.

Initially, much of this new work had a straightforward, functionalist character, with a central focus upon institutions. Social life was seen as a matter of compliance with rule; normal behaviour was rule-governed behaviour, and settlement institutions were there to put things right if temporary malfunction in the form of a dispute developed. This was a view of order which owed much to Durkheim, but was also close to that underlying the dominant tradition in western jurisprudence. It is not surprising that many anthropologists relied explicitly on legal theory. Even where they did not do so, legal categories and ways of thinking often

dominated their work.[3] Radcliffe-Brown identified 'law' as one of the principal compartments into which anthropological study should be divided up; and in his important essay 'On Social Structure' (1940) law appears as a separate and privileged element in the proposed 'social physiology'.[4]

Despite the initial vigour and confidence of these 'rule-centred' studies they soon began to face competition from work with a transactional flavour. The new emphasis was already visible in some of Malinowski's work of the 1920s,[5] but gathered strength in the 1950s and 1960s. This movement involved a shift of interest away from rules and structure towards the actions and strategies of real people, and was founded on an assumption that order could be understood through the study of processes in which living men and women were involved. In these studies human behaviour came to be seen as constrained by the relationships within which individual actors became enmeshed, rather than by rules. Instead of being rule-governed, men were seen as self-seeking, co-operating with each other only out of enlightened self-interest. Disputes, far from being pathological, were normal and inevitable as people struggled to secure their objectives; and order was the product of the *ad hoc* accommodations and adjustments which ensued. In short for those within this tradition social order came to be seen as the changing product of conflicting interests, constantly renegotiated, 'made up' as life went on.

In contrast to the rival tradition, these studies owed little to legal theory. In some it was disregarded; in others it was explicitly rejected as positively hampering the understanding of other cultures. Looking back, this emphasis on 'interest' and 'process' seems an inevitable development, given the research strategy which has already been referred to. Out there in his village, the ethnographer was bound to lose himself in the activities, plotting and talk which were going on around him. Furthermore, public quarrels, just because they were readily accessible, were bound to become the show-pieces of his work.

The achievements and limitations of work done during this

[3] Among the classic monographs in this tradition is I. Schapera's *A Handbook of Tswana Law and Custom* (London, 1938).
[4] *Journal of the Royal Anthropological Institute*, lxx (1940), pp. 1–12.
[5] E.g. *Argonauts of the Western Pacific* (London, 1922); *Crime and Custom in Savage Society* (London, 1926).

second phase speak for themselves. In terms of political theory, numerous studies of small-scale, relatively egalitarian societies without rulers decisively undermined the idea, stretching back at least as far as Hobbes, that social order is only conceivable in the context of some form of central government. It is not the fault of anthropologists if the lessons of these studies, clear as they are, have yet to be absorbed by some legal and political theorists. Empirically, as accounts of 'what other societies are like', the best legal ethnographies of the period are also very impressive, both in the quality and depth of detail presented, and in the level of analysis. But this strength is in one respect deceptive; mesmerized by the life and bustle of a small face-to-face community, some lost sight of the wider picture. The progress of longer-term change and the effects of 'contact' with larger external groupings both tended to recede in the struggle to understand immediate surroundings in the present. But they were a part of that 'present', so even the picture of the moment was impaired when they were neglected. Damaging also was the opposition between 'rule-centred' and 'processual' approaches which I have already outlined.[6] In some studies functionalist and transactional assumptions were found together in an uneasy blend; but in general the separate development of these two traditions seriously hampered understanding as the normative element in social life tended to appear dominant in one set of studies while conflict and the pursuit of interest assumed too much importance in the other.

Over the last couple of decades or so, legal anthropologists have extended increasingly their interests beyond the small groups with which they are traditionally associated to consider the relationship of these groups with those larger units within which they are now all incorporated. As I noted at the beginning, a focus upon the relationship between the state and partially autonomous local groups within it is also a major feature of several contributions to this book. Interesting parallels appear between these cases from the European past and the contemporary results of nineteenth- and twentieth-century colonial expansion at present being studied by anthropologists: in both we find rulers struggling to establish, consolidate and expand control in peripheral areas; in both the rulers present themselves as judges of local disputes, and we see

[6] See pp. 3–4 above.

those on the periphery seeking to exploit or avoid these agencies.

In anthropological studies this shift of interest has led to a much greater emphasis on 'change' and 'development', and there are signs of a return to those large questions which preoccupied scholars in the nineteenth century. Work drawing on Marxist theory is prominent here,[7] but this is not the only direction which renewed comparative and historical concerns have taken.[8] A revival of these concerns must lead us to re-examine the conditions under which different institutional forms and dispute processes are likely to be found; to consider the critical differences between dispute processes in small, acephalous groups and those of the state; and even to postulate sequential stages for the growth of legal systems. Again, there are clear signs of similar interests in these contributions, notably in Castan's chapter.

Other contemporary work represents a less radical break with earlier studies, and can be seen as an attempt to 'put rules and action back together'. Sensitive to the harm done by any rigid opposition between 'rule-centred' and 'processual' approaches, it recognizes that the concerns reflected in both represent necessary and complementary areas of inquiry. Only by contemplating structure and process together, it is argued, can we confront fundamental questions to do with social order.[9]

[7] E.g., M. Godelier, *Perspectives in Marxist Anthropology* (Cambridge, 1977); C. Meillassoux, *Maidens, Meal and Money* (Cambridge, 1981); P. Fitzpatrick, *Law and State in Papua-New Guinea* (London, 1980); F. G. Snyder, *Capitalism and Legal Change* (New York, 1981).

[8] Note, for example, the efforts of members of the Chicago School to establish an underlying economic rationality in the organizational forms of 'primitive' society. See e.g. R. A. Posner, 'A Theory of Primitive Society, with special reference to Primitive Law', *The Journal of Law and Economics*, xxii (1980) no. 1, p. 53.

[9] Following M. Barkun's approach in *Law Without Sanctions* (New Haven, 1968), a number of recent ethnographic studies of dispute settlement processes in small-scale cultures have treated 'rules' as comprising a series of reference points, a kind of symbolic grammar out of which reality may continually be constructed and re-constructed. On this view there is neither discontinuity nor opposition between norm and behaviour; the two exist in a dialectical relationship, reacting on each other as time goes on – the normative repertoire providing the conceptual elements out of which this interaction is rendered meaningful and negotiable. From this angle, it is possible to observe how changes in the repertoire come about, as individual rules are utilized and reformulated in the course of exchanges between parties to a dispute in the light of the objectives of the disputants. Thus, as the system is experienced, changes take place in the content of the rule base which will themselves have consequences for future behaviour as people develop their strategies in the light of the reformulated rule. See e.g. J. L. Comaroff, 'Rules and Rulers: Political Processes in a Tswana Chiefdom', *Man*, n.s., xiii (1978), pp.

2. THE STUDY OF DISPUTES

Anthropologists have been widely criticized for their failure to conceptualize 'dispute' in such a way that this sphere can be marked off from other forms of conflict.[10] Here one difficulty, as we have already seen, is that those working within 'rule-centred' and 'processual' paradigms have tended to regard conflict rather differently: the former, as an abnormal feature associated with breaches of rule; the latter, as part of the normal flow of life and inherent in the pursuit of interest. On another level, even when the element of distortion which polarization of these rival positions can produce in fieldwork is allowed for, empirical studies show that 'folk' views of conflict differ sharply from one culture to another. In some, any confrontation or controversy is strongly disapproved, and peace and quiet valued above anything. Elsewhere, loud, aggressive behaviour is perfectly acceptable, and people may openly relish a quarrel.

One possible approach is to identify as 'disputes' only those confrontations which follow from an actor's perception that some harm he has suffered or anticipates flows from another's departure from accepted criteria of association. The existence of any human group must imply *some* understanding among the members as to how the activities of everyday life should be arranged, and as to what forms of conduct are to be acceptable or unacceptable in a given context. How far these understandings are translated in explicit, articulate normative terms has been shown to vary considerably from one culture to another; but some shared idea of recognized interest, some conception of 'wrong', constitutes a necessary basis of association. From that position, we could treat as disputes those occasions where one feels he has suffered an injury, sees another as to blame and confronts him with responsibility.

1–20; S. A. Roberts, 'The Kgatla Marriage: Concepts of Validity' in Roberts (ed.), *Law and the Family in Africa* (The Hague, 1977); J. L. Comaroff and S. A. Roberts, *Rules and Processes: The Cultural Logic of Dispute in an African Context* (Chicago, 1981); see, generally, A. L. Strauss, *Negotiations: Varieties, Contexts, Processes and Social Order* (San Francisco, 1978) and P. H. Gulliver's concluding remarks in *Disputes and Negotiations: A Cross-Cultural Perspective* (New York, 1979), pp. 274–5.

[10] See, for example, M. Cain and K. Kulcsar, 'Thinking Disputes: an Essay on the Origins of the Dispute Industry', *Law and Society Review*, xvi (1981–2), pp. 375–402.

That would enable us to distinguish such cases from those where one suffers a reverse or another secures an advantage without any departure from approved patterns of behaviour. Examples of the latter occasion are provided by any form of 'competition' in which two struggle for a resource which one will attain and the other inevitably lose even though both may adhere to mutually acceptable standards of conduct throughout: obvious instances of this kind are struggles for political ascendancy, or rival efforts to capture the market for a particular product. While the distinction suggested here may still seem too loose or vague, the advantage of such an approach is that it gets away from the intractable difficulties inherent in attempting to define an area of 'political' conflict, and avoids probably fruitless attempts to distinguish 'political' and 'legal' spheres.

Even if a conception of dispute along these lines is agreed on, it can still be objected that the occasions falling within the field mapped out are far too varied to be treated as a single category. Here, for example, much anthropological work can be criticized as tending to present all disputes as confrontations between equals; the implications of stratification, the presence of control from the centre (and thus the question of 'crime') have frequently been ignored. This emphasis can be explained as a consequence of the kind of society which anthropologists have typically studied; but as soon as we move away from small-scale, relatively egalitarian cultures at least three broad categories of dispute have to be distinguished:

1. disputes between parties in relationships of relative equality;
2. disputes which cross lines of stratification (e.g. confrontations between lord and villein; between employer and employee);
3. disputes which arise directly out of a ruler's efforts to govern and in which the ruler himself or his agents will be directly involved.

Dispute processes within each category may be expected to take a different shape; and variations in institutional structure may be observable, as in the criteria invoked by the disputants and those attempting to achieve an outcome.

When we look at the manner in which quarrels are pursued a general distinction between fighting and talking characterizes much of the discussion in this book. In this connection, two quite durable ideas about dispute processes are challenged in anthropological studies of order. One is the notion that fighting somehow precedes talking in evolutionary terms and then gives way to talking at an

identifiable point in social development. The other asserts that while processes of settlement-directed talking tend to be rule-governed, fighting is not. Recent research has yielded a number of careful studies of small, stateless groups in which a high level of inter-personal violence is observable and in which fighting is seen by the members as the proper way to deal with a quarrel. Equally, other studies reveal similar groups in which violence hardly features at all and in which any form of fighting is strongly disapproved. Elsewhere, fighting and talking are found side by side in a complex relationship within the same culture. Furthermore, the scale and form of fighting in these cultures seem infinitely varied, sometimes limited to private acts of retaliatory violence, sometimes involving protracted exchanges between rival segments, even extending to cyclical warfare between adjacent groups of different ethnic affiliations. But satisfactory predictions as to the conditions under which fighting is likely to be encountered and as to why quarrels involve fighting in some groups but not in others remain elusive.

It is clear from these papers that social historians require no introduction to the ways in which anthropologists have seen the particular institution of the feud; and anthropologists should find very interesting what the former have to say here about the treatment of feud where central government has been established. On the whole anthropologists have assumed that fighting is seldom an approved mode of handling disputes under central government. Rulers tend to object strongly to sustained fighting among their subjects, to present themselves as authoritative agents of dispute settlement and to do their best to make sure that they are treated as such. Where significant resort to retaliatory violence and fighting between groups has been found in association with central government, this has been taken as an indication of the uncertain extent to which government is established. I am not sure how far this view is challenged by Wormald's account of the incorporation and regulation of the feud in early modern Scotland. For any ruler struggling to establish or extend his authority an alternative to attempting direct suppression must be to associate himself closely with indigenous institutions in the first instance and gradually subject them to regulation.[11]

[11] See the example provided by the growth of the Merina Kingdom outlined by M. Bloch, 'Decision-Making in Councils among the Merina of Madagascar' in A. Richards and A. Kuper (eds.), *Councils in Action* (Cambridge, 1971).

If it is the case that where fighting does survive under strongly established central government it is likely to be subject to close normative control, often taking on a ritual form, fighting in stateless groups tends to be closely rule-governed also. Bohannan's terse reflection that there are 'basically two forms of conflict resolution: administered rules and fighting, Law and War',[12] is misleading. The picture emerges clearly from recent studies that where fighting is found in small, acephalous groups it almost invariably takes an institutionalized form.[13]

When social historians turn to those dispute processes which depend in the first instance upon talking as opposed to fighting, they are free of two constricting assumptions which it took anthropologists a long time to throw off. We no longer see the presence of central government agencies as essential to social order; and we now recognize that third parties who intervene in disputes do not necessarily do so as judges. In *Ancient Law* and in subsequent writings, Maine treated adjudication as the basic means of dispute settlement from the very onset of social life. From the senior male agnate right through to the Victorian high court judge he saw the mode of resolution as one of third-party decision. In tantalizing asides he expanded upon this position slightly to suggest that this process began as arbitration and only gave way to adjudication later on. But it was a matter of 'judging' from first to last; the only differences being that, as successive stages of 'civilization' were reached, different kinds of people did the judging and new criteria underpinned their judgements. Underlying this view, as I have already noted, was a long-standing assumption that order is only conceivable if there are strong men in positions of authority ready to tell others what to do. Non-lawyers were slow to challenge this position,[14] which was still subscribed to by a few anthropologists working within a 'rule-centred' paradigm as late as the 1950s,[15] but at least from the publication of Malinowski's field studies in the 1920s[16] the majority of anthropologists began to accept the

[12] *Law and Warfare* (New York, 1967), p. xiii.
[13] See, for example, R. Rappaport, *Pigs for the Ancestors: Ritual in the Ecology of a New Guinea Mountain People* (New Haven, 1967).
[14] Both E. Durkheim and M. Weber certainly appear to have assumed a necessary link between social order and some form of central control.
[15] See, for example, L. Pospisil, *Kapauku Papuans and their Law* (New Haven, 1958).
[16] Notably the volumes referred to in footnote 5 above.