PROCEDURE IN THE STUDY OF CUSTOMARY LAW

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The title of this article is slightly ambiguous and this is intentional, expressing at once its two basic themes. In the first place, I want to address myself to the questions of how the study and teaching of customary law are best approached in Papua-New Guinea. But for the lawyer, of course, Procedure is also a technical term referring to that branch of the law which governs the conduct of affairs in our courts; by its use here I want to suggest the importance of studying customary law in the context of disputes and in the modus employed for their settlement.

The study of law in pre-literate and pre-industrial communities has a respectable and well-established place within the discipline of anthropology, and a very extensive literature now exists in this field. Much in this literature, however, is concerned with broad sociological issues, such as the nature of social control, rather less with law in the more narrowly defined sense of the professional legal practitioner. There have been, of course, some notable monographs on customary law in many parts of the world, but it is worth noting that the studies on which they were based have usually been carried out in response to the request of colonial administrations, as in the case of Schapera's *Handbook of Tswana Law and Custom* (1955), or else by administrative officers who had received advanced training in anthropology, of which Howell's *Manual of Nuer Law* (1954) perhaps offers the best instance.

Such studies appear to have arisen out of the felt needs expressed by administrators for the proper recording of customary law. The desirability of carrying out such a task, at least in British dependencies, was implied to some extent in the policy of Indirect Rule, under which local tribal courts were recognized as an integral part of the territorial legal system, but the problems of applying an unwritten body of rules in rapidly changing circumstances raised the issue more urgently. The position has been well stated by Mr. J. P. Moffett (in Introduction to Cory, 1953), then Local Courts Adviser to the Government of Tanganyika. ". . . one reason why the recording of customary law is so essential is to enable the courts to refer to a generally approved or an 'authorised version' of the law, sanctioned by chiefs and people. Without a written record there can be no certainty in the law, nor is it wise to bring about changes in the law without the sure knowledge of it, and its underlying principles, which only written law can give."

According to specialists on African law, such as Professor Allott (1953), the eventual aim of this kind of study should be the production of legal textbooks that could be cited in Court or used for teaching purposes. The best works in this genre, such as those already mentioned or that of Hans Cory among the Haya (1945) and Sukuma (1953) peoples of Tanzania, have

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one thing in common they all proceed on the assumption that customary law can be set out as an organized statement of rules Such a method might seem at first glance to have much to commend it, particularly to the practising lawyer whose primary interest is in law conceived of as a body of rules, to be applied, interpreted and manipulated, and whose workaday tools are the law reports and annotated digests I do not want to give the impression that I decry the efforts that have gone into these studies I do want to suggest, however, that from the point of view of research (data collection), presentation of the material, and of teaching, to view law simply as a body of rules is likely to be inadequate, if not positively misleading Let me discuss briefly each of these points in turn

Consider first the question of collecting the raw material The view that custom can be translated into a series of clear cut statements of rules of law can easily lead to the method that has been dubbed as "looking for the wise old men of the village" Cory, for example, working among the Sukuma, was faced with the problem of variation in local custom He was led finally to working mainly through an assembly of expert and authoritative spokes men questions were put to the gathering and the matter was debated and discussed until all agreed on the answer, which was then recorded It seems to me that there are a number of ways in which this kind of approach can give rise to difficulties In my own fieldwork among the Bemba, and later in the African urban courts of the Copperbelt of Zambia, I soon found that court members could expound the points involved in a case with great command and infinite patience, but they were much less at home in the discussion of hypothetical issues which I sometimes had to put to them This was not because they were unintelligent or lacking in legal insight and imagination, but because their mode of legal thinking was particular rather than abstract the rules of law were not conceived of as logical entities, they were rather embedded in a matrix of social relation ships which alone gave them meaning Answers to direct questions recorded in this way may thus prove to be unreliable guides to the way in which the stated rules may be applied in a given set of circumstances

This is not to assert that the careful questioning of informants cannot provide valid statements of custom—often there is no other way for the investigator to proceed The point I wish to stress is that the method is likely to lead to an unnecessarily restricted view of custom native law and custom come to be seen as being made up of statements of rules governing human behaviour, but divorced from the procedures, themselves equally customary, through which the rules are applied Such an approach is likely to result in serious misconceptions of the nature of the rules themselves and so to frustrate the aims of the entire exercise Some of these difficulties I believe, are to be seen in Cory's discussion of divorce in Sukuma law, which provides at the same time a convenient point of entry to discussion of the presentation of the material once it has been collected

In addition to discussions with tribal elders, Cory also cites the records of cases heard in the tribal courts But he does not treat the cases as units of analysis from which the underlying principles can be deduced They are presented rather by way of illustration, and mainly as a check on his informants' statements So in his discussion of divorce he sets out at length the various grounds on which divorce may be granted in a Sukuma court In the course of this account he also observes that certain forms of behaviour, such as the cursing of a wife by her husband or vice versa, would

not be considered adequate grounds for divorce. All of this appears as quite straightforward until in a later part of the discussion we come across an actual decision cited by Cory in which it appears that a court granted a divorce "without the petitioner giving any grounds for his demand". Cory cites the judgement without comment, apparently unaware that the decision did not square with his earlier discussion of grounds for divorce in Sukuma law. Yet clearly something is wrong, and we are led to ask whether the case was simply an example of a bad decision, whether Cory's informants were wrong in their statements of the rules governing divorce, or whether it is simply that Cory was led by his methods into misinterpreting the Sukuma concept of divorce. I would submit, with respect, that the evidence we have from the workings of other Bantu systems points to the last of these possibilities. In order to bring out my point more clearly, let me examine briefly a case of divorce which is typical of the many hundreds I have heard in African courts throughout Zambia and the Congo.

The case was a suit for divorce filed by the wife before one of the urban courts on the Copperbelt. Her story was briefly as follows. One day while she had been pounding maize at her mother's house in the compound, her husband arrived and announced that he was on the way to the Beer Hall. He told his wife to meet him there when she had finished her task. On the way to the Beer Hall the wife met a friend who invited her into the house, and asked her to stay a little while she prepared some ground-nuts. When eventually she reached the Beer Hall she had missed her husband. When they both finally returned home the husband was very angry and accused his wife of being with a lover. They quarrelled over the matter for a number of days, and finally the wife decided to bring the matter before the urban court. The general outline of the wife's statement was substantiated by the husband, but he claimed that the complainant was still his wife.

From these statements made to the court the grounds for divorce would appear to be rather flimsy. Yet as a matter of fact the court did not concern itself overmuch with this question. Thus it did not even consider whether the husband had beaten his wife as she alleged, or whether he had any sound reason for believing that she was with a lover. Instead it concentrated its attention on the "total" nature of the marital relationship—a relationship that in many African societies, as in New Guinea, includes not only the spouses but also the close kin of the wife. After establishing that a marriage had been properly contracted (by passage of bride-wealth) the court inquired about previous misunderstandings between husband and wife. The wife then took up a lengthy story from which it appeared that there had been a good deal of trouble in the past as a result of which her father had earlier wanted to have the union dissolved. She described how, for example, when her father had been ill, her husband had not gone to offer sympathy; he did not greet his father-in-law with the customary salutations when the latter returned home from work; he had refused to go into the bush to seek medicines for a sick child, and so on. Let me quote a few excerpts from the record of the case to show how the court dealt with these points.

Court: Is it true that you refused to fetch medicines for a sick child?
Husband: No, I did not refuse to fetch it.
Court: But did you go and get it?
Husband: No.

Court: Do you think your wife's relatives would have been pleased by that?
Husband: No, they were not very pleased.
Court: Yes, you see. That is where you were very foolish. And don't you know that whenever your father-in-law comes back from work in the evening you should clap before him in accordance with our Bemba custom?

Another member of the court, a Kaonde by tribe, now intervened.

Court: According to the customs of the Kaonde, if I were to come to you and seek to marry your daughter, what would you say?
Husband: I would be pleased.
Court: Would you not say that this son-in-law of ours will help us in all our difficulties?
Husband: Yes, I would.
Court: Well, that is exactly the point here. You should know that you made a mistake by refusing to go where your father-in-law directed you. Listen now, if your chief came and married my daughter I would be entitled to make him climb trees. [This was a reference to the Bemba custom of performing services for one's in-laws by cutting trees and making gardens for them.] There is a proverb in Bemba that a chief does not marry the daughter of a fellow-chief unless he is anxious to cut trees. Now what have you to say about your wife?

The husband still claimed his wife, but she continued to insist on a divorce. As the discussion proceeded it became clear that there was no hope of reconciliation. The husband at length recognized the position, and a certificate of divorce was granted to the woman.

I have not attempted to give here a complete record or analysis of the case, but from the excerpts I have presented it will be seen that the points on which the court concentrated had little to do with the statements initially made by the parties. The court in fact took the view that the complaints made by the wife in her opening remarks were only indices of a deeper rupture in the marriage relationship, and it proceeded to examine the behaviour of the husband within the total context of that relationship. It is clear of course that in presenting one's suit for divorce, reasons have to be specified for taking this course of action, and on occasion these may in fact closely correspond to what we ourselves would regard as grounds of divorce—adultery, neglect, desertion, etc. But it should also be clear from the case cited that the procedure adopted is very different from that of our own system, and therefore involves a very different concept of divorce. The issues are presented to the court not in the form of "pleadings", but by way of statement, and the "grounds" alleged—adultery, neglect, misunderstandings, etc.—are not regarded as "tight" legal categories, the ingredients of an issue, each more or less carefully defined and strictly to be proved. Hence if a woman seeks to divorce her husband, mentioning his ill-treatment as the reason, the Court may not be over-concerned about establishing such ill-treatment as a fact. Rather, it is concerned to explore the marriage relationship as a whole, including the relations between the spouses and their in-laws, in an endeavour to trace the real causes of difficulty, and on this basis to try and reconcile the parties. Accordingly, we have to regard the "grounds" adduced by a petitioner for divorce merely as the broad reasons by which the court in granting a divorce satisfies itself that the couple are no longer able to live together in harmony, and that it would be better to allow them to separate.

I have been suggesting then that a formal statement of rules is likely to lead to misunderstanding if no account is taken of the context within which the rules are applied. When the rules are presented in this way in handbooks or manuals of native custom they are also likely to give rise to difficulties in the courts. Thus in a case of the type we have been discussing, if the matter were to come before a Magistrate or High Court judge by way of appeal, and he were to refer to such a handbook, he might be inclined to interpret the statement of the rules in it in terms of his own technical concept of grounds of divorce. Instances of this kind are not unknown, as the following case shows. A woman of the Yao tribe once sought a divorce from her husband, who was Henga, in a tribal court in Malawi. The wife claimed that she was constantly being beaten, though the real source of friction appears to have lain in their conflicting tribal customs. The tribal court granted a divorce, and the husband appealed. The matter eventually reached the High Court where it was found as a fact that the beatings did not take place, and held accordingly that the tribal court was wrong in granting a divorce on that ground. I am not trying to argue here that tribal courts are never wrong; but I think it will be agreed that a potentially serious situation is created when two sets of courts, sharing the common aim of recognizing and enforcing native law and custom, are in fact working with totally opposed conceptions of what that system is.

I have illustrated my general argument with examples drawn from Africa, and it may well be asked how it can be applied to the circumstances of Papua-New Guinea whose traditional societies lacked courts of the African type. I cannot speak for the Territory as a whole, but in general I believe that the lack of means for the peaceful settlement of disputes can easily be overstated. For many areas there is evidence that at least within the local community it was customary for disputes to be brought before the village assembly or moot, and there were special terms for this institution in the vernacular. Nevertheless, Professor Lawrence (1969: 32) is essentially correct when he points to the importance of relativity in defining legal operations in Papuan-New Guinea societies. In Lawrence's terms, the closer the relationship and association between the disputants, the fewer the people involved, the less severe the retaliatory action and the easier the settlement. Conversely, the greater the social range of the dispute, the more people involved, the more severe the retaliatory action and the more difficult the settlement. Stated in rather different terms, what this means is that the settlement of disputes has often to be seen within the context of political relationships. There is a point involved here which many lawyers without experience of the Territory find difficult to grasp, and which worries them a great deal. They seem to feel that the settlement of disputes in these ways must mean the abandonment of any attempt to administer law as such. This is seen, for example, in some comments by Professor Derham on the settling of cases amongst the Tolai at village moots. "It seems clear", Derham notes, "that the main aim of such meetings is to achieve agreement and it seems equally clear that in most matters, if agreement is reached, anything may be done that is in fact agreed to. Even where such well-established matters as the rights to the use or inheritance of land are concerned, general agreement may justify almost any variation in the established or recognized rules". This is, I think, based on a misconception. When, for example, the Rhodesian judges decided recently that they could

not accept a ruling of the Privy Council, it is evident that they were making a political decision. But they could not, of course, present that ruling simply as a political decision; if they were to win support for their position both within and without Rhodesia they had to do so by justifying their action by appeal to legal norms. In the same way, in New Guinea, however obvious the political aspects of a dispute, the battle itself is waged through the marshalling of arguments, all of which have their basis in the customary law of the people. The parties to a dispute do not arbitrarily change the laws; rather, as counsel do in our own courts, they seek from amongst a number of alternative rules the ones which are most favourable to their case, and they seek to have such rules accepted as applying to the case in question. Listening to many disputes amongst the Tolai, particularly over land, I found that they were often difficult to follow at the time because of the way in which they seemed to hop from issue to issue, and because of the way apparently irrelevant details would suddenly be introduced. But when the case had been fully recorded and could be examined in retrospect, almost invariably it turned out to have a very simple structure built up around the confrontation of specific legal arguments; no less than amongst ourselves, the hearing of these disputes resolved itself into a dialogue of norm and counter-norm.

If I have stated my argument sufficiently clearly, it will be apparent that the approach I advocate calls for something rather different from the more usual form of recording or codification of customary law; it leads rather to an emphasis on the elucidation of concepts and their underlying assumptions. Concentrating on the dispute process in indigenous contexts, we are confronted not with static "specimens" of custom, but with legal ideas in action. Such an approach is especially important in a period of rapid social transformation, for if we insist on treating custom simply as a statement of rules we may be depriving ourselves of that very flexibility we need if the law is to be adapted to meet changing circumstances and relationships. On the other hand, if we deal with general principles abstracted from the study of customary law in action, we put ourselves in a position to interpret novel situations in terms consistent with indigenous modes of thought. We recognize in this way the potential for growth in customary law, and thus help to promote it.

I believe that similar considerations are also very important in the teaching of native law to indigenous law students. For the trained lawyer, brought up in the Common Law tradition, custom has a special status within the legal system: in general terms it is seen as an "exception" to the law. Hence the various tests that have been devised for "proving" custom before it can be enforced. Translated into the colonial situation, therefore, the law of the land is essentially the law of the administering authority, and the inferior status of native law and custom is indicated in the fact that it is deemed to have legal effect only when recognized by territorial legislation. When young indigenes come to undertake formal training in Western law, this sense of the inferior status of their own traditional institutions can easily be accentuated. Serious problems may thus be created when these students in due course come to administer a system of law with which they have little sympathy and perhaps even less understanding, but which in fact continues to regulate the behaviour of most of the people who are likely to appear before them as litigants. There is no easy solution to this problem, but it seems to me that the attitude of a rising class of trained

indigenous lawyers towards customary law will depend at least to some extent on the way in which the subject is taught It must appear to be taught seriously as an integral part of the whole course, and not as a mere marginal appendix to the real study of the law represented by the courses on contract, tort and real property, etc In so far as this can be done, I believe it can only be done when students are brought to understand the rationale of the system, that it is a coherent body of principles, adapted to certain sets of social conditions, and not simply an assemblage of exotic customs followed by their barbarous ancestors, and still clung to only by the unsophisticated

In a well known passage Sir Henry Maine (1907 389) speaks of ancient law as being secreted in the interstices of procedure Maine had in mind the formalism that was characteristic of early Roman and other legal systems We now know that this kind of formalism is completely absent in most tribal communities Nevertheless, provided that we do not insist on this narrow interpretation of procedure, my contention is that Maine's aphorism still carries important lessons for us

References

Allott, A N (1953) "Methods of Research in African Customary Law , *Journal of African Administration* 5 172 177

Cory, H (1953) *Sukuma Law and Custom,* London, O U P for the International African Institute

Cory, H and Hartnoll, M (1945) *Customary Law of the Haya Tribe,* London, Lund Humphries for the International African Institute

Derham, D P (1963) "Law and Custom in the Australian Territory of Papua and New Guinea ', *University of Chicago Law Review* 30 495 506

Howell, P P (1954) *A Manual of Nuer Law,* London, O U P for the International African Institute

Lawrence, P (1969) "The State versus Stateless Societies ', in Brown, B J (ed) , *Fashion of Law in New Guinea,* Melbourne, Butterworths

Maine, H S (1907) *Early Law and Custom,* London, John Murray

Schapera, I (1955) *A Handbook of Tswana Law,* 2nd ed , London O U P for the International African Institute