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THE SOCIOLOGICAL FRAMEWORK OF LAW*

by M. G. Smith

My main objective in this paper is to show the relevance of a comparative history of the growth of legal systems and theory to the sociological analysis of jural institutions and legal development, with special reference to Africa.

Law in Africa is only in part African law. It includes also certain elements of European law—Roman-Dutch, Portuguese, Belgian, French, or British—together with their local development in the African context. Further, there is a substantial body of Muslim law, often claiming greater local antiquity than European codes.

Under various accepted definitions of law, indigenous African societies may be said to have lacked law, or at best to have had an exiguous and erratic public law. On such views, before the Muslims or the Europeans overran tribal Africa, its peoples knew only custom instead of law. Sociologists and anthropologists have debated these notions at length, as features of a general difference between "primitive" and "modern" law, but as yet have reached no significant conclusions. As a rule, all parties to this debate have assumed that European legal theory and framework provide the appropriate standard, and arguments have accordingly centered on the presence of comparable or substitute patterns or their functional equivalents among primitive peoples. It seems possible, however, that the differences between European and Muslim law in sources, content, procedure, development, and political framework are quite enough to suggest the inadequacy, in a cross-cultural framework, of those European axioms that identify law with centralized administration and its apparatus of tribunals, registries, legislatures, or police.

An independent African state has to select the legal framework it

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will use. To date, the evidence suggests that Europeanized Africans, the political elite in most new African states, may prefer to retain the basic framework of European law inherited from the previous regime, with such modifications, especially in constitutional spheres, as seem immediately appropriate. Likewise, African Muslims prefer to retain traditional Islamic law, with modifications in the penal code and in personal and commercial law appropriate to modern circumstances. Tribesmen, lacking alternatives, continue to observe or modify their tribal laws as the political superstructure permits. One issue that no new African government can indefinitely avoid is the integration of these tribal traditions in the law of the state. Before independence, this problem preoccupied the colonial regimes; and before the establishment of European rule the problem of tribal jurisdiction confronted all Muslim and non-Muslim conquerors who subjugated culturally alien groups. Today, when new elites proclaim the African personality and the African heritage, it is well to recall that African tribal tradition, law, and custom are clearly among the most authentic and fundamental expressions of this heritage. It would be ironic if these new ideologies functioned to legitimate further displacement of tribal law and custom by state rules based on alien models.

There are many sociological frameworks of law. The sociologist examines law in the broad context of social relationships. Thus, for Durkheim, law is the prototype of social fact: the sociological framework in which law arises, develops, and operates is society itself. But law is also a rather special type of social fact because it is regulatory in distinctive ways and spheres. In this sense the sociological framework of law consists in the institutional machinery through which its regulation is manifest. In another sense, we may identify the sociological framework with the milieu of thought in which systems and theories of law develop. As these systems of thought directly influence the operation of law in societies, this framework may be the most fundamental of all.

Until recently, the African continent was almost entirely partitioned into colonies. Thus the most important general experience shared by Africans was the colonial situation. Adriano Moreira has defined this situation rather neatly: "There is a colonial situation whenever one and the same territory is inhabited by ethnical groups of different civilization, the political power being usually exercised entirely by one group under the sign of superiority, and of the restraining influence of its own particular civilization."¹ After 1945, and mainly in Africa, there was a "sudden awakening of racial groups which had no political power, the emergence of an elite struggling for political supremacy, and, in consequence,

¹ For notes to chapter 2, see page 245.

all problems of citizenship, of representation, of the communities on an equitable basis, of the right of the people to self-determination."²

Moreira identifies this situation as one of social and cultural pluralism. The basic character of colonial pluralities is worth attention:

By virtue of their cultural and social constitutions, plural societies are only units in a political sense. Each is a political unit simply because it has a single government. . . . Democratic governmental forms appropriate to plural societies are usually federal. Autocratic governmental forms reserve the ultimate political functions for one or other of the constituent cultural sections, even where other sections are separated territorially, for instance on reservations, and are allowed some internal autonomy. But some uniformity of laws and government is essential, if the society is to remain a political unit at all. Excluding government and law, the institutional differences which indicate plurality relate to marriage, family, education, property, religion, economic institutions, language and folklore.³

In this sense these African states, colonies, and protectorates were all plural societies, and their colonial character directly confronts us with the basic significance of the sociological framework of law.

Such pluralisms generally arise through the domination of one culturally distinctive collectivity by another, and, as Moreira says, in this condition the dominant group is subject only "to the restraining influence of its own particular civilization," especially its own laws, customs, and morals. The effective limits of political power may determine the boundaries of dominance thus established; they cannot directly account for the form, administrative or legal, which this dominance takes. Whereas in homogeneous societies it is society that constitutes law, in plural societies, such as those of Africa, there is evidence that law may serve to constitute society. Thus law both derives from and may establish society.

In the first instance the social milieu is typically homogeneous, ethnically and culturally, and the basis of society is primarily consensual; in this situation law may express organic institutional relations. In plural societies, on the other hand, the social milieu is heterogeneous in cultural and ethnic constitution and coercive in base, and the law that seeks to constitute it and serves to regulate it is essentially sectional. In the culturally homogeneous society, the state—that is, the central political institutions—is, like law, a derivative, expressive, and secondary structure. In the evolution of plural units the state preexists society, and provides the legal framework within which the new society may or may not emerge. This distinction between society and polity, or, as it is often phrased, between society and the state, combined with the basic differences in structure and function of governmental institutions in these two differing types of society, indicates yet another range of problems that lurk in the general concept of law.

While law is a social fact in homogeneous units, as Durkheim holds,

in colonial pluralism it is clearly in some sense presocietal. In the homogeneous society the state claims legitimacy as the derivative authorized regulatory institution. In the plural society, whether protectorate, colony, or racially exclusive union, the state seeks to constitute a new society within a legal framework which it legitimates independently. Given the profound differences in legal, political, and communal structure between these two social contexts, it would be surprising if they did not also exhibit comparable differences in legal form, substance, and mode of operation, even where the rulers hold to a doctrine of the state which Dicey and others have summarized as the rule of law. For an example, Sir Ernest Barker's statement of this widely accepted doctrine serves well:

The purpose of the state is . . . a specific purpose of law. Other purposes, so far as they concern or affect this purpose, must necessarily be squared with it . . . but the adjustment is not a matter of discretion, and it is not absolute: it is controlled by the purpose of the state. . . . In a word, we see and accept the Sovereignty of Law—both the Law of the Constitution which expresses the fundamental purpose on which the State is based, and the ordinary law of the courts, duly made in accordance with the Constitution which expresses that purpose in detail.⁴

These are the final self-restraining influences to which Moreira refers.

The significance of the doctrine of the rule of law is no more deniable than its ethnocentrism, which imposes on sociologists the important task of formulating culture-free definitions of law and government which may have comparable significance. But we shall advance nowhere if we adopt the current formulas of European political and legal philosophy without a careful comparative study of their histories. Manifestly, also, the culturally neutral analyses of developments in African law and politics may contribute much to such understanding.

The history of law and government in Islam presents a vivid contrast to European developments, and may accordingly show how inadequate for comparative study are conceptions of law and the state drawn solely from Europe. Attention to Islamic law is also relevant here, for Islam has been one of the major sources of external influence on Africa. Formally and otherwise, European colonial powers in Africa have made various special provisions to accommodate their Muslim populations.

Islamic law developed by paths and mechanisms almost exactly the reverse of those by which European law developed. Until Muhammad's time, the Arabs had lived in tribal communities with temporary confederations, following an unwritten, variable body of custom in which agnation, the jural autonomy of lineages, *lex talionis*, and jural subordination of women were the principal elements.⁵ As Allah's Prophet and

Messenger, Muhammad simultaneously proselytized, organized the Muslim community, and delivered Allah's pronouncements in the Holy Koran. On his death, this book became the unquestioned basis of Islam, regarded both as a faith and as a system of law, divinely ordained to regulate and protect the faithful. The serious incompleteness in koranic rules, however, soon became evident through the rapid expansion of Islamic territory by conquest in obedience to the Prophet's command of jihad (holy war). Muhammad's death also raised certain central problems of succession, of continuity and coordination in Islam, which had important legal and political as well as religious implications.

To rationalize their procedures of adaptation in accordance with the requirements of the Faith, Muslim doctors compiled the Sunna, or traditions of the Prophet and his Companions, and used these as a source of guidance to supplement and interpret the Koran. A number of other principles were also employed to amplify and develop a substantial code of laws from the slim body of given rules. These include exegesis, opinion (*ra'y*), analogy (*qiyās*), and consensus (*ijmā'*) as elements of *fiqh*, or the finding of judgment. Of these, *ra'y* was the first to develop; a tradition of the Caliph Omar II (717-720) authorized its use by a *qāḍī* where the texts gave no guidance.⁶ Analogy, which rests on the interpretation of Sunna or koranic rules to identify the reason or purpose (*illa*) of particular passages so that it may then be validly extended to other circumstances, sought to limit the scope for independent opinions, to exclude arbitrary judgments. *Fiqh* originally meant finding (the basis) of judgment by knowledge of the Koran and the Sunna, or by analogy. Later, in consequence of the development of formal law, it came to mean knowledge of the practical rules of religion.

Ijmā' was a further important source of law legitimated by the Sunna. "The Prophet said, 'My community will never agree in an error.'" By inference this saying came to mean that the agreement of the community could supplement revealed law by further rules. Opinions would inevitably differ, as the Prophet, according to tradition, had anticipated: "The Prophet said: 'Difference of opinion is a gift of Allah.'" These two sayings of the Prophet "were destined to explain the variety of legal schools and also the origin of *ijmā'*."⁷

Opinions initially varied about the membership and the location of the community whose consensus was relevant as a further source of law, and also about the legal status of minority views. Eventually the '*ulamā'*, or body of devout and learned Muslims, was identified as the relevant group. On this basis jurists and doctors sought to develop a law consistent with koranic directions and adequate for daily use.

General agreement obtained about the need to restrict the scope for arbitrary opinions (*ra'y*) by means of precise legal rules. As each suc-

cessive school of law emerged, the scope for *ra'y* decreased. Opinions differed among the founders of these schools about the admissibility of analogy as a source of law, and about other details of substance. The founders of the four orthodox rites or legal schools—Abū Ḥanifa, Mālik b. Anas, Ash-Shāfi'i, and Aḥmad b. Ḥanbal—all owed their authority and legitimacy to the doctrine of *ijtihād*, by which the right of the most learned to initiate new interpretations of Sunna or koranic texts, independent of previous exegesis or traditional glosses, was admitted. The doctrine of *ihtilaf*, or divergence of opinion, itself served to legitimate the division of Islam among the followers of these four jurists.

This sketch of early Islamic legal development focuses on sources of law internal to the law itself. Along with the Sunna and the Koran, from which their legitimacy derives, opinion, analogy, interpretation, *ihtilaf*, and *ijmā'* are the principles that constitute the law (*shar'*, *shari'a*). Two other sources of law, political and customary practice, remained outside this logical framework. Islamic expansion did not await the development of legal codes; neither were the political problems of succession and administrative continuity which followed Muhammad's death resolved by earlier directives from Allah. *Ad hoc* adaptations to these new situations which were simultaneously consistent with Islam and appropriate to the circumstances were the best the faithful could do. Later generations in unforeseen circumstances likewise sought the most advantageous accommodations consistent with their Faith and its obligations. The alternatives open to believers in these conditions were strictly limited. If Islam was to prevail politically and socially, as the Prophet had enjoined, it was necessary for Muslims to allocate substantial discretionary powers to their ruler the caliph, his official, or the local chief in his capacity as *imām* or head of their community. From this developed the doctrine of *siyāsa*, which empowered rulers to exercise discretion corresponding to their responsibilities for the maintenance and spread of Islam. In theory, the ruler should be a *mujtahid*, which means that in the absence of qualified legal advice he must be capable of finding the appropriate solution in keeping with accepted principles and precedents. In effect, the *siyāsa*, or political jurisdiction, guided by reasons of state, could supersede, supplement, or, on occasion, abrogate the *shari'a* with a legitimacy that varied with the '*ulamā*'s consensus or the force of circumstances.⁸ As the Koran enjoins obedience to the ruler,⁹ however, this discretionary power could also claim the ultimate legitimacy of koranic sanction, even when it directly contradicted the *shari'a*.

This basic ambiguity in the relation of *shari'a* and *siyāsa*, code and discretion, has always exercised a profound influence on legal administration in Islam. Even under the early caliphates, "the *qādī*'s jurisdiction was handed over to the executive arm of the government to be decided

by the vizier, or the governor, who presided over the so-called *mazālim* [lit., wrongs] court”¹⁰ which exercised a jurisdiction in some ways similar to the French *droit administratif*. Gustave von Grunebaum holds that “this innovation . . . fatally wounds the idea of uniform administration of divinely ordained justice among the Muslims.”¹¹

A religious obligation which no Muslim ruler should disregard requires that he establish or maintain a *qāḍī* court to administer the *shar‘*. In the western Sudan, one of the grounds by which Fulani Muslims justified their jihad of 1804-1810 was the absence of such courts in the Muslim Habe states they overran.¹² But the functional significance of these *qāḍī* courts varies with their number, distribution, and independence of the executive *siyāsa*. No rule of religion clearly regulates the distribution of such courts in terms of area or population. One *qāḍī* court seems both essential and formally sufficient for qualification as a Muslim state, but it may have little work if the court of the *nazr al-mazālim* is very active.

One implication of this situation is the recognition of non-Muslim practice or custom (*‘urf*, *‘ada*) as valid in regulating social relations. Another implication is that deviant practices which arise may also be recognized among Muslims as valid tradition (*‘urf*). For example, in northern Nigeria it is now accepted as local custom that issues involving claims in land should be reserved for the ruler’s courts or handled by executive officials.¹³ This executive jurisdiction over suits involving land persisted after the Fulani jihad which expressly sought to enforce Islamic observance.

The simple absence of an effective administration of the *sharī‘a* through *qāḍī* courts, itself in part a correlate of the *siyāsa* power to create and maintain or quietly to ignore such courts, suffices to perpetuate adherence to old customs and to promote the recognition of new ones as further indirect sources of law. Levy points out that this position was held even during the Prophet’s lifetime: “The Koran declares that no Muslim under penalty of everlasting torment in Hell may slay another who is innocent of offense. Yet to this day the exaction of blood-revenge remains an important part of tribal life.” Further, “Where family life is concerned, in marriage, divorce and the distribution of inheritance, the provisions of the *shar‘* would appear to be very widely neglected.” “There have not been lacking attempts to regard *‘urf* as one of the roots of the *fiqh*, but excepting the works of the early Sunni *mujtahids*, the customary laws have generally gone unrecorded by the legists. Yet they have not gone unrecognized, for by some *faqih*s they were preferred to laws derived by means of *qiyās*, and where local influences have been strong, custom has frequently been held to be decisive.”¹⁴ Thus, although various customs have been integrated in the law by special devices, the total body of custom as such has not been integrated, perhaps

because such integration would formally abrogate the *sharī'a* in many areas. The integration of specific customs is more readily achieved because Muslim law is a deontology, a series of moral injunctions, rather than a logically systematized body of law, although the Mālikite elaboration of the sacred law comes perhaps closest to a system owing to its concentration on the *furū*, that is, the substantive regulation of detail. From the earliest times, elements from *'urf* entered the *sharī'a* through *ijmā'* and judicial decision.

In its own theory, then, Islam is a theocracy, based on and regulated by a divinely revealed law, the *sharī'a*, which is developed by *fiqh* on the foundations of the Sunna and the Koran. In practice, the *sharī'a* has various sources and an application that varies inversely with the range of *siyāsa* and *'urf*. Under these conditions Muslims stress the diacritical significance of certain symbolic, formal acts, such as Ramadan, pilgrimage, or the daily prayers, by which adherence to Islam is expressed. The *sharī'a* as an ideal system of law is dependent for its realization on secular pragmatic considerations, as well as on historic political precedents. Thus Muslim law as applied represents a system based on revelation, rules of interpretation, precedent, and consensus, as well as on custom and reasons of state expediency. The basic religious premise and goal set certain limits to the variability this mixture of elements might otherwise exhibit. The Sunnite world formally subdivides among the followers of the four orthodox legal schools, West Africa being mainly of Mālikite persuasion. In practice, legal recognition of *'urf* considerably increases the variety of substantive laws, whereas *siyāsa* introduces comparable variations in procedure. Political fragmentation of the Muslims further enhances this diversity. The overriding religious obligation of rulers to maintain and expand Islam serves to legitimate expedient deviations. In consequence, local differences in political and legal administration are quite as impressive as Muslim continuities. Moreover, much of the operative law, both *'urf* and *siyāsa*, remains unwritten, applied by Muslim courts but forming no part of *sharī'a*. The theory of Islam as a theocratic civilization, regulated by God's revealed law, accordingly remains unaffected by these contrary, secular developments.

Legal theory and institutions in Europe developed on lines sharply different from those in Islam. From Rome to the present, European law has had a secular base and orientation even where formal structure or theory was absent. As we shall see, such qualities are not easily integrated with the requirements of theocracy.

Greece did not produce a theory of law before Zeno, mainly, it seems, because of the character of the polis. Cities varied widely in their political constitutions, but in the typical city the assembly of notables

which decided policy also decided important legal issues, and no clear distinction between the two was consistently maintained. In effect, Greek thinkers directed their attention to the requisites of the desirable polis, that is, to social and political philosophy, rather than to the theory or analysis of law. In such conditions, legislation and jurisprudence are equally inhibited. Moral, political, and religious issues tend to invest the judgment of critical cases of law.¹⁵ Nonetheless, the seeds of a future theory of law are to be found in Aristotle's casual references to natural law as both general and inherent in human nature, in contrast with particular positive rules.¹⁶ With the decline of Hellas, Stoics developed the notion of natural law both as empirical truth and as normative ideal.

Rome lacked speculative philosophers, and produced little literature of a theoretical sort. Instead, from an early separation of judicial and political functions, the Romans gradually developed a refined and inclusive system of secular law, backed by a technical jurisprudence directed toward the clarification of precedents, legal conceptions, and the like. The nearest approaches to a formal theory of law in these Roman writings center on discussions of natural law and of the imperium or sovereign power. As Roman jurists and praetors developed the *jus gentium* to supplement the ancient civil law, they identified the idea of natural law with this emerging law of nations and used it to rationalize innovations of procedure and substantive law. Such juriconsults as Gaius, however, undertook no formal discussion of the notion of natural law. In their *responsa* (as in the *responsa* of the rabbis and the *fatārwī* of the Muslim legists) they simply gave their opinions on specific issues of law put to them, initially by praetors, and later by the emperors, citing appropriate precedents, distinctions, rules, and reasons for their conclusions. The results were valuable manuals of a rational, technical kind suitable for practicing lawyers, but devoid of general theoretical content. In due course codification followed, to eliminate conflicting *responsa* and reduce the corpus to an authoritative order. It was at this point that the nature of imperium, the source of authority for this finished code, emerged as a theoretical problem. Under the republic, the nature and the locus of imperium had, perhaps deliberately, remained obscure, the relative powers of senate, *populus*, and tribunes varying within certain ill-defined limits which constitutional history, unwritten traditions, and the political situation sanctioned. Under the principate and the early emperors these ambiguities persisted, though in a differing form. Justinian, in the preface to his *Institutes*, first sought to define and rationalize the imperium, and did so on logically inconsistent grounds, claiming the sovereign power simultaneously as the ruler appointed by God, and also in accordance with secular constitutional practice. In his

code, then, the source of law is imperium or sovereignty, but the source and the legitimacy of this sovereign power remain obscure.

A formal theory of law in Europe derives from the competitions of Church and state during and after the twelfth century. In outline this struggle had long been foreshadowed. Even before Justinian based his claims to imperium on divine appointment as well as on secular practice, in the politically insecure West, Augustine had stated the superior claims of Church to state and the incompatibility between the laws of human society and those of the City of God. With the rise of the Holy Roman Empire and the political dominance of the Western Church under and after Gregory VII, relations between Church and state, and between divine and secular law, became problematic. Implementation of Augustine's ideals seemed quite possible for the popes. Feudal Europe was at this time a patchwork of loosely connected jurisdictions. The Holy Roman Empire itself was an *ad hoc* assemblage of scattered principalities, often held by the same individual under quite different titles, and typically distinguished by differences of law and jurisdiction. Of contemporary systems, canon law was superior in its rational structure, and appeared likely to develop the only universally applicable law. In between estate-stratified feudal jurisdictions, during these centuries, the law merchant gradually emerged as an applicable autonomous code based on elements of old Roman law, supplemented or modified as conditions required. In Britain there was the further peculiarity of an evolving royal law, relatively centralized, and superior to that of the courts baron and leet in range and scope as well as in structure.¹⁷

Papal dominance produced its own crop of problems, initially in papal control of political appointments, but also in the relations between canon and secular law. Aquinas, for instance, sought to harmonize the notions of Aristotle and Augustine with the realities of the early thirteenth century. He proposed a classification of law into four species: divine law, most nearly represented by ecclesiastical law; positive law, enforced in the courts of princes whose authority derived principally from God; the *lex aeterna*, or divine purpose immanent in all creatures; and natural law, identified with man's rational faculty as applied to the understanding of divine rules and purposes. St. Thomas supplemented this hierarchy of law with injunctions requiring Christians to fulfill the obligations of their social status, and appealed to the feudal nobility to practice *noblesse oblige*.¹⁸ Thus Aquinas ultimately sanctioned the heterogeneity of feudal jurisdictions while seeking to subordinate them to the higher, divinely sanctioned jurisdiction of the Church.

This papal theory of law was challenged sharply by Marsilius and Dante, who drew on the studies of Roman law carried out at Bologna.

Marsilius bluntly denied the legitimacy of papal claims to the religious leadership of Christendom, recommended a democratic collegial system of government for both Church and state, and advanced a utilitarian theory of reason and natural law. Dante preferred a secular autocracy to that of the Church, and harked back to Byzantium and the Antonines.¹⁹ This competition between secular and theocratic ideologies and interests accordingly focused attention on the problem of the nature and functions of law, especially since both theses drew their inspiration from common sources, the Roman codices and late classical doctrine of natural law. Both these schools of opinion were also disturbed at the legal chaos of late feudalism, and sought to replace it by a uniform and universally applicable system, in one instance with secular base and rational orientation, in the other with a theocratic order. In this period the Holy Roman emperors began to refer legal cases to jurists trained in civilian (Roman) law in order to promote some uniformity of legal administration within their diverse territories.²⁰ Other monarchs followed suit. In consequence, the Roman civil code came to serve both as a reservoir from which positive law could be borrowed and adapted for current application, and as the model from which systems of natural law could be developed. The civilians whose technical knowledge facilitated this process rationalized their activities by doctrines of natural law which inevitably drew their attention to problems of jurisdiction and its sources, and thus to the theory of society, government, and law. Their position as jurisconsults of the monarch further encouraged these thinkers to formulate their problems on secular lines, favorable to the rulers' claims.

It was in this context that the theories of social contract were developed to provide a logical basis for the secular theories of state and law necessary to legitimate a structure of centralized administration.²¹ Grotius and Hobbes are admirable examples of these dual concerns, the development of a social philosophy appropriate to centralized administration and of a rational universally applicable code. To institute this rational legal structure, political centralization and the elimination of feudal jurisdictions were both prerequisite. The competing theories of natural law and social contract which advanced solutions to these questions were thus no less significant for men of the sixteenth to the eighteenth centuries than theories of democracy or communism may be for us today. The first direct political expressions of this movement took place during the Thirty Years' War, after which secularization and centralization proceeded apace, and absolute monarchies replaced feudalism in most of Europe, their ideologies and legal systems alike being shaped by doctrines of natural law and social contract. As Weber has shown, Britain escaped the legal reforms linked with this develop-

ment, owing partly to an earlier centralization and partly to the presence of a well-entrenched professional group with vested interests in the maintenance of common law.²²

A pivotal element in these theories of natural law and social contract is imperium or sovereignty. As legal unity and uniform administration presume an imperium, these two doctrines reinforced each other and also supported centralization. In Rome, legal unity and centralization had obtained without any formal theory of imperium. In the modern Europe emerging from theocracy and feudalism, an explicit theory was indispensable, as well to legitimate absolutism as to determine the most suitable form of political reorganization. Theorists differed. Grotius, though advocating the sovereign power of the monarch, derived such power from the people, with consequent ambiguities about the final locus of imperium.²³ Althusius advocated a federal type of structure based on the historical priority of lesser corporations to the state they composed. This federalist view denied an unrestricted absolute sovereignty to the ruler, whose role and powers were thus defined as in essence representative.²⁴ The practical difficulty with this thesis is that it implied the preservation of the historical feudatories as modal units of political and legal administration, thereby obstructing the desired growth of central power. Hobbes, seeking to cut this Gordian knot, in his theory derived social unity entirely from the prior overriding power of a central absolute ruler. In this view the imperium and the system of law were virtually identified, and the legal validity of any corporations not explicitly created by or based upon concessions by the state was denied.²⁵ With the triumph of these ideas, the essentials of the modern theory of the law and the state were complete.

Later reactions against monocratic centralization took the form of a doctrine of natural rights, itself clearly derivative from earlier natural law. In Britain, Locke employed this notion to advocate the sovereignty of Parliament. In America these "inalienable rights of man" helped to dissolve the British connection; in France they helped to overthrow the monarchy. In neither revolution do we find successful movements toward decentralization. In both instances arguments center upon the locus and the exercise of imperium, but its indispensability for law and the state remains unquestioned. These three notions—sovereignty, law, and the state—once related in this way, may thereafter have seemed to lawyers and political philosophers alike almost inseparable. Each presumes and expresses the others.

These historical developments furnish the essential background for evaluating the modern European theory of law. After movements for the introduction of civil law in Britain and Blackstone's defense of

custom and common law, British legal reformers such as Bentham and Austin were driven to examine the relations of custom and law, questions of significance to continental jurists only where custom competed with civil law. Thus the search for a general theory of law developed in Britain and America, in countries committed to common law as well as to a central imperium. The apparent logical indispensability of the central imperium for the existence of law to these theorists is striking, given the history and composition of Anglo-Saxon common law.

Thus Austin defined law in clearly Hobbesian terms as the commands of a sovereign which his subjects must obey. This Austinian emphasis on sovereignty and centralization persists despite other modifications in the writings of Salmond, Holmes, Pound, and Cardozo. It represents the received tradition and theory of law in Europe and the Anglo-Saxon world, one that sociologists and anthropologists have borrowed and applied or debated without adequate scrutiny of its historical basis.

For Salmond, "all law, however made, is recognized by the Courts, and no rules are recognized by the Courts which are not rules of law."²⁶ For Holmes, law is simply "the prophecies of what the Courts will do in fact."²⁷ For Cardozo, law is "a principle or rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the Courts if its authority is challenged."²⁸ In place of Austin's sovereign, these views identify law solely by reference to courts, without considering legislation or other processes by which courts are constituted and maintained, but denying the possibility of law where courts are absent. Notably all these definitions share Austin's preoccupation with a centralized imperium, although, unlike Austin, later writers presume the imperium without direct mention. Like Austin also, these later definitions focus on substantive rules, the form of legal procedure and machinery of administration being assumed as essential for the existence of law.

Long ago, Sir Henry Maine, defending common law against advocates of codification, the derivative of natural-law theory, questioned the relevance of imperium for the existence and recognition of law: "It is certain that in the infancy of mankind, no sort of legislature, nor even a distinct author of law, was contemplated or conceived of." In such states of social development, says Maine, "law has scarcely reached the footing of custom: it is rather a habit."²⁹ In Allen's words, however,

To call these legal rules is something of an anachronism, for in many cases they are equally rules of religion and morality, which, at this early stage, have not become distinguished from law; but they are "legal" in the sense which is nowadays attached to that term, inasmuch as they are binding and obligatory rules of conduct (not merely of faith and conviction), and that the breach of them is a breach of positive duty. Austin denies them the force of law until they have been expressly recognized by the sovereign.³⁰

Holmes, Cardozo, and Salmond agree that these rules are legal only when courts exist to enforce them.

Anthropologists and sociologists have tended to adopt one or another of these two opposing views, without adequate attention to their place in the historical development of European legal and political theory. Malinowski aligned himself on the side of Maine, while Radcliffe-Brown adopted Roscoe Pound's definition of law as "social control through the systematic application of the force of politically organized society,"³¹ and on this basis concluded that many primitive societies lacked law because they lacked "political organization." In his classification of sanctions, only those "imposed by a constituted authority, military, political, or ecclesiastical," rank as legal.³² Here, also following Pound, Radcliffe-Brown assumes a particular type of machinery and procedure as a precondition of law. In both writers the underlying assumption is that of the modern state, defined by MacIver, for instance, as "an association which, acting through law as promulgated by a government endowed to this end with coercive power, maintains within a territorially demarcated community the universal external conditions of social order."³³

The retreat from Austin's position we have observed in the views of Cardozo and Holmes is continued by Pound. Whereas Cardozo, Holmes, and Salmond replace Austin's ruler by the courts, Pound replaces the courts by the "systematic application of force," a criterion that led Radcliffe-Brown to wonder whether feud is law or war, while denying that obligatory compensation or indemnification was legal.

The opposed view is presented in its most extreme form by Sidney Hartland, who asserts that the law of savage societies consists in the totality of tribal custom.³⁴ "The core of legislation is a series of taboos; . . . an atmosphere of terror is sufficient to prevent a breach of custom; . . . the savage is . . . bound in the chains of an immemorial tradition. . . . These fetters are accepted by him as a matter of course; he never seeks to break forth."³⁵ In this way, Maine's "legal habits" are made to include all tribal culture, but since in this view primitive man is the willing automatic slave of tradition, there can be neither lawlessness nor law.

It is clear that the problem that confronts these writers with both these differing views is in essence the problem that social-contract theorists sought to resolve: What is the logical relation of the state, society, and their components to one another? And what are the minimum reciprocal relations of law and polity? I have already suggested how the doctrine of the necessary priority of sovereignty came to seem historically indispensable in modern Europe for the movement from theocracy and feudalism toward a secular centralized state. If my interpretation is correct, then we should expect that these rather special his-

torical circumstances and interests would produce equally special theories of law, society, and the state. Insofar as sociologists and anthropologists have adopted this special frame of theory, it furnishes the decisive element in the sociological framework of law, for it guides their hypotheses, research, and analysis on lines consistent with its own axioms and equations.

For a neutral comparative sociology, these European developments and definitions have no superior claim to furnish general categories or guidance over comparable developments in other cultures, such as Islam. In fact, the inadequacy of a framework preoccupied with the problem of political centralization and indivisible sovereignty or its opposite is readily apparent from the history of Islam. This civilization owed its religious and political impetus and the territorial basis of its establishment to central sovereign direction. It persisted despite dispersal of sovereignty as a unit with a common basic law. This law itself has positive validity, even though it incorporates unwritten customs, both ancient and modern, and applies in courts authorized by religion, in strictly executive courts, or informally and by various means. I am therefore suggesting, first, that the traditional preoccupation of Western sociologists with legal uniformity and centralized administration—"the systematic application of the force of politically organized society"—is intelligible only in terms of criteria drawn from Western political and legal development; and, second, that these criteria are inadequate as a basis or sociological framework for the comparative study of law. Indeed, some inadequacies of this special viewpoint are well known. International law obtains even without "machinery for enforcement," and perhaps precisely because societies are politically organized. In Celtic Ireland, Brehon Law flourished without courts, without central authority, and without any enforcement machinery, even after conversion of the Irish to Christianity had removed its original ritual sanctions.³⁶ In Sweden, the law delivered by *lagmen* likewise took effect without direct sanctions.³⁷ In Anglo-Saxon law as well as in Islamic law, where custom enjoys legal status with judicial precedent and legislation, further difficulties arise.³⁸

The adherence of many British sociologists to a theory of law which is essentially derived from Hobbes and Grotius presents a problem of some interest, especially because it seems that preoccupation with the problems of law, its nature and place in society, has been confined mainly to scholars who live under common-law systems rather than codes, and also because in essence the theory they espouse is at odds with common law. Durkheim's role in promoting this viewpoint may be decisive. He restated Maine's evolutionary movement from societies based on kinship and regulated by customary status to those based on

territory and regulated by legal contract in terms of a movement from extreme decentralization and mechanical solidarity toward centralization and organic solidarity. According to Durkheim, only a repressive public law, such as Radcliffe-Brown claimed among Kikuyu and Akamba, obtains in the earlier phase, whereas the latter exhibits restitutive private law administered by tribunals.³⁹ The crucial criterion of law advanced by Durkheim and Radcliffe-Brown is thus the repressive sanction backed by collective force. A moment's thought will show that this sanction might as easily characterize lawlessness.

Durkheim's difficulty may have been cultural. As a Frenchman, he lived in a climate of thought structured by doctrines of natural rights and natural law and by the Code Napoléon, the crowning triumph of the movement for legal rationalism, and the prototype of other modern codes. He could not therefore recognize the independent jural significance of corporations, other than those created or formally acknowledged by an evident state; in consequence, he could not initially discern their evolutionary and structural significance as units of jural regulation. Later Durkheim was to change his view, and to advocate the establishment of occupational corporations, intermediary between individual and state, on historical and functional grounds.⁴⁰ But the difficulties that invest his earlier treatment of law persist in Radcliffe-Brown's emphasis on "constituted authority, political, military, or ecclesiastical," as the agent disposing of legal sanctions. Radcliffe-Brown makes no attempt to elucidate the constitution of authority. The attempt might have led directly to a formal theory of corporations.

In developing the ideology appropriate to institute and guide and legitimate the modern bureaucratically centralized state, with its unified form of legal administration, political philosophers and lawyers alike had logically to exclude recognition of independent or antecedent corporations; hence arose certain peculiarities of social-contract theory. By these means they denied the legal existence of corporations, save those derived from the imperium. Any other course might simply have permitted the perpetuation of feudal elements such as fiefs or guilds, which it was necessary to eliminate in law and state if the requisite centralization and uniformity were to obtain. In Britain, Maine reopened this subject by directing attention to the historical priority of corporations aggregate over corporations sole. In Germany, the status of precivilian Teutonic corporations was keenly contested during the process of drafting the Civil Code of 1898, following the work of Savigny and Jhering. It was in this context significantly that Tönnies contraposed *gemeinschaft* and *gesellschaft*, and Gierke undertook the historical analysis of natural law in Europe, seeking thereby to reinstate as legal units

the ancient Germanic corporations, fraternities, local communities, and the like. The curious convergences on the subject shown by syndicalism, by the Fascist theory of the corporative state, and by advocacy of intermediary corporations, are also significant. In different ways and for different ends, these were all attempts to reintroduce corporations as units of legal jurisdiction, after their virtual elimination as autonomous units from the legal systems of modern states.

Malinowski, in his attempts to redefine and analyze primitive law, reacting against the presumption of central power, began by looking for "rules regarded as compulsory obligations of one individual or group towards another."⁴¹ He found that "the whole structure of Trobriand society is founded on the principle of legal status. By this I mean that the claims of chief over commoner, husband over wife, parent over child and vice versa, are not exercised arbitrarily or one-sidedly, but according to definite rules, and are arranged into well-balanced chains of reciprocal services. . . . Social relations are governed by a number of legal principles . . . mother-right, . . . succession to rank, power and dignities, economic inheritance, rights to soil and local citizenship, and membership in the totemic clan."⁴² In short, legal relations are embodied in and expressed by social structure which analytically reduces to a distributional network of reciprocal jural rights, privileges, and obligations. The primacy of corporations as units of this social structure is owing partly to their qualities of persistence, to their estates which include rights in the persons of their members, to their external unity and identity, to their internal jural autonomy, which defines the essential conditions of membership, and above all to the fact that together, and in their interrelations, they constitute the society and the polity. Given these characteristics, the procedural features which writers like Roscoe Pound or Radcliffe-Brown have stressed as essential prerequisites of law cease to be meaningful. The primitive corporation is simultaneously a unit of social structure and of social procedure; these two aspects cannot be separated.

Thus, when Hoebel defines law as a social norm, the neglect or infraction of which "is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting,"⁴³ two comments are in order. First, the unit of reference and authorization is a corporate group of some kind, and the authority varies with regard to issue and as the corporation is autocephalous or heterocephalous. Second, binding obligations are law, even where physical force is rarely or never applied, provided that their breach effects some alteration in the jural status of the corporation or any of its members.

The appeals of legal uniformity, coherence, and efficiency for lawyers and theorists are quite understandable. We should not, however, allow these normative qualities to lead us astray. Regularity and effectiveness in legal operations have directed attention to the efficiency of sanctions in the process of law; hence there is stress on centrally administered coercive sanctions to enforce decisions made by authorized tribunals. Certainty in the application of sanctions is one but not the only characteristic of "perfect"—that is, predictable—legal process. Such certainty may be irrelevant when law consists in skillful guesswork, or in the words of Judge Holmes, "prophecies of what the courts will do." Here, near perfection or predictable regularity in the application of sanctions fails to compensate for irrationalities in legal decision making. In this situation, the routine, predictable administration of sanctions is clearly no adequate basis for identification of law.

In societies that are imperfectly centralized, we may expect an imperfect or irregular application of sanctions, and perhaps even of judgment also. These are both quite consistent with the presence of law. Difficulties arise only when we accept the ambiguous ideals of perfect law, that is, of routinely enforced judicial decision, which is clearly a lawyer's desideratum, as the basis for a minimum general definition of law. It is clear that this ideally perfect law, the derivative of natural-law theory, represents an extreme of legal development in which many differing levels and types of imperfect law are also important. In simple societies, legal imperfection obtains, both as to recourse to law and in regard to the enforcement of decisions. Typically, the tribal law is unwritten, and judgment considers many particulars which Western rules of evidence would exclude. Such systems of law have predominant commitments toward rationality of substance rather than form, using these terms in Max Weber's sense. One basic reason for this difference is that the primitive law normally operates without the overriding sanction of central political institutions, and accordingly requires consensus and support among members of the corporate groups it affects. Where overriding repressive sanctions are available to enforce judicial decisions, lawyers and judges are free to pursue formal rationality and coherence at the public expense.

Undue attention to substantive rules and their codification, coupled with the assumption that only perfect law is law, has diverted the attention of sociologists from the significance of procedure in defining legal events. Even the catalog of Radcliffe-Brown, despite his procedural concept of law, does not include the sanction of nullity, which is essential for valid legal form. Sir Paul Vinogradoff identifies this sanction when he says that "unless certain rules are observed, an intended result cannot

be achieved."⁴⁴ The effect of this sanction is to distinguish jural from other types of social procedures and rules, whether recorded or not. Feud, compensation, arbitration, appeals to divination, ordeals, oaths, councils, and the like are all procedures institutionalized within social units to publicize, regulate, and resolve intercorporate disputes.

Only when writers, having assumed a very specific procedural basis, define law substantively and as a perfectly effective system, are these imperfect modes of procedure theoretically problematic. Thus Weber, having initially identified law as an order "externally guaranteed by the probability that coercion (physical or psychological), to bring about conformity or avenge violation, will be applied by a staff of people holding themselves specially ready for that purpose,"⁴⁵ soon has to admit that "not all law is guaranteed law," and thus to recognize "indirectly guaranteed" and "unguaranteed" law, where enforcement staffs are absent.⁴⁶ The distinction Weber makes here corresponds closely to the differences between perfect and imperfect law mentioned above. But there is also a special normative quality of perfect law which derives from its basis in the programmatic theory of natural law, and which, aiming at a perfectly coherent, formally closed, and independent system of law, directly excludes all that might obstruct its objective, and rejects the incorporation of all elements extraneous to the imperium with which it identifies itself.

We can provisionally test and refine this analysis by a brief review of the framework of legal development in certain African colonial societies. For this purpose, I shall consider only three bodies of legal tradition—French, Muslim, and British—which interacted with native African society and law. In various parts of Africa these foreign systems were established by treaty, force, or other means as the law of the dominant group, in "territories which never showed signs of national life . . . and where the principle of unity is fundamentally due to the action of the dominant group."⁴⁷ In all such situations the native society and legal tradition were officially subordinate to the foreign law. The new state was constituted by its rulers in the context of their own legal tradition, and the forms of law familiar to them served to limit or regulate their relations with native institutions. We have seen that these three dominant traditions differed significantly in their development and constitution. They differed also in their accommodations to the common situation of African overrule. It is therefore worth asking to what degree their differing theories of law and government may have guided or limited the adaptive capacities of these ruling groups to the colonial condition.

We may regard French law after the Code Napoléon as a fine ex-

pression of systematic legal rationalism developed and advocated by theorists of natural law. The sole and ultimate source of this law is the imperium of the French state. It is not directly crucial for this theory of law how the imperium is distributed among the central corporations that constitute the state, providing only that there is a definite, recognized procedure by which all laws are instituted and applied. In theory and fact alike, this body of law begins with a systematic coherent code, which is subsequently modified and supplemented by statute, including rules made by particular organs of state in the exercise of powers delegated by statute. The result is a formally perfect legal tradition which excludes all units, relations, and processes not directly or indirectly represented in the statutory law. In this system procedure and substantive law are both well defined, the distinction between public and private law is central, and there is great refinement of form. High levels of certainty obtain in regard to both adjudication and the application of sanctions. The code expresses a classical tradition aimed at perfection in law. The state itself has as legal basis a written constitution, and all the organs of government are defined and identified by law.

Muslim law, like Islam, derives from Muhammad's mission. Its base is the Koran and the Sunna. Its object and limits are Islam, as both the Faith and the community of the faithful. In theory, this law expresses God's *religio* (or binding ordinance). In practice the sources of law are heterogeneous, and the *shari'a* is furthermore mixed with or supplemented by regulations derived from *'urf* or *siyasa*. In theory, then, legal procedure and substance are well defined. In practice both are somewhat ambiguous in various spheres. Muslim law as we actually encounter it in Africa embodies all these elements, some directly at odds with the Koran and the *shari'a*, others supplementing their prescribed procedures or substantive rules. In this legal tradition there was initially no legitimate place for statutes, other than those contained in the Sunna or the Koran, although they may derive legality from the ruler's authority as sanctioned by the Koran. In a word, the tradition is one of theocratic pragmatism with a predominant focus on substance or content.⁴⁸ In this system uncertainty attaches, *ceteris paribus*, both to judicial decisions and to the application of sanctions.

British common law is almost equally complex. Besides custom, its sources include precedent, judicial decisions, legislation, equity, and various rules made by subordinate units with autonomous powers.⁴⁹ It is equally consistent with an imperium based on organic historical growth and expressed in an unwritten constitution, or with one defined by a formal document, such as the American and Australian constitutions. Where, as in Britain, there is an unwritten constitution, the legality

of law ultimately reduces to the observance of certain accepted procedures by legislature and courts alike. In such a system, if it merits that term, the traditional diversity of sources of law is linked with and maintained by rejection of systematic codes. In consequence, conditions conducive to conflict of laws arise, and uncertainty attaches to legal decisions on both formal and procedural grounds, though the application of sanctions is sure. In keeping with this secular empiricist tradition, periodic compilations of the current law are undertaken as part of a more or less continuous process of adjustive activity in which legislature, courts, jurists, and others are involved. In general, the law of procedure exceeds substantive law in clarity and certainty.

Indigenous African law varied widely in procedure and substance, in sources, theory, and scope, perhaps as an expression of differences in social organization too numerous to catalog. The extremes of this variation may be illustrated by the Bushmen and the Baganda. In Buganda, Muteesa I (1856?-1884), following Kabaka Mutebi, exercised an absolute and despotic power, the autonomous jurisdictions of clans having been circumscribed, hereditary chiefs and officials eliminated, and the ruler's orders enforced as supreme law. During these developments, the political constitution and legal procedures and content underwent simultaneous complex changes which we may summarize as the modification and replacement of an old corporate structure by a newer highly centralized despotism. These changes were partly legitimated by the Ganda theory of the Kabaka as the sacred personification of their unity as a nation.⁵⁰

Within a Bushman tribe, bands are the only corporate groups, and band headmanship, which is often held by infants and occasionally by women, is the only corporation sole. Band and headmanship are identified with each other and with certain properties, such as water holes, veldkos areas, and the like. Both persist, with their estates, even when the band has ceased to exist. Jural rights over property—that is, over Bushmen resources—vest entirely in bands, and the Bushman's habitat is divided accordingly. There are no legal tribunals, unless the flurries of excited collective jabber in which members of a band engage to "talk" some offender into retribution are so regarded. But crimes such as theft, though rare, are recognized, and violent punishment by the injured person is sanctioned, no protest arising even though the thief is killed.⁵¹

Between these extremes we find a wide variety in the corporate constitution of African societies: age-sets, age-regiments, age-villages, lineages, clans, local communities, associations, secret societies, castes, offices, and various types of chieftainship. In all instances an individual derives

his jural status and rights from membership in some corporate category or group, or from tenure of some corporation sole. Thus the subordinate Hutu in Ruanda, like the slaves in West Africa, shared the jural disabilities attaching to the corporate category to which they belonged. These corporations, in their differing constitutions, bases, ideologies, and interests, provide the sociological framework of indigenous law. As Gurvitch points out, "the real collective units only, e.g., groups, give birth to the frameworks of law," the legal system of a given society "representing already the syntheses and the equilibria among different kinds of law."⁵² Moreover, as corporations defined the scope and the source of the law, they embodied its theory and procedural forms and established the frame within and through which legal relations and processes obtained. The nature, form, and content of these jural relations and processes will therefore change with the identity and characteristics of the corporations involved, directly or indirectly, through the parties to the relation in their representative capacities. In this context law provides the medium for expression and adjustment of the corporate relations which constitute the framework of society.

Perhaps the most important structural difference among the French, Muslim, and British legal systems lies in their treatment of corporations. In English law, corporations emerged as independent juridical personalities endowed with continuity and exercising legally valid powers. The law accordingly admitted the existence of a certain type of unit which may or may not have been formally acknowledged by the state. In the developing English law of corporations, the legal capacities of these units were taken to include powers of rule making for their membership, where not inconsistent with the laws of the land. In short, common law, with its feudal basis and heterogeneous sources, accepted corporations constituted on various principles as relatively autonomous legal units.⁵³ The position in Muslim law seems curiously similar. Muslims were free, through the *siyāsa* and the doctrine of *'urf*, to suspend application of Islamic rules in favor of local practice, and could thus recognize and use the corporate organizations of those they ruled. They could also, with fewer procedural problems than the British, institute new corporations, both group and sole, as social or political conditions seemed to warrant. In the French legal system corporations exist as juridical units only by virtue of specific recognition or acknowledgment by the state. The French legal framework, being logically coherent, complete, and closed, cannot admit the logical or historical existence of native corporations independent of or antecedent to the colonial regime. On this basis the French theory of law denied recognition to African custom and polities.

Inevitably this consequence follows from the French view of law as a statutory code, properly authorized by the French state or by some other state that France recognizes. Only by special legislation could such law admit the existence of other old or new units. Even then it had difficulty in recognizing custom. With these bases the French had little alternative except "to regard their oversea territories as an integral part of the national community."⁵⁴

One case discussed by Delavignette makes the position plain.

For a long time African customary law was not legally recognized, since the situations to which it applied did not fall within any of the categories provided for by French law. Supposing a Chief tried to establish in the Courts, in accordance with the Code, the traditional rights exercised by a village over its own land. . . . The magistrate inquired in what capacity the Chief appeared. As representing the village—true, but what, according to the Code, is the legal status of the group known as a village? Is it a public utility company, a society, an association, a syndicate, a corporate body, an association of owners? The magistrate searched through the Code and found nothing. The African village exists in fact but has no means of proving its existence in law. It exists within the framework of customary law, but has no power to act within the framework of French law. . . . Now on 3 November 1934 the Court of Appeal at Dakar, the supreme court of French West Africa, for the first time took cognizance of the nature of customary law in its own legal practice. . . . The court decided two questions: first—what was the legal basis of the African village? The court's decision was that the French legislature, by proclaiming its recognition of local custom, placed the village on a legal basis entirely distinct from anything provided for in French law. . . . In order to recognize the legal status of the village and of the land rights it asserts, the court must define custom and legislate in accordance with it. The second question was, who is qualified to represent the village in law? . . . The decree of 3 November 1934 [points] . . . the way to a solution of the conflict between Code and Custom by means of a development of French law.⁵⁵

This involved a major modification of French legal theory.

The British, with their inadequate theory of law, and the Muslims, with a religious conception liberally modified by and adapted to circumstance, escaped the difficulties that faced the French because of the logical closure of their system and the extreme integration of legal theory with the theory of the state. Common-law willingness to accommodate corporations allowed the British to deal freely with tribal units whose forms and boundaries they could identify. Given prior experience with custom in common law, in Africa the British were well equipped to incorporate traditional social units and custom within the framework of their colonial administration, both legal and political, under the general rubrics of native authorities or native law and custom. Moreover, again on the basis of common-law experience, the British were well placed conceptually to admit that customs have a capacity for change, and thus tapped an essential source of adjustive development. As native

law and custom changed, the British were therefore free to admit changes in the boundaries, character, and identity of the representative native corporations.

For Muslims, Islam imposed the obligation of jihad and thus legitimated their conquests. Under the Koran, the Muslim ruler also enjoyed a discretionary power of pragmatic accommodation to secular conditions. The adaptive capacity of *siyāsa* has enabled Muslim law to harness the regulatory powers of custom and local corporations to the service of Muslim rulers. In practice, only those who identified themselves by the essential religious observances as Muslims had access to the *sharī'a*, all others being subject to the poll tax (*jizya*) and irregular levies or demands, as well as to effective official disenfranchisement, although under *siyāsa* and the doctrine of *'urf* they were free to maintain their traditional custom and social groupings.

I draw two conclusions from this review. First, as a rule of method, in the comparative sociology of law, it seems as essential to examine the history of legal theories as to observe the operation of legal systems themselves. In a very special sense, these theories and ideologies, however imperfect they may be, as in modern Britain or ancient Rome, serve to define the framework within which law proceeds. It is furthermore possible, given suitable data, to refine an initial analysis of the special properties and assumptions of differing systems of law by comparing their adaptation to a common situation such as African pluralism provides. Perhaps only by some such procedure are we likely to develop a culture-free notion of legal facts significant for theory and practical affairs alike.

My second conclusion relates to the theory of law itself. We have found that the critical element in three traditions—Muslim, British, and French—is their treatment of corporate bodies other than the state. Muslim law apparently ignores the question, but thereby permits great adaptive freedom; British law explicitly provides legal recognition for autonomous corporations; French law as explicitly excludes them. It seems possible that law is both the process and the product of processes by which corporations emerge, acquire definition, and articulate with one another within a wider unit. In Muslim theory, the most inclusive corporation is the House of Islam; but when dominant, Muslims are legally free to acknowledge the corporate organization of their pagan or *dhimmi* subjects, whose traditional customs are accordingly recognized as valid in regulating their internal affairs. Without any overriding religious commitment or classification, British law permits equally flexible accommodation. Per contra, French law, which most perfectly expresses

the dominant rational Western theory of law, assumes a primary sovereign corporation, the state, and accordingly denies the legality of prior or independent units unless the latter are expressly recognized by the state. In their common African situation, the responses of these dominant legal traditions inevitably differed; and their relative capacities to absorb native legal and political institutions into their framework varied inversely with their logical closure and formal completeness, that is, with the specificity of their political presuppositions. If this conclusion holds, its pertinence for sociologists concerned with the general problem of law and social control may lie in its stress on corporations as modal units of social and legal structure.

a theory of law derived from legal apparatus and practice. An explicit theory may in fact be at variance with practice.

²² *Justice and Judgment among the Tiv*, pp. 5-7.

²³ For comments on African reactions to imprisonment see Elias, *op. cit.*, pp. 285 ff., and Bohannan, *Justice and Judgment among the Tiv*, p. 68.

2. The Sociological Framework of Law

¹ Adriano Moreira, "General Report, Ethnic and Cultural Pluralism in the Inter-Tropical Societies: Legal and Political Aspects," in *Record of the XXXth Meeting*, International Institute of Differing Civilizations (Brussels, 1957), p. 496.

² *Ibid.*, p. 498.

³ M. G. Smith, "Ethnic and Cultural Pluralism in the British Caribbean," in *Record of the XXXth Meeting*, International Institute of Differing Civilizations (Brussels, 1957), pp. 443-444.

⁴ Ernest Barker, Introduction to Otto Gierke, *Natural Law and the Theory of Society* (Boston: Beacon Press, 1960), p. lxxxvii.

⁵ W. Robertson Smith, *Kinship and Marriage in Early Arabia* (Cambridge: The University Press, 1885).

⁶ Reuben Levy, *The Social Structure of Islam* (Cambridge: The University Press, 1957), p. 165. For a fundamental study of the part these elements played in the growth of Muslim law, see Joseph Schacht, *The Origins of Mubammadan Jurisprudence* (Oxford: Clarendon Press, 1950).

⁷ H. Lammens, *L'Islam: croyances et institutions* (Beyrout, 1926), p. 104. See also G. E. von Grunebaum, *Medieval Islam* (2d ed.; Chicago: University of Chicago Press, 1953), pp. 149-152; Schacht, *op. cit.*, pp. 82-97. I should like to stress that the nature and the role of *ijmā'* in Muslim law are matters on which specialists may differ.

⁸ Levy, *op. cit.*, pp. 259-261.

⁹ Koran 4:62 (cited by von Grunebaum, *op. cit.*, p. 157).

¹⁰ Von Grunebaum, *op. cit.*, pp. 163-164.

¹¹ *Ibid.*, p. 164.

¹² M. Hiskett, "Kitāb al-farq: A Work on the Habe Kingdoms Attributed to 'Uthmān dan Fodio," *Bulletin of the School of Oriental and African Studies* (University of London), XXIII (1960), 566-568.

¹³ C. W. Cole, *Land Tenure in Zaria Province* (Kaduna, 1948), pp. 32-41, 65, 69, 74-82.

¹⁴ Levy, *op. cit.*, pp. 243, 244, 248.

¹⁵ Max Weber, *The City*, trans. and ed. Don Martindale and Gertrud Neuwirth (London: Heinemann, 1960), pp. 168-172.

¹⁶ Aristotle, *Ethics* 1134^b 18-21; *Rhetoric* 1373^b 4.

¹⁷ H. G. Hanbury, *English Courts of Law* (London: Oxford University Press, 1944), chaps. 2-4.

¹⁸ St. Thomas Aquinas, *On the Governance of Rulers* (1259), cited in Robert Bierstedt, *The Making of Society* (New York: Modern Library, 1959), pp. 52-57.

¹⁹ Bierstedt, *op. cit.*, pp. 60-76.

²⁰ Max Rheinstein, ed., *Max Weber on Law in Economy and Society* (Cambridge: Harvard University Press, 1954), pp. 274-275; Barker, *op. cit.*, pp. xxxix-xlii.

²¹ Barker, *op. cit.*; Ernest Barker, Introduction to *Social Contract: Essays by Locke, Hume and Rousseau* (London: Oxford University Press, 1947).

²² Rheinstein, *op. cit.*, p. 275.

²³ Gierke, *op. cit.*, pp. 45-47, 77-79.

²⁴ *Ibid.*, pp. 70-76.

²⁵ Thomas Hobbes, *Leviathan* (1651), chaps. 13-15, 17-30. See also Richard Peters, *Hobbes* (London: Pelican Books, 1956), pp. 190-239.

²⁶ John Salmond, *Jurisprudence* (10th ed.; London: Sweet and Maxwell, 1947), p. 60.

²⁷ Oliver Wendell Holmes, *The Path of Law* (1897), cited in C. K. Allen, *Law in the Making* (6th ed.; Oxford: Clarendon Press, 1961), p. 42.

²⁸ B. N. Cardozo, *The Growth of the Law* (New Haven: Yale University Press, 1924), p. 52.

²⁹ Sir Henry Maine, *Antient Law* (new ed.; London: J. Murray, 1905), p. 6.

³⁰ Allen, *op. cit.*, pp. 66-67.

³¹ A. R. Radcliffe-Brown, "Primitive Law," *Encyclopedia of the Social Sciences*, IX, 202, quoting Roscoe Pound, *Readings on the History and System of the Common Law* (Boston: Boston Book Co., 1913), p. 4; Roscoe Pound, *Jurisprudence* (St Paul, Minn.: West Publishing Co., 1959), I, 13-14. See also E. Adamson Hoebel, "Letter to Editor," *American Anthropologist*, LXIV, no. 4 (1962), 36-37.

³² A. R. Radcliffe-Brown, "Social Sanction," *Encyclopedia of the Social Sciences*, XIII, 531-534, reprinted in his *Structure and Function in Primitive Society* (London: Cohen & West, 1952), p. 208.

³³ R. M. MacIver, *The Modern State* (Oxford: Clarendon Press, 1926), p. 22.

³⁴ Sidney Hartland, *Primitive Law* (London: Methuen, 1924), p. 138.

³⁵ *Ibid.*, pp. 8, 214.

³⁶ Sir Henry Maine, *Lectures on the Early History of Institutions* (London: J. Murray, 1875).

³⁷ Sir Paul Vinogradoff, *Common Sense in Law* (London: Oxford University Press, 1913), p. 119.

³⁸ *Ibid.*, chap. vi; Allen, *op. cit.*, pp. 64-152.

³⁹ Emile Durkheim, *The Division of Labour in Society* (1893), trans. G. Simpson (Glencoe, Ill.: Free Press, 1947).

⁴⁰ Emile Durkheim, *Professional Ethics and Civil Morals*, trans. C. Brookfield (Glencoe, Ill.: Free Press, 1958); and *Socialism and Saint-Simon*, trans. Charlotte Sattler (Yellow Springs, Ohio: Antioch Press, 1958), chap. 8.

⁴¹ Bronislaw Malinowski, *Crime and Custom in Savage Society* (London: Routledge & Kegan Paul, 1926), p. 15.

⁴² *Ibid.*, p. 46.

⁴³ E. Adamson Hoebel, *The Law of Primitive Man* (Cambridge: Harvard University Press, 1954), p. 28.

⁴⁴ Vinogradoff, *op. cit.*, p. 23. On the distinction between perfect and imperfect law, see p. 31. Nullity (*butlan*) exists in Muslim law; in 'urf it exists in the sense that omission of "economical" nullifies the binding character of the act.

⁴⁵ Rheinstein, *op. cit.*, p. 5.

⁴⁶ *Ibid.*, p. 13.

⁴⁷ Moreira, *op. cit.*, p. 502.

⁴⁸ Levy, *op. cit.*, chaps. 4, 6-8.

⁴⁹ Allen, *op. cit.*, chaps. 3-7.

⁵⁰ Martin Southwold, *Bureaucracy and Chiefship in Buganda*, East African Studies no. 14 (Kampala: East African Institute of Social Research, [ca. 1960]); Audrey I. Richards, ed., *East African Chiefs* (London: Faber & Faber, 1960), chap. 2.

⁵¹ Lorna Marshall, "Kung Bushmen Bands," *Africa*, XXX (1960), 225-355; and "Sharing, Talking, and Giving: Relief of Social Tensions among Kung Bushmen," *Africa*, XXXI (1961), 231-249.

⁵² Georges Gurvitch, *Sociology of Law* (London: K. Paul, Trench, Trubner, 1947), p. 156.

⁵³ Maine, *Ancient Law*, chap. vi; Vinogradoff, *op. cit.*, pp. 54-60.

⁵⁴ Robert Delavignette, *Freedom and Authority in French West Africa* (London: Oxford University Press, 1950), pp. v-vi.

⁵⁵ *Ibid.*, pp. 91-92. See also Lord Malcolm Hailey, *An African Survey* (London: Oxford University Press, 1938), pp. 185-206, 484-491.

3. Land Law in the Making

¹ Cf. *Report of Kenya Land Commission, September 1933* (London: H.M.S.O., 1934). Land tenure "should be progressively guided in the direction of private tenure" (par. 1650). "Some direction by authority is necessary. . . . Government should take and use the power to make rules" (par. 1408).

² Gusii country was first opened up by the British in the early 1900's, about twenty years before the start of the period we are considering here.

³ In one Gusii area, Getutu, a rudimentary chieftainship seemed on the point of emerging when the British took over; the organization of descent groups and local communities was different in this area also. In this paper we refer to conditions outside Getutu. For the peculiarities of Getutu see Phillip Mayer, *The Lineage Principle in Gusii Society*, International African Institute, Memorandum XXIV (London: Oxford University Press, 1949), esp. pp. 14 f., 28 f.

⁴ The system was applied with some differences in Getutu (see *ibid.*, p. 2 n. 2).

⁵ *Ibid.*

⁶ See Philip Mayer, *Gusii Bridewealth Law and Custom*, Rhodes-Livingstone Papers, no. 18 (London: Oxford University Press, 1950), p. 5.

⁷ Arthur Phillips, *Report on Native Tribunals, Colony and Protectorate of Kenya* (Nairobi: Government Printer, 1945). Paragraph 113 gives figures for the year 1942 as follows: Gusii (Kisii), 5,835 civil cases, Luo, 1,543; Gusii, 895 appeal cases, Luo and Bakuria, 190.

⁸ Cf. Philip Mayer, "Agricultural Cooperation by Neighbourhood Groups among the Gusii," in *Two Studies in Applied Anthropology in Kenya* (London: H.M. S.O., 1951), pp. 5-19.

⁹ Max Gluckman, "Kinship and Marriage among the Lozi of Northern Rhodesia and the Zulu of Natal," in *African Systems of Kinship and Marriage*, ed. A. R. Radcliffe-Brown and Daryll Forde (London: Oxford University Press, 1950).

¹⁰ Cf. Mayer, *Gusii Bridewealth Law and Custom*.

¹¹ Here again there was a somewhat different pattern in one Gusii tribe, Getutu (see Mayer, *The Lineage Principle in Gusii Society*).

¹² *Ibid.*, p. 28.