Katherine S. Newman

LAW & ECONOMIC ORGANIZATION

A comparative study of preindustrial societies

Law and economic organization

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This book is dedicated to my parents,
Evelyn and Charles Newman,
for their support and encouragement

Acknowledgments

This book was originally written in 1979 as a doctoral dissertation for the Department of Anthropology at the University of California, Berkeley. Its present form reflects my association in the intervening years with the Jurisprudence and Social Policy Program at Berkeley and the Department of Anthropology at Columbia University. The opportunity to work with faculty and students in each of these settings has contributed a great deal to the development of the ideas presented here. It is a pleasure to acknowledge my debt to them.

Brent Berlin first encouraged my interest in the topic of evolution through the unlikely avenue of his own research in the field of ethnoscience. Though his substantive interests are quite removed from my own, the approach to comparative analysis that this book represents owes a great deal to his example. Berlin's insistence on data-based verification of abstract theory has shown me the virtues of his own brand of "dust-bowl empiricism." I appreciate his support and advice over the years.

My association with Philip Selznick was probably the high point of my years as a student and teacher at Berkeley. He gave freely of his time and intellectual energy and provided me with many thoughtful criticisms of this work.

Jack Potter and Aram Yengoyan introduced me to much of what I know about Marxist theory in anthropology. Burton Benedict, Gerald Berreman, and David Mandlebaum listened to my ideas and offered their own throughout the years. Rae Lesser Blumberg guided me in cross-cultural data analysis through the example of her own research on sexual inequality and by giving generously of her time and advice.

Susan Allen-Mills, my editor at Cambridge University Press, pa-

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tiently saw this work through the review process and offered the kind of encouragement and professional advice that every author needs, but which is often hard to come by. I am also grateful for the comments of the three anonymous scholars who reviewed this book for Cambridge. Although the errors in this book remain my responsibility, I am certain there are fewer of them as a result of the careful reading they gave the original manuscript.

It is a curious fact that this book was originally written in Berkeley, which for all its virtues was not particularly identified with a historical-materialist tradition in anthropology. Columbia University was better known as a crucible of evolutionary-materialist research, and long before I had any personal contact with the Columbia department I thought my work was more closely associated with the traditions of that faculty. I have had the distinct good fortune to learn firsthand that the theoretical approach represented in this book is alive and well at Columbia. I am grateful to my colleagues and the graduate students in the anthropology department.

This work could not have been completed without the generous support of the Institute of Human Learning at the University of California, Berkeley, which provided me with a four-year fellowship funded by U.S. Public Health Service Grant GM1207. Graduate students in the present era receive far less support for their education than I did. I am grateful for the assistance I received and hope that future generations will once again be as fortunate.

I also wish to thank the following group of compatriots who have provided intellectual stimulation and friendship: Alex Alland, Jr., Cheryl Crawley, Terry D'Altroy, Leslie Dow, Willett Kempton, Nancy Lutz, Ann Millard, David Neal, Abraham Rosman, Paula Rubel, Colin Sumner, and Kit Woolard.

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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

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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 proferred 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.

1

Theories of legal evolution

We begin by turning to the past. Many scholars have looked for patterns in the historical development of legal systems. In this chapter, I briefly review the contributions of some of the more important early evolutionary theorists – Maine, Durkheim, Marx and Engels, Weber – and the writings of several more contemporary scholars.

Part one: classical theories of legal evolution

The nineteenth- and early twentieth-century legal theorists shared a general evolutionary perspective. They believed that legal systems could be classified on the basis of formal characteristics, including sources of legal authority as well as similarities in organizational form. Classificatory schemes could be ordered; that is, each type of legal system could be ranked in a sequence. The sequence itself need not represent historical time, although this was often thought to be the case. It might, for example, represent increasing legal complexity.

The classical theorists also assumed that the sequence could be understood as the result of some underlying "force" or movement in history. Evolutionary idealists generally located this movement in the unfolding of an internal logic, a logic that necessarily transformed one kind of legal system into the next one in the sequence. Evolutionary materialists tended to locate the motive force outside the institutions themselves. In examining the work of each theorist, it will be important to determine how each of these three principles was manifested, in addition to describing their specific developmental schemes.

Henry Maine: from status to contract

Sir Frederick Pollock's glowing introduction to Maine's most famous work, *Ancient Law*, notes that the book marked a significant turning point in the study of legal history.

> We who are in no way bound to reticence must say that he did nothing less than create the natural history of the law. He showed, on the one hand, that legal ideas and institutions have a real course of development as much as the genera and species of living creatures, and in every stage of that development have their normal characters. (Pollock in Maine 1970:xiv)

The modern reader may find it difficult to imagine that the science of legal history was born as late as the mid-nineteenth century. However, as Pound (1930) points out in *Interpretations of Legal History*, Maine's antecedents were suffused with notions of the "state of nature." Maine (1970:87) argued that the belief in the natural origins of law was an ill-fated romantic notion that retarded the scientific understanding of legal history. *Ancient Law* stands as one of the earliest scholarly efforts to analyze the foundations of modern law historically rather than philosophically.

In the course of his studies, Maine observed a general trend in law that has subsequently been adopted as a truism by most grand theorists. The movement from status to contract, "a shift from legal rights, duties and commands based on personal status to the objectification and codification of law in impersonal statutes having universal application" (Goddard 1969:85), has been recognized as a key feature distinguishing small-scale societies from modern complex societies. Maine was the first to examine the ramifications of this transformation.

One of the most unusual aspects of *Ancient Law* is the wide variety of sources it draws on. Maine made use of unlikely historical sources, such as epic poetry of the Homeric period and tracts of Stoic philosophy, a practice resembling more contemporary methods of cultural reconstruction.[1] Although Maine's use of these texts was ingenious, his use of extant societies to validate his portrait of primitive cultures of a bygone era is even more impressive. His familiarity with Hindu law and custom[2] formed the basis of his quest for the principles of customary law. However, unlike most

[1] Maine argued that although these epics were written for other purposes, they constituted a rich source of untainted data on legal culture. Unlike later Greek historians, who had theological interests, the Homeric poems had no particular bias and as such could be taken as a reliable source of "early forms of jural conceptions."

historians, who derived information only from available written records, Maine supplemented these sources by drawing upon an evolutionary methodology: He viewed synchronic variation as evidence for diachronic change. Having researched the early history of property law as far as the legal record could take him, Maine turned to contemporary "primitive" societies for confirmation of his evolutionary hypotheses.

Maine relied upon yet another analytic technique drawn from the social science of his day, the use of "survivals." Tylor (1958:134) described survivals as institutions or practices that "have been carried on by force of habit into a new state of society different from that in which they had their original home" and argued that survivals constituted evidence for social evolution in that they were "proof . . . of an older condition of culture." In *Ancient Law* this methodological tool was used extensively to argue for the historical (as opposed to Natural) origins of certain legal principles.

Maine adopted this approach, particularly when one legal principle appeared not to "fit" into the logical pattern of contemporaneous legal rules. He explained anomalies in law as survivals from a previous era when they did "fit." He then searched for evidence that the legal principle in question was indeed a historical holdover.

One further methodological point should be made about Maine's work. Because he saw his ranking of legal institutions in terms of unilineal evolution – one institutional form metamorphosing into the next – he had to find evidence linking the stages into a sequence.

Historical records documenting the entire sequence for one society would be the strongest evidence for this kind of evolutionary theory. Since this would be hard to find, however, Maine adopted the next best strategy: He "proved" the reality of the sequence by locating transitional forms, societies undergoing a transformation from one stage to another. Thus in Maine's discussion of the evolution of the legal status of married women, he described first the subordination of women to their *blood relations* in primitive societies. Next he noted that in the law of his own time a married

[2] Raymond Firth's preface to *Ancient Law* indicates that Maine served as a member of the Viceroy's Council in India following his retirement from the Chair of Civil Law at Cambridge University. Maine lived in India for seven years and was well acquainted with Hindu law.

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