

Law and economic organization

A comparative study of
preindustrial societies

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Introduction

Nineteenth-century social theorists believed the history of human society could be understood as the unfolding of natural laws of development. The infinite variety of human societies, technologies, and cultures was seen as governed by common causal principles. Careful observation and analysis could give rise to a science of humans.

In contrast, the twentieth century is an era of skepticism in the social sciences. Discouraged by the failures of the nineteenth-century vision, modern anthropology in particular retreated to a more limited view of its possibilities. Particularism – the careful study of individual cultures – replaced generalization, as twentieth-century scholars sought a more secure footing in empirical evidence than that afforded the grand theorists of an earlier age.

In this effort to ground theory construction in reliable evidence, much of the original quest was forgotten. Those who originally believed that an adequate data base would eventually allow for generalization ended up convinced of the opposite. Historical particularism engendered a passion for specifics, for detail, for careful and excellent scholarship; it took a dim view of abstraction and an even dimmer view of theory as an enterprise. Within anthropology, the result was a wealth of carefully collected data on individual societies, practically untouched by theoretical hands.

Rumblings of dissatisfaction with the particularist strategy have been heard at various points in time during the “post-Boasian” era. Harkening back to the aspirations of the grand theorists, such anthropologists as Leslie White, V. Gordon Childe, Julian Steward, and a whole host of their well-known protégés (including Marshall Sahlins and Elman Service) initiated a return to some of the more

important nineteenth-century questions and goals. "Evolutionism," a term held in disrepute between the turn of the century and the mid-1950s, resurfaced in the anthropological vocabulary. The comparative method, another ill-fated child of the "speculative" period, became a "new" means whereby social scientists could attempt to make sense out of particularistic ethnography.

Furious debates erupted over the adequacy of particular theoretical explanations for social evolution, the development of agriculture, the origin of the state, and a host of similar topics. The stridency of the arguments was a healthy sign. It indicated that the new comparative anthropology was far more sensitive to issues of methodology and empirical grounding than its nineteenth-century predecessor.

This renewed interest in comparative and evolutionary research has not been applied evenly across the subfields of anthropology. Anthropology of law, for example, remains dominated by particularism, despite the fact that it has been blessed with a wealth of data that can be subjected to theorizing of the sort now common in political and ecological anthropology. Virtually every important general ethnography has included information regarding dispute-settlement practices. Hundreds of studies have focused specifically on the ways in which the world's cultures deal with internal conflict. Indeed, the data base of legal anthropology constitutes an embarrassment of riches.

The same cannot be said of its theoretical development. We still know very little about why particular kinds of societies exhibit the structures of conflict resolution they do. There has been a dearth of modern *comparative* work attempting to formulate typologies of legal institutions and determine what, if any, systematic causal links may be found between these institutions and the *types* of societies in which they occur.

This is not to say that legal anthropology is devoid of explanatory analysis. However, the dominant trend in the field has been to describe the internal workings of conflict management in particular preindustrial societies. To the extent that generalization *across* societies has been attempted, it has tended toward the most general forms of explanation. From Malinowski on, anthropologists have relied upon a functionalist explanation of law, that law reduces

conflict in a society, that it restores equilibrium when the social fabric is torn.

There is nothing particularly objectionable in this as a first stage in theorizing. Unfortunately, this is all too often both the first and last theoretical step. In ethnography after ethnography, the dispute-settlement practices of “face-to-face” societies have been shown to restore broken ties, to make the peace rather than punish. (Indeed, the point is often made that the legal mechanisms they have developed are more sensible than ones we find in our own advanced industrial societies.) But the theory leaves unanswered some important questions: Why are certain kinds of legal institutions found in some societies and very different ones found in others? What explains the variation?

There is a second sense in which the traditional anthropology of law has led us away from fundamental questions. Because the emphasis of functionalist analysis was on law as an equilibrating mechanism, legal anthropologists working in this tradition have tended to concentrate on conflict *resolution* to the detriment of studying the *origins* of conflict. This is clearly seen in the work of Max Gluckman, one of the finest of legal ethnographers. Gluckman’s masterful work on the law of the Barotse of Northern Rhodesia (Zambia) showed that in “multiplex societies,” where people are bound by multiple social and economic interdependencies, conflict is particularly disruptive and cannot be tolerated if the community is to survive. Barotse judges are therefore oriented toward reconciliation and devoted to “mending” broken ties, not simply punishing offenders (Gluckman 1955). “Multiplexity” therefore explains the character of the Barotse judicial process.

Echoes of this approach can be seen in the work of many prominent legal anthropologists, including Laura Nader’s work on “making the balance” in Zapotec dispute management (Nader 1969) and Phillip Gulliver’s research on Arusha moots and conclaves (Gulliver 1963), to name only two. The kind of functional analysis proffered by Gluckman and his followers in the Manchester School has become the major analytic tool in contemporary legal anthropology.

The problem with this functionalist emphasis is that it makes strife appear exceptionally destructive, as abnormal or pathological. In focusing on conflict resolution, it tends to downplay the fact that conflict is a chronic phenomenon in these societies – that conflict

is not random, but is generated repeatedly and often in stereotypical contexts. The functionalist perspective draws us away from explaining the origins of conflicts and the ways in which legal institutions are adapted to the specific kinds of social cleavages that they address. Thus another neglected part of the anthropology of law consists of the search for causes or sources of conflict in preindustrial societies and asks: Do these sources of conflict vary systematically across different kinds of societies; how do they shape legal institutions? In short, the comparativist believes that a causal explanation of legal development depends on understanding cross-cultural variation in forms of legal institutions, variation in sources of conflict, and the relationship between these two factors and other features of social structure.

Such an enterprise requires us to formulate both hypotheses that specify the connections between these variables and a methodology capable of testing the empirical validity of the hypotheses. To the best of my knowledge, this has yet to be accomplished. This book represents an effort to explore these comparative questions.

In Chapter 1, I examine a number of classical and contemporary theories of legal development from which the aforementioned hypotheses might be generated. As the reader will see, I choose to elaborate and test a materialist theory of comparative legal institutions. For the moment, suffice it to say that the materialist is concerned with the nature of material production in societies and the internal distribution of the fruits of labor. I shall argue that legal systems play a vital role in regulating labor, allocating economic surplus, controlling land and water rights, and other vital aspects of economic life.

The major analytic tool employed toward this end is that of the "mode of production," a concept that will be fully discussed in Chapter 3. Thus the bulk of the book is dedicated to showing a systematic causal link between particular preindustrial modes of production and the legal institutions and substantive law found within them.

This cannot be accomplished without first developing a typology of legal systems, which is the central purpose of Chapter 2. Eight distinct institutional forms are identified, ranging from self-redress to state-level court systems, and are ranked according to a scale of complexity.

Chapter 3 discusses materialist theory in some detail. I construct variables that measure important dimensions of modes of production, and hypotheses are developed that predict the relationship between these variables and the complexity of legal institutions. Using a cross-cultural sample of sixty societies, these hypotheses are tested and the findings interpreted. Chapter 3 therefore speaks to the first of the two deficiencies in traditional legal anthropology discussed in this Introduction: the lack of understanding of the distribution of legal institutions across preindustrial societies.

The second deficiency concerns our need for a better grasp of the sources of chronic conflict. Chapter 4 analyzes data on recurrent patterns of disputes within different modes of production and argues that the content of the disputes and the growth of substantive law stem directly from strains inherent in the social relations of production and from the regularities of stratification discernible in various production systems. The concluding chapter pulls these arguments together and articulates them into a more fully detailed materialist theory of legal development in preindustrial societies.

This book was undertaken with three basic purposes in mind. First, I hoped to contribute some comparative research to the literature of legal anthropology. Second, I intended to add a useful methodological approach to the developing arsenal of analytic techniques in social anthropology. Finally, I wanted to make a contribution to materialist theories of social institutions. These were my intentions. The reader will be the best judge of their success.