LIMITATIONS OF THE CASE-METHOD IN THE STUDY OF TRIBAL LAW

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I

E. Adamson Hoebel is justly honoured for the contribution he made to the study of tribal law by insisting on the recording and study of what he, with the late Karl N. Llewellyn, called "trouble-cases" in their innovative book, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (1941). The fruitfulness of this method was demonstrated also by Hoebel in another book, published at virtually the same time, on *The Political Organization and Law-Ways of the Comanche Indians* (1940), and argued further in his *The Law of Primitive Man* (1954). We may see the form of these studies as emerging partially from the method of case-law in Anglo-American jurisprudence, and here the influence of Llewellyn was probably important. But concentration on specific "cases", "situations", "incidents", *et alia,* was also part of a general tendency in social science from the 1920's onwards: the increasing focus of analysis on untangling the structure of specific situations against the general social background was marked in political science and economics (see *e.g.,* Devons, 1960, 1970) and sociology (see *e.g.,* Gouldner, 1954). I have discussed the general development in social anthropology (Gluckman, 1959, 1965b, 1967).[1]

In the field of tribal law there were other studies similar in pattern to those of Llewellyn's and Hoebel's — Richardson's on the Kiowa appearing in 1940. In Africa, among social anthropologists, the lead in the detailed study of law-suits, in

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terms of date of publication, was given by Epstein (1954), Howell (1954) and Gluckman (1955), and followed, to cite the most prominent books, by Bohannan (1957), Gulliver (1963 and 1971), and Fallers (1969). Pospisil (1958), Berndt (1962) and Meggitt (1962) may be cited as major studies from another part of the world which employed what Pospisil has called "the casuistical approach" (1971). From all regions there have come in the last decade many important articles. I have been citing major studies in tribal law, but of course there were earlier studies in law, as in other fields, in which social anthropologists developed much of their argument from analysis of specific social situations (see citations in Gluckman, 1940); and for tribal law itself, all anthropologists ought here to acknowledge the seminal influence of Malinowski's corpus of work on the Trobriand Islanders, and specifically of his *Crime and Custom in Savage Society* (1926). Malinowski insisted that "most instructive we found the study of life situations which call for a given rule, the manner in which it is handled by the people concerned, the reaction of the community at large, and the consequences of fulfillment or neglect" (summary statement at 1926: 125). But most of these "life-situations" he reported on in other books; and he did not develop the theme, set out in his very short, but very great, book, into a full jurisprudential study of the relation between rule and case; nor did he do so in his "Introduction" to Hogbin's *Law and Order in Polynesia* (1934).

In general anthropological analysis of social systems, and of other fields than law, this study of specific situations was further developed into what I called the "extended-case method" as against the method of "apt illustration", where by "extended-case method" I meant the tracing of the origins of a breach or disagreement backwards in time to see how it emerged, and then pursuing forwards in time the development of social relationships among the persons involved, possibly after adjudication or settlement or ritual reconciliation. This new method was well exhibited in such books as Mitchell (1956), Turner (1957), Middleton (1960), and Van Velsen (1964). I have cited four books listed by Gulliver (1969a: 16-17) as contributing to the development of this method, a judgment with which I agree warmly, though I disagree with some of the conclusions that Gulliver draws from their worth, as I shall shortly expound. As it happens, all four of these anthropologists were pupils of mine, and I worked closely with three of them for many years,

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as teacher and then colleague and in effect condiscipulus, while I did to some extent participate in the development of the specific analysis of the fourth. I mention this to emphasize that I can claim, as a teacher and colleague as well as in terms of my own research,[2] to have cooperated in the increasing use of analysis of law-suits, situations, and extended cases in general, as well as in legal, anthropology. I hope therefore that I will not be accused of opposing "case-law" when I express my disquiet — nay, my dismay — when an anthropologist as good as Gulliver (1969a) and a lawyer as good as Abel (1969) contend that the study of the case, or the dispute, or the conflict, should be the only focus of the study of law. In a number of conferences I have also heard the "dispute" cried up as seemingly alone the key to the study of tribal law, but I cannot give detailed citations as the papers I read were marked "not for publication". In this essay to honour Hoebel (who never went to that extreme) I contend that there are involved here stultifying dangers, as when any useful role becomes a slogan, blocking thought. I shall first cite what Gulliver says, then discuss the problem in general, and end by showing that an actual, very skillful, analysis by Abel, does not observe the rule (note!) he promulgates.

Gulliver, in the essay to which I refer, makes a statement which is initially balanced: "Although understandable in some ways, it nevertheless remains unfortunate, even strange, that there should have been so little interest in and concern for the consequences of dispute settlement and legal action. No doubt this circumstance can be traced in part to preoccupation with disputes themselves and with legal mechanisms and perhaps to an overly legalistic viewpoint among social scientists" (Gulliver, 1969a: 17). I do not consider this statement to have been justified in 1969. What, however, I am concerned about is that Gulliver then immediately loses his balance: for he also suggests "that it may also come from the fruitless concern with what 'law' is, instead of concentrating on what 'law' does" (Gulliver, 1969a: 17). Later (at p. 19), Gulliver writes that he "would think that almost all anthropologists agree that the compilation of a list of laws, rules, norms — a *corpus juris* — is by itself a somewhat arid undertaking. It is most likely to conceal as much as it reveals". Despite the saving phrase, "by itself", this erects a straw-man for a bonfire; and even by itself a list of laws, rules, norms, may be very useful for many purposes and types of analyses, though clearly such a list is

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improved if supported by cases. As I shall argue, indeed, a dispute may not be analyzable save in the background of such a list. But I am more troubled by the earlier statement that it is fruitless to be concerned "with what 'law' is, instead of concentrating on what 'law' does", as if it were possible to do the one without the other.

That statement carries echoes of what it is often alleged that fact-sceptical and rule-sceptical realist lawyers in American jurisprudence said (see Abel, 1969: 579). A more careful reading of the writings of the best of them makes clear that they were arguing that a study of the rules of law alone was inadequate; it was essential also to study the processes by which facts in evidence became facts-in-law, and the processes by which problems of uncertainty not covered clearly by specific rules were met. They also stressed that the cases could not be understood without study of the rules, and of practice. For example, Mr. Justice Frank of the USA, who called himself a "fact-sceptic" as against the "rule-sceptics", in the preface to the sixth printing of his *Law and the Modern Mind* (1949, original 1930), made it clear that he was not saying that the study of rules was not an important part of legal studies:

> I have always endorsed the aim of those, who, following Holmes, point out that the rules (whether made by legislatures or judge-made) are embodiments of social policies, values, ideals, and who argue for that reason, the rules should be recurrently and informedly re-examined. I may add that since, for the last seven years, I have sat on an upper court which concerns itself primarily with the rules and which has little to do with fact-finding, it should be plain that I regard the rules as significant.
>
> But rules, statutory or judge-made, are not self-operative. They are frustrated, inoperative, whenever, due to faulty fact-finding in trial courts, they are applied to non-existent facts. . . .[3]

And Llewellyn, the so-called rule-sceptic, did not in fact deny the significance of rules altogether: he was stressing that attention should be directed to the many legal problems which were not covered clearly by rules, often in changing circumstances, mainly in the rapidly developing field of American contract law.[4] This "uncertainty" restricted, but did not eliminate "predictability" in advising clients on the probable lines of a judicial decision in a particular case. Llewellyn saw this problem as focusing on law as an institutional complex, and on an examination of how "men-at-law" operated the juristic method within the framework of that institutional complex, and perhaps how they ought to operate. He argued (1940: 581)

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that judges and officials "are not wholly free and must not be wholly free. . . ." Two facts are involved, the first "con-concerned with the control, the restraint, the holding down of judges and officials; [and] the other fact is concerned with the allowing to them of a limited degree of freedom and a limited kind of leeway, and the putting on them of a duty to exercise their uttermost skill and judgment within that lee-way". It is in this setting that Llewellyn's theory of rationaliza-tion by judges, as against the "theory that traditional prescrip-tive rule formulations are *the* heavily operative factor in producing court decisions", has to be set. "Rationalization", a term explicitly borrowed from psychology, is parallel with "discrimination" among "rules with reference to their relative significance", *i.e.,* with selection, in order to correlate "fact-situation and outcome . . . [to] reveal *when* courts seize on one rather than another of the available competing premises" (Llewellyn, 1931: 1222f.; for a similar analysis of an African people's courts, see Gluckman, 1955: Chap. V). Judges' art and craft (Llewellyn, 1940) is to be free to be wise and just in selecting the doctrines of law best applicable to a case; and this process has to be understood not in terms of the "vagaries of individuals", but in terms of a judge being a human being in a particular social system (United States), and a lawyer, and a judge, all of which roles affect the operation of the lee-way allowed by rules — as against arbitrariness. This leeway is essential, because society is in flux, typically faster than the law, and this leeway is a means to social ends. Hence there is a probability that "any portion of the law needs re-examina-tion to determine how far it fits the society it purports to serve" (Llewellyn, 1931: 1222 circa).

Llewellyn and, with him and independently of him, Hoebel were fascinated by the juristic method in *The Cheyenne Way* (1941), as Llewellyn was fascinated by the juristic method of the American way. As part of their study of the juristic method, Llewellyn and Hoebel therefore concentrated on how rules were operated by the Cheyenne in the background of their social life, or how rules were created to meet new con-tingencies in that life, as exhibited in "trouble cases". I cite only how the Soldier Chiefs set up a rule for the future that no-one should borrow another's horse without permission, when this caused difficulty (1941: 128). Many other cases in their book show that Llewellyn and Hoebel were working on a triad of (i) "trouble case" — (ii) its setting in Cheyenne

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social life — and (iii) a rule enforced by the "judges" or the specification of a rule changed or a new rule set up for the future (see Moore, 1969: 262, for the same opinion on the book).[5]

It appears to me that work of the fact-sceptics and the rule-sceptics, aside from aiming at improving American law, was a much-needed antidote to what Seagle (1941) described as worship of "Our Lady of the Common Law". But their achievement has to be seen in proper perspective; and it seems unnecessary for anthropologists to go through the same extremes of controversy as were argued in jurisprudence, but rather that we should learn from that experience. I cannot help feeling that it is lamentable that so-called "legal anthropologists" should be so ignorant of those jurisprudential controversies. To alter the citation from Gulliver above, in order to understand what "law" was, is, and is becoming, one has to understand what "law" did and does; and to understand what "law" did and does, one has to understand what "law" was, is, and is becoming. This necessarily takes one outside of the narrow confines of dispute itself. One cannot even record what law does without recording what law is. Beyond this, one must also know the social context and social process of dispute (below, "praxis"). Yet I have seen work by able anthropologists which shows that they have been so excited by what has been achieved ostensibly through the study of cases, that they have overlooked these backgrounds to good analyses; and they have treated the study of dispute as a panacea for all the difficulties in the study of law. In some, it ends with assertions that what might be called "the rules" — what law is — are only manipulatable by the judges, and are not in themselves constraining (*cf.*, Llewellyn, cited above). Gulliver began with something like this approach in his study of the Arusha, his first specialized book on law (Gulliver, 1963: criticised by Gluckman, 1965a and Lange, 1967). By 1969, in the same essay from which I have been citing, he had shifted his stand considerably, despite those general statements. He now has come to acknowledge that rules are significant, particularly if they are seen as effective within a hierarchy (1969a: 20), a theme that I expounded, with acknowledgments to jurisprudence, for anthropology in my study of the judicial process among the Barotse (1955: Chap. VII; see also the later Dworkin, 1967, commenting on Hart's *The Concept of Law,* 1961).[6] And I

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stress that Gulliver has always set his analysis of cases in the context of social life.

In this festschrift, it is with pleasure that I emphasize that though Hoebel stressed that we should study law-suits, he always stressed equally that there was the triad of case-rule-praxis (see above): "Any investigation of a law system will record and make note of the ideal norms — the legal *rules* — for at no point can it be maintained that the ideal norms are without significance. They are guides for action, and more often than not the real norms of behavior coincide with them . . ." (1954: 30).[7] There is also an important premise contained in this assertion that more often than not the real norms of behaviour coincide with the ideal [norms of] legal rules, *i.e.*, that people observe more often than they break the law. Beyond that, in Hoebel's analyses he set out not only the legal postulates and their corollaries (the rules), but he also reports the praxis that informs the law and the settlement of disputes — where by "praxis" I try to sum up environmental, ecological, economic, etc., facts and practice. Hoebel's premise here is the same as that contained in my citation from Frank, where he said that he, following Holmes, considered that ". . . the rules (whether made by legislatures or judge-made) are embodiments of social policies, values, ideals . . .". This is akin to statements cited from Llewellyn. And in 1926 Malinowski, while saying that the study of life situations was "most instructive", considered that the essence of his own analysis was that "law and order arise out of the very processes which they govern" (1926: 122-3); and he stressed that as a reaction against a kind of anthropology that concentrated on the "singular and sensational . . .", he had "started with a description of the ordinary, and not the singular; of the law obeyed and not the law broken; of the permanent currents and tides of their social life and not its adventitious storms", though there were hitches and breakdowns (1926: 73-4). In the relation of obedience and breach, and of rule and praxis, what is critical is conflict between the domains of the law and in the hierarchies of rules in each domain, as well as their vagueness, latitude and elasticity (1926: 98, 100, 123-4).

Of course many complex problems reside in these brief citations, and in the disputation that has occurred around their themes. I am seeking here only to establish that it is inadequate to quote either from the anthropologists Malinowski and Hoebel, or the sceptical lawyers Frank and Llewellyn, one

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such sentence as Llewellyn's (1940: 588) that "the predicabilities and proper lines of work in the judge's office, which transcend individuality . . . can be dug out only by case study", and to take that as representing the whole of the argument. All of these writers stress from their experience, and show in their analyses, that "case study" has to be done in relation to "the ideal norms — the legal *rules*" (Hoebel), the manner in which "law and order arise out of the very processes which they govern" (Malinowski), the fact that rules are "embodiments of social policies, values, ideals" (Frank), within whose leeway[8] the human being who is an American lawyer and judge operates in an organized craft by art in the institution of law to strive, by discrimination, selection and rationalization, to find the wise and just decision (Llewellyn). These processes have to be studied, as have the origins of the case and the effects of the decision in the case on the relationships of the parties involved (in anthropology see Gluckman, 1961, 1967: 370-1; Fallers, 1969: Chap. 8; Gulliver, 1969a), and possible effects on other persons (Gluckman, 1955: 189-90, 1965a: 121-2; Moore, in press).

For in his insistence on studying the prehistory of a particular dispute as crucial, Gulliver (1969a: 17-19; see also his field studies, 1963, 1969b, 1971), overlooks the important fact that when a "law-suit" comes to a court, or to a village moot, or to a conciliator or mediator or arbitrator, it undergoes a "transformation" (Moore, in press),[9] through the shift of the disagreement, or alleged breach of rule, from an incident involving two parties to an incident involving a "public", of "officials" and others, with an interest in maintaining or changing in certain directions a form of social life and its rules (Moore, 1972). Hence those in authority of any kind — even if it be most transitory of conciliation or mediation — have to judge the possible effects of their decision or action on other persons and on their society: their ruling must, in Pospisil's words (1958, 1971: 78f.), in most systems of law have the "intention of universal application". It is for this reason that there are, in various cultures, such maxims as "kitata, kono kimulao" ("it is hard [and possibly against moral judgment], but it is the law" — Barotse), akin to "hard cases make good [bad] law" (Anglo-American).

When one looks at decisions in courts or moots in this way, one is not burking the fact that there are unwise, foolish, and even partial or corrupt judges: to do so would be idiotic.

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This sort of situation can usually be handled within the framework of the social system, and its law, which provide for human frailty. There are also systems in which corruption is standard. And it would be equally idiotic not to accept that in some societies courts represent the interests of particular sections of the population: that presents a situation in which the social policies, values and ideals (Frank) which affect judge-made law favour those sections of the population, and possibly thereby may be in some conflict with some other set of rules of the system. The problems raised by this sort of situation, a fairly frequent one, do not alter the argument I have thus far adduced, but in fact strengthen it: some lawsuits can only be understood with an emphasis on the social assumptions and presumptions that form part of the praxis of the system.

I come now to an important implication of my citations from Hoebel, Malinowski, Frank and Llewellyn. If, to understand fully a case, we have to be aware of the social policies, values, ideal norms, rules, within which judges have leeway or latitude, the approach to the study of both rules and cases must be from a study of society itself. This is banal indeed, a truth which should be a platitudinous truism. Unhappily, one has to devote time and energy to justifying the truistic platitude, because the study of breach or quarrel is so much more enticing — and in my opinion much easier — than is the study of observance, just as the study of war is more exciting than is the study of peace (see Malinowski, 1926: 73). But, I have always believed, the study of observance and of peace may be more fruitful. The truth is, that in most societies at most periods most people observe the rules, or compromise their disagreements; and this observance constitutes the matrix out of which are often born social policies, values, ideals. Legislation and judicial decision sometimes go ahead of social observance in change: often social change in observances precedes legislative and judicial recognition (see Fallers, 1969: 256f., for an anthropological study; Milsom, 1969: 292f. for the growth of assumpsit in England).

I must interrupt my argument here to stress that I am of course aware that there are situations where individuals or sections of a population act against the establishment's law because they do not accept that law: this again complicates, but does not alter, the methodological problem.

In general anthropology, as heretofore done in substantial

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studies, the fact that law is more often honoured in observance has meant that anthropologists have reported and analysed what people do in conformity, within a reasonable leeway, as well as discussed inevitable disagreements and breaches. The best studies of conformity have involved detailed reporting of two kinds of norms, ideal norms and behavioural norms, and a discussion of the relation between them (see citation from Hoebel above). This kind of analysis gives us an understanding of law as set within a particular set of institutions, or a domain of social life (Gluckman, 1962: 11); it has produced some of the best monographs we have, and these have formed the basis for excellent comparative studies. The approach appears in concentrated form, summarising many years of widespread research, in Schapera's *A Handbook of Tswana Law and Custom* (1938, 1955) which covers all domains of life of the nine Botswana tribes. And if one moves to a more specialized study of law, involving examination of lawsuits, one has constantly to refer back to conformity and observance to understand how deviance and breach — and the emergence of new practices — are handled. The statement of the relationship between observance and breach may be explicit in the operations of, say, judges' consideration and decisions. Thus I have spelt out for the Barotse (Gluckman, 1955: 93, 173-4, 185, 239, 256-7) how their judges — like people in everyday life — continually used what I called "moral exemplification" by which "law in [one] sense is constantly exhibited [to litigants and public] in the conformity of upright people to norms" (at p. 93) beyond even the reasonable demands of the law; and they were wont to quote from everyday life "precedents" of people they knew who had behaved morally — unlike some litigant — though the judges rarely quoted their own past decisions in court. The same process, in some situations without even explicit statement of norms, has been analysed for other African courts — by Epstein for African Urban Courts in Northern Rhodesia (1954), Howell for Nuer courts (1954), and more recently by Fallers for the Soga courts (1969). I have re-analyzed (Gluckman, 1965c) some of the cases presented by Bohannan (1957) to bring out the extent to which this process was present in the society he studied, though he does not appear to have appreciated its significance. The same process has been recognized, though differently phrased, in cases in Anglo-American courts when reasonable standards, customs of a

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trade, etc., are discussed by judges in the various areas of the law.

One can, of course, *pace* Gulliver, circumscribe any of the intimately interdependent triad — ideal norms; actual behaviour (praxis); and the genesis of, handling of, and effect of, dispute — and focus on it as the centre of one's analysis, but one neglects to consider the other two at one's peril. Gulliver has in his study of the Ndendeuli (1969b, 1971) and in his general statement (1969a) shifted his position substantially from that he took in his 1963 book on Arusha law, when he argued that rules were insignificant when compared with what he called the "political process" and "political power" where there are no authoritative judges, but he still insists on the greater significance of what he calls power (1969a; 1971; for criticism of his use of "political" see Moore, 1969b). Gulliver included forensic skill under political "power", but he made little use of it. In fact, in an addendum added as an essay went to press I was able (Gluckman, 1965c: 144-6) to re-examine one of his principal cases (Gulliver, 1963: 243f.) and to show that the main protagonists in a dispute over when and what payment of marriage-cattle should be completed, *i.e.*, the wife's father and the husband, tried to present themselves as behaving reasonably, and the other as behaving unreasonably, in terms of their role-sets (wife's father and grandfather of children as against husband, father of children, daughter's husband). Lange (1967)[10] has developed this re-analysis, and has pointed out that when in the moot a brother of the wife's father asserted loudly that his niece and her four children should be taken away from the husband, because he had not paid up all the marriage-cattle as required by one rule of Arusha law, the father probably could not have afforded to do this because he would have had five more mouths to feed. The father in fact did not point this out: he conceded that his son-in-law was a good husband to the woman and father to the children, and a good son-in-law save that in his poverty he had not paid the final cattle. And he explained why he himself needed the cattle urgently. That is, the father in his argument held himself out as behaving reasonably since he was pressed by his debts, and admitted that in terms of ideals the defendant was a good man in most respects; but this statement of norms, though important, and backed by evidence, was possibly interinfluenced by his lack of economic "power" (fitting Gulliver's analysis) to enforce his claims by the extreme of justified

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legal action. The compromise agreement was that the husband should at once pay a male calf in place of a large, fat ox, and some time later a sheep in place of a heifer. Gulliver therefore concludes that the rules were not observed: but in fact there seems to be another rule — besides that insisting the woman and children can be claimed if payment is not completed — that a poor man may substitute a smaller, cheaper object for the named item in such transactions between relatives. Such a rule is common in tribal societies, and can be applied in need to offerings to spirits.[11] Our own courts make similar adjustments to meet the varying wealth and poverty of parties.

I have cited this case from Gulliver's study because it brings out that knowledge of factual situations (praxis) and knowledge of all the rules of law are both essential to understand a case. The example also illustrates that the body of rules in the set of relationships discussed above, is not a logically coherent code but contains independent, discrepant and perhaps even conflicting principles or even conflicting systems of law (Malinowski, 1926: 100, 123; Llewellyn and Hoebel, 1941: 60f., 224f.; Gluckman, 1955: 283 on Barotse with reference to Halsbury on English law; Pospisil, 1971: 107f.).

II

We are caught in a circle, in which law, it is true, can only be understood through cases — but cases can be understood only through law, and both have to be set in the matrix of social process.[12] I illustrate this in detail by examining a very learned and acute article by Abel (1969) on "Customary Laws of Wrongs in Kenya: An Essay in Research Method". I have selected Abel's argument for criticism precisely because it is of high quality. It opens modestly with a statement that he worked in Kenya on the records of primary [Customary African] courts because he lacked the skills to work through vernaculars and by anthropological methods, the results of which he praises generously. He demonstrates his contention that the records are an invaluable source of information [given one has other data: M. G.]. But he also goes too far in asserting that cases alone will give rules.

Abel begins by stating that before he went to Kenya he made notes from the extensive literature on the customary laws of Kenya. He found them to be "lifeless", "totally disembodied propositions, mere abstracts of abstracts". The reason

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was that "few, if any, of the numerous ethnographic accounts contain any description of actual cases". The data were collected from allegedly knowledgeable informants, and "elicited rules empty of content". He takes as a particularly "egregious" example, an article on "The Organization and Laws of Some Bantu Tribes of East Africa" (1915) by the Hon. (later Sir) Charles Dundas [a British District Officer, later Governor of Nyasaland, trained neither as a lawyer nor an anthropologist, but the author of a fine book (1924) on the Chagga of Kilimanjaro]. Abel rightly points out the inadequacy of Dundas' statements of some rules for an understanding of how the law of these tribes worked, though even here I think he goes too far. One can accept Abel's main point, and applaud his decision to search the records of cases tried and recorded by the customary courts set up by the British and later Kenyan administration. But I shall argue that in interpreting these records he was constrained to rely on statements, collected by others, about both ideal norms (rules) and actual norms of behaviour (praxis) in the tribe concerned. He cannot escape the dilemma that law and cases can only be fully understood through each other in a social context (see Allott, Epstein and Gluckman, 1969). Naturally, this last proviso does not mean that there is not room for the lawyer's specialized craft, particularly in our differentiated society, about which there is much background knowledge.

Before proceeding to my re-examination, I note that Abel sets out a number of dangers inherent in obtaining an account of the law of a people through questioning, each of which separately is easily fallen into, but which together would constitute the procedure of a near-moron. No modern well-trained anthropologist or lawyer would in fact be unaware of these dangers (see Allott, Epstein, and Gluckman, 1969). The accumulation of possible errors cannot be used to discredit the use of intelligent questioning itself, though it is useful in indicating traps. Nor, indeed, do I believe that Dundas in the 1910's was unaware of them. We have to recognize that Dundas' later book, on a different people, the Chagga, shows that the article, published in 1915 when that sort of report was standard in many writings on tribal peoples, did not contain all his knowledge of the peoples: the article has to be seen in the perspective of publications of that period. But, setting this historical proviso aside, I do not feel that Dundas' statements are useless in more developed analyses. For example, take one which

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particularly raises Abel's ire: "the rules offered by Dundas are so dehumanized as to be almost absurd. Indeed, some are absurd:

> [The law of homicide does not consider the accused's state of mind.] [Abel's square brackets — M.G.] So strict is this broad rule that Kikuyu elders have told me [Dundas] that if a man were seized by a lion, and his friend wishing to save him were to throw a spear, he would be liable for compensation if he inadvertently struck the man instead of the lion (Abel, 1969: 574, citing Dundas, 1915: 263-4).

In terms of the general tenor of Abel's argument hereabouts, it is clear that he would like — as who would not? — a statement of how often this sort of incident has occurred, and what were the relationships of the persons, and what compensation was paid; and one may add, in terms of the extended-case method, an account of the prior and subsequent relationships between the parties. More modestly, one would like to know if Dundas was told the rule by the elders in reply to his putting an hypothetical case, or whether they volunteered it when they were discussing with him the absolute liability of a man of one group for blood-compensation if he kills a member of another group, or whether it cropped up spontaneously from the elders in a discussion of the relationships of groups involved in potential feud as against payment of blood-compensation. It seems likely that it must have been a statement in one of these contexts, or a very similar context. Hence the very fact that Kikuyu elders saw liability as thus absolute *is* illuminating for an understanding of the law of wrongs and of relationships between such groups. What such a statement of rule certainly is not, is "absurd". Elias (1957: 142) used a similar rule among the Kamba neighbours of the Kikuyu, that a man is liable for an accidental killing (Penwill, 1951: 78f.) to argue, somewhat teleologically, that the enforcement of compensation was to provide an insurance for the dependants of the victim. I have used Dundas' statement as part of an analysis of how each injury suffered between feuding groups has to be examined in their tale of "blood-debts" (Gluckman, 1965a: Chap. 7), though admittedly I was able to do so more effectively because I found a case (see ibid.: 209-10),[13] not it is true from the Kikuyu, but reported by Peristiany (1954) from the Pokot, also of Kenya. Peristiany seemingly found that the best account of a feud which he could collect began when a member of the Hawk clan in a fight against a neighbouring tribe missed his enemy with an arrow

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and killed a member of the Dove clan. They were resident in different but not widely separated federations of villages. The Doves made an armed demonstration against all Hawks living in the killer's village. The prominent elders in the federation feared that the dispute might spread and persuaded the Dove elders accompanying the warriors to submit to their arbitration. The resident members of each clan exerted pressure on members of both parties to agree to a compromise: the killer to pay compensation, the near kin of the deceased to claim only reasonable compensation, and not an extravagant one, lest one day they too be under extravagant demands. Finally the Hawks, though outraged by the claim, handed over to the Doves a hut full of goats with a calf attached to each of its two doors. In the next generation a Hawk was killed by falling from a Dove's tree which he had climbed to get honey: the Hawks failed to secure the damages they had paid years ago. In the third (the present) generation two Dove brothers were accused of committing adultery with wives of Hawks, and again the Hawks demanded a hut of goats and two calves. Peristiany does not make this point, but I suggest that it is significant that this is the vendetta apparently best remembered. The outrage was that the Doves demanded such high compensation, neglecting that the "murder" occurred in a fight against common foes, which should have induced them to accept much less compensation. Other circumstances, further back in history, may indeed have made the deceased's kin so intransigent. Clearly we have here, if fully explored, a case which itself would be best understood outside of itself, by tracing back the prehistory that led to it, and the results it produced — in short, by handling it by the extended-case method. It might have illuminated what Moore (1972) has called "the principle of expanding dispute", under which one examines how the past and persisting relationships between the parties, and their respective positions within the wider political or economic systems, move them either to accept conciliation and agree to compromise, or to provoke a contestation by demanding that the rigours of the law be applied (see also Malinowski, 1926: 79). In terms of several possible analyses, Dundas' report is far from absurd, even if it be inadequate. Knowledge that people state such a rule is illuminating. It may well be that such an accident had never occurred among the Kikuyu.

Abel (1969: 575) repeats that the "lack of culturally sig-

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nificant detail makes many reported rules absurd: certainly all 'murderers' are not in fact killed [as informants may say — M.G.]. The case method avoids these dilemmas by deriving rules from disputes". I now take one of the cases he analyses, and I argue that in fact he gives us understanding of it — indeed acute understanding — by turning to other sources for ideal norms (which I shall call E-rules for rules of evidence, and S-rules for substantive rules), for beliefs, and for norms of actual behaviour or environmental background (both of which I shall call praxis). He also relies on anthropological analyses made on a mixture of observed incidents and answers to questions or reports of people's statements. I select the first case he analyses, but any would do. In order to do justice to the learning and the sharpness of Abel's analysis, I cite it in full, and insert in square brackets [E- or S-rule] or [belief] or [praxis] or [anthropological analysis] at appropriate points. I note that I have distinguished rule from praxis (ideal from actual social action and context), by the common standard of there being an idea of "ought" present. The case record which he gives in full (Abel, 1969: 588-9) consists of brief statements by plaintiff and one supporting witness, and by two defendants with two supporting witnesses, followed by a brief record of judgment. No cross-examination by the judges was recorded by the court. It is from this very bare record that Abel, skillfully drawing on his study of background sources, explains the dispute and the judgment (Abel, 1969: 590-7).[14] For lack of space, I have had to delete Abel's footnotes, though they contain many of his key references to rules, beliefs, praxis and anthropological analyses, but I have counted his references to these in my final toll below. (Abel's references to footnotes in his text are not deleted.)

> "The total sequence of events in this [Luo] case can be reconstructed in outline. Ogalo, the son of one of the defendants (co-wives of Onyango) got into a fight away from home, in which both he and his adversary were injured. He fled the scene and hid to avoid prosecution, but a letter reached his home, where people were already alarmed by his prolonged absence, which contained an inflated rumor that he was dead or dying. The defendants immediately burst into a lament, blaming the tragedy on Augustino's witchcraft. Augustino heard their cries, and when he came to investigate the accusations were repeated. The

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women then rushed off to see the dying boy, but failed to find him, as did their husband in a later search. In fact, Ogalo did not die but was merely hiding to escape justice and when he revisited his family the witchcraft accusation was dropped. Augustino then went straight to court, filing his complaint five days after the incident, as soon as he was able to collect the necessary 32/-fees.[94] He failed to submit the dispute to arbitration because, in his anger, he wanted quick action. In the event, he received his full claim less than three weeks after the incident.

"There is little to be learned from the three sentence opinion taken in isolation, and this paucity of reasoning, typical of many primary court judgments, may be one reason for their neglect by lawyers. But when the court record is read as a whole, patterns of assertion, adversarial response, and judicial determination (whether implicit or explicit) may be discerned which identify the sources of conflict and illuminate the way in which controversial conduct is defended and evaluated. Let me [Abel] try to demonstrate this through a detailed analysis of the relatively simple facts of this case, with the aid of Luo ethnography [anthropological analysis].

"Although Augustino stated his claim as one for defamation,[95] thus dignifying it with the prestigious terminology of the English common law, the gravamen of his complaint was in fact that the defendants had spoken words which were insulting to him [S-rule]. Both Isabella and the court demonstrated this by focusing their questions on the critical failure of Augustino and his witness to allege that Augustino was present at the incident, an essential ingredient of the cause of action where the injury is personal affront but not where it is damage to reputation [S-rule].[96] By far the more serious [S-rule] of the two insults alleged was the first — that Augustino was a witch who had killed the defendant's son. This accusation was made explicitly by Atieno, but was also given more subtle utterance by Isabella in her cry that Augustino's wives should bear children named after Ogalo [praxis]. One form of restitution for homicide in Luo customary law is for the clan of the murderer to provide a girl to

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bear progeny to the name of the deceased [S-rule].[97] It is important to recognize that the defendants, in placing responsibility for the death of their son on Augustino's witchcraft, were not denying that the physical injury had been incurred in an ordinary fight with another man; rather, witchcraft was invoked to explain why Ogalo had become involved in the fight in the first place, and then why he had suffered such egregious harm [anthropological analysis]. Widespread belief in witchcraft among the Luo has not greatly changed in the last sixty years [praxis],[98] as illustrated by the readiness with which these women — nominal Christians, if illiterate — resorted to it in trying to comprehend their tragedy [praxis]. Because witches are so greatly feared they are generally avoided [praxis] and Augustino was at least threatened with ostracism if the accusation was believed [praxis]. Indeed, Isabella urged more drastic action — the use of anti-witchcraft medicine [praxis],[99] to take revenge for the death of her son.

"The second insult alleged — that Augustino was a *jadak,* or tenant, who should go back to his clan's home — was much milder. *Jodak*[100] are members of foreign lineages who have been granted land for purposes of cultivation but who suffer from insecurity of tenure and an inferior status in society [praxis].[101] To call attention to this in public is clearly derogatory [praxis].[102] Moreover, the two insults are interrelated. Augustino, as a *jadak,* was subject to immediate and automatic expulsion from his lands if the community found him to be a witch [S-rule and praxis].[103] But quite apart from the possible consequences of the accusations (which would have been more significant had the action been grounded in defamation) the insults were intrinsically injurious to dignity [S-rule and praxis] and had to be redressed [S-rule]. In seeking to do so Augustino was not only preserving his own self-respect [praxis] but also that of the ancestor after whom he was named and whose spirit was believed to inhabit Augustino's body [belief and praxis]:

> A person tends to be sensitive [praxis] about his *juok* [ancestor name] and "spoiling a name" is a serious matter [S-rule]. An insult is not merely an insult to ego, it is also an insult to the ancestors with who (sic-Abel) ego shares a common *juok,* and if the insult is not avenged, they will be angry and punish the in-

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sulted man [belief]. While the origins of the belief are now largely forgotten by the young, the sensitivity remains [praxis] . . .[104]

Luo do feel [praxis] that the obligatory response [moral (?) rule] to abuse, if honor is to be protected, is counter-abuse or physical violence.[105] That Augustino did not indulge in either may be due to a combination of causes including fear of legal liability [S-rule][106] and a recognition that his accusers were only women [praxis], irresponsible in the absence of their husband [praxis and S-rule]. But because honor requires a vigorous reply to abuse, the traditional mode of arbitration by local elders is even less appropriate [S-rule of etiquette] than violence since these arbiters are ultimately powerless to extort redress [praxis]. In the circumstances of the instant case, moreover, Augustino may have apprehended that the clan elders would be biased against him, as an outsider [praxis]. For these reasons a demand for substantial civil damages[107] allowed him to vindicate his name promptly and effectively [praxis].

"Augustino presented a strong case to the court. His own testimony contained a clear, detailed, and internally consistent statement of the facts on which he based his claim. More important, he produced an independent [E-rule] eye-witness [E-rule] who generally corroborated [E-rule] his evidence. Despite minor contradictions — Augustino and his witness differed, for instance, as to whether Augustino was present in Onyango's *boma* at the start of the incident — Oburu's testimony carried conviction [E-rule] through its wealth of additional detail [E-rule], for example, the precise [E-rule] words of the defendants, and what Atieno was carrying. This confirmation gained probative force from the fact that Oburu was required to wait outside the court until he spoke [E-rule]: failure to obey this rule would have led to his disqualification as a witness [E-rule].[108] Against Oburu, the defendants could only counterpose two very weak witnesses, one of whom the court quickly revealed as their close relative [E-rule] and member of their *boma* [E-rule]. In relying on plaintiff's eye-witness and discounting the testimony of the parties as well as that of defendants' relative the court was making the implicit judgment, frequently found in the reasoning of primary courts, that

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interested persons and their relatives can be expected to lie [praxis].[109] Equally significant is the court's observation that, whereas the plaintiff specified the particulars of defendants' wrongful conduct, the defendants contented themselves with general denials. Facts, the court appears to have reasoned, must be met with facts, not mere conclusions [E-rule]. The defendants may well have anticipated this criticism for they offered an alibi [praxis], which was repeated by the first defence witness. But the story they chose — that they had gone to Sakwa to see their son immediately on hearing of his misfortune — was irrelevant [E-rule] since they could easily have insulted Augustino before they left.

"In assessing the evidence the court did more than simply weigh the quantities of independently corroborated factual detail on each side. It employed as evidentiary rules perceptions about modal behavior in Luo society, comparing conflicting allegations with the conduct which it believed could be expected in the circumstances [praxis].[110] Both defendants admitted receiving the news that their son was dead or dying, but denied uttering cries of grief. The court explicitly rejected this contention as inconsistent with its own experience [praxis]: mothers always cry when they hear of the death of their children [praxis].[111] Thus the women, by foolishly alleging a course of behavior that was inherently incredible, destroyed the cogency [E-rule] of their subsequent defence. In answering this defence the court relied on two further implicit perceptions. The first, that mothers in their grief accuse those they believe responsible for their misfortune [praxis],[112] was not contested. But Atieno forcefully challenged any inference that she or her co-defendant would tend to name *Augustino* as being responsible. And, even granting the court's first two perceptions, what reasons were there for the defendants to malign Augustino? He himself proffered none, and was forced to admit, in response to Atieno, that he and Ogalo had harbored no grudges against each other which could cause the defendants to suspect him. Nor, according to Atieno, did she bear Augustino any hatred which would lead her to accuse him falsely; she further contended that he had never en-

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tered her *boma* (courtyard) and hence could not have stimulated a spontaneous accusation.

"Although the court never spoke to this issue, an explanation of the defendants' motives is implicit in Augustino's allegation that he was called a *jadak* as well as a witch. A *jadak* is by definition an alien, a member of a foreign lineage; as such he is a potential enemy, viewed with considerable suspicion [praxis].[113] The defendants, themselves members of foreign natal clans by reason of the rules of exogamy [S-rule],[114] also occupied somewhat insecure positions [praxis][115] and thus had additional incentive to fix the blame on Augustino [praxis]. Moreover, at least one of the defendants was the co-wife of Ogalo's mother, a relationship typically characterized by rivalry [praxis].[116] Misfortune suffered by the child of one wife is most commonly attributed to the jealousy of another,[117] in this case the defendant, unless a more suitable suspect can be found. This Augustino provided, not only as an outsider, but as the occupier of badly needed land [praxis]. Central Nyanza, one of the most densely populated areas of Kenya,[118] suffers from a significant land shortage [praxis]. By accusing Augustino, a *jadak,* of witchcraft, the women provided a ground for his subsequent expulsion by the local clan [S-rule and praxis]. Thus they sought to shift suspicion from themselves by appealing to the revanchist sentiments of their husband's group [praxis].[119] They may even have stood to benefit materially from the redistribution of Augustino's holdings, since they were his close neighbors [praxis]. For this combination of reasons a *jadak,* often the object of witchcraft accusations, was a particularly suitable target here [praxis],[120] the court may well have considered this in ignoring Atieno's protestations that she lacked any motive to accuse Augustino [E-rule].

"Having found that the defendants did utter the insulting words in plaintiff's presence, the court next had to pass on possible defences. The defendants and their witnesses appear to have sought to convey the impression that Ogalo had actually died, for it was only on cross-examination that Atieno admitted that this did not in fact occur. Augustino clearly feared that the court might be deceived on this point, and conclude

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therefrom that the abuse was justified, for he took great pains to emphasize that Ogalo was still very much alive and missing from the village only because he was a fugitive from justice. However, the court was not misled and hence did not have to answer the very difficult question whether that death was caused by Augustino's witchcraft. Moreover, the court was never confronted with the less controversial issue, which was raised by the facts, whether a good faith or reasonable belief by the women that Augustino had killed Ogalo would constitute a defence [S-rule]. The defendants could not propose this argument because they refused to concede that they had accused Augustino, and to plead the defence merely hypothecating such a concession would probably appear to a legally unsophisticated court to constitute that very admission [E-rule]. Nevertheless, the reiteration in the testimony of defendants and defence witnesses that defendants did receive a letter warning of their son's imminent death, and did believe it to the extent of going straight to Sakwa to investigate (a journey of many hours) may be seen as an attempt to put forward evidence of at least a good faith [E-rule] belief in their son's death. In ignoring this belief as a possible defence, the court may have been following Augustino's implicit distinction between the precipitate, and thus unjustified, charges by the two women and their husband's more cautious reaction in organizing a careful investigation of the incident at Sakwa.

"When viewed against the background of available ethnography this case report is a fertile source of hypotheses about law, though of course these must still be tested against numerous other disputes before general principles can be induced. Where a rule-directed inquiry might have produced an abstract statement of the wrong — 'compensation is paid for abuse' — attention to the details of this case illuminates the social environment in which the wrong occurred. We learn that the 'mothers' of a young man, upon hearing that he had been suddenly injured and might die, uttered witchcraft accusations against a near neighbor who is a *jadak*. Available remedies are not merely listed as fungible alternatives: counter-abuse, assault, arbitra-

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tion, civil action for damages; the choice made under the circumstances of this case provides some data indicating when certain remedies are chosen, and why.[121] Existing biases cannot be dispelled by a mode of inquiry, but the case method does help to reveal them and thus avoid their consequences. An investigator working, perforce, with an elderly informant who reported only traditional conduct might never have learned of the wrong of insult even though it constitutes a substantial portion of the work of the primary courts. On the other hand, the case lawyer is immediately alerted to the prestige accorded anything connected with English law by these courts [praxis]. But this negative ethnocentrism, unlike the elder's blindness towards change, is a significant element of the contemporary legal system, and an analysis of the case reveals the precise extent of English influence: the language may be that of the common law, but the elements of the action are unmistakably indigenous. An interrogator might well have been too easily content with the discovery that his terminology — defamation — coincided with that of his informant to inquire further. Finally, the case suggested indigenous formulations of other legal rules, auxiliary to the general principle of compensation for abuse, which an investigator might not have thought to elicit nor an informant to volunteer. These were both evidentiary: how is conflicting testimony to be balanced [E-rule], how is credibility to be tested [E-rule]; and substantive: what constitutes justification [S-rule] for abuse."

It is clear that the analysis of this case is built up — I repeat, most skillfully — of a whole series of rules and praxis of different kinds, collected in various ways, as well as of references to other cases, in the background of anthropological and jurisprudential analyses. I may have been somewhat enthusiastic in my interpolations (including those in his footnotes which are not reproduced here), but a count of what they were is striking:

Rules — of evidence	19	
of substantive law	27	46
Beliefs		2
Praxis		51
Anthropological etc. analyses		6
		105

[N.B. "Rule and Praxis" entry counted under both.]

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I could similarly show, had I the space, that Abel's analyses of other cases embody constant references to rules, beliefs, praxis and analyses. In another case, he cites work by Professor R. LaVine and Mrs. B. LaVine on the Gusii; I have been able to consult the former and he gives me permission to state that the citations are generalizations from their work, built up, as in other anthropological analyses, from observation of praxis, collection of censuses, genealogies, disputes, and the like, and questioning of informants about rule belief and praxis, as well as consultation of published and archival material, as presumably are the sources on which Abel drew for his analysis of the Luo case which I have examined in detail. From his very use of material, it is clear that Abel himself considers knowledge of the rules and praxis to be essential for analysis of cases: my criticism of his stand is in a sense on the statement about certain rules themselves, in order to emphasize his admirable practice.

I hope my examination brings out the learning, the perception, and the skill which Abel brought to his study, all of which I, with others, must admire. His claim is fully validated that primary court records are an invaluable (and sometimes a neglected, though already much used) source for the study of African law — *IF* the records be interpreted in the light of background information and analyses. I similarly admire the whole and the most of the parts in the work of Gulliver. Both, too, demonstrate that for full understanding of "law" one must have cases: a study of abstract rules is not enough. But this was long established and accepted. Their actual analyses further demonstrate that one must also have knowledge of social life, in its ecological, economic, political, etc., aspects. What I am criticizing is their conclusion, in generalizing statements, that cases are more important than rules, instead of laying stress on the fact that cases, rules and praxis have all to be handled together. I am prepared to assert that it is impossible to record a dispute out of such a combined context, and that not even a whole series of cases would give one a system of law.[15] Only in a total context of social process and of the significance of particular rules within the whole body of law can one begin to cope with the following sort of problems: What is the scale of a particular case both in its scope and in its effect in time? By what criteria does one select certain cases for analysis and determine which are the key disputes? By intuition? How is a

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particular decision related both to changes in the law and to changes in the whole or parts of praxis? What factors move judges or conciliators to particular decisions? How are disagreements and breaches related to law as observed? (See Allott, *et al.,* 1969, and Gluckman "Foreword" to Deshen, 1970: xxif.) I may add that similar problems attend on attempts to relate particular transactions to social forms (*cf.,* Barth, 1966).[16]

My re-examination shows indeed that I inserted "praxis" about as many times as I inserted "rule". This is surely adventitious to the case and to the analysis made; but it does emphasize that the background of praxis — environmental and ecological, economic, political, social, etc., facts — properly analyzed is as crucial to understanding a case as is study of the case and the rules. This is also well established. But it is illuminating to treat similarly a jurisprudential analysis of judgments in unimportant and important cases in, say, Anglo-American courts, as well as the judgments and conciliar arguments themselves, to see how far "praxis", whether factually accurate or as forensic presumptions about praxis, enter into the process of the law. Obviously they (as is widely realized: I claim no vision) do so considerably in American decisions on constitutional issues, though in Anglo-American, as against African, courts, expert evidence may be called about praxis, instead of there being a greater reliance on judicial knowledge, so that "praxis" becomes part of the facts presented in the contestation, instead of being brought in by judges themselves through inference, presumption and implication (see Gluckman on the Barotse, 1955; more recently, Fallers, 1969: Chap. 8). But this process is still general. If this point needs stressing, it may be because disciplines tend to work in pigeonholes: some lawyers tend to be concerned in Africa to record rules, as the *Restatement of African Law* shows, and anthropologists to analyse praxis, with a recent tendency to focus on dispute and to shy away from rules.

It is also striking that at key points in his analysis Abel relies largely or at least leans on complex anthropological analyses, based on observation of praxis and recording of fact and rule, as in his summary statements on how accusations of witchcraft function in situations of misfortune in terms of personal animosities related to social stresses.[17] This may be particularly necessary when one is trying to expound an exotic system of law: the background to a study of law in our own

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society is a considerable body of literature not only on law, but also on society and its history, the natural world, etc. (see Allott, Epstein and Gluckman, 1969).

In short, I argue that if the study of disputes is erected as a slogan it can be as stultifying as the reporting of rules on their own. Both have to be set, to quote a passage from Abel's (1969: 596) analysis which I have just re-examined, in "the social environment in which the wrong occurred". He put it the other way round: *viz.,* that ". . . attention to the details of this case illuminates the social environment in which the wrong occurred". That is also true. He stressed the importance of Luo "modal behavior". Disputes illuminate social process; but disputes cannot be understood without knowledge of social process. There have been many laudatory comments, including that by Gulliver cited above, on Turner's *Schism and Continuity in an African Society* (1957) on the Ndembu of Zambia: but most attention, like that of Gulliver, has been focussed on his analysis of what he calls "social dramas" — complex interconnected events affecting the history of one set of people, whether these events be quarrels, law-suits, divinations, rituals, *aut alia.* Almost all anthropologists who have thus used his book seem to have overlooked the first 90 pages of the book which contain a detailed, and often quantified, analysis of the external environment and the structure of Ndembu society. This analysis sets out historical and ecological background, and the topography and demography of villages and their social composition: thus patterns of residence, succession and inheritance, marriage, making a living, political organization, etc., are all covered. Turner necessarily gives an account of what I sum up as "praxis" and he has to include statements of rules, and of how most "reasonable" and even "upright" persons behave. Only in this background is he able to analyse how "social dramas" — which often take the form of disputes — arise in the history of a set of people, and influence the future course of their relationships. He himself says (1957: 93) that "the social drama is a limited area of transparency on the otherwise opaque surface of regular, uneventful social life. Through it we are able to observe the crucial principles of the social structure in their operation, and their relative dominance at successive points in time." Turner, like others cited above, considers that these crucial principles are independent, perhaps discrepant, and even possibly contradictory, and operate in different sets of institutions between

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which and within which they may come into conflict. In a similar treatment (*Immigrant Voters in Israel,* 1970) of a series of social situations evoked by an Israeli election, Deshen analyses the actions of parties and their members, and of religious congregations and their members, to reveal a series of sub-structures within social life. He too begins with a detailed quantified analysis of the age- and sex-structure, occupations, incomes, education, "ethnic" affiliation, period and site of residence in town, mode of coming to town, as well as the political organization of the country, etc. These are essential for the analysis of social situations, though analysis of the situations brings into life the sociological categories which in turn control that life.

The study of the honouring of customs in "regular, uneventful social life" (Turner) is an essential background to understanding their breach. When Hamlet explained to Horatio (Act 1, Scene iv, lines 7 f.) that

> "The king doth wake to-night and keep his rouse,
> Keeps wassail, and the swaggering up-spring reels;
> And as he drains his draughts of Rhenish down,
> The kettle-drum and trumpet thus bray out
> The triumph of his pledge,"

presumably most Danes thought King Claudius was behaving in observance like a proper king. They would have considered Hamlet himself a prig, had they heard him reply to Horatio's question: "Is it a custom?"

> "Ay, marry, is't;
> But to my mind, though I am native here
> And to the manner born, it is a custom
> More honour'd in the breach than the observance.
> This heavy-headed revel east and west
> Makes us traduced and tax'd of nations;
> They clepe us drunkards. . . ."

This road, through praxis, rule, and dispute, is the road along which Ad Hoebel kept us directed: he did not direct us only to the study of "trouble cases". As Moore (1969a: 262) stated clearly in her synoptic review of "Law and Anthropology": "It was not until the publication of Llewellyn and Hoebel's *The Cheyenne Way* (1941) that anthropology produced a book focused on legal cases. The authors treated individual cases as emerging from problems that required solution, the basic general task being to maintain order" [in a changing social environment through an established system]. She discusses Llewellyn's influence from his interest in "the practice of the lawyer's art, the craft skills of the profession

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. . . He was a specialist in the law of sales and contracts, and hence was, in his own milieu, very much aware of the relationships between *commercial practices* [italics added] and court decisions". Hoebel, working with Llewellyn, also greatly admired the "ingenuity" of the Cheyenne in working "good rules . . . out of troublesome and difficult situations — rules that would endure and be useful in other cases" (Moore, *loc. cit.*).[18]

FOOTNOTES

[1] See my own essay on "Ethnographic Data in British Social Anthropology" (1961), also my 1965b: 235-42, and my "Introduction" to Epstein (ed.) *The Craft of Social Anthropology* (1967), and essays by Epstein and Van Velsen therein.

[2] See references in footnote 2.

[3] I discuss Frank's views and his clarification of them in relation to anthropological problems in Gluckman, 1955, 1967: 349-51.

[4] See Lloyd, 1965, 256-78. I am grateful to Dr. Sally F. Moore for this reference, and also generally for focussing my attention clearly on this background to Llewellyn's approach (see her 1969a: 262).

[5] See Fallers, 1969: Chap. 8, for an excellent discussion of this triad.

[6] Malinowski (1926: 123-4) argued that there was a hierarchy of a rather different kind, covering the rules, down to "the clandestine evasions and the traditional means of defying law and abetting crime." He thus saw the rules as having "different degrees of orthodoxy, stringency, and validity, placing the rules into a hierarchy. . . ."

[7] I do not agree with Abel (1969: 579) that *The Cheyenne Way* is ". . . based entirely on what they [Llewellyn and Hoebel] call 'trouble cases.' " Contrast Moore's judgment in her 1969a: 262.

[8] See also Malinowski, 1926: 31, 58.

[9] I take this word from a still unpublished paper of Sally F. Moore's (in press). It neatly summarizes and then develops a process insisted on by many anthropologists (*e.g.*, Malinowski, 1926: 98 circa) and jurists, though overlooked by, at least, other anthropologists.

[10] Since Lange's argument is a still-unpublished M.A. Thesis (University of Manchester, 1967) written under my supervision, I gratefully acknowledge its value to me.

[11] See *e.g.*, Juncd, 1913: *passim*, on how cocks were substituted among the Tsonga for oxen in sacrifice; Evans-Pritchard, 1940: *passim*, on how cucumbers were thus substituted among the Nuer; Leach, 1954: 144-54, on the substitution of lesser for greater in Kachin ritual debts; and Gluckman, 210, 214, 221, on how a beast and 1 pound sterling were held equivalent in marriage-payments despite the fall in the value of money and the rise in the price of cattle.

[12] A phrasing I owe to Professor Charles L. Black, Jr., of the Yale School of Law, with whom I discussed the problem, and who, as ever, was most helpful to me. The kind of emphasis I have put on what I have called "praxis" was greatly stimulated by his *Structure and Relationships in Constitutional Law* (1969) where he — as I understand it — argues boldly for a change in legal style to developing key constitutional doctrines from the basic nature of American political structure, as consisting of a Union of all its people, who are free citizens, granting equal protection to resident aliens. He states (1969: 31): "There is, moreover, a close and perpetual interworking between the textual and the relational and structural modes of reasoning, for the structure and relations themselves are created by the text, and inference drawn from them must surely be controlled by the text."

[13] I also found similar cases reported from other regions of the world (Gluckman, 1965a: Chapter VII).

[14] I am grateful to the editors of *The American Journal of Comparative Law* and to Professor Richard L. Abel of the Yale School of Law himself for permission to quote extensively from his article.

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[15] In stressing this point I acknowledge stimulus from the Department of Anthropology at University of California, San Diego, to whom I presented the gist of this essay.

[16] I again thank Sally Moore for a stimulating discussion drawing attention to these problems.

[17] First clarified in Evans-Pritchard's *Witchcraft Oracles and Magic among th Azande* (1937, citing earlier essays by him); see summary of later work following him in Douglas (1970) and in Gluckman (1972).

[18] Long after this essay went to press, I was able to elaborate on my discussion of the Arusha case about marriage-payment reported by Gulliver (see above), in a Wilson Memorial Lecture at the School of Scots Law of Edinburgh University: "Crossexamination and the Substantive Law in African Traditional Courts", to be published in the Scottish Juridical Review, and then in a book with other Wilson Memorial Lectures.

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