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TOWARDS AN ANTHROPOLOGY OF LAW IN COMPLEX SOCIETY: AN ANALYSIS OF CRITICAL CONCEPTS

by

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The undersigned certify that they have read, and recommend to the faculty of Graduate Studies for acceptance, a thesis entitled "Towards an Anthropology of Law in Complex Society: An Analysis of Critical Concepts" submitted by René R. Gadacz in partial fulfilment of the requirements for the degree of Master of Arts.

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ABSTRACT

Departing from the traditional legalistic perspective in the anthropology of law, this study addresses itself to three research problems of wide current interest and importance in social science. One problem or research area is the study of the preconceived models of society upon which judicial and legislative action is founded. Another is the study of the process of legal westernization and development. Finally, it moves toward an assessment of the consequences of judicial action from a conflict perspective. In this study it is recognized that law, in the field of social development, needs to concern itself with the creation of new legal systems that are responsive to the needs and values of particular groups or individuals encapsulated within the nation-state. It is further recognized that modern law, despite its self-proclaimed aims, disrupts community life, displaces sub-groups, breaks up traditional systems of mutual support and social relationships, promotes stratification, and permits subtle but significant forms of domination. One sees in the development, expansion, and consolidation of the national legal systems of industrial societies the application of laws over wider spatial, ethnic, and class areas on the grounds of racial authority, religious imperative, economic progress, and national interest, all subsumed under the overarching grounds of "civilization". Modern law thus superimposes itself on the normative systems of diverse groups. Modern law claims to value and preserve equality, individual autonomy, and to maintain the ties of friendship and community, yet strict adherence to formal rationality (the model for modern law) too often produces the opposite results.

The concern for subgroups in the plural or polyethnic context is linked, though in no simple and direct way, with the concern for drastic changes in the structure and content of modern law. Diminished confidence in the legal system and authority has resulted in radical attacks that stress the corruption of the legal order; contradictions inherent in the Rule of Law and legal order are brought to the foreground when the interests and ideologies of superordinate and subordinate group goals are discrepant. Thus, the western liberal legal tradition with its emphasis on cases seemingly isolated from cultural and social contexts and its clear preference for decisions at times remote, irrelevant, and indifferent to the consequences, has led to a concerted effort and search by scholars of the socio-legal tradition for alternative models of dispute settlement and legal or judicial administration. The search has led to an examination of studies in the anthropology of law and the data these studies have produced - it is recognized that these studies describe modes of dispute management more fully attuned to the contexts out of which disputes arise and more fully committed to preserving social and other relationships than to severing them. That legal anthropologists should address some of the issues raised by socio-legal scholars is clear; that legal anthropologists must be cognizant of to what use the socio-legal scholars wish to put anthropological data is also a conclusion of this study. In this way will the research interests of both traditions converge.

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One of the most awful crimes one nation can commit on another is destroying the image of Justice, which in an institution is represented more truly by the people by whom the institution is being developed than in an alien institution of Justice; it is a thing adapted to its environment.

- Mary Kinsley in 1898,
cited by Gordon (1980)

CHAPTER 1

AN INTRODUCTION AND OVERVIEW

Introduction

It is the purpose of this thesis to bridge the interdisciplinary gap between anthropology and other disciplines which are concerned with law by analyzing some of the crucial concepts with which scholars of the socio-legal tradition have been concerned. Professor Laura Nader, a leading legal anthropologist, long ago expressed her concern for the fact that there was, at the time (1965), little joint research and few spheres of mutual influence between sociologists and anthropologists in the field of law. Sociologists have traditionally had a somewhat closer relationship with colleagues at the bar and bench; anthropologists and anthropological studies of law are further removed from the concerns of students of Anglo-American law. This is not to deny that anthropological studies of law are "important"; they are, but seemingly only insofar as they provide information about interesting "primitive" societies. "Anthropologists", declares Nader with a colleague, "have made less uniquely anthropological contribution to social science knowledge in law than in other areas of study" (Nader and Yngvesson 1973: 913). Professor Nader has advocated a change in the epistemology of the discipline, and is urging scholars to address themselves to different issues more pressing and urgent and less academic than they have tended to deal with in the past.

Indicative of what may be the new direction, we are told that "most members of complex societies and certainly most Americans do not know enough about, nor do they know how to cope with, the people, institutions and organizations which most affect their lives" (Nader 1969: 294). Advocating an "ethnography of law" approach, Nader and her collaborators noted that anthropologists of law have produced "less than half a dozen articles and one monograph" that dealt directly with Anglo-American law and the Anglo-American legal system (Nader and Yngvesson 1973: 915). Nader's interest is in conducting an ethnography of the Anglo-American legal system. Concern lies with the study of law and social change in modern *complex* society - from an anthropological point of view. But why the urgency of this, and what are the issues that are so pressing?

The traditional legalistic perspective in the anthropology of law aimed first and foremost at the classification and typology of dispute settlements, rules, and institutions in what seem remote social and political contexts - contexts, incidentally, which are quickly becoming scarce. Suggesting that perhaps anthropology and sociology do indeed have something to share with one another (more than just a common interest in law), Nader directs attention towards stratified or plural societies. The main concern of the ethnography of law approach seems to lie in this context. Pluralism is seen reflected in legal systems and in the legal relationships between the groups that comprise a plural, polyethnic, or multi-interest social system. To better appreciate the problems faced by the groups encapsulated within the larger nation-states one must understand "the system" by which their activities are controlled and their livelihoods governed. Nader and others recognize that

"the system" has superimposed itself upon a great number of ethnic or multi-interest groups, both on this continent as well as abroad. We are told then that "much of the trouble in administering the law has arisen from a total ignorance or avoidance of the question of pluralism" (Nader and Yngvesson 1973: 903). The ethnography of law approach, as described by its proponents, seeks to "map certain shared modes of perceiving, the behavioural referents of which are the law ways of particular groups or collections of persons observed" in order to appreciate and recognize that

> ...the existence of subgroups with values and needs different from those held by the larger society [suggests] that we create a legal system responsive to these...The creation of such a system requires research [into] such aspects as cultural boundary zones, disparate models and rules, and variations in use patterns...(Nader and Yngvesson 1973: 888)

The issue that is so pressing, then, is the creation of, or an effort towards, the development of a more responsive law that is sensitive to pluralism. The task is an urgent one since it goes beyond mere theorizing on the need to understand a people's customary way of life in terms of its role and survival when that way of life is contained within and is part of non-traditional, or modern industrial, society. Differing legal and social needs are foremost among the concerns when this issue is addressed. Whether traditional anthropology of law is equipped or prepared to meet this challenge therefore depends as much upon cognizance on the part of anthropologists of the fact that scholars in the socio-legal tradition are looking to the anthropology of law for orientation as it depends upon the realization, again on the part of anthropologists, of to what use the socio-legal scholars wish to put anthro-

pological data. Clearly, Nader has been urging legal anthropologists to take a look at the socio-legal tradition, probably in anticipation of some collaboration. But there can be no collaboration if the problems are not mutual ones, and at the present time divergent interests and priorities unfortunately prevail.

In contrast to the bulk of the legal anthropology literature, there are studies in the sociology of law, in political science, and in jurisprudence that are concerned with a critique of the contemporary social and legal order. These studies envision alternatives to the contemporary order, and they speculate on the possible outcomes of the evolution of the modern legal order. Processual changes in modern law are postulated to occur in two possible ways. One is an evolutionary transformation to a new type of law, as yet unknown, and the other, interestingly enough, calls for an evolutionary "regression" to premodern forms of law. Bearing such titles as "responsive law" or "public interest law", there are a growing number of studies sponsored by law reform commissions that deal with plea bargaining, mediation, informal and popular tribunals, neighbourhood courts, community participation in the sentencing process, offender restitution, and victim compensation. These studies reflect a certain and definite unhappiness with modern or Formal law since plea bargaining and so on are considered techniques and procedures antithetical to it. The posited reversal of evolutionary trends, if taken too far, has been called a "return to anarchy" by Donald Black (1976) and a return to "a regime of substantive justice characteristics of tribal society" by Roberto Unger (1976).

The concern for subgroups in the plural context is thus linked, although in no simple way, with the concern for drastic changes in the structure and content of modern law (Nonet and Selznick 1978). Those who choose not to respond to Nader's prompting will not be burdened by an analysis of the modern legal order at all, but instead run the risk of getting bogged down in "cultural salvage work" (Cox and Drever 1971: 408). To put the choice starkly, the anthropology of law can take either of two research directions. It can study the legal systems of contemporary western societies, and together with such a study, it can summon the data it has collected over the past thirty to forty years and present it to socio-legal researchers as a contribution to their critical efforts (they are in fact asking for it). Or, the anthropology of law can choose to ignore this research direction altogether. The point is that the excellent and thorough studies on informal courts, negotiation, mediation, and arbitration that have been conducted in traditional settings by anthropologists are not without their worth and have considerable relevance in complex society, if and when these techniques and procedures are envisioned as possible solutions to current legal dilemmas (Abel 1979: 175). Anthropologists are beginning to respond but it has taken more than a decade (see for example the introduction to Robert's *Order and Dispute*) and, on occasion, more than a little prompting:

> If anthropology is to remain relevant it must be able to account as well for language riots in Bombay, religious upheaval in Belfast, black power in America...as it does for the elegant symmetry of unilateral cross-cousin marriage among the dualistically organized societies of the Amazon basin... may I suggest that, intellectually, both types of problems may be equally enthralling, but that there are pressing reasons why anthropology should

> not remain the arcane fief of urbane collectors of exotica (van den Berghe 1973: 970-71).

The Basis of This Study

Building on the foundations laid by Nader, this study attempts to outline a new perspective for the anthropology of law that, it is hoped, will lend a new dimension to legal research in non-traditional society. It is based on the premise that in plural society there exist a number of competing legal ideologies, and that the state should not have a monopoly on law, force, or sanction. The development of this new perspective is predicated upon several ideas. The first is that a society's or group's legal system or law-ways, or perhaps more appropriately, its normative base, is an inextricable part of its total adaptation to its physical and social environment. This, of course, is not a revelation to the anthropology of law - scholars as far back as Malinowski who have studied law and social control have come to the same conclusion. Some, like Pospisil, have even written about multiple legal systems or levels contained within a single society, simple or complex. Plural societies contain within them a number of such systems, again, each supposedly with its own normative order or system of norms and values. The second idea is that modern law, in its quest to be universally applicable and homogenous in its application has superimposed itself on the normative systems of diverse groups. Modern law is frequently inconsistent with and insensitive to new and changing social needs and values or to the needs and values of particular groups or individuals within society-at-large. Thus, as it was for the colonies, and is now for the new deve-

loping nations, so it is also in the modern "advanced" countries where there exist subcultures within the larger society, each with their own systems of law, where "the various subcultures may be in conflict with one another..." (Nader and Yngvesson 1973: 906).

In such pluralistic situations modern law applies regardless of regional, local, cultural, ideological, institutional, structural, or social distinctions. Traditional authority is weakened and replaced. Paradoxically, legal authority in its quest for equity and evenhandedness unfortunately achieves the reverse effects from those which it officially promotes, and so may foster institutionalized racism, prejudice, discrimination, and minority oppression by disregarding social contexts and consequences. It is these effects, which seem so contradictory to the promises, goals and expectations expressed by law and jurisprudence, that have occasioned criticisms of law, sometimes vicious, and as well an attendant search for a more humane and a more responsible law that will indeed take into account regional, local, and cultural differences. Students of law and social science further recognize that there is a fundamental contradiction between the desire to achieve universality, uniformity, and autonomy - attributes and goals sought by modern, Formal law - and the belief that modern western liberal society is a type of social organization which "generates, and is reinforced by, a style of consciousness whose substance is *the image of society as an arena of conflicting subjective interests*" (Unger 1976: 68-69 - emphasis added).

The study of legal relationships between the elements or social units that comprise the plural, polyethnic, or multi-interest society is

really the study of the management of competing and at times antagonistic interests and of a perennial struggle for power. An analysis of how such a power-conflict situation is handled through the medium of the law would form a solid point of departure for the study of law in plural society - particularly when it is realized that various social groups envision a plural society, whilst the dominating and controlling powers envision a society that is homogenous, uniform, and consensual. This necessarily involves a study of not only "the law" and "the system" (i.e., the larger system of power relationships of which "the law" is a part) but also of the multiple laws and systems that exist subordinate to and in tension with the dominant system. It is, in short, a study of conflict.

This study is, as a consequence, further predicated upon the proposition that the multiple and diffuse sources of law within the plural setting represent viable and legitimate competing legal ideologies - viable in their existences and legitimate in their challenges to the dominant order. As such, the conflicts within plural society can, from the perspective of law, be seen as a conflict of laws. A *conflict of laws* perspective as part of the more general and broad *conflict theory of law* sees types or kinds of law in confrontation, and not merely one type in domination. A more responsive - and responsible - law will lend authority to "unofficial" institutional arrangements by recognizing subgroups' spheres of autonomy as well as their own rule-generating and enforcing capacities and capabilities. Bureaucratic innovation and organizational expertise together with a certain sense of justice are brought into play when these segmental competing arrangements are harmon-

ized and linked to a wider order, as they must be in order to achieve some measure of social cohesion and some aspect of community and civic participation. Models of collective bargaining based on mediation and negotiation derived from anthropology may be useful in this regard, in seeking ways to balance and accommodate individual interests, promote common interests and adapt ideals to the realities of needs and community pressures. Models of adjudication and arbitration may not prove to be as useful and might instead promote antagonisms. In conducting an ethnography of law in such a setting and in articulating a conflict of laws perspective it is important to bear in mind that "the first step in clarifying the relationship between law and society is to distinguish the major sorts of law [presumably, the normative bases]. For without such a classification we lack a language in which to describe the connections between species of law, on one side, and of society, on the other" (Unger 1976: 47-48). That there is one law, and only one law, is as we shall soon see not an indisputable fact, but rather a premise implicit in a certain type of legal system. The point the next section raises is that "traditional" legal anthropology is biased towards this premise and must, therefore, abandon it if it is to carry out the ethnography Nader and her colleagues envision.

An Interpretive Review of the Discipline

Nader and Yngvesson (1973: 903-904, ff.) have observed that "the focus on process and networks by means of the extended case method has forced upon us the observation that all societies are plural in composi-

tion...". The term "pluralism" in the anthropology of law literature is rarely if at all overtly mentioned. It seldom appears even in the indexes to books. In contradistinction to sociology, anthropology has only recently begun to use synonyms such as "subgroups", "society's segments", "autonomous groups", or "semi-autonomous social fields" with respect to law. Curiously, acephalous as well as complex societies were somehow thought of as "monolithic" and "homogenous": Pospisil noted that the law of a primitive people "has been almost invariably described as an expression of a well-integrated single legal system" (Pospisil 1967: 2). In the anthropology of law it has not been uncommon for scholars to accept the premise (which, incidentally, is from jurisprudence and *not* anthropology) that a society must have one law controlling the behaviour of all its members. It is, therefore, not surprising that a given society selected for study by the anthropologist was thought to have only one legal system, and if that society displayed a lack of organized legal sanctions and other mechanisms that would give evidence of a legal system, then it was proclaimed not to possess law. That is why, as Evans-Pritchard maintained, the Nuer "in a strict sense have no law". We now know that this was a conclusion drawn from a particular conception of what "law" is.

The premise that a society has but one law which its members must obey has an important implication, namely that that law is somehow dissociated from the societal membership. This in turn suggests that it is someone's or some group's sole monopoly. The premise and its extension are vaguely reminiscent of the attributes and goals of Formal law. But this should not surprise us because anthropologists, coming

overwhelmingly from a tradition where these ideas are strong, are bound by their own ethnocentrism to distort observations by a conscious or unconscious application of their own conceptual and institutional frameworks. English jurisprudence, imperative and positivist as it is, is also very vague about pluralism and in fact on occasion chooses to ignore it. That there may exist subgroups in a society which possess their own legal systems, however defined, is unacceptable when viewed from the English state-law tradition; that members of a society might not yield to one system is even more repugnant to it. The tradition, of course, is not blind to reality - it merely operates on the basis of powerful premises and attempts to restructure the world in conformity with them.

The anthropology of law has for a very long time focused on two concerns which have had some influence on how research was conducted. There is, first, a concern with *law* (law-centered studies), and second, a concern with the broader issue of *order* (order-and-dispute studies). These concerns, as I shall explain, correspond to the *order* (integration, assimilation) and *conflict* (coercion, pluralist) perspectives, respectively. The former naturally relies upon jurisprudence for its theoretical base; the latter categorically rejects this base. The two foci are coeval to some degree but law-centered studies are considerably older and hence have had a greater influence upon students in the anthropology of law. The order approach is by no means a "dead" approach. Since Maine, but with some important exceptions, the law-centered tradition has proclaimed: "There is no law until there are courts and really primitive peoples have no courts...and if a people who are ordinarily recognized as primitive have courts, then *ipso facto* they are not

primitive" (op. cit. Seagle 1941 *in* Hoebel 1961: 21-22). Or, "nothing so refined and sophisticated, so well organized and logically perfected, nothing so authoritarian, so purposeful as law, could exist on the primitive level" (Hoebel quoting some jurisprudents, *ibid.*, 20). Only with a certain reluctance were more lenient points-of-view later adopted. The law-centered studies have produced such famous definitions of law as Hoebel's and Pospisil's:

> A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting (Hoebel 1961: 28)

and

> ...legal decisions, and therefore the law contained in them, have four major attributes whose co-existence defines social phenomena as law. The four attributes in their logical sequence are authority, intention of universal application, obligatio (not to be confused with obligation), and sanction (Pospisil 1978: 30)

Similarly, though earlier in time, Radcliffe-Brown followed Roscoe Pound's definition of law which was simply "social control through the systematic application of the force of politically organized society" (Radcliffe-Brown 1933: 212). Bohannan, greatly influenced by H.L.A. Hart and Julius Stone, defined law thus: "law is...a body of binding obligations regarded as a right by one party and acknowledged as the duty by the other which has been reinstitutionalized within the legal *institution* so that society can continue to function in an orderly manner on the basis of *rules* so maintained" (Bohannan 1965: 36 - emphasis added). Even Bohannan's meaning of the term "institution" presupposes or implies an agency that is somehow dissociated from the rest of society

- again, this is strongly reminiscent of jurisprudence.

The stimulus value of jurisprudence cannot be ignored or discounted. Yet, the *case method* (Llewellyn and Hoebel 1941; Fallers 1969; Epstein 1967a), the *Reasonable Man* model (Gluckman 1965a; Epstein 1973), the emphasis on intervening *authority* and *sanction* or enforcement (Pospisil 1958, 1969, 1971), on so-called *jural postulates* or *corpus juris* (Gluckman 1965a, 1965b; Hoebel 1961), and a particularly heavy emphasis on *prescriptive rules* (Schapera 1938, 1943; Schlegel 1970; Goldschmidt 1965) *all* in essence echo the fundamental notions of the state-law tradition. This tradition has as its singular emphasis "rules, courts, and organized force". This emphasis cannot but inaccurately depict and misconstrue the meaning of the legal arrangements and mechanisms of other societies who may in fact not possess these things. Some anthropologists were confounded when the concept of "crime" had no equivalent in an exotic society, or when even the notion of *mens rea* or the guilty mind did not exist or was meaningless to informants. Lowie (1927), for example, insisted that there were indeed such things as family law, property law, and a law of associations in primitive societies. Epstein (1967b) has written a paper on legal liability, a common law concept pure and simple. Ethnocentrism such as this is obvious in the number of territorial manuals prepared for colonial governments; consider Schapera's classic *Handbook of Tswana Law and Custom* (1938) or Howell's *A Manual of Nuer Law* (1954). Similarly, the Restatement of African Law Project, begun by Allott, serves as "an extreme example in the sense that efforts were made to organize normative materials in a rigid rule-by-rule format" (Roberts 1979: 194-195). Yet, Hoebel, like Pospisil, fully

endorses the use of a set of originally *western* folk concepts as analytical conceptual tools by a law scholar or legal anthropologist (Pospisil 1973: 554, 555).

While there is no denying that the many studies produced between the 1930's and late 1960's that are primarily of this tradition are skillful and at times praiseworthy additions to our ethnographic knowledge, the point I want to stress here is that the assumptions upon which they are founded are nonetheless antithetical to conflict assumptions and hence they are inadequate to cope with plural legal situations. They are ultimately ethnocentric. Disputes tend to occur universally, yet law-centered studies generally tend to view them as destructive and pathological rather than inevitable, constructive, and integrative. Malinowski taught us to ask what law *does*, not what it *is*: Pospisil sees law as "principles abstracted from legal decisions"; Nader and Yngvesson (1973: 909) instead see

> ...that law does not function solely to control. It educates, it punishes, it harasses, it protects private and public interests, it provides entertainment, it serves as a fund-raising institution, it distributes scarce resources, it maintains the status quo, it maintains class systems and cuts across class systems, it integrates and disintegrates...

Roberts (1979: 33-34) made a good point, one worthy of acknowledgement here, when he said that we should not start with the idea that peace and harmony necessarily represent a "natural" state of things, disrupted only by occasional, "pathological" instances of trouble. A delusory view such as this is, of course, perfectly compatible with an *order* perspective which is the hallmark of the positivist approach in law. This view in turn bears directly upon the "diagnosis" and "treat-

ment" of the "pathology" by what else, but a "forensic" institution. The courts, taking this perspective, perform the diagnosis by appealing to rules and applying them. This defines the pathology. It then recommends treatment or remedy. The "cancer" or "disease" (let the comparison stop here) is, if serious enough, removed and isolated from the body. Typically, no thought is given at all to the possible malfunction of existing social relationships or social institutions. That some anthropologists subscribe to such a perspective is evident from Epstein's (1967a) division into phases of dispute resolution: inquiry, adjudication, then redress. Epstein recognizes that disputes are universal and affirms by implication the concomitant universality of these procedural means.

An ethnocentric order perspective thus prevails in the anthropology of law and has persisted despite Malinowski's exhortation to move away from a preoccupation with western institutional forms. When indigenous concepts are forced into alien categories the anthropologist is himself committing an act of domination. An order perspective *de facto* deemphasizes pluralist notions. It is not that the anthropologists themselves are blind to pluralism or diversity in society (see for example Gluckman 1964), but that assumptions and preconceptions carried into the field subtly compel the researchers to view their data in ways that more accurately reflect the researcher's own background than the social matrix of which his informants are a part. Thus, *law-centered studies deeply rooted in positivist jurisprudence and in the English common law tradition echo, however unconsciously and unwittingly, the order perspective that has dominated European and North American social and political*

thought for centuries and indeed is the principal approach reflected in government policy.

Malinowski (1934) said that "law ought to be defined by function and not by form, that is, we ought to see what are the arrangements, the sociological realities, the cultural mechanisms which act for the enforcement of law". By looking at what law *does*, anthropologists seek to discover why some societies have developed certain dispute resolution mechanisms and others not, and why they work in some contexts and not in others. In some contexts the normative base is not even conceptualized or articulated; legal life is not invariably thought about in rules. Only some societies articulate their laws and customs by providing a catalogue of their approved rules and normative terms. Clarity and detail will vary considerably as the ethnographic record shows - yet how tempting it is to cast those rules into terms with which we are familiar. The "commands of a sovereign" of "the compulsion imposed by statutes" are realities seldom encountered in the field (Moore 1969: 282). Why then adherence to positivism? An anthropology of law conducted in this tradition perjures itself.

There is an alternative research tradition. To analyze disputes as universal, inevitable, constructive, and integrative and NOT as pathological presupposes a manipulative, bargaining, and transactional approach to the study of social life. A research orientation following from this presupposition draws significant impetus from game theory and transactional analysis (e.g. Rapoport 1966; Von Neumann and Morgenstern 1964). In anthropology consider the studies on network analysis by Mitchell, et al (1969), transactional analysis by Barth (1966), political competi-

tion by Bailey (1969), the politics of corporate groups by Smith (1966), situational analysis and the extended case method by Garbett (1970), Van Velsen (1967) and Turner (1957), and finally, the analysis of negotiation by Gulliver (1969, 1971, 1973, 1979). Turner very succinctly said that,

> From the point of view of social dynamics a social system is not a harmonious configuration governed by mutually compatible and logically interrelated principles. It is rather a set of loosely integrated processes, with some patterned aspects, some persistencies of form, but controlled by discrepant principles of action expressed in rules of custom that are often situationally incompatible with one another (op. cit. *in* Moore 1978: 36).

The situation is not, as Durkheim would have it, one of a harmony of interests and shared goals, but is instead one of conflict, opposition, contradiction, tension, multiplicity, and manipulability (Moore 1978: 37). Order-and-dispute studies, though by no means numerous, have drawn from such studies as those cited above and have concentrated instead upon *process*: processes of socialization, armed combat, and upon ritual procedures such as competitive food exchange (Berndt 1962; Koch 1974; Young 1971). A transactional approach to social life leads us to view disputes as a form of social interaction and therefore sees them as normal, where ways of dealing with disputes range from homicide and ordeal, to avoidance and malicious gossip (Gluckman 1963; Hogbin 1947). Fighting, resort to supernatural agencies, use of shaming and ridicule, the withdrawal or withholding of economic cooperation, or merely "talking" are, as Roberts (1979: 26-27) points out, very effective means of handling conflict. These are quite a contrast to the "rule-authority-sanction" triad. Recalling Pospisil's emphasis on a con-

trolling authority within his definition of law, the legitimate question is raised as to what would happen legally when there is no supervening authority. Political, military, and economic strength are equally important factors that may determine the outcome of disputes.

As one would expect, order-and-dispute studies do not seek to define "law". Rather, they focus on what disputes and conflicts are, how they are likely to arise and in what contexts, and what the range of possible responses will be. A bargaining and transactional approach to life therefore focuses closely upon relationships between individuals or groups. The web and tangle of social relationships that exist in a given society can be regarded as on-going utilitarian pursuits of interests wherein guilt/innocence and the validity or reaffirmation of rules are seldom at issue. Compromise decisions and agreements rather than verdicts and zero-sum, all-or-nothing, or win-lose decisions, are much more appropriate to the negotiation of mutual interests where the future and the long-run is of concern. Rather than completely replacing the rule-oriented approach, order and dispute studies serve to supplement the emphasis upon rules by suggesting that it is not a question of the presence or absence of rules but rather it is a question of the weight attributed to, and the clarity of articulation of, rules in the process of dispute resolution (Roberts 1979: 183). Positivist and adjudicatory processes by contrast require clear-cut unambiguous rules and their rigid application. Decisions are based on rules and social facts are subordinate to them. Concern with procedure and the formal application of rules is at the expense of substantive and discretionary determination:

> Mediation and arbitration have distinct purposes and hence distinct moralities. The morality of mediation lies in optimum settlement, a settlement in which each party gives up what he values less, in return for what he values more. The morality of arbitration lies in a decision according to the law...The procedures appropriate for mediation are those most likely to uncover that pattern of adjustment which will most nearly meet the interests of both parties. The procedures appropriate for arbitration are those which most securely guarantee each of the parties...a decision in his favor...Not only are the appropriate procedures different in the two cases, but the facts sought by those procedures are different. There is no way to define "the essential facts" of a situation except by reference to some objective. Since the objective of reaching an optimum settlement (mediation) is different from that of rendering an award ...(adjudication), the facts relevant in the same two cases are different, or when the same, are viewed in different aspects (Fuller 1963: 43).

Order-and-dispute studies, as Roberts (1979: 201) points out, paved the way to the formation of hypotheses as to the circumstances under which different modes of intervention, kinds of "appropriate" procedures, and sorts of objectives would be encountered. This led political scientists and others - not anthropologists - to write important comparative studies, of which notable examples are Abel's (1974) *A Comparative Theory of Dispute Institutions in Society*, and Felstiner's (1974) *Influences of Social Organization on Dispute Processing*.

The role of intervening third parties such as the go-between and mediator, the pursuit of interests in recognized complex on-going relationships, the resolution of disputes in ways that are not strictly bound or inspired, by law, and so on within a context of literal free enterprise and competition, *all these are implicit features of order-and-dispute studies which share a particular affinity with both the conflict or pluralist perspectives*. These perspectives presuppose a society

that is composed of multi-interest individuals and associations who seek cooperation yet who compete for resources, power, and other valued goals. Western liberal society, for example, is also a society which extols and encourages the virtues and notions of free enterprise and competition yet whose dominant legal ideology does not subscribe, in all aspects of private and public life, to the presuppositions and methods of mediating and negotiating competing interests in the legal arena. Efforts to change the structure and content of modern Formal law draw their inspiration from these comparative and order-and-dispute studies: pluralism ought to be recognized, where homogeneity, universality, and uniformity in law runs counter to the interests of diversity.

Order-and-dispute studies began to appear towards the end of the 1960's. Even in cases of societies that exhibited adjudicatory techniques and more or less "formalized" processes of settlement these new studies that were inspired by the game theorists and interactionalists concentrated on exploring successive instances of conflict or series of disputes, and on strategies and final outcomes. The role and behavior of the actors themselves within patterns of alliances were deemed to shed new light on old questions such as "how is order maintained in stateless societies". Old data itself were re-examined. Quite significantly, *the genesis of the order-and-dispute tradition coincides with the rise of general unhappiness with Formal law and the growth in popularity of informalism and the conflict perspective in Western society in general* (Wolff 1971; Trubek 1977; Mazor 1972). While law-centered studies continue to play a meaningful role in legal anthropology, the emphasis instead on order and disputes in human societies generally

seems to reflect deep suspicions towards and grave discontent with the authority and legitimacy of the secular political and legal order. The premises that a society must have one law controlling the behavior of all its members, that the uniformity of the law is the desired end, and that automatic submission to the law is required for a successfully integrated and consensus-based society are all premises which have come to be questioned these days.

Conclusion

Roberts (1979: 206) informs us that "the societies we have been considering [in his book] are now to be found - those of them that survive in an identifiable form - within the context of some larger nation-state and subject to its legal system". Few of the societies, for example the Cheyenne, the Gidjingali, the Ndendeuli, the Nuer, or the Tswana survive today as they were described and studied those many years ago. For precisely this reason did June Collier remark:

> At the same time that we attempt to analyze other societies, however, we must examine our own. As thinkers, we are products of our time and situation, and all of the people who form the object of our study at home and abroad have been touched by the tentacles of modern industrial economies. We need to wonder why we, as anthropologists, have failed to study up - why we have looked at the poor and powerless rather than the rich and influential whose decisions have far more effect in shaping the world...Every square inch of habitable land is now under the jurisdiction of some government which..asserts a monopoly of force ..the "state" with its organized army creates the "rule of law" which inevitably destroys and replaces the consensual "order of custom"..(T)here can be little doubt that governments have radically altered the environments of traditional political-legal systems (Collier 1975: 135-136).

Order-and-dispute studies, so much akin to the *conflict* (coercion, pluralist) perspective, recognize that to realize a manipulative and transactional approach to the study of social life, a monopoly of force and the rule of law is neither the solution nor the means. Therefore, in the spirit of competition, opportunity, and cooperation "no society or nation can be studied as if it existed in isolation; it must be treated as a 'semi-autonomous social field' within its own rule-generating and enforcing capacities [yet] linked to the wider world order" (Collier 1975: 136). Formal law has superimposed itself upon communities and groups whose normative base is predicated upon different moralities, as Fuller said (supra), so that one can say there is a clash or an incompatibility between moralities. With one or two exceptions, law-centered studies have treated their societies as isolated, homogenous entities; recognizing plurality and diversity is but one small step from realizing that "society's segments" and "subgroups" *can* challenge the legitimacy of the rule of law. These subgroups are sometimes referred to as "veto-communities" (Mazor 1972: 1041).

Though the existence of a multiplicity of legal systems within societies are implicit in the works of Pospisil (1958, 1967) and Moore (1973) who both follow Weber (1954), neither of these two scholars presented these systems as potentially militant or challengers to the state's monopoly on law. Likewise did Malinowski (1962) speak of "systems of law in conflict" but he did not expand beyond his conflicting patrilineal principle. Lewellyn and Hoebel (1941) stated similar notions: "The total picture of law-stuff in any society includes, along with the Great Law-stuff on the whole, the sublaw-stuff or bylaw-stuff

of the lesser working units" (p. 28).

In what is perhaps a chronological reversal of statements that brings the concerns of almost fifty years ago in line with the present study, consider that Moore (1973: 722) urges us merely to study "semi-autonomous social fields" or groups which she considers the key to anthropological study in complex society; Pospisil (1967: 9) claims categorically that "every functioning subgroup of a society has its own legal system *which is necessarily different* in some respects from those of other sub-groups" (emphasis added). This implies that the needs and values of these subgroups differ and therefore beg attention. Yet, and finally, it was Malinowski himself who fifty years ago in 1934 warned us:

> The long and short of the story is that whether we are interested in primitive or modern law, we must study principally the working and not the form of rules. In the practical application of anthropology to primitive societies, *we must advise the administrator to be very careful how he changes native custom and law and replaces it by the rulings of a higher civilization*...Finally, in modern jurisprudence we must demand a wider view from the theoretician...Law is being used nowadays as a panacea...That way lies real savagery, such as is not to be found in primitive societies. Such artificial rules either do not work or work at such a cost to the most fundamental institutions of mankind: family, religious community, school.., that all the substance of social life and culture is destroyed. From the practical point of view legislation and the use of law must be put in their proper place, or else civilization will perish (Malinowski 1934: lxxi-lxxii).

As Collier urged that we examine our own society and its law, so too did Malinowski warn us of the pitfalls of Formal law. Nader and Yngvesson's approach suggests that we study Formal law as an ethnographic object in and of itself and recognize the discrepancies between it

and the needs and values of those groups and communities that make up the multi-interest and polyethnic context.

This chapter has suggested that legal anthropology has had to escape from the influence of jurisprudence in order not only to recognize the effects of modern Formal law upon communities and groups within the nation-state but even to study modern law itself. In later chapters I will describe, in juxtaposition with one another, the normative order of a hunting society that is quickly vanishing, and that of modern Formal law. It will be demonstrated that the normative order of a society, or its collective law-ways, is an inextricable part of its total adaptation to its physical and social environment, and that that normative order, as Malinowski cautioned, is to be respected. The reasons why there is dissatisfaction with Formal law and why multi-interest groups have become increasingly vociferous and militant will then become clearer. The next chapter gives careful consideration to three important topics that bear directly upon an ethnography of law in complex society.

CHAPTER 2

PROBLEMS OF DIVERSITY AND MODERNIZATION

Introduction

The conflict perspective is, surprisingly, seldom articulated in the literature on government policy or Indian-White relations in Canada produced by anthropologists (Walsh 1971; Price 1979), though there are certain exceptions (Frideres 1974; Gibbins and Ponting 1980). One would have anticipated statements clearly articulating such an approach; instead, the consensus/assimilationist perspective predominates. Native studies in anthropology do not often go beyond describing the difficulties and hardships of acculturation (Schermerhorn 1970: 127; van den Berghe 1973: 962). Few submit the assimilationist perspective to a systematic critique, which would involve recognizing that equal application of laws can accentuate injustices when applied to individuals or groups unequal in economic condition and social opportunity. Acculturation could then be discussed not only in terms of the native's inability to adapt to white cultural standards, but those standards themselves would be criticized. Instead, relations are viewed as dominant-subordinate and that relationship is cast in terms of the premise that the law expresses the aspirations of the group or groups, usually dominant, that formulate, promulgate, and apply the law. Corollaries to this premise are, as we have seen, that the uniformity of the law is the desired end and that there be automatic submission to the law if social order is to be preserved. The conflict theory of law has, therefore, accorded the legal system the role of social antagonist; law is seen as the

instrument of the ruling class in whose interests it is to promote those standards. In what are unmistakably assimilationist terms, consider this statement:

> ...we can say you're at a crossroads - the time is now to decide whether the Indian will be a race [sic] apart in Canada or whether it will be Canadians [sic] of full status. And this is a difficult choice...as total citizens they will be equal under the law but they risk loosing certain of their traditions, certain aspects of a culture and perhaps even certain of their basic rights... (Prime Minister's speech in Vancouver, 1969; op. cit. *in* Cumming and Mickenberg 1972: 331)

and, with respect to the law:

> ...in consideration of the transition of Inuit to *our* system of Canadian law, we found that the Magistrate's and Supreme Courts have made a *special effort* to bridge the gap between traditional and modern law ways...
>
> Despite the various efforts of the agents of socio-legal control in the legal instruction of Inuit... we believe that their *tutelage* in this regard is not yet complete.
>
> In an effort to establish a more viable program for the *resocialization* of indigenous offenders, the Territorial Government has moved toward the decentralization of corrections...(Finkler 1976: 133, 135 - emphasis added)

The court's "special effort" to bridge the gap between two law ways is indeed an effort at "leniency" and "flexibility". Black (1972: 18), however, recognized that this "is an act of paternalism, a complicated and subtle form of social oppression". Tutelage is a fitting word to describe even the relationship between parent and child, and in this connection much has been done in the area of legal reform through education (Deloria 1974; Kydd 1977). Few researchers, including anthropologists, have asked why the Inuit have to be "resocialized" at all however.

The order and conflict perspectives can be thus compared:

> From the order approach, problems of racial and ethnic relations are largely a product of members of subordinate racial and ethnic groups who need to become adapted to the dominant group culture...
>
> Therefore, from an order perspective existing values and policies of dominant institutions are viewed as healthy and good and problems...are due largely to subordinate racial and ethnic groups' failure in adjustment. Assimilation, or the shedding of unique cultural traits and identity, and adoption of those of the dominant group is felt to be the primary way to bring about a stable and healthy society. The order/assimilationist perspective minimizes the significance of power and coercion in everyday life between subordinate and superordinate groups, emphasizing the social psychology of individual and group adaptation to dominant group values and practices. Society is viewed as made up of competing individuals who carry out their competition within the context of neutral social institutions. The significance of competing groups and classes as far as one's social, political and economic opportunities are concerned is largely neglected.
>
> Another approach has emerged largely within the last few decades...The conflict/pluralist approach to race and ethnic relations views society as a contested struggle between groups with opposed aims and perspectives. Differentials between race and ethnic groups in economic, political and social power are emphasized as significant for analysis. Conflict is viewed as an essential facet of societies and the unit for analysis is largely that of race and ethnic groups and social class, with emphasis upon collective situations and definitions.
> Pluralism is viewed as a viable alternative to assimilation which considers the point of view of...minority group members...(Reasons 1978: 367-369)

Pluralism is seen as an aspect of the conflict approach. The next section of this chapter discusses pluralism and is followed by sections dealing with the imposition of law and legal westernization.

Pluralism

The pluralist perspective shared by most conflict theorists articulates a concern for not losing sight of the fundamental fact that western liberal democratic society *is* pluralistic, that it is founded upon pluralism. The assimilationist perspective which is part of the order or consensus theorists by contrast articulates and gives normative value to conformity and homogeneity. Consensus theory, while not denying that society may be composed of competing individuals or groups, nevertheless refuses to ascribe to these groups differential political, ideological, cultural, and structural status (or, to sum up, jural status) within the unicentric power structure. The main contribution of the pluralist orientation, so van den Berghe tells us, "is the systematic reorientation of anthropology and comparative sociology away from the allegedly homogenous, insular, integrated, consensus-based 'society-culture' as the basic unit of analysis" (van den Berghe 1973: 966; Nader and Yngvesson 1973: 904). It is desirable, in understanding any self-conscious group, to attempt to see them as they see themselves, but it is also desirable to see the world as they see it. To do this it is useful to have, at least for the purpose of academic inquiry, a multicultural or pluralist view of the world.

As the usages of several authors illustrate (notably van den Berghe (1973), Schermerhorn (1970), Kuper and Smith (1969), among others), pluralism can take on a variety of meanings. It can be used descriptively, and as van den Berghe urges, as a sensitizing concept. Pluralism can be both designation and attitude. M.G. Smith defines pluralism "as a condition in which each of several cultural groups has a set of

mutually incompatible institutions in every major sphere of life except the political, in which the institutions of one of the cultural groups dominates the entire society" wherein "the politically dominant group is a numerical minority" (op. cit. *in* van den Berghe 1973: 964). Exactly what "incompatible institutions" are, is difficult to say. While Smith later emphasized the political component in his definition (Kuper and Smith 1969: 434-436), and thereafter extended the definition to include the notion of "differential incorporation" to mean the range of shared institutions among groups, his emphasis upon the size of the politically dominant group placed him in much the same position as J.S. Furnival whom he himself had criticized for restricting the meaning of pluralism to multiracial colonial societies. As van den Berghe notes, quoting Smith, "there is certainly nothing uniquely tropical, colonial, or European about pluralism, nor is pluralism confined to multiracial situations". Schermerhorn (1970: 148) notes nevertheless that colonial societies were the classic form of plural societies. It would seem that there are many situations in which the ambiguous "numerical minority" of the dominant group, where perhaps the colonial situation would be an obvious unambiguous example, does not make the slightest difference. At least, as van den Berghe observes, nothing drastic has been shown to occur when the dominant group passes from 49 to 51 percent of the total (1973: 968).

This apparently leaves the definition with two criteria, that of "mutually incompatible institutions" and "differential incorporation". To arrive at a meaningful definition of these terms consider that pluralism has been distinguished in at least four ways - ideological,

political, cultural, and structural (Schermerhorn 1970: 122-124). The ideological designation refers to the "doctrinal belief usually ascribed to an ethnic minority group whose members assert the desirability of preserving their way of life" - Schermerhorn calls this normative pluralism. Political pluralism refers to "the multiplicity of autonomous interest groups and associations" which aim to prevent the state from gaining monopolistic weight. These groups and associations typically seek to function with relative autonomy from the state which they seek to oppose. Cultural pluralism, as Schermerhorn puts it, analytically focuses upon "language, religion, kinship forms, nationality, tribal affiliation, and/or other traditional norms and values separable from race or social stratification". Finally, and again following Schermerhorn, there is the structural designation, a more complex concept, which is also called social pluralism. This refers to the organization of cultures or subcultures as plural structural units that are "segmented or compartmentalized into 'analogous, parallel, non-complementary, but distinguishable sets of institutions'" (op. cit. van den Berghe *in* Schermerhorn 1970: 124). Schermerhorn notes that "when we refer to structural pluralism we are focusing on institutional differences in ethnic groups which separate or enclose them from dominant or majority groups in terms of social participation" (p. 127). Social participation is measured in terms of *degrees of enclosure*, as Schermerhorn calls it, "with indicators like endogamy, ecological concentration...rigidity and clarity of group definition, segmentary relations of members with outsiders, etc.", which van den Berghe also mentions. Turk (1977: 36) referred to cultural distance between the dominant and subordinate

groups, the congruence of demographic with political dominance, the linkage between racial categorization and territoriality, and the degree of economic development of both groups.

Van den Berghe suggested that social or structural pluralism is a facet of cultural pluralism in much the same way that the ideological and political designations are facets of the cultural designation. Certainly, all four designations are not mutually exclusive but can be separated for analytical purposes. M.G. Smith's "differential incorporation" may be understood in terms of Schermerhorn's "degrees of enclosure" both of which in turn are related to the nature and intensity of structural and cultural pluralism as Schermerhorn has outlined them. Indeed, "the greater the degree of enclosure among the cultural sections, the greater is the potential for purely coercive integration and the lesser the possibility for consensual integration" (Schermerhorn 1970: 125). Schermerhorn's degrees of enclosure, as if on a scale of "greater" to "lesser", therefore represents a suitable operationalization of Smith's criterion of incompatible institutions. Regardless of the kind of institution that happens to be incompatible, the degree to which it is "enclosed" and therefore the manner whereby it is incompatible can be deduced from *how* the particular group to whom the institution belongs is integrated into the society in which that group as a structural plural unit is contained. Van den Berghe (1973: 965) correctly points out that "it seems that if plural societies are to show any stability, they have to be held together by more than sheer political coercion. For one thing, the cost of coercion for the dominant group is too high unless it is accompanied by economic exploitation; and exploitation is a form of

interdependence, however assymetrical the economic relationship may be".

The basis of integration (or non-integration) in plural society rests upon, to some extent at least, the "quality" of the interaction between groups. The qualitative differential (van den Berghe 1973: 965-966) is therefore as important as the "quantity" (i.e. the degrees of enclosure) and has a bearing upon the nature of the integration. Schermerhorn (1970: 78), citing the work of Wirth (1945) for instance, notes that minority groups may pursue assimilationist, pluralist, secessionist, and militant aims in response to their clearly unprivileged position. The assimilationist strategy is to seek to totally merge their values and style of life with that of the dominant group. The pluralists assert the distinctiveness of their culture and seek tolerance from the superordinate group. The secessionists, by contrast, are interested in pursuing an autonomous or independent existence and are clearly not satisfied with mere tolerance and quasi-recognition. The militant policy, to carry it to the extreme, "set domination over others as its goal" (Wirth 1945: 362-363).

It seems reasonable to assume that the congruency between the "views" of the dominant and subordinate groups also determines the nature of the integration. When the views are congruent, the process of integration is well under way, and when these views are incongruent, "conflict of an overt or covert variety will appear". The possibilities for plural integration range from pure coercion to perfectly legitimated authority (i.e. consensual), where integration is defined as "a process whereby units or elements of a society are brought into an active and coordinated compliance with the on-going activities and objectives of

the dominant group" (Schermerhorn 1970: 66). Political and social domination can therefore be seen as legitimate and illegitimate when considered from the points-of-view of both the dominant and subordinate groups, where legitimacy and illegitimacy is viewed from the vantage point of the congruency between the "quality" and the "quantity" of inter-group interaction. The question of legitimacy looms large. In the colonial situation, the "highly unstable system is dependent on the successful legitimation and institutionalization of political domination, buttressed by the spread of interdependence as the dominant section extends its economic institutions over wider and wider spheres of activity among indigenous populations" (Schermerhorn 1970: 149). The integration of such a society was more coercive than consensual and domination was illegitimate. The situation is by no means unique to colonial examples however.

The Integration of Society: Law and Modernization

"The field of law in rapidly changing contemporary societies", Moore (1978: 8) tells us, "puts before the anthropologist, with an immediacy from which he cannot turn away, the spectacle of attempts at intentional control and planning and publicly rationalized imperative decision-making". Galanter (1966: 153-154) very eloquently expressed the situation this way:

> In the past two centuries, the whole legal landscape of the world has altered dramatically. Throughout the world, there has been a proliferation of governmental responsibility and a growth of new areas of law; social life is regulated increasingly through law, rather than through

> market pressure, custom and informal courts, fiat or force. During this period, the industrializing nations of the West have developed and consolidated unified national legal systems of a kind not known before. And in the poorer parts of the earth, the nineteenth and early twentieth centuries have seen an influx of foreign law unprecedented in scope...
>
> In both older and newer nations, the development, expansion, and consolidation of these national legal systems seem to involve certain common directions of change. Laws are applied over wider spatial, ethnic, and class areas; personal law is replaced by territorial law, special law by general law, customary law by statute law. Corporate rights and responsibilities are replaced by individual ones. Religious sanctions and inspiration are replaced by secular motives and techniques; moral intuition is replaced by technical expertise. Law making and law applying move from authorities with local accountability and diffuse responsibility to specialized professionals representing central national power.

The move towards societal "modernization" and development is said to take place only if the law, *the instrument by which development can be achieved*, is unified and universalistic. Law is seen as one of the major independent variables which could explain relative degrees of backwardness. We are told that if the rule of law were instituted or imposed in traditional societies, economic progress would follow:

> "Law" was seen as both a necessary element in "development", and as a useful instrument to achieve it. "Law" was thus "potent", and because legal development would foster social development and improve human welfare it was also "good".. Moreover law was also associated with rational, instrumental action to secure greater material well-being and other developmental goals. Law was one of the tools that could be used by planners consciously to enhance human welfare. *If law became more effective, the planners' powers would grow.*
>
> The legal profession studies *started* from the assumption that a strengthened legal profession

> would foster development (Trubek and Galanter 1974: 1073-1074, 1075).

We are also told that "legal institutions...have a definite role, rather poorly understood, as instruments that set off, monitor, or otherwise regulate the fact or pace of social change" (Friedman 1969: 29). Friedman is certainly not the only one who stated that "many basic questions of the relationship of law to social change and to cultural development are completely neglected" (ibid.). One may gather from what theoretical literature on the subject there is that the concern lies with two issues. One is with modernization (or westernization) and development of law and society and *how* it can be achieved; the other issue concerns a questioning of *why* it should be achieved. Recognition here is with the ethics of unilaterally-initiated social change. This concern has prompted some to review the old literature on the relationship between law and society (Friedman 1969: 30; Unger 1976). Trubek thought it pertinent to review the work of Max Weber and concluded that "the common tendency to think of 'law and development' as the study of problems unique to the 20th century often results in our neglect of the groundwork already established by scholars of an earlier age facing similar problems...Until recently, however, legal studies and the social sciences failed to carry on this tradition, and little was added to the initial work done by the classical social theorists" (Trubek 1972b: 720). Yet the studies that have been conducted do not offer conclusive evidence that there is a definite relationship between the rule of law and economic progress (Trubek 1972a: 46-47). Collier (1975: 134) after reading Trubek closely (supra) commented that "Trubek effectively shows that Weber cannot be blamed for the simplistic idea that a

western-type legal system is a prerequisite for economic development because Weber argued that capitalism and legal rationality arose together out of the *specific historical conditions* of feudal Europe" (emphasis added).

An idea imbedded in modern Formal law itself is the evolutionist assumption that the western legal system is a goal towards which all legal systems or law types somehow inevitably tend. Legal development assistance programs were based on the belief that, to some degree at least, the United States could and should be a model for the developing nations. Many have come to share serious reservations about such notions (Trubek and Galanter 1974: 1092). Even if development and industrialization is a common goal, it occurs in very different contexts. There are profound differences in the cultural heritages, political organization, and economic systems of so-called developing countries. There is no *a priori* reason to believe that all these divergent patterns will tend toward some uniform model of law, as Trubek and Galanter have pointed out. Indeed, differences in cultural heritage, ideology, social structure, political system, and economic organization will lead to very diverse kinds of law. Consequently, some have expressed serious misgivings, based on practical as well as moral reasons, as to the validity of transplanting or imposing the western legal system - at home OR abroad. Consider where the modern legal order originated and from which context it sprang:

> ...the development..may be discerned in Europe as far back as the reception of Roman law, beginning in the eleventh century. But the development of national legal systems of this kind gathered momentum in Europe at the very end of the eighteenth

> century and spread over most of Europe in the early part of the nineteenth century. The foundations of such systems were laid in many other parts of the world in the nineteenth century. Thus, the "modern" legal experience in most of the world began only a short time after the European (Galanter 1966: 156).

The rule of law has reinforced an ethnocentric and dichotomous view of history. History is seen as a uniform process tending towards a goal. Hence, it is evolutionary and deterministic. "Development" is the process by which societies move towards a specific goal or condition. The goal, obviously, is the type of society found in developed countries, in other words, a model approximating that of contemporary Western society. The historical process of development and modernization is perceived in dichotomous terms: modernization means the move from "traditional", "static" and "underdeveloped" to "modern", "dynamic", and "developed" (Trubek 1972a: 17). As with the order perspective societies are perceived as homogenous, insular, consensus-based and integrated wholes (Friedman 1969: 37) in which all levels or subsystems of society have related characteristics - a traditional society will have a traditional legal system, and so on. This, together with a view of society which states essentially that distinct stages of social development are paralleled by distinct stages of legal development, serves to explain why modern law assumes that social change automatically brings about legal change. Legal and economic developmentalists have extended this to mean that when the rule of law is introduced, economic progress is guaranteed (supra). Thus, the basic scheme of parallel development of legal and social life is maintained and can be seen to operate in the law reform and law education programs both in the Third and "Fourth" worlds.

Trubek and Galanter (1974: 1065-1069) summarize and give an account of the mood of law and development efforts during their heyday, the 1960's:

> These newly developing nations need our help - not only our money and machines and food, but also the great capital of knowledge accumulated by our professors...Refrigerators and radios can be easily exported - but not the democratic process. Ideas of liberty and freedom travel fast and far and are contagious. Yet their adaptation to particular societies requires trained people, disciplined people, dedicated people. It requires lawyers... (Trubek and Galanter 1974: 1067-1068, note 16).

While modern law and modern legal thinking together can be seen as an ideology designed to legitimate foreign intervention in the legal and political lives of other nations, by the same token it has also been portrayed as a response to "a summons for help" (Seidman 1972: 312-314) to which no responsible nation or group could turn a deaf ear. The role of the lawyer and of legal education are apparently both central to the development issue, for "the lawyer must participate in social engineering by drafting rules that will induce the desired activity...", and with respect to Africa and elsewhere, "(there) is an important felt need.. to develop knowledge and techniques apt to generate rules which will have a high probability of inducing desired activity directed toward development" (ibid., 312). Official "lawyers' law" is said to be the law of modern society (Galanter 1966: 161).

Development and "modernization" continue in various places and in varying forms and intensities. In some cases the process goes on more rapidly, more visibly, and sometimes more violently - especially in the new nations. In other instances development is bilaterally inspired, not unilaterally, and is less violent or disruptive. Japan and Turkey,

for instance, are among some nations that have willingly borrowed western codes "lock, stock, and barrel" (Friedman 1969: 42); in the case of Brazil, changes in economic and political life did not imply a full program of liberal, instrumental legalism - contrary to expectations and predictions (Trubek 1972a: 40-50). Instead, a thriving market economy under an instrumental authoritarian regime has done well and economic success has served to cast doubts on the assumptions held valid by the rule of law in the area of modernization. In yet other instances, "modernization" and "development" have simply meant outright imposition of law as a matter of national policy (e.g. the British in Australia, New Zealand, and North America).

In some parts of the world efforts are different still. In Africa, the program of the Restatement of African Law Project of the School of Oriental and African Studies (University of London) aimed at the unification of the myriad legal systems on that continent. This project, probably the first of its kind, "aimed to 'record the customary law' of those traditional African societies which survived within modern national boundaries and to prepare 'restatements' of this material for use in the newly integrated courts" (cf. Cox and Drever 1971: 410; Roberts 1979: 194-195). Unification and integration of the traditional courts into the national system was justified, of course, in the name of economic progress and civilization. Yet the Project proved futile by all accounts (beyond its utility in salvaging information on customary law that might have otherwise been lost) because, as pointed out earlier, customary law was recorded, treated, and submitted in forms and categories which lawyers use in *English* law. Customary law, described through the con-

ceptual categories of the Rule of Law, is no longer customary law. It loses much of its character and effectiveness, it is transformed, for as Galanter (1966: 163) said, "schemes to revive the 'simplicity' of local customary law..cannot put together the broken vessel of traditional law". Galanter also referred in his text to some of the legal revivalist movements that took place in Ireland, Pakistan, and Israel that have had but little success.

A very interesting case however, and one that stands in contrast with the African Restatement Project, is that provided by Papua New Guinea (Gordon 1980). Here is a situation in which the Customary Law Project of the P.N.G. Law Reform Commission is taking considerably elaborate steps to *impose customary law from above*, though not for the reasons normally attributed to such an endeavor. While national pride and self-respect are certainly among the ideological motives behind this movement to develop customary law, Gordon (ibid., 3-4) believes that issues of autonomy and legitimacy, rather than the content of the law, are the critical parameters which define the bureaucratic motives. Considering that Papua New Guinea achieved independence only in 1975, one appreciates the internal political difficulties faced by the central government. Gordon argues, then, that the institutions of the state must compete for legitimacy with other "home-grown" institutions (p. 6), that the "unofficial courts" at the village level represent a serious threat to the state's control over the means of coercion. There is the possibility that customary law can become a "neocolonial fraud" developed by the center and imposed upon the periphery (ibid., 8) in order to establish legitimacy and domination. Gordon has observed, as have others,

that in moving from non-recognition to recognition of customary law, the state gives itself the authority to declare what the custom is and to legislate it. It can then override any custom that it thinks "repugnant" (ibid., 7). Customary law, within this context of development and modernization, is seen as an ideology used as one of the instruments of the state in order to establish legitimacy over a people and in so doing reduces the autonomy of the "home-grown" institutions. The situation in Papua New Guinea is still very much in flux and is of considerable interest to law and development scholars; a Customary Law Digest and draft legislation are being prepared "to develop a self-reliant Papua New Guinea legal system based upon customary law" (Newsletter of the Association for Political and Legal Anthropology 1980 Vol. 3(2): 9).

That *customary law is a competing legal ideology* is a conclusion that is not difficulty to reach, even though it is operationalized according to the criteria of the rule of law. At the state level the judicial machinery seeks to incorporate, co-opt, and assimilate in order to achieve universality and homogeneity of the law as well as of society. It also seeks to gain legitimacy. Efforts at modernization are attempts to integrate instrumentally, subversively, or consensually, to control for the congruency of group goal definitions. The African and New Guinea cases may well represent the same process of the "cannibalization of custom by law" that Stanley Diamond (1971) talked about. For Diamond law is seen as a deliberate device used by a ruling elite to usurp customary practices of subordinate groups and to dissolve their autonomy. The conflict of laws can be seen as a struggle between different levels of authority and following Gordon (1980), the establishment of this

authority is seen to rest upon legitimacy gained at the expense of the autonomy of the home-grown institutions. In the age of modernization this is not very surprising. During the colonial period the dominant theoretical paradigm within which most anthropologists operated contributed, as Gordon observes, to the non-recognition of customary law as one of these institutions (i.e. the law-centered approach with its emphasis upon positivist jurisprudence). Administrators, lawyers, and even anthropologists believed that indigenous societies lacked a clearly formulated body of law and had no clear concept of justice (see Roberts, supra). For this reason customary law could not be recognized - only Western society had law, while indigenous societies only had social control (Gordon 1980: 3).

It is in the establishment of authority and its legitimacy that conflict also precipitates out of the difference between law on the books and law in action, or between the letter and spirit of the law. There is an unresolved tension, according to Galanter 1966: 158) between the national and local, the formal and the informal, the official and the popular law. This too, for those who read Max Weber, is also the tension between formal rationality and substantive rationality. Customary or interactional law is indeed a competing ideology. As Galanter so well put it, there is a striking contrast between modern and premodern law in the way in which the higher and most authoritative elements in the legal system address themselves to the local and discordant elements (ibid., 159). With modern law, local law is usurped, whereupon much conflict is generated when an appropriate balance between unity and diversity is sought. In the unicentric power structure, diversity,

discrepancy, and deviance must be contained, and as we know, need not necessarily involve perfectly legitimate authority.

In the case of the American Indian (and in the case of the Canadian Indian without a doubt) Svensson (1979: 70) made the following statement that is reminiscent of the New Guinea situation:

> In societies like that of the United States, where a national identity is still in the process of creation and where its reinforcement has been the subject of considerable social and political concern, the general view has been that major weapons in the social arsenal should be brought to bear on recalcitrant islands of alien ethnicity in the body politic. Law has been one such weapon in the forefront of the assault on autonomous identity.

Svensson has identified six phases, covering almost 400 years, in the development and imposition of American (and British) law on tribal communities. Of these six only the first phase (1607-1817) was one of "accommodation". Since 1817 the government's Indian policy has oscillated between reorganization, termination, and retrocession of Indian treaty relations, lands, and rights. In the late 1970's "new termination bills are being introduced into Congress designed to dissolve entirely the special, treaty-based status of Indian tribes. At the same time a major assault on Indian ownership and control of land and natural resources is being mounted, primarily by a coalition of private interests" (Svensson 1979: 70-71).

Of course, native autonomy upon which native power rests is dependent upon a distinct identity, which in turn rests upon the land base and the land resources procurred by treaty rights. As in Canada, treaty law in the United States is central to Indian status - Indians alone of all ethnic and political groups in North American society have treaties with

their government. And like the termination bills being introduced into Congress, Canadian sentiment on the issue is little different:

> ..one of the things the Indian Bands often refer to are their aboriginal rights and in our policy..we say we won't recognize aboriginal rights. We will recognize treaty rights. We will recognize forms of contract..and we will try to bring justice in that area and this will mean that perhaps the treaties shouldn't go on forever. It's inconceivable..that in a given society one section of the society have a treaty with the other section..We must be all equal under the law..I don't think that we should encourage the Indians to feel that their treaties should last forever within Canada... (Prime Minister's speech in Vancouver 1969, op. cit. *in* Cumming and Mickenberg 1972: 331)

Equality before the law indeed. The serious charge against the rule of law is that because it claims neutrality and autonomy, it does not assume responsibility for the consequences of the enforcement of its rules.

The Imposition of Law

It is clear that "imposed" law reflects the lack of correspondence or congruency between the interests, needs, attitudes, and convictions of a particular population, subordinate minority, or ethnic group and those interests and attitudes expressed, through law, by the dominant group. Imposed law does violence to existing systems of beliefs, cultural norms, or established norms of behavior (Lloyd-Bostock 1979: 10). Imposition, therefore, involves (a) an attempt to introduce fundamental change unilaterally and therefore to usurp indigenous institutions; (b) an attempt to introduce norms that are foreign or external to those sought to be replaced; and (c) usually takes place in the absence of

democratic consensus. Law that conflicts with the interalized norms or the law that seeks to introduce new patterns of behavior will very likely lack the support of a people's internal motives to comply (ibid., 10).

The law of the state, in contrast with the law of custom, institutionalizes the imposition of interests of a superordinate group over the rest of society. The legal order, as we have also seen, seeks to legitimate the implementation of social control. Justice, in such a situation, becomes the state-authorized administration of authority and coercion (Forer 1979: 90). The administration of justice can be seen as a form of *socialization* in that its coerciveness produces a common belief in the desirability of compliance and therefore a tendency towards acceptance of the social values that rationalize the law (ibid., 91). Domination is rationalized on the grounds of racial authority, Christian imperative, economic progress, national interest, mutual self-interest, law and order, etc. - in other words, on the grounds of "civilization" and "rationality". The socialization process "engineered" by the modern state can be viewed more accurately as a resocialization process - it attempts to eliminate and replace traditional and local group identities with deference to individualistic identification with the goals and motives of the dominant group. This resocialization creates and reinforces the general belief that the law is somehow above society and even above the state and that it is an inspired guide to the mediation of differences among men (cf. Balbus 1977).

To the extent that growing industrialization breaks up traditional mutual support systems and relationships and seeks to replace them, the concept of an impartial or neutral law becomes one of the dominant norms

of society. It is difficult at times to distinguish between legal imposition and governance and other modes of exerting power and influence. The imposition of law from one society to another takes place, as we discussed in the previous section, as part of a more general penetration into economic and political life. Resocialization in the sense described above is apparently cyclical: special interest groups and ethnic and minority groups consistently challenge the legitimacy of the state and its law, and then reaccept the state's legitimacy when it provides new opportunities for economic redistribution (Forer 1979: 91). The dominant strategy and principal means of social control in modern industrial society, it seems, is the capacity to translate claims from diverse groups into economic terms, for example, higher wages, more consumer goods, jobs, reparation for damages, and so on. But as soon as a group accepts the translation of its needs into economic terms, as in the contest to assert aboriginal and treaty rights, it has already lost the battle for it has paid the price of increasing dependency and diminishing freedom for a finite measure of compensation. Native petitions of nationhood status, for example, as a claim for the validity of "a way of life", are coincident with the examination of various legal claims in an effort to regain the basis upon which traditional livelihoods may be carried out. These claims are based upon the proposition that social change hinges ultimately on non-economic motives (Watkins 1977: 71, ff., 84-99). As part of the right to self-determination, some of these native groups call for the recreation of traditional native political institutions which, as we shall see in the next chapter, presupposes the survival of traditional forms of livelihood and unfettered access to the

land upon which these livelihoods are carried out.

Imposed law would include instances of law imposed from within an established legal system as well as the importation of an entire legal system from another culture. In the case of North America the notion of imported or received law can be appreciated in terms of the rather unique position of natives in the industrially-oriented "growth and development" culture of the European newcomers. After contact, Indian tribes were the only groups whose existence as national entities demanded collective possession of land, land-based subsistence, and exchange production: it is little wonder that Euro-American society, based on private ownership, commodity production, and industrial expansion would clash physically as well as ideologically with these groups. This problem was by no means restricted to North America. Friedman (1969: 37) pointed out, as did Seidman (1972: 312), that "some scholars..might argue that the new African states must stamp out all traces of customary law, not merely in the name of national unity, but also because customary law is incompatible with the modern state, and modern agriculture, business, and trade. They do not feel that customary law has any values worth preserving or that it could be usefully adapted to modern needs". Indeed, "modern societies, as opposed to those societies which we call primitive or traditional, are change-oriented. This means not only that they are changing, but also that they *want* to change" (Friedman 1969: 38). Finally, law may be imposed in periods of rapid social change, instability, and perhaps even upheaval (Lloyd-Bostock 1979: 10). *In less than one generation*, and in some cases in less than one decade, changes occurring in parts of northern Canada, for example, have meant

"the movement from a sub-marginal subsistence level, through a hunting and fur-trading economy, to a wage and welfare way of life" (Morrow 1973: 384); from underdevelopment to development. Dependence upon a money economy and adoption of the system of social and cultural values that *de facto* accompany such an economic system is rather foreign to the preceding mode of production. Accounts of the difficulties with the legal system that came along with it have a familiar ring to them.

Conclusion

Witness the rising militancy of special interest groups (e.g. labor, ethnic, and minority groups). Consider the various native petitions for "nationhood" status which place their reliance upon the "law of nations", or the principles of public international law, as their source of rights (Watkins 1977: 157-162, 163-173). For many of these groups, of which the Dene of the Northwest Territories are an example, pluralism is no longer an academic question. To escape from what seems maximal legal control and overt interventionism, militant policies set cultural and political autonomy as their goals. They recognize that an asymmetrical form of economic interdependence subverts and virtually denies them by merely asserting the distinctiveness of their culture and receiving tolerance in return. There is no simple demonstrable relationship between law and economic progress, nor is there one between economic progress and prosperity since often the benefits accrue elsewhere. It is recognized that "the theory of democracy is wrong", and that consensus that produces "egalitarianism within elitism" is merely "part of a flim-flam designed to divert attention from the actual distribution of power"

(Mazor 1972: 1041, ff.).

The pluralist perspective alerts one to the fact that the institutions - and not only their kinship, religion, or language - of a people are linked with their traditional way of life in a way that is not as the dichotomous view of history and development would have it. Yet the modern legal order fails to recognize this connection and insists on superimposing its methods and structures upon an entirely different cultural and philosophical base. Each culture has its own logic, and the epistemology of one society may not fit that of another, as Barkun (1968: 145) reminds us.

When Nader and Yngvesson urged research into "cultural boundary zones", "disparate models and rules", and "variations in use patterns" (supra, p. 3), what immediately came to mind was pluralism, modernization, and the imposition of law. The incompatibility of institutions, the degrees of enclosure, or differential incorporation - in the language of pluralists - are good starting points for an ethnography of law in complex society, for they enable us to "measure", in a sense, the degree of autonomy of the "semi-autonomous social fields" or of "society's segments". This chapter provides not only the backdrop to a more detailed consideration of modern Formal law (and its "antithesis", interactional or customary law), but illustrates as well that "legislation will not long be ignored in a field concentrating on change...And once legislation comes firmly within the perview of the legal anthropologists, *they are likely to open vast legal avenues to the study of political systems* instead of confining themselves to dispute settlements, rules and ideas" (Moore 1969: 293 - emphasis added).

CHAPTER 3

A TALE OF TWO LAWS

Introduction

Few among the Inuit or Dene of the Northwest Territories pursue what may be understood as a *bona fide* and unadulterated "traditional" way of life. Traditional subsistence activities, for instance, furnish in most cases only between 30 and 50 percent of a community's total food requirement. The remaining 50 to 70 percent is taken up by store-bought or non-traditional foods. A diminishing dependence upon the use of country food in the native diet will be reflected in these figures. That the native "traditional" economy is dying is news to no one. As an economic system based on Western industry and wage-labour gradually replaces the traditional subsistence economy, reliance upon non-traditional foods, supplies, and equipment becomes less of a matter of choice. In hunting, for example, benefits gained in some cases from a new technology are soon lost because of sudden "over-efficiency", where the regenerative capacities of the resource base is threatened. Some renewable resources are not renewable at all. In other cases the generation gap (consider that in all of the Northwest Territories close to half of the total population is under fifteen years of age) and the enticements of employment, the availability of goods, family allowances, and welfare payments further reduce the numbers able and willing to wrest a living from the land. Survival skills, incidentally, require considerable knowledge and skill which cannot be acquired without the aid of good teachers or many years of "ethological" training. But the good teachers

are almost all gone and steady work in the oilfields of the north has replaced the challenge but also the uncertainties of the hunt. Dependence upon a wage-welfare system with its degenerative social consequence is, therefore, seen as the alternative but is one most would vehemently challenge.

The situation is clearly this: the few individuals who do pursue the "traditional" way of life are thus thrust into the most awkward position of having to virtually compromise beliefs and practices that make such a lifestyle viable in the first place. Furthermore, those who wish to return to that way of life cannot. Compromise is necessary to avoid the impact of a sophisticated system of laws, and the consequences that it brings, with which the native community has been confronted. It is apparently "criminal" for a native to follow ancient custom when it is precisely custom that ensures the viability of the traditional lifestyle. Adherence to the old ways is "breaking the law" which corroborates the image given the native of "having one foot in the past". Data on Inuit law-ways and the cited cases which are presented in the following discussions are derived from Morrow (1970, 1972), who has served as Chief Justice of the N.W.T. for over a decade, and from Hoebel (1961) and Graburn (1967). Both Hoebel and Graburn are anthropologists who have conducted detailed studies of Inuit law-ways. Their studies are among the most informative.

Acculturation and System Breakdown

A distinctive feature of the traditional way of life of the northern hunter is the biological and behavioral, or biobehavioral, equilib-

rium that has been maintained in the past. Indigenous groups throughout North America have until historic times successfully maintained such an adaptive equilibrium. An understanding of this rather important feature leads to a greater appreciation of the acculturation process and the difficulties and hardships that accompany it. In the language of ecological anthropology the biobehavioral equilibrium refers to the dynamic relationship between the native and his habitat, and the components that comprise what is called the exploitation pattern. Put another way, "if there is a direct or indirect relationship between the organization of techniques for production, social relations, perceptions, and values, on the one hand, and the relevant physical and cultural environment, on the other, then a change in that organization or in that environment requires a reaction in the other" (Anderson 1973: 211). The study of acculturation is, therefore, incomplete if it is solely concerned with a description of the effects and speculation on the benefits of change once it has occurred, as has traditionally been the case in anthropology. The study is complete when it gives due consideration to the systemic interactionalism inherent between the components of a cultural system. Technology, social organization, and ideology are subsystems of culture, where culture may be considered the adaptive mechanism or "nexus" between the human population and the physical environment. These are not mutually exclusive components to be studied in isolation (Gadacz 1979). Thus, the process of acculturation must be related back to the correspondence between the human and physical environments. An alteration in the nexus for which culture contact is responsible initiates and contributes to systemic dysfunction. This then sets the pace for acculturа-

tion.

In the context of the white man's law, infanticide, suicide of the aged, and homicide are indictable offenses. Yet within the context of certain patterns of biobehavioral adaptation the practice of infanticide and suicide are an inextricable part of survival. They are features of an adaptive strategy. Characteristic of hunters and gatherers the world over, group survival depends upon the maintenance of a proportion of available game to the number of individuals able to subsist on it. This proportion is maintained by strategies of dispersal, group membership flux, the frequency of moves over an area, a seasonal or otherwise resource emphasis shift, as well as overt population maintenance techniques such as killing. Dispersal or movement over an area, or general mobility, presupposes knowledge of game behavior, something that is acquired in "ethological" training during childhood. Mobility is, therefore, a critical feature of the adaptive strategy. It is further ensured by group composition. The composition of the group is in turn that which is defined as the proportion of dependents to providers. Thus, the number of children for whom a set of parents may provide sustenance, whether or not the mother is already nursing, is strictly governed by the number of providers or hunters within the group - and the availability of game. Similarly, aged individuals who have been reduced to dependency status are also "controlled" for. In other words, newborns or any young children for whom subsistence could not readily be provided were killed (R. v. Kikkik 1958; Morrow 1972: 42; Sissons 1968: 106-108). The aged whose immobility and inability to contribute threatens the mobility and, hence, the well-being of all, will choose

to remain behind to perish in the cold or will call upon someone to "make effective the time-honoured custom" of suicide (R. v. Kaotok 1955; Morrow 1972: 42; Sissons 1968: 67-69).

In other situations, homicide or manslaughter is a matter of the pragmatism of communal conditions under physical conditions that demand a high degree of cooperation and with it, tolerance. Yet there are instances where such tolerance can no longer be contained. Consider the famous case of R. v. Shooyook (1966, N.W.T. Trial Division - unreported), where the wife of one of the hunters "threw fits" and proceeded to seriously endanger the lives of a dozen or so people. After repeated attempts to restrain her had failed, she was killed. Those held responsible at the hearings stated that "we know it is wrong by the white man's law, but we have our children and must not let them die".

There are a number of other cultural practices that were once integral to the traditional way of life which have had a tendency to persist into modern times and which have subsequently become debated at law. The case of *re* Katie (1962, 38 W.W.R. 100), *re* Beaulieu's Petition (1969, 67 W.W.R. 669) and even the close to two dozen or so rape cases heard by Justices Sissons and Morrow between 1955 and 1968 (Morrow 1970: Table I, IV) are good examples. In *re* Katie's adoption, the case involved the custom of exchanging children in a situation wherein two couples were each blessed with two daughters and two sons respectively. The traditional "division of labor" required each family to have at least one daughter and one son. Such grounds were sufficient for the adoption to take place. As in other instances of customary adoption, this line of reasoning finally persuaded the court, after lengthy review, to consider

the adoption a legal one.

Attitudes towards rape are quite flexible - despite the participation of native women on juries (used extensively in the N.W.T.) there are no appreciable increases in rape convictions. We are told that "the circumstances in each instance showed the complainant placing herself in a position where if she did not actually invite the attack she might reasonably have expected it. *Perhaps the jury knew its own people better than the judge*" (Morrow 1970: 52 - emphasis added). Where sexual intercourse with a female under the age of 14 was concerned, it was held, again, after much publicity and deliberation, that such acts could not truly be considered offenses since females were of marriageable age at 14, and that marriage at that "tender age" was the custom. And, as the courts were informed, wifely duties include sexual intercourse with the husband.

The celebrated case of *re* Noah's Estate (1961, 36 W.W.R. 557; 32 D.L.R. (2d) 185) was one in which the Marriage Ordinance of the Northwest Territories did not, as it turned out, abolish Eskimo customary marriage. According to the facts, Noah and his "wife" lived together for a period of approximately one year. Towards the end of that time period the Inuit community-at-large recognized the marriage and that it was in fact monogamous. Although there was no certificate of marriage, Inuit customary marriage recognizes the state of "matrimony" as a consensual union for life of one man with one woman, to the exclusion of all others. Willingness on the part of the court and government to recognize customary marriage was put to the test when Noah was killed in an industrial accident: the government of the Northwest Territories first

considered Noah's wife a concubine and, hence, would not award any insurance monies to her. The judge, with rare insight and considerable legal maneuvering, applied the common law definition of marriage and the state of matrimony, and accordingly held that he recognized native custom. Noah's wife subsequently received her entitlement. The court was persuaded to recognize that the marriage was "valid by the law of the place where it was celebrated". It thus not only affirmed that the Inuit had "a law" pertaining to marriage, but also confirmed that customary marriage is as integral and valid to Inuit life and livelihood as it is to the white man (perhaps even more so).

A review of what information there is concerning the illegality of certain cultural practices or features of the culture indicates that the courts as well as the government have, though with reluctance and some apprehension, held the validity of these practices. But they have done so, alas, only in the context of the "remote wilderness". That is to say that such a tolerant attitude becomes less so as proximity to the settled areas increases. As greater and greater numbers of Inuit (and Dene) participate in essentially white-dominated community life, customary marriage, customary adoption, rape, suicide, and infanticide will become not only increasingly unlawful, but viewed as unnecessary. Family allowances, welfare payments, and wage-labor, though considered social evils, are now considered helpful measures that make suicide of the aged needless and infanticide a "mindless and shocking" prescription.

But Black (supra) is correct in saying that efforts at leniency and flexibility are acts of paternalism and subtle forms of social oppression. The much discussed and applauded all-native jury in use through-

out most of the Northwest Territories is said to be a major step towards "adapting the Canadian justice system to the needs of the north". Yet it would seem that the verdicts rendered by these juries serve little purpose in the operation of the justice system. While the verdicts have become predictable in most matters involving cultural behavior, as sketched briefly above, *there are no verdicts one way or the other when the Game Ordinances of the Northwest Territories are involved.* It is precisely the Game Ordinances that have caused the greatest hardships and have raised the most cries of outrage, and it is precisely these laws that have made it difficult if not impossible to pursue the hunting way of life. Herein lies the paradox. Designed to protect species of bear, caribou, and birds from the "outsider" (the white sportsman), the native is now informed that he cannot hunt out-of-season, shoot females with young, or any of the so-called endangered species (*ducks*: R. v. Sikyea 1962, 40 W.W.R. 494; *musk-ox*: R. v. Kogolak 1959, 28 W.W.R. 376; R. v. Koonungnak 1963, 45 W.W.R. 282; *caribou*: R. v. Sigeareak 1966, S.C.R. 645; *moose*: R. v. Smith 1969, 71 W.W.R. 66, to cite but several examples). Ducks, caribou, musk-ox, and polar bears were always shot when abundant or encountered. The vastness of the land and the relative rarity of encounter made it expedient to do so. Yet such severe restrictions have driven the Inuit and some of the Dene off the land and into the communities to find wage-labor as an alternate means of support. Thus, how significant is an acquittal or a verdict of not guilty on a charge of rape that is rendered by an all-native jury in a place as relatively remote as Igloolik, when in all likelihood those same individuals will probably end up in a community where their status or conduct

will not be so tolerantly received, as in Inuvik or Yellowknife? And it does not end there: with the land base effectively gone, it is very easy for the government to deny aboriginal rights. Use of electric power, gasoline engines, high-powered rifles, fiberglass boats, and government housing is ample evidence of successful culture change. After all, why discuss aboriginal rights when there are no longer any "true" aborigines?

While claiming flexibility and tolerance in one area, difficulties in other areas of the law belie those claims. Use of the native jury system, Inuit and Dene, as a means of pursuing justice for the natives and by the natives seems, therefore, to be a concession of doubtful merit for the reason that fewer natives serve on juries in white-dominated areas. It is curious that the criminal justice system should be so ready to make such a concession yet postpone the issues of hunting and fishing rights which are of far greater importance and urgency (Cumming and Aalto 1974). These issues remain unresolved and have been before the Supreme Court of Canada for almost two decades. The use of the jury system in the north is said to serve to mitigate against the harshness of neutral or Formal law; this perhaps has been accomplished to some degree. Yet here is an interesting implication: the use of the jury system and acceptance of the verdicts it renders implies that the natives have "a law", or at a minimum, concepts of normative behavior that can be so construed, upon which they base their decisions to acquit or convict. If the judgments of such legal bodies are considered competent, then surely it is but a small step to recognize their processes and procedures as well. But Formal law, as we shall see later, will not

recognize substantive judgments that it itself has not rendered.

Customary or Interactional Law: The Inuit

Hoebel (1961) has offered a number of postulates which he claims have "jural" significance in Inuit society and culture. To this we have already responded (supra, Chapter one). His postulates are of interest and importance primarily in terms of the variety of behavior they illustrate but, not surprisingly, they obscure or misconstrue the particular judicial practices or structures that may or may not prevail among the Inuit. Graburn (1969: 56) concluded upon examination of Hoebel's postulates that "one cannot examine Eskimo law in terms of a simple relationship between offense, resolution mechanism, authority, and sanction, for few such regularities are encountered over any period of time or over any large area". Instead, there are "a wide variety of *reactions* to superficially similar events (ibid., 46 - emphasis added). A look at what constitutes an offence and how it is dealt with leads one to the conclusion that conflict *management* is the normative ordering technique, not conflict *resolution* or even dispute *settlement*. These are important distinctions, and not merely semantic ones. There are few genuine disputes that take place strictly between individuals that do not quickly become the concern of the entire community. Conflict is "controlled", not eliminated, and its management need not be discussed in terms like official authority or privileged force. Instead, the rights and the liabilities that individuals have within the group are stressed. The stress is upon behavioral reform, rather than the transfer of specific goods. Since conflict is viewed as normal and not

pathological it makes only sense that problems and their solutions are only temporary - hence the term "management". Native jury findings involving rape, theft, assault, manslaughter, and so on might reflect this notion of conflict management. A verdit of not-guilty or of an acquittal may simply affirm the committing of an act. The view of the jury is that the individual may have only temporarily lapsed in his responsibilities and, hence, did not really intend any malice. The individual is placed on probation, as it were, where his conduct is assessed as time goes by. Further community reaction depends on his performance, both of duties and general behavior.

Graburn (1969: 48, ff.) discussed the following "sanctions" in terms of "reactions to conflict" among the Inuit. They are: (a) murder, (b) self-detachment (suicide), (c) ostracism (exile or banishment), (d) avoidance, (e) deference to Dominion authority (the R.C.M.P.), (f) resort to a shaman, (g) boxing contest, (h) song contest, (i) scolding session, (j) malicious gossip, (k) probation, and (l) exculpation (pardon). These reactions listed above become progressively less severe; in a sense a dispute is only "resolved" or "settled" (however temporarily) when the persisting errant or recidivist is put out of his misery or is forced to leave the community to live in another. It is not all that uncommon to find that the native jury will not convict even in cases of homicide (e.g. Morrow 1970: Table III) or even rape (ibid., Table IV). This may be because there is the strong likelihood that the accused "got rid" of someone the whole community wanted to see dealt with anyway, or in the case of rape "the girl had it coming". Alternatively, the verdict of guilty given to someone who was in fact the unpopular errant

individual likewise serves to dispose of him: his is avoided (d) and is likewise banished (c,e).

Unknown perhaps to the white man, and certainly not made explicit by the native jury members themselves, it is speculated that the jury's proclivity to "conflict management" tend to be reflected in their verdicts. A verdict of guilty, much less a plea of guilty, becomes essentially meaningless within the context of conflict control or management rather than conflict prevention or deterrence. Pleas and verdicts do little more than confirm acts and facts - what happens then? Guilt or innocence are not at issue. A jail term upon conviction may serve to banish an individual from the community but it may also leave his or her family without visible means of support. A conviction or jail term may simply be too severe under certain circumstances. A fine too is meaningless in those cases where an individual's or his family's income is far below the poverty line. Since sentencing still lies with the discretion and wisdom of the court and not at all with the all-native jury, it seems all the more reasonable to render a verdict of not guilty and thus permit the individual to return to the community where his treatment, by all accounts, rests upon the discretion of his fellow. Conflict management aims at restoring peace within the community as a whole; it does not aim at social justice in the individual sense.

Conflict management is a characteristic feature of a regime of substantive or interactional law. A distinguishing feature is the lack of third-party intervention, in the case of the Inuit. The behavior and operation of such a regime can be better appreciated within the context of the system of social behavior or the social milieu. "Law", we are

told, "is recognized as profoundly involving the way a society is organized" (Barkun 1968: 77). Researchers agree that,

> ...the Eskimo response to their kinship organization tended to result in a seriesof mutually exclusive relationships consisting of an individual and his nuclear family, and ultimately of the individual alone. In effect, though he was related to nearly everyone nearby, he could and often did act as though he were related to no one, and in fact tended to stand entirely alone (Hippler and Conn 1973: 5).

Graburn (1969: 47) wrote of personal strategies that express this kinship organization:

1. consider one's own self above all others in all things;
2. take every opportunity for self-enhancement of prestige or self-preservation;
3. test every situation and person to see how much one is likely to be able to get away with safely; and
4. manipulate one's social situation to every advantage.

Hoebel (1961: 69-70) in this connection presented the following as postulates of "jural" significance.

Postulate VI.	The self must find its realization through action.
Postulate I.	The individual must be left free to act with a minimum of formal direction from others.
Postulate VIII.	The bilateral small family is the basic social and economic unit and is autonomous in the direction of its activities.

One is immediately confronted with a paradox. Here is a situation where intense competition that fosters extreme frustration and harbors latent aggression may be attributed to the scarcity of resources, where "life's goods and some of the marks of prestige are frequently so scarce as to be unavailable to a seeker unless he makes a concerted effort to deprive another of these goods" (Finkler 1976: 12; Graburn 1969: 47).

Yet at the same time the social solidarity and stability of the community is contingent upon some measure of cooperation and sharing between individuals. Generosity is considered a virtue, for with it comes prestige. Constant manipulation and acquisition of resources, scarce or not, requires that some individuals possess these resources and others not. Within this context conflict management makes even more sense. Since competition for prestige *viz* resources is inevitable, hoarding resources in excess of what one can use immediately cannot be tolerated. Leadership is also non-existent except when it is to the economic benefit of followers and only for as long as the leader can provide such benefit. With competition the norm conflict in varying intensity is bound to arise. Thus, there can be no such thing as a "resolved" or a "settled" dispute. Maintaining a semblance of peace in the community is, therefore, everyone's concern but is contingent upon the symmetrical distribution of prestige. In Inuit society, as it turns out, there are few isolated, choice-making, autonomous individuals. Relationships exist for a purpose, to be sure. So do the disputes.

Hoebel's other postulates read as follows:

Postulate III.	Life is hard and the margin of safety small.
Corollary I.	Unproductive members of society cannot be supported.
Corollary III.	Those who are no longer capable of action are not worthy of living.
Postulate IV.	All natural resources are free or common goods.
Postulate V.	It is necessary to keep all instruments of production in effective use as much of the time as possible.
Corollary I.	Private property is subject to use claims by others than its owners.
Corollary II.	No man may own more capital goods than he can himself utilize.

Graburn (1969: 47) describes the behavior in these related terms,

> 1. life loses its value for one when one can no longer participate effectively in the prestige competition, and
> 2. the weak, deformed, and incompetent are laughed at and may be done away with whenever they become burdens.

These postulates and their corollaries clearly enunciate a complex of social and psychological attitudes, some of them obviously contradictory to one another. All desired things in life (women and food specifically) exist in limited quantities which cannot be increased. Covert competition is the norm, yet overt avoidance of conflict and the belief that one should never interfere in the life of another person clearly is stressed (Hippler and Conn 1973: 17). This clearly is the antinomy upon which Inuit social existence is built (ibid., 22). Like Foster's (1967) Image of Limited Good concept*, "someone's advantage implies someone else's disadvantage", where the best strategy is "unbridled individualism". Cooperation is viewed as practically useless since it is not possible to increase the supply of scarce resources (ibid., 124, 133-134). Graburn notes: "the future is by no means entirely predictable and is often subject to forces beyond one's control (Graburn 1969: 47; cf. Hoebel's Postulate II and its Corollary). Thus, toleration of

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* The use of Foster's "Image of Limited Good" has been made implicit in a number of writings; none of them which have alluded to Foster's model to whom the obvious credit should go, have described it with its proper title. Starr and Yngvesson (1975) have titled their paper "Scarcity and Disputing...", and Nader and Todd (1978) have included a small section within their introduction entitled "Control of Scarce Resources" (pp. 18-19). Not only is there no mention of Foster, but there is a definite paucity of published data dealing with the matter at all. It occasionally emerges in the feud literature (cf. Black-Michaud 1975: 173-177).

the leadership required to make cooperation viable is tantamount to the admission that some individuals have access to a larger portion of resources than others. The lack of leadership and cooperation among the Inuit, beyond the few examples that can be found wherein they do have leadership, is perhaps now a little more understandable. And so, too, are cases that involve socially-approved homicides such as infanticide, invalidicide, senilicide, or simply murder of a persistent irritant. As well, "rape" and "theft" are seen within the context of competition for resources. It can be suggested that in view of the competition ethic (notice how inter-related all the postulates and their corollaries are) there can be no legal concept and notions about crime in our sense; indeed, "traditionally, no words existed in Inuktitut for law, crime, or justice" (Finkler 1976: 12). There is considerable difficulty, for example, with the concept of *mens rea*, the "guilty mind" which is essential to the determination of guilty in the Anglo-Canadian tradition. Evidentiary guilty and guilty feelings are rarely distinguished, particularly for one "who presumes that being called before authority means that the fact of guilt has already been established" (Hippler and Conn 1973: 16).

On this basis it is clear that some epistemologies do not fit. All-native jury verdicts continue, it is conjectured, to reflect the notion of conflict management. Yet such verdicts and the applicability of the jury system in this northern context may run the risk of loosing relevance, particularly in light of the effect of the game laws. As an unfortunate consequence attitudes towards natives and the law are likely to become less tolerant towards using "systemic dysfunction" as a justi-

fication for legal difficulties. There is the probability that the Inuit and also the Dene will come to be regarded and treated similar to those whites who occupy the lower socio-economic strata of society and who reside in the underprivileged areas of urban centers throughout North America.

Summary: Customary Law

Relationships in Inuit and Dene traditional society are frequently multiplex, that is to say, enduring, long-term, dependent, and continuing. As such, conflict is frequent, intense and remembered. Disputes tend to be polycentric, to involve multiple issues and to have, therefore, considerable historical depth. Disputants are bound by a continuing relationship which is often the source of the dispute, the reason for airing it, and is moreover the incentive for accepting the outcome. Disputants, in Black's (n.d.: 4) terminology, are "proactive": they bring a dispute to a "hearing", advocate aggressively, and are responsible for executing judgment. There is a high level of disputing, and social control operates through special deterrence - convincing each wrongdoer not to repeat his error - rather than through general deterrence, i.e. making an example of one wrongdoer in order to influence the behavior of others (Graburn's "reactions" to conflict, supra). Norms employed are flexible, vague, particularistic, inconsistent, and supported by general consensus. In situations where there are not formal institutions of any sort, indeed even where there are some, institutions tend to be unspecialized, undifferentiated, and nonbureaucratic; moral evaluation, fault-finding and so on will be individualistic yet subject

to the approval of the entire group or community (Abel 1979: 170-171; Unger 1976: 49-50).

The Rule of Law

An examination of some of the recent literature in the socio-legal tradition reveals that there is a commonly-held set of ideas about law and society and the relationship between one and the other (Abel 1974; Felstiner 1974; Friedman 1969; Galanter 1966; Mazor 1972; Monet and Selznick 1978; Parsons 1977; Seidman 1972; Trubek 1972a, 1977; Unger 1976). Explicitly or implicitly, views are shared on the nature of law, the differences between Formal "modern" and other types of law and the relationship between law, economics, and politics. This set of ideas or points-of-view, discussed at length below, is called the "core conception", or a core of concepts. Trubek (1972a: 4, n.8) has coined this phrase and its utility lies in identifying the basic premises upon which the legal order and the social order are founded. Just as Inuit conflict management is seen to be founded upon the competitive ethic within their society, closely linked with the condition of their environment, so, too, does the Core Conception illustrate the particular social reality with which it is associated.

That the rule of law is a distinct and autonomous part of social life is an idea that lies at the very base of the Core Conception. Like the components of a modern piece of technology, law is seen as a separate and necessary part of total modern society. Law is seen as having an identifiable structure and as performing specific tasks. It can be separated from the other institutions of society and its behavior and

performance can be separately observed and studied. The rule of law is seen to achieve order through a combination of rule, reason, or purpose and power. It can be "located" in society by reference to the action of distinctly legal groups and structures, for example, courts and a specialized legal profession. Laws are articulated, normative terms are clearly enunciated, there exists a catalogue of rules, and legal life is thought about in terms of rules. Law is distinguished from other arenas or social action such as the marketplace or from certain social structures, especially the state, with which, of course, it is related. Law is said to regulate the market and protect the individual from the state.

The Core Conception sees law as a technique of normative ordering: it is purposive social control through rules. It is the task of the legal order to formulate, promulgate, and apply rules which are designed to govern social behavior. Modern law is contrasted to the normative systems of traditional society whose systems operate through a number of particularist controls which are defined and maintained by primary social groups or associations such as the lineage, clan, family, tribe, or club. Normative expectations and patterns of conduct are reinforced or monitored by individuals occupying status roles within typical hierarchical structures. As well, normative prescription and sanction varies with geographic place and social situation. Traditional law's specificity with regard to status, roles, and so on and its circumscribed jurisdiction in this instance can be contrasted to modern law. The consistent and universal application of general rules is desired in modern law. Formulated, promulgated, and applied by specialized agencies such as the courts, its personnel, the legislatures, the police, and so on,

these rules apply regardless of regional, local, cultural, or social distinctions. Individuals are formally treated and considered as equals; this formal equality is prized and guaranteed by rights proclaimed by the law and is enforced by procedure.

The particularism and specificity of traditional law or social ordering is, therefore, contrasted to the universality and homogeneity of modern law. It is out of this notion of a universal and homogenous law that the idea of an autonomous law emerges - autonomy from other societal sources of normative order. Under a regime of the rule of law the rules which govern social life are not determined by, though they may be derived from, the village, tribe, church, family, or association. The modern legal system as a unifying and superior social entity which replaces (and to some extent absorbs) traditional sources of social control. The modern legal system is thus seen as a social entity in itself and therefore does not derive its rules from other entities which have been the traditional sources of social control. Rules derived from traditional sources are re-institutionalized (cf. Bohannan 1965), and the system achieves universality through its commitment to a regime of general rules that are binding on all within the society (Unger 1976: 69). Rules for modern law and the legal order are also valued for their instrumental utility in producing consciously chosen ends; law is seen as social control consciously designed to achieve specific purposes. The legal order and its law is seen as a rational process, and rationality means purposiveness. Hence, the law is also highly predictable and reliable. The concept of purposiveness further highlights the contrast between modern law and traditional law. Another basic assumption

held by the Core Conception is that the prescriptions of traditional society are shaped from history and custom, and not by conscious design. Thus, says Trubek (1972a: 5), not only does modern law free man from the grip of traditional norms and values but it allows him to consciously shape the world in which he lives.

The Core Conception as Trubek describes it expresses some ambiguity about the relationship between modern law and the state. Law is seen as a means of restraining the power of the state yet simultaneously the rise of modern law is seen as contributing to the strength of the state. Trubek points out that "when national law grants men rights and immunities, they can escape from the grip of village and tribe" (1972a: 6; Galanter 1966: 162). State power derived in this way weakens and replaces the foci of traditional authority. This strengthens the state and modern law thus becomes the instrument through which state power replaces communal authority. Essentially, law and the legal order is created by the state - it is the state that has created the system of rules, courts, and associated institutions that are synonymous with modern law. The existence of this system through its claims of rationality, universality, autonomy, and purposiveness also strengthens the state. The legal system appeals to reason and equity which, for the most part, are valued in any political culture, and it thereby enhances the state's legitimacy and thus also its effective power. As it legitimizes the state, modern Formal law is in turn "backed" by the state as it imposes specific substantive norms. Purposive law or instrumentally rational law seeks to increase the effectiveness and penetration of official rules: an increase in the effectiveness or instrumental capa-

bility of the rules of law is tantamount to an increase in the penetration of society (Friedman 1969: 43) which ensures wider participation in the formation of social norms, greater synchrony between means and ends, and a reinforcement against state interference by the endorsement and preservation of individual rights. A desired end is an increase in the instrumental capability of the legal system; the more law becomes a mechanism to advance in a rational way toward specified goals (cf. Burman and Harrell-Bond 1979: 35, 37 ff.), the more effective it will become. This can be achieved in the field of education, for example, which is considered a strategic area in which teaching methods and curricula can be designed to increase the purposiveness of the legal system.

The Core Conception of law also recognizes that law restrains the state - law is distinguished from power. Law as a system of social control has specific characteristics that differentiates it (supposedly) from pure power because, as Weber said, "power has its reasons that reason cannot understand". Legality of "principled adjudication" (Trubek 1972a: 8) is said to eliminate arbitrary exercises of state power. This again suggests that the legal order is somehow autonomous since to contrain the state it must be autonomous from it, as well, of course, from other traditional sources of normative order. The roles of the independent judiciary, judicial review, and constitutionalism are seen as techniques and methods for securing such autonomy. Law as well is identified with liberal society and democracy - the growth of the modern legal order is clearly a part of such liberal goals as wider participation in the formation of social norms and the guarantee of specific individual rights against state interference.

Summarizing, the Core Conception of law in modern liberal society has the following characteristics:

1. Law is separated from politics. Characteristically, the system proclaims the independence of the judiciary and draws a sharp line between legislative and judicial functions.

2. The legal order espouses the "model of rules". A focus on rules helps enforce a measure of official accountability; at the same time, it limits both the creativity of legal institutions and the risk of their intrusion into the political domain.

3. "Procedure is the heart of the law". Regularity and fairness, not substantive justice, are the first ends and the main competence of the legal order.

4. "Fidelity to law" is understood as strict obedience to the rules of positive law. Criticism of existing laws must be channeled through the political process. (Nonet and Selznick 1978: 54; Galanter 1966: 154-157)

The genesis of therule of law or the legal order can be explained by briefly considering the historical relationship between the rise of capitalism and political conditions in Europe. This, of course, is the subject of Max Weber's analysis.

To begin with, a mutual relationship between political and legal structures is assumed; hence, the legal order could only emerge under certain political conditions. In essence, the legal order was closely linked to the rise of the modern bureaucratic state, yet at the same time the modern state itself was dependent upon a legal system such as that represented by the rule of law. Closely connected with this almost symbiotic relationship are Weber's ideal types of political systems or forms of domination, which in turn are construed as forms of legitimation. Members of a social organization may treat demands as legitimate because (a) in one instance they are issued in accordance with immutable

custom, (b) in another instance because they are issued by an individual with extraordinary characteristics (charisma), or finally, (c) because they are in conformity with rational or legal enactments (Trubek 1972b: 732). Since legal decisions are a part of the total structure of domination, they, like the actions of the rulers themselves, must be legitimated.

Law may be associated with these three types of domination (a-c) and each type has a characteristic form of "judicial process" which provides the basis for the legitimation of "legal" decisions. Under traditional domination in interactional or customary law, decision-making is empirical, or case-by-case, and is based on immutable custom or tradition. Under charismatic domination in bureaucratic or regulatory law, legal decisions are accepted as binding because they originate from the charismatic leader and the process similarly assumes a case-by-case or *ad hoc* procedure. In these two types of domination and law, "law" is legitimated by something extrinsic to itself, such as religion. The modern legal order and its rule of law (as a type of law), as rational law, becomes its own legitimating principle and thus becomes the basis of legal or legitimate domination (Trubek 1972b: 732).

There is also a close relationship between the types of domination, the types of law, and the types or rationality (or irrationality) that a system may exhibit. The following prevails in the legal order (following the summary of the Core Conception):

(a) established norms of general application,

(b) a body of law as a consistent system of abstract rules administered in terms of only those rules within a specific jurisdiction,

(c) a superior or leader who is himself subject to the law, and,

(d) obedience to the law and not to some other form of social ordering.

Thus, only formal rationality can maintain a consistent system of abstract rules characteristic of legal domination. No other types of law will generate a body of norms and still guarantee they will determine the outcome of legal decisions (Trubek 1972b: 733). Law may be formally or substantively irrational, or formally or substantively rational (ibid., 729). Formality means "employing criteria of decision intrinsic to the legal system" and thus measures the degree of systemic autonomy, while rationality means "following some criteria of decision which is applicable to all like cases" and this measures the generality and universality of the rules employed by the system. Therefore, formal rationality is rational to the extent that it relies on some justification that transcends the particular case and is based on pre-existing unambiguous rules (ibid., 730), and it is formal insofar as the criteria of decision are intrinsic to the legal system. This system is logical to the extent that rules or principles are constructed by logical systematization where decisions on cases are reached by processes of deductive logic proceeding from previously established principles. In this law-type both the autonomy and generality of legal norms are high (Trubek 1972b: Table I).

Other forms of law, or other types, differ in their ability to "generate a system of general rules". The decisions and results of formally irrational law (i.e. prophecy or revelation), as well as substantive irrationality (i.e. case-by-case treatment), are unpredictable and

do not follow general rules. In the case of substantive rationality, law is governed by rules but merely in the sense that they are derived from some body of thought outside the law itself, for example, religion, ethical philosophy, traditional morality, and so on. This type of law seeks to achieve particular and expedient results set forth and determined by the values of this extrinsic set of principles. As a consequence, these types of law display a low degree of autonomy, a low degree of generality of rules or both. As a result, it is hard to predict the types of decisions they will reach (Trubek 1972b: 729-730).

Formally rational law is a necessary ingredient to a situation in which domination is to be rationally legitimated. By the same token, other forms of legitimation or domination discourage the rise of rational law. As Trubek, drawing from Weber, states, traditionalism places serious obstacles in the way of formal and rational law (ibid., 734). In traditional society legitimacy is based on adherence to traditional principles where successful domination merely requires the maintenance of the economic welfare and well-being of those being dominated. Hence in Inuit society, "secular leadership is only followed when it is to one's social and economic benefit, and the office holder remains leader only as long as he benefits his followers" (Graburn 1969: 48). Indeed, "a charismatic leader has to prove his qualifications for leadership anew every day..." (Mommsen 1974: 78). Traditional and charsimatic leadership and domination (and authority) is considered irrational in terms of the world view of legal formalism.

Unlike other types of law, the modern legal order has developed bodies of rules which are applied through formal procedures which guaran-

tee that the rules will be followed in all cases. For these reasons the legal order curbs the arbitrary action of the ruling groups and is as a result *predictable*. In terms of economic activity, law of this type reduces one element of economic uncertainty. Weber, for instance, talked about economic rationality and likewise of irrationality. The calculability of the legal order, Weber said, is its major contribution to capitalist economic activity:

> The rationalization and systematization of the law in general and...the increasing calculability of the functioning of the legal process in particular, constituted one of the most important conditions for the existence of...capitalistic enterprise, which cannot do without legal security (quoted from *Economy and Society* in Trubek 1972b: 740).

Unfortunately, as Trubek notes, "Weber never worked out in detail a model of capitalist production which might explain why legal calculability was so important to capitalist development" (ibid., 740).

There are difficulties, however, with a law or legal system that is formal rational:

> Weber drew a distinction between "law" and "administration". Administration is government "pursuing concrete objectives of a political, ethical and utilitarian" or other kind. Government only becomes "law" when the government promulgates general rules, as in legislation. Substantively rational justice is associated with administration rather than law, in this latter sense. Weber says that although "systems of justice can well be rational in the sense of adherence to fixed principles, it is not so in the sense of a logical rationality of its modes of thought but rather in the sense of the pursuit of substantive principles of *social justice*". Systems of this type "refuse to be bound by formal rules...they are all confronted by the inevitable conflict between an abstract formalism of legal certainty and their desire to reach substantive goals" (Trubek 1972b: 734, note 24).

The consequence is clear: there is a contradiction between legal rationalism of the logically formal kind, and the legal system's creative capacity to generate the new substantive concepts and institutions that are required by changing social, political, and economic conditions. Unhappiness with modern Formal law stems from its inability to render social justice by acting in a substantively rational manner. In modern law there is a very real conflict between legislation and adjudication, that is, "government" and "judge"-made law. It is based on this fundamental contradiction: while the legal order seeks to increase the instrumental capability of the rules of law (thereby weakening and replacing traditional authority and traditional sources of social control), it tends to affirm the state as the only valid source of goals (Trubek 1972a: 20; Unger 1976: 200), and thereby its neutrality and autonomy, and certainly the universality of its rules tends to be undermined as well. The legal system is thus threatened with becoming the instrument of state power. Reliance upon the state for goals in turn contributes to the law's inability to render social justice - "when the range of impermissible inequalities among social situations expands, the need for individualized treatment grows correspondingly" (Unger 1976: 198) *so that* "the decline in the distinctiveness of legal reasoning is connected with the need administrators and judges have of reaching out to the substantive ideals of different groups, of drawing upon a conventional morality or a dominant tradition" (ibid., 200). Leniency, flexibility, and "special effort" in the guise of fairness by the legal order produces instead "an unstable oscillation between generalizing rules and *ad hoc* decisions" (Unger 1975: 99). Contradicting the fundamental

claims of the Core Conception therefore, these substantivist tendencies pull in the direction of particularism and specificity, abhored by the rule of law, and are clearly antithetical to the basis of its legitimacy (though a legal order can partially palliate this dilemma and bridge the contradiction by instituting a decision which is, in effect, substantive, such as the native jury system). That the legal order treads on thin ice is clear enough: if the tendency is towards substantive rationality, the state cannot be considered as a valid source of goals and if such be the case, the state's legitimacy is likewise called into question (Unger 1976: 174).

Too complex to be considered here (and not really part of the topic) is that body of literature that deals with "the twilight of the nation state" and "the withering away of the state" - the logical conclusion of the discussion above. In the main, the problem seems to lie with the failure of the rule of law to deal with discretion and the uncertain place of a substantive theory of justice in discretionary adjudication *within a formalist framework.* It would appear that "modern law reflects the consciousness of a society whose ideals and social structure are in conflict" (Trubek 1977: 541). More to the point however, "the ideology of liberal society values social equality, individual autonomy, and fraternity, yet the social system creates and strengthens stratification, permits domination, and dissolves the ties of community...as members of a liberal society, we embrace the ideals yet are unaware of their negation" (ibid.). It seems to be law's task to mediate the apparent tensions between social ideals and structure, and to maintain the state's legitimacy despite the challenge to its own ideals.

Summary: The Core Conception

Social relationships in complex society are considered simplex, that is, society is assumed to be composed of atomized individuals instrumentally pursuing single, narrowly defined, selfish goals. Relationships between individuals are neither long-term nor enduring. While conflict may be endemic, disputes are relatively simple, superficial, and quickly forgotten. The paradigm for legal regulation is "interaction among strangers", where all the individuals in society are considered formally (that is legally) equal. Disputants tend to be relatively passive and give deference to professional representatives (lawyers, prosecutors). The norms involved are universalistic, clear, rigid, and consistent. Decisions generally involve the ordering of transfers of money, and are enforced immediately and with finality. A key feature of modern court litigation is the translation of wrongs and duties owed into money-equivalents, and there is little if any correspondence with the norms or values of specific groups subject to the law. With a high level of technological competence within the society and real property as a commodity (where contractual relationships are actively and enthusiastically sought), the "interaction among strangers" paradigm is perpetually reinforced (Abel 1979: 171-174; Unger 1976: 52-53, 66-69; Feeley 1979: 278-290).

Conclusion

Condensing several complex bodies of scholarly work as that represented by Weber, Unger and others, into a few relatively concise gener-

alizations, necessarily involves some oversimplification and arbitrariness regarding issues and details of considerable importance. The aim of this chapter has been to present two types of law in a manner which contrasts one with the other. The importance of understanding and analyzing the law-ways or legal systems of various groups as they operate in particular cultural and societal contexts is clear enough. The law of a people, or the legal system of a society, must be investigated in the context of its political, economic, and religious systems, as well as within the social structure of interpersonal and inter-group relations. Law can best be studied through an analysis of the procedures that deal with the resolution of disputes, or - in a broader perspective - with the management of conflict over time. In order to render a valid report on the law of a people, the cognitive categories by which the people whose law-ways are to be studied structure their ideas of wrongs and their ideas of forms and procedures of redress, must be ascertained. In the case of the Inuit it is clear that the way they manage their disputes has a great deal to do with their adaptation to the physical environment. Accordingly, research of dispute settlement or management "in context" should pay particular attention to the following variables:

(a) kinds of injury requiring redress that a particular community or group recognizes,

(b) types of adjudicating or mediating agents operating in that community,

(c) conditions under which particular disputes end in compromise or adjudication,

(d) procedures taken for each type of dispute under various conditions,

(e) types of sanctions or reactions applied and applicable,

(f) enforcement, if any, of decisions by customary officials, if any,

(g) exo-systemic functions and effects that attach to legal processes (this involves looking into the effects of conflict management, for example, on social, economic, and political relationships between the parties involved and their supporters), and

(h) interaction of customary methods of dispute settlement with the official law and court system.

Investigations of these variables for any "semi-autonomous" social group found within a polyethnic nation may suggest how and to what extent the methods and goals of modern Formal law are incompatible with those of the group. Something which cannot be explored here is the possibility of a "jurisprudence of insurgency", where the basis of such action would be founded upon an evaluation of these variables. The rule of (Formal) law is incompatible, for example, with the Inuit's own "institutions" in that relationships among the Inuit - despite Hoebel's postulates - are *not* as those between strangers, but rather between mutual dependents. Nor are the inuit or Dene (yet) completely industrialized: contractual relationships based on concepts of real property are not yet a part of Inuit or Dene society and culture. Yet the modern court system, its laws, and its procedures - whose genesis was closely related to the emergence of concepts of contract and property - seeks to adjudicate "crimes" where none exist and rectify wrongs that then alienate individuals from the collectivity. The Inuit serve as a useful example and reminder of how detailed, complex and interwoven their way of life is with things that ultimately become "crimes" by the white man's law.

The ponderous description of the rule of law, enshrined within a "core conception", may not reflect the subtleties and nuances of the modern court system and its catalogue of rules, but it does give greater depth to the previous discussion on modernization and the imposition of law. In considering an anthropology of law in complex society, we are concerned with the *motives* and the *effects* of domination and imposition. How modern Formal law *operates* ought to be the primary concern of the ethnographer before he or she embarks on a description telling us how incompatible or how differentially incorporated the institutions of "society's segments" are.

Close scrutiny reveals inherent contradictions in the system, such as that between logical and substantive rationality, a situation which has produced a social reality different from cherished beliefs to which we cling desperately. We should submit the basic assumption of our legal system, that is, the homogeneity of our society to anthropological scrutiny. We already know that in our society only a very small portion of the disputes between people are settled by courts (it is a false comparison, for example, to contrast dispute settlement mechanisms in traditional societies with appelate courts and not with the magistrate courts in our society). There is also, one may add here by way of caveat, the false problem of distinguishing between the sociology of law, the study of law in traditional society. *This creates the false impression that what we observe in traditional society does not apply to us.*

The next chapter brings to conclusion this study by first considering what have been the political ramifications of a formal logical rationality in native-white relations, and finally, by asserting again that

past studies in the anthropology of law and the data they have produced are gaining importance in helping to address some of the law-related issues of our complex, but not-as-complex-as-we-think, society.

CHAPTER 4

FORMALISM RECONSIDERED

Introduction

It is within the context of a deteriorating biobehavioral equilibrium in the north that the dominant legal order is founded and operates. Prior to 1873 law enforcement and the concern for legal administration lay almost exclusively with the Factors and other employees of the Hudson's Bay Company by virtue of their Charter, given to them by Charles II of England in 1670. In 1873 legislation passed by the Dominion government (the 1873 Act Relating to the Northwest Territories, 36 Victoria) empowered the authorities "to make and establish such ordinances as may be necessary for (the) peace, order and good government..." (Cumming and Mickenberg 1972: 156). In that year a judiciary composed of a number of magistrates was created; in 1874 the newly established North West Mounted Police with its Commissioner and Superintendent was ordered to act in the capacity of Justice of the Peace. In 1920 the force was renamed the Royal Canadian Mounted Police, and continued to conduct its affairs as it had in the past. By the late 1940's, however, there was a growing awareness that law enforcement had become far more complex than it had been in the past primarily because "the North (had) become more civilized and as a result, the work (policing) is not much different from the South". This was attributed to an "increasing shift in population from camps to the settlements" (Finkler 1976: 15).

In 1887 Parliament proclaimed that English criminal and civil law as it was in 1870 (R.S.C. 1887, c.50) would be in effect in the North-

west Territories, even though the laws of England by the H.B.C. Charter of 1670 were still in effect in "Rupert's Land" which became incorporated into the Dominion of Canada in 1870. The 1887 statute, therefore, superseded the 1670 law, which then remained in effect, despite minor amendments, until 1960. Exclusive of Territorial Ordinances, the 1960 legislation (S.C. 1960, c.20) made all laws equally applicable to the native inhabitants. Until 1955, offenses fell under the jurisdiction of the magistrates installed in 1873 - more severe offenses such as homicide came under the jurisdiction of the Alberta Supreme Court.

In 1955 provision was made for the first time for the appointment for a full-time Superior Court Judge of the newly-created Territorial Court of the Northwest Territories (by the authority of the N.W.T. Act, R.S.C. 1952, c.331). The N.W.T. Act of 1952 as well as subsequent ordinances also made provisions for the establishment of the Magistrate's Court and Justice of the Peace Court which furthermore absolved the R.C.M.P. from JP capacity and duty. In 1972 the Territorial Court was named the Supreme Court and thus came permanently under the administration of the Government of the Northwest Territories. The structure and function of the new court differed little from the other Supreme Courts of the various provinces. In 1971 a Legal Aid Committee was established to serve all three levels of courts, and in 1973 the first members of an Interpreter Corps under the auspices of the Department of Information "graduated" from training.

The last two decades have, therefore, seen the establishment and full implementation of three levels of courts dealing with three basic forms of law. Federal enactments and legislation such as the (a) Crim-

inal Code, (b) Territorial Ordinances such as Game and Liquor, and (c) English common law as in force in 1870 (with amendments) provide the substantive and procedural underpinnings for cases argued in defense and prosecution. Both the Supreme Courts of Canada and of the Northwest Territories argue constitutional cases that involve, among other things, the Canadian Bill of Rights, the Indian Act - and by implication - the British North America Act.

Sources for the Challenge to Formal Rationality

Historically, section 91(24) of the British North America Act (1867) and the Indian Act (1951) are agreements pertaining to the relinquishment or extinguishment of aboriginal title (not rights) to land in exchange for protected reservations and "special" rights to hunt and fish as has been the tradition from time immemorial. The Indian Act supposedly reinforced the special protection offered to Indians and their property and furthermore offered assistance or assurance of assistance for the eventual integration and assimilation of the Indian into white society through enfranchisement, the ultimate goal. Section 110 of the Indian Act states, however, that an Indian having chosen to enfranchise is, in effect, no longer an Indian. It has since been established that a statute (the Indian Act) cannot control the definition of terms contained in a Constitution; hence, an enfranchised Indian, excluded from the provisions of the Indian Act, is still entitled for benefit (or otherwise) from treaty or aboriginal rights, legislated or not. Similarly, the Inuit are excluded from the provisions of the Indian Act by virtue of section 4(1) which states that Eskimos are not Indians, but

within the meaning of section 91(24) of the B.N.A. Act, can be so considered under the term "aboriginals". Nevertheless, such conflicting definitions, though not irresolvable, led Judge Sissons to state that the Royal Proclamation of 1763 was the only "bill of rights" the Eskimos have as Eskimos (*in* Morrow 1967: 260-261). This was before the Canadian Bill of Rights became law. Sisson's remark, therefore, reflects a pessimistic attitude towards the Indian Act, again, despite the redeeming clauses contained in the B.N.A. Act. There is basic dissatisfaction with the Indian Act; as M'Gonigle (1977: 307) pointed out:

> ...the Act is to be protective of a way of life that is different from that of the dominant culture and it is also to foster the Indian's "development" - a concept clearly antithetical to racial paternalism. The reserves and the special rights are central to the protection and development. This is the "mischief" of the Act.

Natives and non-natives are painfully aware of the mischief of paternalism:

> The Indian Act regulates almost totally the life-styles, both as individuals and communities, of those 250,000 status Indians on reserves. The misguided policy behind this legislation is twofold: first, the Indian is viewed as incapable of managing his own affairs, and therefore benevolent paternalism is essential; and secondly the values, culture and life-styles of native persons are looked upon as inferior to those of non-native society. It is apparent, therefore, that the Indian Act serves as a mechanism to assimilate the native person into non-native society.
>
> The effect of the Indian Act upon four generations has been to virtually destroy Indian culture and identity. The colonial administration and legal framework on the reserve has rigorously imposed the non-native at every level of significant community and individual decision-making, such as in respect to local government and the use of monies or the use of lands (Cumming 1973: 243).

This brings into the discussion the Bill of Rights, for there is some speculation that its application was meant to clarify some of the issues raised by the Indian Act, among other issues, in recognition of the fact that section 91(24) of the B.N.A. Act was, alternately, over- and under-inclusive in its classification. Yet the Bill of Rights presented difficulties of an entirely different sort - the meaning of discrimination and equality before the law, something that is still unresolved (Lyons 1976). Serious conflict between it and the Indian Act first emerged in the infamous Drybones decision (1970, 3 C.C.C. 355; S.C.R. 282). In this case, equality before the law (section 1.b. of the Bill of Rights) was found to have been denied because Drybones was treated more "harshly" (section 2.b. of the Bill of Rights) under the Indian Act (section 94.b.) than were citizens in general under provincial legislation (i.e. section 83 of the Alberta Liquor Control Act) or even under the Territorial Liquor Ordinance. Application of the Bill of Rights, though itself considered a statute as is the Indian Act, thus overturned Drybones' conviction and rendered inoperative the offending provision of the Indian Act. As in subsequent cases, the seemingly irresolvable issue is the question of whether a piece of federal legislation, an act of Parliament, can be rendered inoperative by the capacity of another valid legislative power of Parliament. Some decisions considered the Bill of Rights to prevail in situations of irreconcilable conflict (or vice-versa, cf. the *non obstante* clause), yet all were careful to preserve its integrity - not to reduce it to a mere interpretive statute.

It is apparent that problems of discrimination and equality before the law (denial of latter invokes former) contribute to judicial confusion. There is a considerable body of legal literature dealing with these issues (e.g. Sanders 1974; Leigh 1970; Hogg 1974; McDonald 1977; Kelley 1974). "Intended as a shield to protect minority groups such as Indians, it (the Bill of Rights) was almost used as a club against them"; indeed, the egalitarian principles espoused in the Bill of Rights are quite contrary to the differential treatment accorded minority groups such as Indians (i.e. the Indian Act), based on racial or ethnic identity. Consequently, concerning the Indian Act, "the argument that any legislation or policy which sets a people apart, regardless of the purpose it is intended to serve, is necessarily a denial of equality and therefore, socially injurious, confuses protection with discrimination" (Reasons 1975: 33, see also M'Gonigle 1977). A further problem, not unrelated, is that

> The Canadian Bill of Rights refers to "the right of the individual to equality before the law and the protection of the law", but equal application of laws can accentuate injustices when applied to persons who are unequal in condition and opportunity. In such instances, law can become the oppressor rather than the protector, and government action becomes unbearably bureaucratic (Schmeiser 1968: 19).

Particularly for the natives, "if laws which were made by whites on the basis of *their* cultural standards are applied to natives with contrasting and/or conflicting standards, the 'equal application' of such laws is manifestly oppressive" (Reasons 1978: 380). It would appear, then, that neither the Indian Act, nor the Canadian Bill of Rights clarify, resolve or otherwise conclude any of the historical or socio-cultural issues that either of them raise. Attempts at resolution

have also involved the search for legislative intent and assessment of judicial motive - after all, it is difficult to legislate irrespective of race or sex when, for example, it is race that has to be defined and its definition justified (M'Gonigle 1977: 300, op. cit. note 43; 306), given the vast sociological literature on institutionalized racism, prejudice, discrimination, and minority oppression.

There is also confusion between the Theory of Aboriginal Rights and the Law of Treaties in application (following the terminology of Cumming and Mickenberg 1972: 13, 53). Concerning the legal nature of treaties, conflicts often resemble those that arise between the Bill of Rights and the Indian Act. Section 88 of the Indian Act, for example, states: "Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in this province...". The courts have, alternately, interpreted this provision to mean the prevalence of section 88 over conflicting provincial legislation, or the prevalence of federal legislation over conflicting treaty provisions (e.g. the doctrine of paramouncy). The source of confusion, surprisingly, is that "Indian treaties have not formally been implemented by the appropriate provincial or federal legislation...Notwithstanding this non-implementation, the Canadian courts have considered the various treaties with the Indians to constitute obligations enforceable at law" (ibid., 55). Are treaties and issues of aboriginal rights mutually exclusive judicial categories? Aboriginal rights, most assuredly, have legal content. For example, hunting and fishing rights guaranteed by treaty but unilaterally abrogated, mistakenly or deliber-

ately, by such statutes as the Games Act, Migratory Birds Act, Territorial Game Ordinances, Wildlife Act, and the Natural Resources Agreement, to name but several, are subject to judicial discretion in deciding prevalence. There are no *non obstante* clauses with the consequence that literally countless treaty infringements or so-called "unfulfilled promises" are perennially submitted for judicial resolution. Indian treaties have been judicially interpreted as enforceable promises and bilateral agreements, and as legislative acts since, for the most part, they *predate* the provisions contained within the Indian Act. While they could be viewed as private law contract negotiations, considering that the language of real property is used, as what can take place between two or more independent nations, they have not been ratified (implemented) by provincial or federal legislation. The unwillingness of a legislative body to ratify an Indian treaty would be understandable since ratification is tantamount to recognizing various native petitions for "Nationhood" status (i.e. Watkins, supra) based on such criteria as principles of public international law. Viewing the numbered treaties (1 to 11) as contract agreements might also require their future renegotiation since contracts can be unilaterally broken, where breach of contract can be based upon mistake, undue influence, signing under duress, and doubts about informed consent (also, forgeries have been discovered in some treaty cases). As has been noted, "the possible range of methods by which the legality of treaties is challengeable in Canada is a field of law which is largely unexplored" (Cumming and Mickenberg 1972: 56). The point is that they can be challenged.

To be noted is that, for whatever reasons, some native groups have not chosen to renegotiate the treaties, even though this option is open to them (ibid., 127). This suggests that treaties and aboriginal rights are distinguished, both by natives and the government, in quite explicit terms. That eleven treaties have been signed suggests the *ipso facto* recognition and existence of aboriginal rights to title (i.e. fee simple) or usufructuary rights. The purpose of the treaties was to extinguish aboriginal title and establish compensation. One source of aboriginal rights in Canada is the Royal Proclamation of 1763 (Narvey 1974); Cumming and Mickenberg (1972: 31) have concluded, upon detailed study of British and Canadian judicial decisions, that

> ...a strong case can be made that the law of aboriginal rights applies throughout Canada and that in those areas not covered by the Proclamation of 1763, the (original) source of those rights is the law of nations, now incorporated into the common law of Canada and confirmed by colonial and Canadian executive and legislative policy.

The Dene and the Inuit of the Northwest Territories, in their petition for nationhood status are, as we said before, placing their reliance upon the "law of nations" as their source of rights, since they are not covered by the Proclamation of 1763 and since they have signed virtually no land cession treaties save for Treaty No. 11 (1921) where provisions (questions of land entitlement and reserve allotments) have lain dormant for many decades. At the present time the Brotherhood of the Northwest Territoriesis concerned with fair and equitable compensation for the use and exploitation of the land by others than themselves. There are virtually no treaties in the north, save for the one just mentioned, that have formally extinguished aboriginal title. Particularly

for the Inuit who have never signed any treaties at all, this has led to the granting of leases to corporations by the federal government for exploration and/or excavation *without* consultation or compensation which, in effect, has served to extinguish title unilaterally (cf. Cumming 1973: 250). Use of the land is one thing, but equally, if not more important, is the question of hunting and fishing rights (Cumming and Aalto 1974). An area of conflict, as yet unresolved, is the issue of whether hunting and fishing rights are a part of aboriginal rights generally and whether the Proclamation of 1763 extends to the protection of such rights in the Territories, or elsewhere.

The Proclamation, the Indian Act, and federal and Territorial legislation all stand to conflict with one another in the Northwest Territories. These sources of confusion do little to promote confidence in political negotiation, and are seen instead as symptomatic of contradictions inherent in the theory of liberal formalism in a pluralist social context.

The Rise of Informalism: Towards Responsibility

It would appear from much of the literature that the most appropriate balance between unity and diversity is no diversity at all - at least not for the sake of political expediency. Cultural congruence, the congruency between the "quality" and "quantity" of inter-group interaction and so on seems no longer to be a concern for the rule of law viz a viz its legitimacy based on consensus. Notwithstanding the law's claim to preserve equality, individual autonomy, and to maintain the ties of either friendship or community, the proclivity towards

modernization and development has on more than one occasion demonstrated that the tenets of liberal legalism contain contradictions. Scholars involved in legal development assistance programs have questioned whether the projects which they supported and to which they contributed were, in fact, achieving the goals of individual freedom, social equality, and expanded citizen participation that were claimed (Trubek and Galanter 1974: 1063-1064). Legal change was seen to have little or no effect upon social and economic conditions, and actually deepened inequality, curbed participation, restricted personal freedom, and did not increase material well-being (ibid., 1080). Not only did these realizations undermine development and modernization goal values but significantly drove home the need to rethink the basic validity of the liberal formalist ("legalist") model (the rule of law) itself (ibid., 1080). If the legalist model was wrong or inaccurate in its predictions of a direct relationship between the rule of law and socio-economic prosperity abroad, it could also be wrong at home. The premises that a society must have one law controlling the behavior of all its members, that the uniformity of the law is the desired end, and that automatic submission to the law is required for a successfully integrated and consensus-based industrial society are all premises open to question. Trubek and Galanter, among others, have made it very clear that "many of the rules that make up the total *corpus juris* originate from, and primarily serve, specific groups within society. Moreover, those who apply rules have substantial discretion, and this can be and is applied to favor certain groups and viewpoints". And, in the final analysis, "structural biases in the system can and do lead to systematic discrimination against spe-

cific groups" (Trubek and Galanter 1974: 1081; see also Gluckman op. cit. *in* Schermerhorn 1970: 54). Indeed, the imposition of law over subordinate groups seems to reveal much about the internal contradictions and conflicts in liberal democratic theory: "Indian affairs have been like a miner's canary, warning of the presence of poison gases of discrimination and oppression in American society..." (Svensson 1979: 71). Thus we are told, "because of its inherent structure, the nature of its dominant constituencies [i.e. the rule of law], and its system of values, the nation-state cannot promote development, only dependency" (op. cit. Mazor 1972: 1036).

Clearly, there is a difference between law on the books and law in action, and the difference seems to go somewhat beyond the simple difference or tensions between national and local, formal and informal, and official and popular law. On an even more pessimistic note, we are informed by some commentators that the *theory* of democracy is wrong, that there is a crisis of authority and of legitimacy, and that there is no such thing as "consensus" (Mazor 1972: 1041). A mood of diminished confidence in law has pervaded recent writings, say Nonet and Selznick (1978: 4), where alarm over the erosion of authority and "the breakdown of law and order is echoed in a renewed radical attack that stresses the impotence and corruption of the legal order". The essays contained in Wolff (1971) reflect the distemper of the 1960's and portend a continuing widening of the contradictions. The rule of law, fraught with inconsistency and contradiction, finds itself unable to respond to the basic demands of social justice. Furthermore,

> The "rule of law" in modern society is no less authoritarian than the rule of men in premodern society; it enforces the mal-distribution of wealth and power as of old, but it does this in such complicated and indirect ways as to leave the observer bewildered. What was direct rule is now indirect rule. What was personal rule is now impersonal. What was visible is now mysterious. What was obvious exploitation when the peasant gave half his produce to the lord is now the product of a complex market society enforced by a library of statutes...In slavery, the feudal order, the colonial system, deception and patronization are the minor modes of control; force is the major one. In the modern world of liberal capitalism..force is held in reserve while.."a multitude of moral teachers, counselors, and bewilderers separate the exploited from those in power". In this multitude, the books of law are among the most formidable bewilderers (Wolff 1971: 18-19).

The socialization process inherent in the rule of law, as seen from the perspective of diminished confidence, is seen to "degenerate" into more severe attempts at resocialization: when the premises upon which the rule of law is founded are increasingly called into question, attempts to reestablish legitimacy are made in economic terms. When even these attempts fail, disruptive and antisocial behavior, or civil disobedience, is met with repressive action. For the critics, "civil disobedience is thereby revealed to be, not a scourge, nor a problem, but a sign 'of the inner instability and vulnerability of existing governments and legal systems'" (Mazor 1972: 1041). Even Stanley Diamond goes one step further, declaring that not civil disobedience, not violence, but *the rule of law itself* is a "chronic symptom of the disorder of institutions" (op. cit. *in* Mazor 1972: 1046). Not only are legal institutions criticized, but so is liberal legalism itself.

The increase in civil disobedience and the rising militancy of special interest groups is increasingly being met by encouragement from *within* the legal profession. Trubek (1977: 561, ff.) argues that social advocacy and public interest law have been inspired by the confluence of intellectual changes within the legal profession and by popular recognition of the manipulation of legal processes by powerful groups in the society - in fact, "public interest law is basically a movement in the legal elite" (ibid., 564). Given these internal and external pressures whose importance lies in initiating institutional change from within, several conclusions can be reached, whose implications for the study of law and anthropology are sketched below:

1. Inconsistency and contradiction inherent in the rule of law and legal order are brought to the foreground when the interests and ideologies of superordinate and subordinate group goals are discrepant. The incongruency can be understood by considering the tensions between ideals and reality in both the law and social and political life.

2. These tensions give rise to internal and external pressures, as mentioned above, in an attempt to close the gap between reality and articulated ideals encapsulated in the rule of law. The response has been an "erosion" of the rule of law, or formalism, predicated upon the recognition that relationships between groups and individuals within a society or nation must be treated as semi-autonomous social fields, as Moore has defined it, with their own rule-generating and enforcing capacities, but necessarily linked to the wider world order (Collier 1975). This emancipatory view is a feature of the new legal "informalism" (Trubek 1977).

The rise of "informalism" as a viable response to the crises of authority and legitimacy simply draws attention to the fact that Formalism has failed to develop an adequate theory of substantive justice and discretionary adjudication and emphasizes that in order to achieve social equality, "subgroup" autonomy, and to maintain traditional mutual support systems, the model of rules must be replaced.

Nonet and Selznick's (1978: 92-93) "responsive law" encourages criticism of rules and invokes a pluralistic model of the group structure of society, thus underlining and affirming the legitimacy of social conflict, while at the same time drawing attention to the multiplicity and diffuseness of the sources of law (ibid., 95). That customary law is a competing ideology has already been mentioned several times. Plurality, in the context of responsive law, "is most apparent where the law's primary role is to lend authority to private institutional arrangements..." (ibid., 95). Thus, the western liberal legal tradition with its emphasis on cases seemingly isolated from cultural and social contexts and its clear preference for decisions at times remote, irrelevant, and indifferent to the consequences, has led to a concerted effort and search by scholars of the socio-legal tradition for alternative models of dispute settlement. The formal structures of law themselves are seen to threaten basic values of the dominant group. Trubek's informal and public interest law, and Nonet and Selznick's responsive or "competent" law suggest an examination of *anthropological studies* that describe modes of dispute management more fully attuned to the contexts out of which disputes arise and more fully are committed to reestablishing social and other relationships rather than severing them. The work of Danzig (1973), Danzig and Lowy (1975), Nader (1975), Nader and Singer (1976), Merry (1979), Mileski (1971) and Feeley (1979) form part of a rapidly growing tradition that seeks reinforcement now not only from sociological jurisprudence (i.e. Fuller 1971a, b) but as well other disciplines in the social sciences (i.e. Tiruchelvam 1978; Spence 1979; and Berman 1969). These describe "the very diverse attempts to introduce

'tribal', informal, non-coercive, unofficial dispute institutions into modern society", through "movements to reform the legal systems of late capitalism by introducing juvenile, family, small claims, and - of late - neighbourhood courts" (Abel 1979: 175). They can be compared to studies that describe "attempts to withdraw from the world such as utopian or intentional communities in western nations (e.g. the Israeli kibbutz), and efforts to change the world through "popular" judicial institutions such as those found in Russia, China, Chile, Cuba, Sri Lanka, and elsewhere (ibid.).

For modern society, for its law, and as well as for its anthropology, the notion of a fresh start is clear and has asserted itself in many minds. That "we are all Indians" is our reluctant conclusion.

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