# TROUBLE-CASES AND TROUBLE-LESS CASES IN THE STUDY OF CUSTOMARY LAW AND LEGAL REFORM

**J. F. HOLLEMAN** *University of Leiden*

## I.

I first went, as a student, into the field (Zululand, 1938) without the benefit of a clear theory of investigation of customary law. Llewellyn and Hoebel's *Cheyenne Way* (1941) had not yet appeared; and years later,[1] when I ended my fieldwork among some Rhodesian Shona tribes (1952), Hoebel's classic *The Law of Primitive Man,* which further elaborated the theoretical angle of this kind of inquiry (1954: Ch. 1-4) had yet to be published. I did not, however, course entirely haphazardly through this field. I was trained in (mainly African) ethnography and (Roman Dutch) law, had learnt to read the decisions and interpretations of (South African) European courts on "native law and custom" with some critical reservation, and had found in works like Schapera's *Handbook of Tswana Law and Custom* (1938) — probably still the best of its kind as regards Africa — a suitable, systematic frame for the pursuit of my inquiries and the exposition of my findings. Moreover, my home background had acquainted me with some of the work and aims of Dutch scholars on Indonesian adatlaw who, inspired by the great jurist Van Vollenhoven,[2] then seemed to be leading the field with their efforts to arrange the rich variety of Indonesian folk law and practice into a coherent system with a distinctly *indigenous* imprint. Van Vollenhoven's early and repeated insistence upon the need *"het oostersche oostersch te zien"* (to perceive that which is oriental through oriental eyes),[3] instead of seeking to fit Indonesian concepts into the familiar categories and analytical schemas of Western jurisprudence, had obvious application also to the African field.

In retrospect I find that, without consciously theorizing about my method of research (or, for that matter, about a working definition of "law" itself), I did employ a combination of the descriptive, ideological (rule-seeking) and case-focused approaches advocated by these senior American fellow-workers. My conscious indebtedness to them, and especially to Hoebel, came very much later when, facing students and preparing

some of them for juridical anthropological fieldwork, I had to find a methodological baseline from which to proceed upon the paths of field enquiry. Chapter 3 of Hoebel's *Law of Primitive Man* proved to be a simple and stimulating introduction, and it provided a suitable frame for relating the first object-lesson which I myself received in Zululand while visiting the hamlet of the headman of a tribal ward. Here it is.

> Sitting with our backs against the rough poles of the circular cattle corral, we were sharing, together with five or six other homestead heads, a large pot of beer which he had ordered one of his wives to place before me as a token of welcome. A few yards away a couple of youngsters were struggling to force a reluctant she-goat into the goat's pen adjoining the cattle corral, kicking up a lot of dust. The headman shouted to a young woman that her goat was spoiling our beer. She hastened to help put the animal inside. He explained that she was his younger brother's wife, mother of one small son, hard-working and good at making clay-pots, too. In fact, that was how she got this goat. I asked a few questions. It appeared that she either sold or bartered her pots in the neighbourhood. She raised some chickens, too, which she sold at the small district centre of Nongoma. When she had earned eight shillings she bought a young she-goat, now grown and about to have kids. . . . It was not an uncommon form of enterprise, for several other women in the neighbourhood were doing likewise. Here was an obvious opportunity for discussing property rights of married women with a panel of knowledgeable men. The following are some extracts from my field notes:
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> Q: "The goat therefore belongs to her?"
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> A: "It belongs to her, for she made the pots and found the money."
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> Q: "Her husband approves?"
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> A: "He approves; he loves her for she is a good wife."
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> . . . .
>
> Q: "She can sell the goat if she wants to?"
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> A: "She can sell the goat."
>
> Q: "Without telling her husband?"
>
> A: "She will first ask her husband."
>
> Q: "And if he says 'No'?"

A: "Then she cannot sell."

Q: "But why not? You said it is her goat because she earned it herself."

A: "It *is* her goat, but she is [like] the child of her husband. That is why she cannot sell without asking him."

Q: "Does this mean that the goat really belongs to the husband?"

A: "So it is. The husband is the *umnini* (owner) of the woman, the woman is the *umnini* of the goat, therefore it is really the husband who is the *umnini* of the goat . . . It is because he agrees to her making pots that she found the money to buy the goat. So it is really through his *amandla* (power, authority) that she has this goat."

Q: "If he is the real owner, could he sell the goat?"

A: "He could sell it if he wants to."

Q: "Without asking his wife?"

A: "She is his child, he need not ask her."

Q: "So this is the true law of the Zulu, that a husband is the owner of property (*impahla*) like a goat which his wife has earned with her own labour, and that he can sell this property without asking her?"

A: (with some solemnity, all men present nodding in agreement) "*Impela! Umthetho wesiZulu!*" (Indeed, the law of the Zulu!)

Methodologically, I had now travelled some way along the "descriptive" road to what appeared to be practice, and followed the "ideological" line which produced a "legal rule" — Hoebel, 1954 (1968 edition: 29). Now the test of case-oriented inquiry.

Q: "Could you tell about any examples of this having happened?"

A: "Of a man selling his wife's property without consulting her? *Ngeke* (never)! He would be like a rogue[4] stealing from his wife."

Q: "But you all agreed that he could do so under Zulu law (*ngomthetho wesiZulu* . . .)."

The headman thoughtfully took a pinch of snuff before he replied. "You do not understand," he explained patiently. "You asked about the law of the

> Zulu and we told you the truth. But it is also like this, that a man who likes to live peacefully with his wife knows that he should always discuss such matters with her. *U zau khuluma nendlu* (lit. one should talk with one's 'house')."

Some time afterwards, however, I did strike a trouble-case in which this issue cropped up and was tested in the "crucible of conflict" (Llewellyn and Hoebel, 1941: 29). At first sight it looked a simple matter.

> The woman (complainant, assisted by her elder brother) demanded back the money which her husband had received by selling "her" fowls without her knowledge or consent, and which he had used to buy himself a new shirt. But in the hands of the little *ibandla* (gathering) presided over by the local headman[5] the matter proved to be considerably more complicated. The husband had, in fact, first "talked with his wife," but she had refused, accusing him of loitering, "chasing after beer and other women," and of neglecting her. He, having as long a list of complaints about her, "had stayed quiet for a long time," nursing his grievances and even complaining to her family about her casual behaviour as a housewife and her habit of "not listening" to him. One day she left to visit her family ("leaving me like a dog that has to find its own food"). The coast being clear he had collected some of her chickens ("I did not take all"), and sold them at Nongoma for six shillings and ninepence. He had bought a khaki shirt for six shillings, and "intended to buy something nice" for his wife with the remaining ninepence. But upon coming home she had flown into a temper, attacked him with a large wooden ladle, kicked over a cooking pot ("so I went hungry again"), and then left to sleep with neighbouring friends.
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> It was a howler of an *indaba* (affair), which produced as much merriment among some as indignation among others. After a lengthy and often acrid public discussion, the headman delivered his judgment. It was clear (he said) that this "was not merely a matter of selling chickens," but of a long-standing trouble between husband and wife who had both failed the law[6] of *ubulanda obuhle* (maintaining amicable social relations, especially between in-laws). Both were guilty

(*necala*): the woman because she had not "listened well enough" to her husband; the husband because he had neglected (*ukuyeka*) his wife — "the one who bears your children and who looks after you when you are ill." Both were severely scolded and sent home with the warning that further trouble between them would have serious consequences. There was neither an explicit affirmation nor a denial of the husband's right to sell his wife's chickens. Yet, by implication, the "rule" had been tested, or rather, the way it should have been observed in a spirit of reasonableness between parties. This lesson did not go unheeded, because two months later I heard that the husband had gone to work in the mines of Johannesburg, and had sent money home to his elder brother with a message for his wife. When the brother-in-law showed her the money (thirty shillings), he said that his brother had asked him to look after it, but to give her some if she needed it. She took five shillings to buy soap and a piece of cloth for her child, and another five shillings because she wanted a little she-goat for herself. The brother-in-law said: "*Kulungile* (it is alright), for it is not forgotten how he was helped by the money of your chickens to buy a shirt."

What I myself learned from this one interview and trouble-case went far beyond the province of proprietary rights. Most important was the early warning that I, as a Westerner would find it difficult to formulate specific rules of law in a way that would adequately reflect the indigenous norms actually governing the resolution of disputes in which they might be considered relevant. Hence, when years later I wrote a largely case-based book on some fields of tribal (Shona) substantive law, I did not set out to present a tribal *corpus juris* of "strictly defined rules," but rather a coherent arrangement of "broad concepts and guiding principles, the practical application of which [amply illustrated by case material] varied with virtually every case in which they were reflected" (Holleman, 1952a: X).

The difficulty of presenting the substantive law of a preliterate people in a collection of carefully formulated rules is illustrated, for instance, in Pospisil's highly readable and thought-provoking *Kapauku Papuans and their Law* (1958). He presents his law material in some 120 systematically ar-

ranged abstract rules, formulated with the help of his informants, each rule being followed by a brief (too brief) report of actual disputes and the outcome of these, in order to see whether or not the stated rule has been adhered to. In this way, by a simple process of quantification, he could determine the incidence of rule deviation. The results are interesting. Though in more than half the number of cases the outcome was *not* in conformity with the formulated rule, yet in the overwhelming majority of cases these easily excitable and highly individualistic Kapaukus accepted the headman's decision as a just one. One of Pospisil's conclusions therefore is that "it is not the abstract rule that affects the Kapauku people, but the actual decision of the headman . . . although in the majority of decisions the people assume that he complies with the rules" (1958: 255). Fortified by these results, Pospisil (1958: 256f) restricted the field of law to the rock-bed of legal decisions and such principles as could be abstracted from them, thus excluding stated rules not confirmed by such decisions ("dead rules").

The trouble with this method is that, however carefully such abstract rules are formulated without the heat of actual conflict with its concomitant incidents, real-life disputes so often present a much more complex set of issues than can be covered by a single rule. This means that, even when the main focus of dispute does involve the subject matter of such a rule, circumstantial factors (not covered by the rule) play a role in the decision-making process and may lead to an outcome which is not strictly "in accordance with the rules." The incidence of this kind of deviation is likely to be higher still if — as Pospisil usually did — such rules also include quite specific forms of redress or punishment. For in this respect even the most developed law systems permit the decision-making authority a considerable latitude. Pospisil's test, though interesting as an experiment, is therefore not, I believe, altogether valid, because the values he compares (abstract rules focused upon single interests or actions, and conflict situations likely to involve a plurality of these) are often not really comparable.

Few, if any, workers in this field of research will deny that, especially in societies without a strong authority structure, conflict resolution very often (like politics) is the art of seeking feasible compromise rather than the enforcement of more or less clearly stated rules of conduct, and that to

the outside observer the incidence of rule deviation may indeed appear to be high. Having repeatedly observed the same phenomenon myself, I would, however, be inclined to distrust not so much the existence of cohering concepts and "ideal" norms as a society's legal frame of reference, but rather the efforts of formulating individual rules without relating them to a wider context in which also other interacting needs and values influence the course of social peace and conflict.

## II

Since Llewellyn and Hoebel's Cheyenne study several other anthropologists, some with legal training as well, have concentrated on the detailed description and analysis of trouble-cases for the study of unwritten law. The case method, focused upon "law-in-action," the *process* of "dispute settlement" or "conflict resolution," became their favourite tool in research and comparative, theory-stimulating study. This may well, as Gulliver (1969: 12) believes, at least partly have been the result of "a weariness with past endeavors to achieve acceptable definitions [of the key-concept "law"] and . . . increasingly fruitless controversy." But partly also it must be because organized responses to situations of social stress caused by impermissible deviations from ideal norms and precepts offered fresh scope for a better understanding of the actual regulation of human conduct. For this reason both Gulliver (1969: 13) and A.L. Epstein (1967: 208), theoretical exponents and skillful practitioners of this method, re-emphasized Hoebel's early dictum (1942: 966) that the study of "primitive law, like common law, must draw its generalizations from particulars which are cases, cases and more cases." This emphatic statement not only proclaims the absolute priority of the case method in the study of unwritten law, but leaves no doubt that its focus is the trouble-case and no other case material. Trouble-cases are, in Epstein's words, the fruitful "units of analysis" in which the presented "material is used not so much by way of illustration but as providing the raw data for analysis, the various strands in the skein of facts being teased out and dissected to reveal underlying principles and regularities."

In this way field scholars like Gluckman, Bohannan, Gulliver and Epstein himself (to mention only a few who, like myself, worked in Africa) have indeed immensely enriched our understanding of a number of major principles and ideas and the ways these are actually applied in the judicial processes of differently organized types of society.

Yet, in order not only to reveal underlying principles and regularities but also to present a reasonably comprehensive and coherent picture of the substantive and living law of such societies, this method would necessarily require an adequate number of trouble-cases in all significant fields of social activity governed by the rule of law. Unfortunately this is rarely possible. Hoebel himself has admitted that: "It is a rare ethnologist who can stay around long enough to sit on a bag of cases full enough to round out the law picture" (1954: 40). But the inadequacy of such material need not be due solely to the inevitable limits of an investigator's local tenure and opportunities for observation, or of his informants' experience and powers of recollection. For there are, in probably every society, certain avenues of social and economic activity in which the passage of legal traffic and transactions takes place regularly but with very few known cases of litigious collision. In my own fieldwork among some Shona tribes in Rhodesia I struck a few of these. In the field of marriage law, for instance, I could reap a rich crop of matrimonial trouble-cases and litigation arising from obligations (such as bridewealth payments) under the marriage contract. Yet in spite of a kinship system which prohibited, in principle at least, the marriage between all cognates no matter how far removed[7] as well as between most classes of affines, there were very few known contraventions of marriage regulations. Those that I did discover (all dealt with by family moots whose proceedings were merely reported to me) would have been totally inadequate for the legitimate deduction of general principles.[8] Another field concerned contracts (apart from betrothal and marriage), and a third, perhaps more surprisingly, land rights. With regard to the latter, in the more remote parts of Mashonaland no agrarian reform had yet been introduced by the Government at that time (1946-48), and land still appeared to be fairly plentiful. The customary system of shifting cultivation was practised in a rather easy-going manner. This resulted in a considerable mobility of rights to residential and arable holdings, but led to very few overt disputes about individual land use. In fact, I struck only a few that had required formal adjudication, and my informants were hard-pressed to recollect more. Yet there was little or no confusion about the recognized principles which governed the control, occupation and use of land,[9] and as to who should give way to whom in the event of conflicting claims under various circumstances. I was

therefore compelled to test my findings derived from observed normal and *trouble-less* practices, by lengthy discussions of hypothetical disputes. Now Epstein (1967: 210) found that his juridical informants "were much less at home in the discussion of hypothetical issues" than in expounding points involved in (trouble-) cases they had actually dealt with, because their "mode of legal thinking was particular. . . [being] embedded in the matrix of social relationships," rather than abstract in the sense of conceiving rules of law as "logical entities."

I agree with him, up to a point. Obviously, trouble-cases present a rich and compact source of concrete details which not only are the factual bases for further clarification by knowledgeable informants, but they often also provide the observer-inquirer with cues for questions which he may be less likely to think up himself when posing hypothetical cases. But once an investigator has lived long enough in a community to have a reasonably clear impression of its everyday life and normal range of activities, he does not always need trouble-cases (however much he will welcome them as dramatized set-pieces for observation and deeper analysis of the varying complexities of conflicting interests) to get a fair idea of the normative principles of lawful actual behaviour. In the first place, in the overwhelming majority of such activities people do, as a matter of course, pursue their interests and behave in a manner so as to *avoid* legal disputes. In Vinogradoff's words, they have acquired "the mental habit of recognizing rules imposed by social authority."[10] This voluntary observance of the law is therefore its most common form of maintenance. At the same time the knowledge so gained of actual practice, and of local conditions and relationships which affect such practice, also indicates the scope within which the inquirer can still fruitfully pose questions without inviting his informants to start guessing about hypothetical circumstances beyond their practical experience. (When, in the Sabi valley in 1946, I ventured to ask about water rights of people cultivating along a hypothetical irrigation furrow, my informants could only hazard guesses because no one at the time had any experience of artificial waterworks. This inquiry, though not entirely useless, remained inconclusive.)

Secondly and more specifically, many of the more important legal transactions, such as marriage, the allocation and transfer of land or valuable movable property, the undertaking of (reciprocal) services such as cattle agistment, often take place in

the presence of the local authority, family heads or interested others who are in a position, if necessary, to challenge their execution (though the absence of such persons need not invalidate all of these transactions). Dutch scholars of Indonesian adat law have long since recognized that this practice is not so much a matter of "witnessing" such transactions in order to provide reliable "evidence" in the event of future dispute, but rather as authoritatively "attested" or "supported" forms of law observance (*gesteunde naleving*)[11] and of "preventive law care" (*preventieve rechtszorg*),[12] aimed at removing legal uncertainty and avoiding, as far as possible, the prospect of future dispute. In this way the particular contents and validity of (new) legal relations are actually tested by people of juridical knowledge and judicial authority. Their affirmative cooperation (or intervention) or mere acquiescence may lack the explicitness and drama of a judgment invoked by conflict and argument; it nevertheless falls within the sphere of legitimate control and authoritative legal sanction. Why then should these incidents not be given the same analytical attention as the trouble-case with which the case method has become so closely identified?

Surely this wide and varied field of observable common practices — of specific instances of voluntary and attested law observance — offers an abundance of concrete cases, though of the trouble-less kind. If properly recorded, they likewise constitute invaluable "units of analysis," which by their very nature reveal the relevant principles and regularities, *as well as much of the permissible leeway,* of lawful conduct. They are nodal points in the development of socio-legal relations. They, too, present the particulars (less rich perhaps in their individual content than trouble-cases, but far more numerous and accessible in many fields of law) from which the generalities are drawn (*cf.* Hoebel, 1942: 966). In fact, it is the common trouble-less cases of normal practice that usually constitute the normative frame of reference by which trouble-cases themselves are judged. Adequate attention to them would, moreover, provide guidelines and specific clues for the probe into the illuminating prehistory of many a trouble-case itself, and thus facilitate the difficult execution of what has become known as the "extended case method."[13] For the latter refinement, especially if it aims at covering also the aftermath of trouble-cases in order to present them as links in chains of continuous social interaction, makes even heavier demands upon the field-

worker's time and opportunities for a wider investigation of the field of law. The "bag of cases" to which Hoebel referred may well contain specimens of rare value, but they will be fewer in number and even less likely to "round out the law picture." In her recent overview of studies in legal anthropology, Sally F. Moore therefore observes, with reference to the work of some major exponents of the case method approach: "In fact, none of these writers . . . has presented substantive law as a system. Instead, each has taken what he considers to be the most important consistent theme in culture and society, and has traced signs of that theme through some substantive rules" (1970: 270).

## III

I must stress that I do not wish to detract from the value of the case method, which I myself certainly found the most stimulating part of my fieldwork. But I do consider that its commonly accepted province (that is, institutionalized dispute settlement or conflict resolution) is unduly restricted and that the scope of its application should be widened to include at least the kind of trouble-less cases I have indicated above. (In the last part of this paper I shall refer to other situations in which this method is indispensable.) Some of the reasons for my belief I have mentioned: a broad insight into the guiding normative principles and values covering the full range of socio-legal traffic tends to be sacrificed to a preoccupation with (thematically oriented) intensive probes into causes and remedial treatment of collision cases. These, however important they are, still constitute a minority phenomenon. Moreover, since the "incidence of collision" may be high in some areas of the law and extremely low in others, the *over*-emphasis on conflict — and this represents the bulk of what ultimately appears in print in this type of study — is bound to lead to an uneven coverage of the total field of law. It may, in fact, even lead to a distorted presentation of widely accepted and commonly observed legal principles in comparatively trouble-free areas. In the space allotted to me, I can unfortunately give only one example of this in some detail, but it should suffice to substantiate this point.

> In 1946, in the Sabi Reserve, Hera tribal area, land was still considered to be plentiful and the population enjoyed a considerable freedom of movement within the boundaries of their tribal wards (*dunhu*) in the pursuit

of their traditional system of shifting cultivation. Land disputes were, as I have stated, rare in this area.

M, having exhausted his fields, had in July — dry winter season — staked a claim to a piece of cultivable land in the traditional manner, by lopping off branches from a number of trees and stacking them around the trunks to be burnt later in preparation to clearing a field for cultivation with the onset of the rainy season (early November). As his proposed field was some two miles from the place he intended to leave (though still in the same ward), he had made cursory inquiries at neighbouring hamlets. He had learnt that this site had, some eight to ten years before, been left by N, who had taken up residence and arable land about four miles away (same ward), and that N had given no indication of his wanting to return to his old site. Strictly "according to rule" M ought to have "told the *sadunhu* (ward headman) beforehand," but had not done so. This omission was not uncommon, for I had found that, in contrast with the practice in more densely populated areas, the majority of these ward members taking up new land had merely notified the headman at a convenient opportunity after the event. It would also have been a matter of common prudence and practice for M to notify N of his intention to occupy the latter's abandoned fields, something which he had also failed to do.

Early in September, when M was about to set fire to his dried stacks (*mavivi*), N turned up and excitedly claimed that this was *his* fallow land (*makura*) which he and his father (buried at some stone outcrops near by) had "ploughed for many years," and that he intended to return to it "soon." M said he would "stay away from the grave," but otherwise refused to budge. After a heated argument N "climbed the court" (*kukwira pa chivara*) of the ward headman.

Elsewhere[14] I have described the judicial procedure among the Hera, and here it will suffice to give the outcome of the case, the principal arguments advanced during the process in which, as usual, public opinion was freely expressed, and a comparison of this judgment with the generally accepted legal principles involved.

M's right to proceed with his cultivation was confirmed, but he was told to "plough away from the

grave" — which he would have done in any case. N's claim to the disputed area was not denied, but the headman asked him, "What can I do, for you never told me that you wanted to return to your *makura* again."

Now I had, several months earlier, on three or four occasions discussed this very issue as a hypothetical problem with different panels of informants, and the "rules" had been beyond dispute. Here was a question of two preferential rights, the one derived from prior possession and use,[15] the other based on the customary manner of *kupeta gombo,* staking a claim to virgin land or unused and apparently abandoned formerly cultivated land. When I had posed them as concurrent claims, all had without hesitation agreed that the former claim would "always" prevail.[16] "For the people cannot deny (*kuramba*) that he was the first who cleared the land, causing it through his labour (*basa*) to grow food for his children and for brewing beer to propitiate his ancestral spirits (*kupira midzimu*)." Even the presence of a family grave had been mentioned as a particularly strong argument in favour of the former occupier.

At the trial, what appeared to tip the balance in favour of newcomer M was the assumption, in spite of N's denial, that because N "lived not so far away, he knew" (must have known) about M's preparation, and that "by explaining things nicely" at a much earlier stage, he could easily have persuaded M "to look elsewhere" for land. One neighbour even suggested that N had deliberately delayed his intervention until M's preparations were well advanced (he had started to move part of his homestead in order to be close to his new fields), in order to "cause trouble (*kutambudzika*) for M." N hotly denied this allegation and stuck to his opening statement: "One day I knew that someone was taking my *makura* because I saw *mavivi* that I had not seen before and there was a person wanting to put fire to them." M's omission to notify N was glossed over when the latter advanced this point: "Why? Even we who live close by never heard that you wanted to return."

*Not* expressed at the headman's *chivara* (courtyard) was a piece of information which, though pre-

> sumably common knowledge to insiders, I picked up incidentally only much later: N had not been a pleasant cooperative fellow when he was living in that locality, and his neighbours had been rather pleased when he left. Neither they nor the headman whose hamlet was in the same neighbourhood, liked to see him coming back. Social (or if you like, "political") considerations had prevailed over legal principles in the court's judgment.

If there had been a fair number of adjudicated cases in this particular field of law in that locality, I would have had comparable judicially tested material from which to draw legal regularities. In that event the deviation of this judgment would probably have evoked my immediate suspicion that an element of social antagonism as regards N might have been the mainspring of the decision in favour of M (in itself, of course, a not uncommon occurrence in a community of interdependent members who value social harmony and peaceful mutual co-operation). A search in this direction would then have been a likely first exercise. But this was the only trouble-case in which this particular issue was tested before a recognized judicial forum, and no such social antagonism was expressed. Nor did the headman appear to behave unduly arbitrarily (something which normally provokes some critical public response). So I concentrated on legal issues and arguments. According to the theory as regards case-tested law, I should have attached great value to its legal authority. This I found difficult, for the verdict was a reversal of what I had learnt from observed trouble-free practice and repeated interviews about the relative weights of these competitive preferential claims. I was prepared to grant merit to the seemingly plausible and reasonable arguments that N's longtime silence had somehow estopped him from exercising his right (though this, too, was contrary to some of my experiences), and that a decision in his favour would cause undue hardship to competitor M. Even so, with the knowledge then at my disposal, I had expected the court to stipulate that M, after having had the benefit of one or two years' cultivation, should vacate the field if N himself really wanted to resume the active use of it. But no such injunction had been part of this judgment.

So this case stood oddly at variance with several instances of trouble-less cases in which a newcomer had, under apparently similar circumstances, as a matter of course given way when

a former occupier had intimated that he intended to "return to his *makura* some time" in the future. Yet the "rightness" (*mururamiro*) of its decision was affirmed during subsequent discussions with some of the same informants who had previously stressed the weight of a former occupier's right to return to his old holdings. It was only several months later, when my African assistant came back from a beer party at which N had caused trouble, that I was able to evaluate this "test-case" of N versus M. He remarked: "That fellow N is said to be often causing trouble." And he added casually, "It was also said that this is the real reason why C (ward headman) preferred to give those *makura* to M."

I think the lesson is clear. Whatever the merits of this trouble-case (and it taught me a good deal about non-legal values influencing the process of law), it was not the most reliable guide for the discovery of certain norms of substantive and living Hera law. The issue is not, perhaps, the theoretical potentials of the trouble-case technique so much as the practical limitations upon its full employment imposed by circumstantial factors, including the fallibility of the fieldworker himself. As a fieldworker I was not without experience, but in that locality I had not (yet) been sufficiently posted on some of the existing social tensions. This is a situation in which all fieldworkers find themselves at some time or other, and it is doubtful if they can ever fully overcome this difficulty. Even extrovert folk like these Hera retain some reticence in airing the hidden reasons for some of their behaviour in a fieldworker's presence. For he remains an outsider, however cordially he may have become accepted in the community; and however purposeful and skilled his search, he will owe some of his best insights to the chance remark or "lucky break" that comes his way without his conscious bidding.

Therefore, in the study of the substantive law and its practice, and in a field of the law in which litigation is rare, a fieldworker relying mainly on a case-method focused upon actual trouble-cases may get a skewed idea of the accepted principles and regularities in this particular field. Under such circumstances it is the case-studies of normal, trouble-free practice that are more likely, if I may here borrow Llewellyn and Hoebel's words, to be "the safest main road into the discovery of law. Their data are most certain" (1941: 29). The trouble-less case then becomes a necessary check on the trouble-case, rather than the other way round.

## IV

My arguments thus far clearly referred to fieldwork in situations in which the norms, institutions and processes of folk law, though neither static nor unaffected by foreign legal and administrative importations, are still the main determinants of social conduct and legal order in ethnically more or less homogeneous communities. These have been our principal and richest hunting grounds in the search for customary law; and this law (itself often ethnically or locally varied) was looked upon by colonial administrations as well as legal anthropologists as a separate entity or distinct sub-stratum within a territorial frame of legal pluralism. But the advent of independent statehood in most of the ex-colonial world has changed these premises and thereby added new dimensions, problems and priorities for legal anthropological research. The demands for legal reform have assumed a new urgency and inspired a search for unification of large areas of substantive law in order to resolve the plurality of both indigenous and imported legal systems. Moreover, the reorganization of the judicial system, likewise aimed at greater unification and centralization, has affected (sometimes radically) the legal status and operation of the traditional courts and moots, the very sources of customary case law upon which fieldworkers have heavily relied in the past for authoritative data. Indeed, the new statehood has rendered even more acute the very question of what the law is (or ought to be) in any given situation, locality, population group or social stratum in the new national realm. This means that law may have become an even more elusive quarry than before, and we shall have to review this changed law-scape in order to consider how our methodological approaches may lead into the discovery of a positive and *effective* law. The problem is a vast one, and obviously reaches far beyond the scope of this paper. Yet a few aspects should be briefly touched upon because they have a bearing on the points I raised in the earlier sections of my paper.

There is a felt need in the new states of Africa and elsewhere for the development of new systems of "national" law. If only for reasons of political stability and economic development they aim at modernization and a considerably greater unity than the legal pluralism of (pre-)colonial times. At the same time, in Anglophone countries probably more than in Francophone countries, there appears to be a growing desire that, as far as possible, the new national law should also re-

flect the traditional cultural image of its peoples, as presented by the viable principles and concepts of their customary laws. Scanning the African scene in the mid-sixties, Schiller (1965: 176ff) found that, of the various possible legal policies open to them, "the fusion of indigenous and non-indigenous law . . . is the guiding policy, expressed or unexpressed, for most of the emerging states of Africa," and that such a policy would involve "the directed evolution of the indigenous law."

Even without the fusion with whatever non-indigenous law that may be retained, modified, newly imported or purposely created, the direction of the evolution of such *indigenous* law as may effectively be retained will pose immense problems. Most of these countries have ethnically and culturally heterogeneous populations, and regional and local differences may be great. Moreover, social and economic development (mainsprings of legal change) may vary considerably from one region to another and, especially, from rural environments to urban. Whether legal reform is directed mainly by specific legislation (a tempting device for governments understandably impatient to find short-cuts to modernization), or through the hierarchy of the officially recognized courts, the main problem remains essentially the same: how to prevent the law from slipping out of its social context; or in Ehrlich's terms, how to prevent the divergence between the evolved positive law and living law. For the success of any legal reform depends not least upon its acceptance at grass-roots level, where the main volume of legal traffic takes place. But it is at this level, too, that local or regional differences are most marked, and at which ill-advised or premature changes, imposed from above to bring about greater uniformity, are most likely to disrupt the social fabric and to impede rather than speed up economic enterprise and development by the people themselves. Besides, the substantive customary law of many ethnic groups has not yet, or insufficiently, been recorded.

A project like Allott's (London School of Oriental and African Studies) *Restatement of African Law*[17] is a major effort to abstract and systematize the unwritten rules of customary substantive law. It may well become a useful guide, both to officers of the new government courts which (officially at least) have replaced the traditional and "home-grown" tribal authorities, and to law reformers seeking generalities in the variety of customary law which might serve as building material for a more unified national system. But its very method

of gathering information (making use of existing written material, much of it inevitably dated, and inviting rule-oriented responses to hypothetically posed cases from acknowledged indigenous experts) is almost bound to produce systems of "ideal" rules and principles. Even if these reflect the present situation rather than an idealized past, they will still have to be applied with a flexibility which takes full account of their social context in order to be more than a lifeless skeleton without living flesh and blood.

But whatever reformed and more uniform law is being applied by the new and gradually more professionally trained judicial officers of these young states, there is a real danger that the gap between the positive and the living law — a not uncommon feature in colonial times when professional and semi-professional (European) courts dispensed justice in African cases — may actually widen. In this event the greater certainty of the law, which is one of the principal aims of progressive unification by means of legislative and/or judicial action, may actually result in greater uncertainty among common folk, and in their estrangement from the courts in which they expect to find redress for their grievances and the kind of justice they can understand. Or, perhaps worse still, as for instance Tanner (1966) and Hoebel (1965: 45f) have illustrated in respect to East Africa and Pakistan respectively, the legal and judicial systems may be abused by litigants as well as law enforcers to further aims other than justice.

The problem of estrangement is aggravated by the fact that, in many cases, the traditional local adjudicators (chiefs, headmen, village or family elders) are no longer officially recognized as part of the existing judicial structure. (In most of the relatively recently developed urban communities, of course, they never effectively struck root.) This does not mean that they no longer operate. On the contrary, both Tanner and Hoebel confirm my own observations and inquiries in post-colonial Africa, and information (both oral and written[18] from Indonesia) that at grass-roots level the means of dispute settlement continue to operate according to locally accepted norms and practices. Depending on the kind of wrong committed or redress sought, they are being employed rather than the officially appointed courts of justice and other government agents. But how much legal authority is to be attached to their pronouncements in trouble-cases depends largely upon whether they are viewed folkwise or through official eyes. While their

formal recognition may run counter to political aims and sensitivities regarding the often tender and vulnerable growths of national unity and of centrally directed development, their *non*-recognition tends to screen off this world of living folk law, obscuring its internal growth in regional and local diversity, and thus inhibits the very chances of law reformers to direct its successful evolution towards a more uniform and integrated part of an emerging national legal system.

If, as I firmly believe, the most effective way of legal reform is by (suitably statutorily empowered) judicial rather than direct legislative action,[19] and by building upwards from carefully examined ground-level structures rather than by projecting lofty plans and premises downwards through the hierarchy of state authority, every effort should be made to open up the communicating passages between the officially recognized upper storys and the non-recognized but crowded basement of the existing legal structure. To ignore what actually goes on below and to discount the pace and trends of development there, is almost bound to perpetuate and aggravate a situation summed up bluntly by a Pakistani student quoted by Hoebel (1965: 45): "The law of the police and courts is not the law of the people." This is the kind of legal dichotomy worse than the pluralism of pre-national past, for it means that the national body of law is bisected head from trunk. In such a situation to uphold a view that law proper is that which statutes prescribe or courts apply, would be juristic arrogance and sociological nonsense.

One way of helping to counteract this danger and to contribute to a wisely directed evolution of customary law and the creation and effective reception of more unified and modern law, is constant and vigilant research into the different ways of law observance and its enforcement at all levels. This is a task for which probably few courts are equipped. Yet, if they (and their governments) are genuinely concerned about the efficiency and effect of their judicial labours, they should welcome and facilitate such studies by others trained to do so. Here lies an immense and barely explored field of problem-oriented and theory-stimulating research which should be of major concern to their own law schools and social science departments, if necessary aided by non-national others. Its study should include, on the one hand, a scrutiny of the role of the government courts and other legal agencies and the actual effect of their activities in all fields

of law enforcement, as well as a thorough probe into other existing avenues (traditional or non-traditional) of dispute settlement and the kinds of legal issue (social problem) that tend to elude the official channels of redress. Tanner's paper, referred to above, points up some of the problems to be encountered here.

On the other hand, and especially in the urban areas and in non-traditional social and economic situations, there should be a complementary search for new regularities and nascent norms of popularly approved conduct of legal consequence which aim at avoiding trouble. These may well be at variance with the precepts and formal application of hitherto recognized rules of positive law (customary or received), but may reflect the way common folk, without direction from above, are seeking to meet and accommodate the challenges of a changed social context and the uncertainties of an ill-adjusted (or absent, or inaccessible) law. All this needs, of course, to be related to the particular stratum of the society in which they move.

This kind of research is not merely a desirable check on the efficacy of the judicial system in which government and people must put their faith. It should, as I intimated, provide concrete building material meriting the careful consideration of those responsible for the direction of legal reform. That is why it should be a continuous effort, aimed at evaluating legal innovation, whether internally evolved or imposed from above, and the likely reasons for its acceptance or non-acceptance by the population. Hilda and Leo Kuper, distinguishing approaches to unification of different laws in terms of emphasis either on "law shaping society, or society shaping laws," note the primacy given to law in such unification programmes. They rightly state that: "There may be an element of false deduction in this approach. Since the unity of a society is often expressed in a unified system of law, the unity of law becomes associated with the unity of society, and from being an index or consequence of that unity is transposed into a cause. One of the results of a hasty unification of law may be to stimulate the growth of a diversity of deviating customs" (1965: 23).

I now return to the method of such research, and in doing so I hope to summarize my main arguments. For obvious reasons a good deal of this research will have to be case-oriented, and trouble-cases, as far as possible with their pre-

histories and aftermaths, will be vital units of analysis. Broadly speaking they fall into two categories: those dealt with by government courts of the official judicial hierarchy; and those whose resolution is sought through other, officially non-recognized, channels of adjudication. The latter category will, I am sure, as a matter of disciplinary orientation attract the special attention of (legal) anthropologists interested in social control though their authority may be uncertain in the official rational frame of law. But it is the first category to which lawyers are likely to attach more importance (positive law!). Yet it should be clear from what I have noted above, that in the legally still pluralistic situation existing in most new states, and with evidence of a threatening dichotomy between positive and living law, the chances are that many a trouble-case tried by government courts will result in giving a picture of law divorced from its social context. The follow-up of such cases, the careful inquiry into the effect of their judgments, is therefore necessary to give some idea of their divergence from social reality. Nor is it unlikely that, at the lower and often still insufficiently trained levels of the formal judicial hierarchy, case law may present a less than reliable interpretation of even the prescribed rules of positive law. So also in this respect the value of these judgments as authoritative legal statements may be doubtful, and needs to be tested against the very sources of law on which their authority is claimed to be based. Valuable such cases nevertheless remain, perhaps not so much as discrete legal entities but as bits of socio-legal tissue, the loose strands of which invite further search and effort before they can be tied to other pieces of comparable material in order to reveal more clearly designs in the complex fabric of law.

Yet in order to discover current and newly emerging regularities of popularly accepted conduct as evidence of the internal growth of law through changes in social relations and economic traffic, also a fair sample of what I have called the trouble-less cases of prevalent and trouble-avoiding practice should be included in the focus of attention. With regard to marriage, family and property, for instance, the validity of marital unions, rights and obligations of conjugal partners, the legitimacy of children, proprietary rights and liabilities of wider kindred, are but a few aspects in which popular practice seeks to accommodate problems of changed values in acceptable if as yet ill-defined and formally untested ways of conduct.

These may still be insufficiently developed and not widely enough accepted to be considered truly normative, but they deserve close attention as possible indicators of the direction and future shape which the internal growth of new living law may take. There remains, of course, also a great deal of *troublous* practice for which *no* suitable remedy has as yet been found. Many women and children, drifted apart from husbands and providers in the tidal cross-currents of outgoing custom and new, still uncontrollable usage in changing (especially urban) society, could testify to this.[20]

Add to all this the analytical description of the social and cultural context as the necessary frame of reference for the existing and developing law, and we are back to the three main methodological approaches of legal anthropological inquiry (ideological and rule-oriented; descriptive and practice-oriented; disputes, motivation- and result-oriented) which Llewellyn and Hoebel distinguished in 1941. They then stated, "The three approaches are related; indeed they flow each into the other" (1941: 21). Yet their own skillful treatment of trouble-cases in particular, and their infectious belief that these, "sought out and examined with care, are thus the safest main road into the discovery of law," have inspired many others to pursue and refine a case method focused almost exclusively on conflict and its resolution. This has paid great dividends in our deeper understanding of the intricate process of law actively engaged in mending or re-aligning its breached fences with the cultural and social means at its disposal. But I have posed the question of whether this preoccupation with what goes on in the "crucibles of conflict" has not detracted attention from the rest of the premises, inventories and less obtrusive activities of the workshops of law in society; whether these gains in depth may not inhibit comparably successful efforts to widen our knowledge and understanding of the growing bodies of substantive law. I believe the answer is yes. Students of law in pluralistic situations (and these exist virtually everywhere in the third world) are faced with insufficient time and opportunity to cover a very broad canvass. Each will be inclined to select the way most likely to reveal those aspects of the total picture in which he is particularly interested, leaving the rest barely sketched or not at all. This is, of course, their good academic right. Yet their active interest in society raises expectations also in circles other than academic. Governments, law reformers and common folk have a moral right

to expect practical benefits from such research efforts,[21] especially during the growing pains of new statehood and nation building. One of the central problems facing them is the evolvement of a system of *effective* law. This would require at least the critical and systematic examination of the whole living body of substantive and procedural law (customary, received, newly created) and of ways to promote its essential "principle of growth" (Cardozo) towards greater maturity and social integrity.

It is a Herculean task, and if one hand is unequal to it, more hands closely joined in its pursuit will be necessary. Legal anthropology has the skills and tools to make a vital contribution. But the gist of my argument has been that for a successful application, whether by workers operating singly or as a team, there should be a much closer integration of, and equal emphasis upon, all components of the methodological triad of legal anthropological approach.

## FOOTNOTES

[1] A hectic, intervening six-year period as a civil servant in an exclusively non-African part of the country had put a premature stop to my Zulu research, and prevented all work on the field material I did have.

[2] Professor in the University of Leiden from 1900 until his untimely death, at age 59, in 1933. Hardly anything of the great volume of his own penetrating writings on adat law and legal policy (he was a leading authority in other fields of law as well) is known outside Dutch-reading circles. His standard work, published in installments between 1906 and 1931 (Brill, Leiden), is *Het Adatrecht van Nederlandsch Indië*, two hefty volumes, to which a companion volume of his collected essays (excluding his smaller books) was added posthumously (1933). To non-Dutch scholars it is mainly the English translation of his disciple Ter Haar's concise *Beginselen en Stelsel van het Adatrecht,* 1939, (*Adat Law in Indonesia,* edited and with an introduction by E.A. Hoebel and A.A. Schiller, New York, 1948), that gives a glimpse of the activities of the "Leiden school," which virtually died out during the War and as the result of post-war Dutch-Indonesian estrangement. For a brief evaluation of the methodological approaches of this school, see Hoebel, 1954: 33f.

[3] But he also saw the limitations of Western scholars, however sensitive their approach, in interpreting indigenous concepts and arranging indigenous legal categories. He hoped for a "Javanese Blackstone" or "Balinese De Groot," that is, only "a son of the land writing in his native language," could produce the most convincing and inspiring work in this respect (1931: 879).

[4] The term used was *isikelemu,* derived from the Afrikaans-Dutch *skelm.*

[5] He was also the senior man of the defendant's local lineage segment.

[6] The term was *isiko* (custom, principle, characteristic), often used instead of *umthetho,* which tends to have a more specific connotation as an explicitly laid-down rule or command.

[7] In practice the genealogical range of prohibition, though still considerable, may be narrowed (Holleman, 1952a: 50-59).

[8] *Cf.* Allott *c.s.,* 1969:8-9.

[9] The conceptual schema among the Shona very largely conforms to the hierarchical one outlined by Gluckman (1943; 1965: ch. 3).

[10] 1913 (1961 reprint of 3rd edition): 39.

[11] Holleman, 1920: 375ff, 1927: 48ff; Logemann, 1923: 114-34; Van Vollenhoven, 1931: 247-56.

[12] The term is Logemann's. For a recent illustration see Jaspan (1971: 47-9).

[13] Gluckman, 1967: xvff; 1955 (2nd edition 1967): 372ff; Gulliver, 1969: 14ff. Van Velsen (1967: 129ff) prefers to call it "situational analysis."

[14] Holleman, 1952b.

[15] N would have lost this right if he had moved (*kutama*) to *another* ward or chiefdom. Moves within the same ward are indicated by the verb *kusuduruka,* which has a connotation of (relative) proximity. The distinction is crucial, for the ward is, with regard to arable land, the vital unit of "estate of administration" (to use Gluckman's term).

[16] But even an unlawful occupier, if he had actually sown his seed, would normally be permitted to reap his crop before he had to give up the field.

[17] For a brief but balanced evaluation of this project, see Moore, 1970: 288-9.

[18] *E.g.* Van den Steenhoven, 1970; Sugijono, 1971: 493-6; Jaspan, 1971.

[19] For a succinct discussion of various opinions on preferred choices of action, see Schiller, 1965: 180-5. Alliot (1967: 87) reported that, so far, the independent states of Africa had already produced over a hundred "codes" covering various fields of law, including both criminal and civil.

[20] In the geographically widely oriented *Survey of African Marriage and Family Life* (ed. A. Phillips) of 1953, major problems of social change and legal maladjustment receive a good deal of critical attention. Having been out of print for many years, this work has recently been reissued in two separate volumes — by different publishers, see references below. Unfortunately its material content has not been updated, except for the inclusion of some post-1950 literature and, more thoroughly, changes in marriage laws. Yet it remains an invaluable guide in a vital field of socio-legal problems and law reform. Nothing quite comparable has yet been achieved in other fields of law in changing society.

[21] But what use the authorities concerned will actually make of such research findings, is an altogether different matter. For as Allott observes in a thoughtful study on the future of African law, "A government tends to assign the goals first, and then call for the means of attaining them; it does not first conduct a survey to see the limit of practical possibilities" (1965: 225).

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