

In ARP-455  
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*A Working Paper from*

**THE PROGRAM IN LAW AND  
MODERNIZATION**



**YALE LAW SCHOOL**

PJ-ABP-455

ISN 8 3083

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TOWARD A COMPARATIVE SOCIAL

THEORY OF THE DISPUTE PROCESS

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June 1972

Working Paper No. 13

This is the thirteenth in a series of papers reporting works in progress by persons associated with the Yale Law School Program in Law and Modernization. Richard Abel is an Associate Professor of Law at the Yale Law School.

## I. INTRODUCTION

Why study the legal systems of other times or other places? Are there reasons beyond an antiquarianism or exoticism that seeks stimulation for a palate jaded by preoccupation with the minutiae of American law? The increased understanding to be gained by such intellectual exploration seems to me similar, in origin, to the pleasure any of us takes in travel. Differences of physical environment, modes of social intercourse, or patterns of culture, awaken us to phenomena which at home are so familiar as to be almost invisible. The residue of such impressions, on our return, compels us to recognize the contingency of our own ways, and leads us to look for explanations.

Although the scholarly tradition of inquiry into alien legal systems is long and distinguished, with roots in classical philosophy, Montesquieu is generally credited with the revival of such studies in the modern era, having journeyed imaginatively both in time and space. <sup>1</sup> Investigations in the first of these dimensions reached maturity in the historical jurisprudence of the nineteenth century. <sup>2</sup> Academic interest subsequently shifted to the anthropological exploration of contemporary exotic societies through extensive fieldwork. <sup>3</sup> More recently, sociologists have turned

inward to examine neglected regions of our own law, such as informal processes pervading official institutions, or the extra-legal systems serving ethnic sub-groups and classes.

Nevertheless, the corpus of theory devoted to understanding the legal institutions of non-Western societies is severely limited.

Anthropology and history abound in empirical reports but are notorious for their unwillingness to theorize; sociology, though stronger theoretically, has been parochial in its geographic scope. This essay constitutes my attempt to formulate a theoretical framework within which to analyze data concerning the development of a particular legal system, that of Kenya, a pluralist society which has experienced rapid change under the impact of colonial rule and since independence. But I hope that this immediate goal will not limit the broader value of such a programmatic exercise which I see as being two-fold. Although I present no new data, I seek to give a sense of direction to the empirical research which is now proliferating, often without any clear objective. If the proposed focus is not yet a holistic, fully coherent theory, it sets forth some of the alternative approaches and offers explicit reasons for choosing a particular path. I begin with a critical examination of several

concepts frequently employed in social studies of law. My choice among them is guided by certain general sociological orientations. I then survey a selection from the social scientific literature to identify variables for the description of these concepts. Next I consider how to relate the variables. Finally, I explore several general theoretical propositions and derive from them specific hypotheses capable of empirical verification.

## II. CHOICE OF A CONCEPT

### A. Law

It is not surprising that many writers have selected "law" as the conceptual focus of their inquiry. An immature discipline such as ours frequently borrows concepts from the domain of common-sense discourse;<sup>5</sup> parallels can be found in the early history of the natural sciences, as well as in the contemporary travails of social sciences. We may assess that choice by a variety of standards. A concept must, of course, have meaning, i.e., an ascertainable and agreed content. In addition, I will adopt other criteria which are not so generally accepted. I prefer to use concepts which can apply across a spectrum of societies as broad as possible.<sup>5</sup> Greater variation increases the opportunities for testing

the hypothesis; the more such tests it survives, the greater is its explanatory power. I will also avoid concepts that are dichotomous, i.e., restricted to polar values. The differences we discern among social actions seem to be continuous, and unhappily distorted by such either/or characterizations. Moreover, dichotomies curtail further refinement; once you learn that a variable is not present in a given society, there is little more that can be said.<sup>7</sup>

Law does not appear to satisfy any of these requirements. To begin with, the meaning of law is highly problematic. Although all definitions are stipulative, agreement upon a definition of law has been unusually difficult to achieve. Weber has stressed the absence of sharp boundaries around what should be called "legal" within the domain of substantive rules:

Law, convention, and usage belong to the same continuum with imperceptible transitions leading from one to the other. ... It is entirely a question of terminology and convenience at which point of this continuum one shall assume the existence of the subjective conception of a "legal obligation".<sup>8</sup>

Bohannon makes the point more generally: law in all its manifestations is a noetic concept, whose content must depend on our purposes.<sup>9</sup> As the aims of investigators often differ, so do their concepts of law. Since these goals often

definitional controversies tend to be lengthy and heated.<sup>10</sup> Because each proponent is rarely aware of his objective, or of the way in which it colors his strategy, the argument soon becomes circular and impossible of resolution.

A further pitfall accompanies the choice of law as a concept. A recurrent word in everyday usage, it carries a substantial cargo of cultural connotation; i.e., it is a folk rather than an analytic concept.<sup>11</sup> If this folk meaning is unconsciously adopted, "law" acquires content, and thus a shared meaning, but only at the cost of warping the analysis by introducing a serious ethnocentric bias.

Radcliffe-Brown's extremely influential conception of law<sup>12</sup> exemplifies the dangers of adopting untested the assumptions of one's own culture. Borrowed mediately from Pound,<sup>13</sup> it may be traced to legal positivism and in particular to John Austin's perceptions of, or prescriptions for, English government in the nineteenth century.<sup>14</sup> Law is "social control through the systematic application of the force of politically organized society."<sup>15</sup> When this definition was applied outside the western context, Radcliffe-Brown was forced to conclude<sup>(:)</sup> "in this sense, some simple societies have no law." He did not question whether it was valuable to continue

to use the word "in this sense", on the contrary he argued that such usage was "more convenient for purposes of sociological analysis and classification."<sup>16</sup> His pupil, Evans-Pritchard, utilized this conceptual framework in his fieldwork on the Nuer of the Sudan; perhaps predictably, he reached the same judgment in almost the same words.

In a strict sense the Nuer have no law. There are conventional compensations for damage, adultery, loss of limb, and so forth, but there is no authority with power to adjudicate on such matters or to enforce a verdict.<sup>17</sup>

Although "conventional compensations" might satisfy the "systematic" or orderly element of a legal system, they still could not be dignified as law because they were not backed by "the force of politically organized society," here understood to mean "the power to adjudicate on such matters or to enforce a verdict."

The mistake of both anthropologists was to employ a concept, derived from a parochial system of jurisprudence, which had been designed for description and understanding within a particular institutional framework. Used elsewhere, it rendered a verdict of "no law." Because the concept revealed only dissimilarities between domestic and exotic phenomena it oversimplified comparison. However, this lack of fit between definition and data led Evans-Pritchard to expand his concept to recognize the modes

of social control and conflict resolution he had discovered.<sup>18</sup> Shortly thereafter he published an article in which he acknowledged the existence of law among the Nuer: "Within a tribe there is law: there is machinery for settling disputes and a moral obligation to conclude them sooner or later."<sup>19</sup> He perceived that the the institutional apparatus need not be limited to an adjudicative body, nor did it have to enforce a verdict, as long as the dispute was settled sooner or later. Legal authority could just as well be found in moral obligation as in "the force of politically organized society." Together these definitions provide us with a number of subordinate concepts which have proved central to our understanding of legal systems: the processes of social control and dispute settlement; the systematic quality of all social life, whether this is found in conventional practices or takes another form; the contrasts between political force and a sense of moral obligation, between adjudication and other methods of decision; and the importance of finality, whether achieved through a verdict or by more flexible procedures. The value of such refinements may be seen in the sophistication with which subsequent investigators, familiar with Nuer ethnography and Evans-Pritchard's interpretations, have been

legal phenomena where Radcliffe-Brown would have found them absent.<sup>20</sup>

If ethnocentrism commonly leads the investigator to construct a concept in the image of his own folk legal system, he may equally be attracted to the society he studies.<sup>21</sup> Malinowski strenuously criticized the error of "defining the forces of law in terms of central authority, courts, and constables ...."<sup>22</sup> He perceived that Trobriand Island society was orderly even though those forces were lacking. To account for this orderliness, he offered a "minimal definition" of law<sup>23</sup> <sup>which</sup> ~~that~~ was intended to be universally applicable.

There must be in all societies a class of rules too practical to be backed up by religious sanctions, too burdensome to be left to mere goodwill, too personally vital to the individuals to be enforced by any abstract agency. This is the domain of legal rules, and I venture to foretell that reciprocity, systematic incidence, publicity and ambition will be found to be the main factors in the binding machinery of primitive law.<sup>30-c</sup> <sup>23a</sup>

This over-readiness to generalize all facets of Trobriand society constantly reappears in his writing: "I venture to foretell that wherever careful inquiry be made, symmetry of structure will be found in every savage society, as the indispensable basis of reciprocal obligation."<sup>31c</sup> <sup>23b</sup>

But in maintaining that law in "all societies" is characterized by "reciprocity, systematic incidence, publicity and ambition," Malinowski was committing exactly the same anthropological sin as Radcliffe-Brown.<sup>31d</sup>

For a concept modelled upon Trobriand ethnography fails to identify as legal many phenomena commonly categorized as such in other societies:

for instance, that vast body of rules relating to torts in Anglo-American common law, which are not obeyed out of ambition nor primarily maintained by the forces of reciprocity or publicity. In fact M.M. Green, the one anthropologist who adopted Malinowski's concept, was soon persuaded to add the ingredient of sanction so vehemently rejected by her mentor.<sup>25</sup>

Nevertheless, Malinowski's efforts, like those of his fellow controversialists, add to our armory of concepts the positive sanction of reciprocity, rendered potent by the force of personal ambition and reinforced by the glare of publicity.

The conclusion to be drawn from these two landmarks in the history of anthropological inquiry appears to me irresistible. Folk concepts of law possess a meaning, but one tainted with ethnocentrism. When applied to divergent societies they blind the investigator to significant phenomena. Moreover, since the concept is often dichotomous - something either is law or it is not - a negative characterization discourages further inquiry.

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creator, but he is not likely to persuade others of its utility. The result is endless wrangling, of which the Gluckman-Bohannan controversy is a contemporary example,<sup>25a</sup> and continuing preoccupation with the definition of concepts to the hindrance of more fruitful endeavors.

It seems clear that we must abandon law as a concept in our attempt to build social theory. Gluckman, himself, urged as much.<sup>26</sup> There, Political science has recently set an example by resolving to put aside, at least for the moment, its equivalent shibboleth, "the state".<sup>27</sup>

B. An alternative conceptual focus: dispute.<sup>27a</sup> If the strands of law are difficult to unravel, and any single perspective upon that phenomenon seems incomplete, some narrowing of vision must still be accepted. We are not yet ready to construct theory about the legal system as a whole.

I have chosen to concentrate on the dispute process for a variety of reasons. I will try below to give that term a content which is both ascertainable and acceptable. I believe that the concept will be more widely applicable than any of the definitions of law already discussed, and thus help to avoid that dead-end of analysis in which the object of our concern is not discoverable. Nor will the concept be dichotomous;

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which are themselves continuous. The chosen focus is suggested, moreover, by the desire of every new discipline - here a social theory of law - to carve out a proprietary niche for itself. Many substantive legal norms, and the behavior to which they speak, have already been claimed by other fields: economics, for instance, studies much of the subject matter of commercial law and among the catholic interests of sociologists encompass such disparate areas as criminal behavior and family relationships. But in the courtroom, still largely unprofaned by social scientists, legal scholarship has reigned supreme.<sup>28</sup> From that benchmark, only a little intellectual expansionism is required to stake out the domain of disputes and their social response. Some such reasoning may well explain why a disproportionate number of those anthropologists studying law have directed their attention toward disputes.<sup>29</sup>

Other factors may also have contributed to this choice. Much anthropological investigation took place within the confines of a colonial regime, and under its aegis, within both the British and the Dutch empires, ~~Dutch empires,~~ Legal studies flourished which adhered to the doctrine of "indirect rule".<sup>30</sup> Because this policy depended upon a thorough understanding of indigenous political institutions and processes, especially

those which dealt with disputes, anthropologists were of immediate and critical value. Equipped with such data, colonial authorities then began to "recognize" indigenous institutions, invariably changing them out of all recognition in the process. Anthropologists required no material incentives to study that <sup>transformations</sup> for it offered fascinating insights into social experimentation on a large scale. [INSERT FROM NEXT PAGE]

(1) Definition of a dispute. I have chosen a minimal definition in order to maximize applicability across disparate societies. As a result, the concept will be highly mutable; nevertheless, I believe its numerous forms may be related to one another by means of appropriate variables, which I shall try to identify below. A dispute, as I use the term, is the assertion of conflicting claims by two or more persons. A claim is a demand for a scarce resource. It is made as of right, i.e., it is normatively justified, at least implicitly. An argument about a matter of fact - for example, who was the seventeenth <sup>p</sup>/<sub>c</sub> president of the United States - is not a dispute; it might become one if the participants sought not only factual vindication but also an admission of intellectual superiority. As this example suggests intangibles, like reputation, can also be the subject of a dispute. Claims conflict as long as a claimant

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By contrast, a knowledge of substantive customary law was not essential to this policy, and while efforts were made, subsequently, to modify these norms, social scientists tended to dismiss this legislation as ineffective, if rather too cavalierly.<sup>31</sup>

asserts that they do.<sup>32</sup> An assertion is a communication of the conflicting claims to another, either an opponent or a third person; it need not be verbal. For greater facility in description, I will use controversy as a synonym for dispute; argument or quarrel where the disputants are confronting each other and presenting their claims with reasons and more or less heat; and case or litigation where an official judge has become involved.<sup>33</sup>

A dispute is obviously a social process; that is one reason why it tends to be more widely distributed than the structural units<sup>on</sup> which Radcliffe-Brown's concept of law was based.<sup>34</sup> As a process, it is constantly in flux. I will refer to the situation in which the disputants find themselves at any given point in time as the outcome, intentionally choosing a term which permits an implication of continuing fluidity.<sup>35</sup> When I wish to emphasize greater finality I will use "decision", a term which suggests both a choice between alternatives and a resting-place in the dispute, if one which can be no more than tentative. A decision need not be the unilateral utterance of a third person; it can equally result from agreement between the parties. I have deliberately avoided the more common phraseology "dispute set

resolution."<sup>36</sup> The assertion that "settlement" or "resolution" is the most frequent, indeed the only outcome of disputes has been popular, especially among writers on African customary law.

Looking back on the customary judicial process in perspective we have noticed how ... [the] judges are more intent on the maintenance of the social equilibrium than on a strict declaration of legal rights and duties of the litigants without regard to the social consequences of their verdict. Instead of spinning out abstract theories of law, their aim is usually the pragmatic one of removing the causes of social tension, of binding or rebinding the estranged parties in a give-and-take reciprocity, or the re-incorporation of an erring member in the social structure. ... in the generality of cases tried under the customary process the conscious purpose is reconciliation of the parties by a fairly just apportionment of blame or deserts. Hence the normal atmosphere is one of peaceful debate ....<sup>37</sup>

The prevalence of this perspective may be due to the assumption of functional anthropology, at least in its less sophisticated versions, that every society tends toward an equilibrium state.<sup>38</sup> But it has now become almost commonplace to observe that the outcome of a dispute is often unsatisfactory to one or more disputants. A recent ethnography of the BaKongo offers one of the many possible examples:

it is notorious that land cases drag on for generations, and that once "settled" they erupt again in some new guise. Government and people alike deplore the interminable litigation as the result of "politics" which they feel is a social evil. Land disputes carrying status-defining functions are indeed the primary channel of political activity in rural society, which would be radically changed were this channel not available.<sup>39</sup>

(1) Parameters of the dispute process. By stripping the concept of dispute, as far as possible, of those elements peculiar to a given society,

I simply postponed the task of charting the ways in which the phenomenon may vary. I will now try to identify significant parameters of that process, selecting from previous analyses.<sup>40</sup> Let me stress that this exercise is intended to illustrate the feasibility of an approach rather than to survey the literature exhaustively. The processual variables may conveniently be charted by tracing the sequence of events in a paradigmatic dispute; of course, no particular element is essential, nor is their order inevitable.

Before a dispute can arise, an individual must claim a scarce resource already claimed by another. Obviously, societal definitions of resource and scarcity will affect the nature and frequency of such conflict.<sup>41</sup> Its occurrence is also governed by psychological factors: individuals in a society may react to a threat of conflict by repressing their desires.<sup>42</sup> Even if a person is himself conscious of conflict he may decline to publicize it; all societies offer alternatives: migration to avoid further discord, postponement of a grudge for a more opportune time, and resignation, perhaps in the hope of vindication in an afterlife.<sup>43</sup>

If the individual does assert his claim, conflict ripens into dispute. There will be variation in the way this occurs: which claimant makes the assertion,<sup>44</sup> whether he does so personally or through a representative,<sup>45</sup> and to whom he does so, especially in which forum or fora.<sup>46</sup> Once initiated, the breadth of the dispute must then be defined along three dimensions: the number and scope of grievances that may be raised, the number and identity of parties involved, and the historical depth in which the controversy will be explored. Fallers has noted that a "case" is a culturally variable unit, and has contrasted processes which only inquire into the violation of "a particular rule" with others which plumb "the full moral complexity of conflict situations."<sup>47</sup> Nader, independently and contemporaneously, offered a parallel distinction between situations where "the cause of the dispute is already known and proceedings function to settle" and others where a "variety of disputes is discussed to mediate the basis of the dispute."<sup>48</sup> Grievances may ramify not only between the nominal parties to the dispute, but also among others, and among all disputants across time. At one extreme are disputes which

only involve the "contending parties,"<sup>49</sup> "total strangers"<sup>50</sup> whose relationship is limited to that transient encounter, frequently contractual, which generated the dispute. At the other are disputes between parties linked by a "substantial period of association . . . in the course of which each has done things to the other of which he ought to be ashamed";<sup>51</sup> where disputants are enmeshed by multiplex relations "it is the wider social networks that influence a decision";<sup>52</sup> "the case which is the crux of the dispute is only a minor expression of a long-standing antagonistic relationship between two families or groups."<sup>53</sup>

The definition of issues interacts with the nature of the factual investigation. Aubert has sketched two divergent paths which this inquiry may follow.<sup>54</sup> If those engaged in the dispute are motivated by considerations of utility, they will be concerned with historical fact only so far as it assists them in forecasting the consequences of alternative accommodations. These predictions are, of course, subject to verification, and will be revised if shown to be incorrect; the dispute will extend temporally into the future rather than the past. Alternatively, the parti-

participants in the dispute may seek to apportion praise and blame, and must then ascertain historical fact in detail. This option brings into prominence the procedures for factual determination: who presents evidence and how, what evidence is acceptable or necessary, how the evidence is assessed, and what is done if the evidence is lacking. Such an interpretation of history cannot be modified to account for subsequent events.

While the above observations by sociologists and anthropologists are relatively novel, legal philosophy has long reflected upon the characteristics of norms and the way they are employed in disputes. Pound asserted: "Almost all of the problems of jurisprudence come down to a fundamental one of rule and discretion . . . ."<sup>55</sup> This distinction has been refined to recognize the clarity and discreteness of rules when contrasted with vague continuous standards.<sup>56</sup> Application of the norms may focus upon the general, repetitive features of a conflict situation, or on the idiosyncratic features of the dispute.<sup>57</sup> The underlying thought processes have been described as falling along a continuum between the rational and the irrational,<sup>58</sup> or between intelligence and intuition.<sup>59</sup>

The process may be characterized by formal orderliness, expressed in adherence to a code or doctrine of precedent and achieved by means of legal conceptual reasoning; or it may subserve substantive ends and result in a series of "themistes," disjointed from past or future decisions.<sup>60</sup> Norms may be advanced by a party in support of an argument, or by a third person urging a particular outcome; these arguments may be more or less explicit.<sup>61</sup>

Disputes differ in the outcome toward which they tend: some simmer indefinitely without any firm resolution; others generate considerable pressure for a decision of any kind.<sup>62</sup> This may be a clear, simple, dichotomous decree favoring one party to the exclusion of the other; or it may be an ambiguous compromise which considers "all the rights and wrongs of this situation,"<sup>63</sup> and awards to each party some of what he seeks while denying other elements of his claim.<sup>64</sup> The outcome may be imposed unilaterally upon the parties, or an effort, greater or less, may be made to secure their assent by a variety of means.<sup>65</sup> The remedy may be expressed in sanctions which are repressive or restitutive, posi-

tive or negative, diffuse or organized.<sup>66</sup> The judgment may be announced as final, or finality may consciously be avoided;<sup>67</sup> in either case there may be further opportunities for review or reinterpretation. And there will, of course, be variations in the manner in which subsequent behavior is affected by the decision.

(3) Are there two types of disputes, legal and political? In this brief survey of variables which may help to describe the dispute process, I viewed the role that norms may play as simply one parameter like the others. Some writers have argued that this factor divides disputes into two groups, fundamentally different in kind, which require distinct conceptual frameworks for analysis. Fallers contrasts the adjudication of rule violations with what he calls "political" disputes, "interest" arising out of the pursuit of inconsistent policy goals; since in such controversies the choice of decisional rules is itself the issue, resolution cannot be governed by rules.<sup>68</sup> Among its other defects, this view fails to indicate how settlement is arrived at if rules are not determinative. Gulliver has carried the analysis further, and conceptual-

ized "two polar types of process - judicial and political - between which there is a graduated scale ...."

By a judicial process I mean one that involves a judge who is vested with both authority and responsibility to make a judgment, in accordance with established norms, which is enforceable as the settlement of a dispute. ...

The purely political process, on the other hand, involves no intervention by a third party, a judge. Here a decision is reached and a settlement made as a result of the relative strengths of the two parties to the dispute as they are shown and tested in social action. The stronger gains the power to impose its own decision, but it is limited by the degree to which its opponent, though weaker, can influence it. In this case the accepted norms of behaviour relevant to the matter in dispute are but one element involved, and possibly an unimportant one.<sup>69</sup>

Gulliver developed this typology in an attempt to portray dispute settlement among the Arusha of Tanzania. He has since modified his position somewhat in order "to avoid the establishment of precise ideal types or models" and to emphasize that "there is no absolute dividing line between the two modes."<sup>70</sup> But his revised formulation, while thus qualified, is not fundamentally changed.

Essentially the difference is between judgment by an authorized third party, on the one hand, and negotiated agreement without judgment, on the other; that is, the difference between the presence or absence of overriding authority. ...

From this I would suggest the hypothesis that, on the whole, there is greater reliance on, appeal to and operation of rules, standards, and norms where adjudication rather than negotiation is the mode of dispute settlement.<sup>71</sup>

Indeed, he found substantial confirmation of the schema in subsequent fieldwork among the Ndendeuli, another Tanzania tribe which lacks even

those institutionalized notables who, in Arushaland, are available to mediate, though not to decide, disputes.

Obviously in a moot Ndendeuli do attempt to enunciate these expectations [concerning reasonable role performance], and they seek to measure a man's conduct against them. On the other hand, not only are the expectations rather indeterminate ... but there is also no third party, no adjudicator, and no technique to determine specifically the acceptable, operative, reasonable expectations in the event of a particular dispute. And while men seek their own advantages and attempt to avoid what is disadvantageous, the process of settlement must depend also on other considerations not directly related to the merits of the matter in dispute: the strength with which a defendant can resist his claim, the degree to which a plaintiff can be persuaded to reduce his claim, the degree and kind of support each can obtain from other involved persons.<sup>72</sup>

Where Fallers and Gulliver concentrate upon defining the political process, Pospisil arrives at a similar dichotomy by identifying the judicial antithesis with an attribute which he calls "the intention of universal application ... the authority in making a decision intends it to be applied to all similar or 'identical' situations in the future."<sup>73</sup>

This typology is not unfamiliar to lawyers. Their image of the rule of law closely resembles the judicial models described above. Lon Fuller has argued that adjudication, as an ideal type, is a process where the parties present, and the judge is guided by, evidence and reasoned argument.<sup>74</sup> And Herbert Wechsler, in advocating "neutral principles" as the only

appropriate basis for judicial decision, employs a similar standard:

A principled decision, in the sense, I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.<sup>75</sup>

If these models share a common core it would seem to lie in the contrast between disputes which are governed by norms - especially those described as established, universal, determinate, general, or neutral - and controversies dominated by non-normative factors, such as "policy goals," the "immediate result", or the "relative strength" of a party calculated in terms of social support. The distinction is one which is drawn commonly enough;<sup>76</sup> and yet it seems to me to rest upon a fundamental fuzziness concerning what it means for a dispute to be governed by norms. Let me consider the meanings suggested by the above questions.<sup>77</sup>

(1) The disputants or other participants think they are acting in accordance with norms in urging a particular outcome. This appears to be Pospisil's usage when he speaks of an authority intending universal application. I do not believe that this is a fruitful sociological approach. The authority's intention at the time of deciding is singularly difficult,

if not impossible, to ascertain, and Pospisil indicates no way of doing so.

(2) The participants in the dispute invoke norms in advancing a solution to the dispute. Fuller suggests this aspect in his emphasis on reasoned argument.<sup>78</sup> As heirs of the legal realists we are not likely to confuse the invocation of norms with their actual influence. But if normative language is no guarantee that norms govern, what of the converse inference? A number of writers, most recently Fallers, have observed that norms may play a major role in disputes without ever being mentioned explicitly by judge or litigant.<sup>79</sup> Hence invocation as an index does not serve to create two categories of disputes, normative and normless.

(3) Norms determine the outcome of the dispute. Dworkin has analyzed this "model of rules"<sup>80</sup> in depth, and has agreed with, indeed trivialized, the insight of the legal realists that it is the rare norm which can or does dictate a decision,<sup>81</sup> and that many disputes fall beyond the purview of existing rules. From this standpoint very few of the cases tried by official courts are legal disputes. Are we to conclude that norms play no part in the remaining controversies? Emphatically not. Norms of a

different kind, which Dworkin refers to as standards, principles, or policies, "point to a decision" or are "taken into account ... as a consideration inclining in one direction or another" when we reach or surpass the penumbra of rules, or when they require change.<sup>82</sup> Nevertheless, the applicability and relative weight of these standards are always to some degree uncertain, with the result that a full understanding of the course of a dispute can only be gained by looking, as well, at factors extrinsic to its normative content. Hence Fallers cannot readily discriminate between political disputes and lawsuits, so once again the simple dichotomy breaks down.

(4) If only a few rules unambiguously dictate a unique judgment, still the judicial process for dealing with disputes can be distinguished from other such processes by the fact that all the norms it employs possess the characteristic of neutrality. This proposition is obviously subject to the line of attack just outlined; indeed, it is particularly vulnerable since the very neutrality on which Wechsler insists increases the indeterminacy of outcome. But, more importantly, the criterion of neutrality

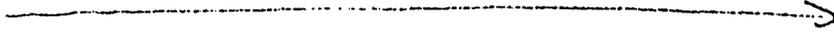
does not divide decisions into principled and unprincipled, for the degree of generality required of a norm is arbitrary and never adequately specified.<sup>83</sup>

It is not necessary to be entirely satisfied with this discussion of the troubled issue of rule and discretion in order to respond to the problem which stimulated the excursus: in charting regularities in the dispute process is norm a variable that is necessary and sufficient to describe one category of disputes, while wholly irrelevant to the other? The first half of this question has been adequately answered in the negative if, indeed, it is not the straw man which Dworkin asserts it to be.<sup>84</sup> The other alternative can be disposed of more quickly. I have, in fact, foreclosed the possibility of a normless dispute by definition, since I limited the disputes I intended to study to those in which the claims are normatively justified. Does this violate my own strictures against unnecessary parochialism? I think not; it is difficult to imagine the assertion of a claim without an appeal, if only implicit, to some general societal evaluation of human conduct.<sup>85</sup> Gulliver alone has offered ethnographic <sup>evidence</sup> of disputes without normative content, and he has since disavowed that

interpretation.<sup>86</sup> It would seem sensible, therefore, to pursue our analysis in the expectation that norms will play some part in most disputes we encounter.<sup>87</sup>

From that perspective, it may prove valuable to return to the distinctions just criticized for hints as to the varying qualities of the norms involved in a dispute. Dworkin<sup>88</sup> demarcates rules from standards on the basis of two criteria: 1) rules either dictate a decision or are irrelevant; standards may argue for a decision without necessitating it; 2) standards have weight relative to one another; rules do not. I do not think this dichotomy can be maintained either; most norms will function more like rules at one time, and more like standards at another. But I believe the variables Dworkin employs in drawing his distinction are potentially useful: the degree of clarity with which a norm includes a fact situation, and points to an outcome, and the weight of a norm. Similarly, while Wechsler fails to convince me that certain principles are neutral in any absolute sense, the generality of a norm may be an important variable.<sup>89</sup> And Fuller is certainly correct that the extent to which reasoned arguments are heard, and responded to, by a judge should also interest us.<sup>90</sup> Other variables somewhat overlapping those just discussed, might be: the de

vaguely or clearly defined,<sup>91</sup> fixed or flexible,<sup>92</sup> and how far the universe of norms is open or closed.

However, the dichotomy we have rejected has another string to its bow: although a dispute may well involve norms, the outcome will only accord with those norms if it is determined by an authoritative third-party adjudicator. 

 Gulliver makes this equation explicit, but even others like Aubert<sup>93</sup> and Pospisil,<sup>94</sup> who identify the authority of the adjudicator as an independent variable, associate that factor with normative decision-making. Perhaps this conjunction is suggested by our everyday experience; certainly popular mythology attributes evenhandedness to the judge and selfishness to the participants. But for purposes of analysis these variables must be kept distinct. They belong to different orders of conceptualization: the way in which norms enter into a dispute is a processual variable; the presence of an authoritative third-party is a structural element.<sup>95</sup>

Moreover, the asserted correlation falls to pieces, both theoretically and empirically. Authoritative decision-making is not <sup>(necessary)</sup> for norms to play

a significant role in a dispute. Such a proposition would imply that the only possible source for the influence of norms upon disputants is the authority of a judge. But there clearly are other sources. One of the disputants may possess an authority to declare norms similar to that of the judge - think of quarrels between parents and children.<sup>96</sup> And quite apart from who announces the norms in the course of a dispute, they may themselves be endowed with legitimacy derived from tradition,<sup>97</sup> or from mutual agreement, as where the players in a game follow the rules because of their desire to keep playing.<sup>98</sup>

Neither is the presence of an authoritative adjudicator a sufficient condition for the dominance of norms. Just as the participants may adhere to norms for reasons other than the authority of the judge, so the judge is subjected to influences which are not exclusively normative. As Gulliver has now realized, insulation from such pressures is denied not only the political but also the judicial process.<sup>99</sup> A striking instance of a dispute process constantly accommodating to relative power is the Lebanese wasta maker, described by Laura Nader.<sup>100</sup> An African example

however, may be more appropriate in the present context. J.A. Barnes has described disputes among the Ngoni, a Central African tribe endowed with a traditional hierarchy of authoritative courts, some of which were absorbed into the colonial legal system of Northern Rhodesia in 1929 and given enhanced powers and more formalized procedures.<sup>101</sup>

Despite this measure of legal assimilation, the present actions of Ngoni Native Courts can be understood only in terms of their historical roots in Ngoni society prior to 1929, and of the contemporary political scene, as well as in terms of the British legal system. The county chief who presides in the Native Court is the political leader of his people and his actions as a judge are coloured by his political position. The Ngoni Paramount Chief is political head of the tribe, and in addition presides over the Ngoni court of appeal. There is then no clear separation of the courts from politics. ... The Native Court is used to implement the policy of the Native Authority. A chief anxious to gain favour with the British Administration sees that his court enforces with substantial penalties the various regulations in which the Administration is interested for the time being. A chief who wishes to obstruct the Administration will neglect these regulations in his court. ...

In the court the magnitude of the penalties imposed or damages awarded is influenced by political considerations, among others. Ngoni society is not egalitarian, and status differences are reflected in differences in penalties ... Political considerations of the moment show themselves when a chief or other court member obstructs a suit brought by a litigant he dislikes. ... Missionaries endeavour to persuade chiefs not to grant divorces to their converts; Indian traders endeavour to get their disputes with Africans heard in Native Courts rather than in those of the Administration, as is required by the Ordinance on Native Courts; white farmers instruct Native Courts to deal promptly with cases involving their labourers.

Barnes concludes: "The legal system is not a kind of calculating machine, with an input of wrongs and an output of rights. It is part of the social process in which groups and individuals strive against

one another and with one another for a variety of ends."<sup>102</sup>

It should not be thought that only in the non-Western world is the dispute process diverted from its normative guidelines. The existence of other forces within our own legal system is so generally recognized that it requires no more than the briefest review. Some instances of deviation are officially recognized and approved: the institution of the jury is the most prominent example;<sup>103</sup> the disposition of offenders is another.<sup>104</sup> Others are tolerated with greater ambivalence. Norms alone do not govern the choice of a forum, whether by private individuals or by the government,<sup>105</sup> despite the occasional protestations of prosecutors that they pursue every infraction.<sup>106</sup> If the disputants avoid a court - and the vast majority do - there may be little pretense of adhering to the judicial model. Even if they initiate legal proceedings the definition of the claim and its later modification during pre-trial negotiation or plea bargaining may not be explicable in terms of the norms officially proclaimed; and many disputants reach an agreement at this stage with the acquiescence, indeed encouragement, of the court.<sup>107</sup> The outcome

of the dispute process is itself a complex product of both normative and non-normative factors, a product we have recently been helped to understand by the investigations of political scientists into judicial background and ideology.<sup>108</sup> Finally, some factors continue to intrude in spite of the efforts to extirpate them or to deny their presence, e.g., corruption,<sup>109</sup> and inequalities among disputants.<sup>110</sup>

The section now concluded provides at least some justification for treating the participation of norms in the dispute process as a social variable. This is a decision of no mean importance, for on it rests the possibility of a social theory of law distinct from legal theory or jurisprudence.<sup>111</sup>

### III. The Form of a Social Theory of Law

#### A. Construction of ideal types.

Social science has long been discontent to stop at the mere description of variety, classifying phenomena according to some arbitrarily selected common trait.<sup>112</sup> One means of advancing our understanding beyond this point is the construction of an ideal type,

which Weber has defined as:

the one-sided accentuation of one or more points of view and ... the synthesis of a great many diffuse, discrete, more or less present and occasionally absent concrete individual phenomena which are arranged according to those one-sidedly emphasized viewpoints into a unified analytic construct.<sup>113</sup>

I have already adverted to several ideal types of dispute process:

the dichotomy of judicial and political process was explicitly stated

in this form,<sup>y</sup> but most of the other processual variables identified

above were also extracted from a typological construct. Thus we

find repeated references in the literature to oppositions such as:

mediator and adjudicator;<sup>114</sup> legal and scientific decision-making;<sup>115</sup>

repressive and restitutive law;<sup>116</sup> adjudication, negotiation and

election;<sup>117</sup> ancient,<sup>118</sup> or primitive,<sup>119</sup> or tribal,<sup>120</sup> or African,<sup>121</sup>

or Indian,<sup>122</sup> or Japanese law<sup>123</sup> on the one hand - and modern, or

western, or Anglo-American law on the other. And of course Weber

himself developed a typology of justice which is frequently imitated.<sup>124</sup>

Several factors may explain this predilection for ideal typical

thinking: residual ethnocentrism, a predominately pragmatic or ethical

concern<sup>125</sup> conjoined with theoretical immaturity, or a lack of the data

which would be necessary to test hypotheses.

Nevertheless, it is essential to ask whether this approach is the best means of proceeding. The answer, as always, depends upon the goal. Weber argues:

This procedure can be indispensable for heuristic as well as expository purposes. The ideal typical concept will help to develop our skill in imputation in research: it is no "hypothesis" but it offers guidance to the construction of hypotheses. It is not a description of reality but it aims to give an unambiguous means of expression to such a description.<sup>126</sup>

← We have confirmed this claim by extracting from the ideal types  
← of others a number of significant variables, and possible linkages  
← among them. But this mode of thinking does have latent draw-  
← backs. In the hands of a less erudite theorist there may be a  
← temptation to model the construct upon randomly chosen, often  
← inaccurate, perceptions drawn from limited experience or reading,  
← rather than mobilizing the vast number of highly diverse phenomena  
← on which Weber was able to draw. The qualities defining the type,  
← being lumped together, are imprecisely specified. Dichotomies  
← are common, almost universal, in sharp contrast to the multipli-  
← city of alternatives which Weber usually offered. The pairs of

variables on which they are based may not lie on the same scale, or may fail to represent the extremes of that scale, and certain parameters may only possess a single value. What emerges is a stereotype rather than an ideal type which, far from instructing the eye of the observer, blinds him to data not encompassed by the type, and also to the possibility of other types.

Perhaps my criticisms reduce to a fear that we know too little about relationships among the qualities of disputes to begin grouping them in this fashion. Let me use Laura Nader's recent typology to illustrate what, to me, is the arbitrariness of the conjunction; the example is chosen with deliberate unfairness, for hers is surely one of the most fruitful concepts in the literature. Nader finds a style of court procedure among the Zapotec which resembles that of societies otherwise totally dissimilar in their institutional framework and general political and economic conditions.

The similarity is principally in the value placed on the minimax principle, rather than on the zero-sum game. From this principle follows a de-emphasis on establishing past fact; a prospectively oriented reasoning; and the use of proceedings as a technique for expression and for finding out what the trouble really is before reaching a settlement; even though this may be ... an agreement to avoid a decision.<sup>127</sup>

The elements of this typology may be paraphrased as: 1) minimax vs. zero-sum; 2) prospective reasoning vs. emphasis upon past fact; 3) broad definition of the dispute vs. narrow, superficial issues; 4) settlement by agreed compromise vs. unilateral decision. Are these two styles so fundamental, and mutually exclusive, that we can usefully <sup>SS</sup>clarify dispute processes according to whether they resemble one or the other? I think not. No reason is offered by Nader for her assertion that the combination is a significant one, aside from its empirical occurrence in a variety of societies. Yet it is not difficult to cite examples of other disputes which might well adhere to the "Zapotec" style in most respects, but deviate from it in one particular: 1) competitors disputing over a license or other economic good would still be engaged in a zero-sum game;<sup>128</sup> 2) a parent intervening in a quarrel between his children might choose to emphasize past behavior and its divergence from norms in order to internalize

those norms; 3) a married couple quarreling over a minor irritant will often scrupulously avoid all the deeper issues; 4) a parole board considering whether to release a prisoner certainly renders a unilateral decision. Indeed, it is hard to believe that similar departures from the "Zapotec" style could not be found in the Zapotec courts themselves.<sup>129</sup>

One response to the discovery of such discordant data might be to multiply the number of ideal types.<sup>130</sup> This is clearly a process without end, and would deprive the typology of whatever heuristic value it possessed. An alternative might be to refine the construct; but the typologists offer no criteria by which we might make a choice among potential ingredients. I prefer to proceed differently and resolve each proposed type into its constituent variables, which can then form the ingredients for another kind of generalization.<sup>130a</sup>

#### B. Correlation of variables.

Another means of explaining the characteristics of the dispute process is to look for regular conjunctions with other social variables. These will be of the general form "if x, then y", where y, the dependent

← variable, is the quality of the dispute process to be explained.<sup>131</sup>

In order to narrow the independent variables to a number that can realistically be explored, I will again employ the criteria of meaningfulness, universality, and continuity invoked earlier. Naturally, I will also pay greater attention to variables which have already been identified as significant by existing theory; for instance, I would investigate the ways in which children are taught to channel aggression before asking how they are instructed about the natural universe.<sup>132</sup>

(1) Separability. The selection of one variable imposes upon the other an additional constraint of independence or separability.<sup>133</sup> I have sought to satisfy this requirement by choosing my independent variables from among the structural characteristics of the dispute, as contrasted with the process itself; the environment in which the participants act as opposed to what they do. This distinction, however, is not as clear as it might seem. True, extreme examples present no problem: the seating arrangement of participants discussing a dispute is clearly structural when counterposed against the breadth of issues ventilated.

Nevertheless, the labels are relative: the same physical setting might be seen as an event in the dispute process when set against a background of the structural relationship between the disputants; and the issues which are aired could be viewed as a structural dimension of the dispute which helps us to predict the kind of evidence offered. Because of this relativity the designations become somewhat arbitrary when affixed to contiguous elements in the spectrum, where structure and process merge. Are the choice of a forum and the definition of the claim asserted two variables which can meaningfully be correlated, or a single datum measurable in two ways? This is, of course, an empirical question which is not answered by calling one structural and the other processual.

Nevertheless, the categories may help us to evaluate alternative strategies for inquiry. As the variables approach each other, correlations between them become more likely, but also more commonplace; moreover, an asserted correlation may often turn out to be simply the discovery of identity. Choosing variables which are more dissimilar reduces the probability of identifying significant relationships; but any such finding will be less obvious, and thus a more substantial contribution to our

knowledge, if also less precise and more subject to exceptions. Because there is no accepted criterion for deciding between these alternatives, I will consider variables falling everywhere along the spectrum from structure to process, trying to make explicit just how separate each structural quality is from the process it purports to explain.

(2) Generality. Structure tells us the direction in which to look; the next question, therefore, is what structure we will look at. I argued earlier that social inquiry should focus upon disputes rather than law because of the greater universality of the former concept: the possibility of finding an identifiable referent in a wide variety of societies. The same consideration leads me to reject a structural unit derived from any actual institutional framework for disputing. Structural concepts modelled upon Western notions of a court inevitably incorporate idiosyncracies which hinder comparison, for exact counterparts can rarely be found in alien societies.<sup>134</sup> Within our own society, indeed, excessive preoccupation with the peculiarities of courts has long diverted legal scholars from the numerous non-judicial institutions which deal with the vast majority of disputes. Nor do the structures of other societies offer any better perspective for comparison; there are just as many obstructive

singularities in such institutions as the leopard skin chief of the Nuer,<sup>135</sup>  
the tonowi (rich one) of the Kapauku Papuans,<sup>136</sup> the group of mbatarev  
(lineage elders) of the Tiv,<sup>137</sup> the mkutano (meeting) of the Ndendeuli,<sup>138</sup>  
or the kuta (council) of the Lozi.<sup>139</sup> When efforts are made to compare  
such disparate structures, one or the other is usually distorted.<sup>140</sup> And  
the attempt to construct a "neutral" concept at a level of complexity  
sufficient to account for the heterogeneity

of actual institutions inevitably founders on objections of incompleteness and arbitrariness, colloquially phrased as: "with us, we do it differently." <sup>140</sup>

#### IV. CHOICE OF AN EXPLANATORY CONCEPT: THE ROLE OF THE INTERVENER<sup>141</sup>

##### A. The concept of role.

Many of these problems diminish or disappear if, for law, we substitute dispute and consider the structural components of that process rather than the qualities of particular court-like institutions. My definition of a dispute as "the assertion of conflicting claims by two or more persons" presupposes a minimum of three structural units: a person asserting a claim, another asserting a conflicting claim, and a third acting as audience for the assertions.<sup>141</sup> Each participant in the dispute may be analyzed as the conjunction of a person and a behavior, which composite represents one version of the sociological concept of role.<sup>142</sup> The role of participant is therefore, by definition, an elementary building block of all dispute processes.<sup>143</sup> By combining variables of person and behavior, the concept nicely expresses the relativity of structure and process discussed above.

(1) Description and prescription

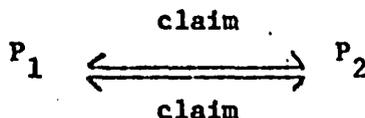
Nevertheless, there are numerous ambiguities latent in the concept of role, two of which I must clarify at the outset. Behavior may be classified in many ways: I will do so in terms of process, and speak of participation in the dispute process. Roles will be further partitioned by function within that process, e.g., asserting a claim, or listening to an assertion. An issue more critical for the present study is the possibility of confusion between description and prescription. The concept of role can refer either to perceived characteristics of person or behavior, or to prescriptions concerning those characteristics. This ambiguity equally afflicts my definition of the dispute process, which may be studied either in terms of the actions of participants or of prescriptions for action. These elements diverge in all societies, but the schism is especially marked in colonial and post-colonial situations, for a number of reasons: the radical transformation of behavioral patterns under the impact of changed social, economic and political conditions; the introduction or intensification of normative pluralism resulting from superimposition

upon indigenous norms of alternatives promoted by the colonial administration, missionary churches, and settler population; and the incorporation of some of these alien norms into the legal system. We should, obviously, be interested in both perspectives. But although their interrelationship is frequently noted, attention has been directed almost exclusively towards ascertaining the conditions under which prescription is followed by action. Thus writers have asked: when is a law effective, and when nullified; what are the prerequisites for the penetration of a legal system, and what defects will relegate that system to mere formalism?<sup>144</sup> One reason why we have progressed so little beyond the platitudinous observation of ineffectiveness may be our failure to investigate other patterns of rule and act. Prescription which does not produce the result prescribed may yet lead to other actions or prescriptions: rent control legislation passed during a housing shortage is not "ineffective", even though rents continue to rise, if a landlord alters his behavior, a tenant initiates legal action, a judge decides a case differently, or any person invokes the norm proclaimed by the statute. Alternatively,

the norm may be cited as precedent - good or bad - in other attempts to regulate the economy. Action may lead to action, e.g., increasing the salaries of judges may diminish the taking of bribes - or to prescription, e.g., a judge chosen from outside the community he serves may be readier to depart from its norms in passing judgment. Having learned not to expect a one-to-one correlation of these elements, it seems reasonable to look instead for a more complex relationship between roles, both actual and prescriptive, and a similar processual constellation. This should not lead to misunderstanding if we are careful to specify which we are discussing.

(2) The elementary structure of a dispute: the role of disputant.

The field of inquiry demarcated by the criteria chosen thus far is still much too large for a single study. I can best explain the additional limitations I have adopted by means of a diagram of the dispute process. The simplest structure, in terms of the number of elements, is one in which each party performs the role of audience for the claims of the other.



Here the investigator is effectively limited to studying the roles of the disputants, and their relation to each other. Even in the presence of a distinct audience these are obviously important facts, and a number of writers have profitably examined them. Gluckman has emphasized the way in which African social structure determines relations between disputants different in kind from those typical of European societies, and the influence this has upon the dispute process.<sup>145</sup>

[In tribal society] relations among the members of these groups are thus directed to a multiplicity of purposes, and I have therefore named them multiplex. It is this situation that I describe continuously as one "dominated by status."

These ties establish the most important sets of obligations between persons, and hence transactions between persons are determined by their status (in Maine's sense) relative to one another. The relations involved stand in sharp contrast with the relations, arising out of single interests, in which we nowadays become associated with other persons through the many contracts into which we enter throughout our daily lives.

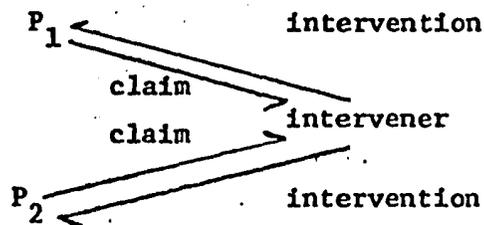
Evans-Pritchard, in his classic study of the Nuer, demonstrated that the structural distance between particular disputants significantly affected the evolution of their dispute;<sup>146</sup> more recently, Donald Black has shown the applicability of this hypothesis to the decision by urban Americans to invoke police intervention in their private quarrels.<sup>147</sup> And Philip Gulliver has explored the unique

historical relationship between disputants as an aid to understanding the dispute process.<sup>148</sup>

I re-emphasize what should be clear from my deliberate account of successive disputes among the same group of people: an understanding of one case cannot be adequately gained if the case is treated as isolated from its precedents. It seems at least doubtful if such interpretation is entirely justifiable even in fully juridical systems of courts, judges, laws, established formal procedures, ideal impartiality, and the like. But Ndendeuli disputes are worked out in the full context of the continuum of community life, so that previous disputes and their settlements, and developing relationships of all kinds, impinge on any current case.

(3) A special case: the role of intervener in dispute.

Although this very fruitful approach should certainly be pursued further, I will not do so here.<sup>149</sup> Instead, I will examine a special instance of the dispute process, which can be diagrammed as follows:



The additional characteristics which define this situation are: an audience for the claims other than the parties themselves, who hears their claims, and who intervenes in the dispute in some manner.<sup>150</sup>

These limitations represent a somewhat arbitrary circumscription of

a broader field for purposes of the present inquiry; I do not claim to have defined a significant type of dispute, much less one which is distinctively judicial. Nevertheless, the process thus delimited seems to me worthy of analysis: disputants commonly do bring their claims to another person, and his response is rarely entirely passive.

Within this dispute process, I will concentrate upon the role of

"intervener in the dispute"<sup>151</sup> I have deliberately adopted that

ugly neologism because it is free of the connotations which attach

to such alternatives as judge, mediator, or dispute settler; where

those additional meanings are appropriate, I will revert to the more

common terminology. My choice of the role of intervener was in-

fluenced by additional considerations which should be made explicit.

Because most legal systems revolve around such a role, it offers a

common denominator for comparison between official courts and unoffi-

cial dispute processes. The intervener is, moreover, an appropriate

fulcrum for those instrumentally interested in social change; since

the role is played by a limited set of persons under circumstances

of relative publicity, it is more readily controlled than is the role

of disputant or other participant in the dispute. Finally, the historical evolution of the role offers a fertile source of empirical data since many developing countries, and especially Kenya, recognized its mutability, as well as its focal position in the legal process, and devoted considerable energy to transforming the indigenous interveners into <sup>a</sup> ~~the~~ semblance of <sup>the</sup> ~~a~~ European judge.

B. Parameters for the role of intervener.

Just as the minimal definition assigned to the dispute process required us to identify variables in order to describe its protean forms, so we must select parameters with which to analyze the role of intervener. Again I will review the literature, though more selectively, for suggestions of structural variables which may help to explain the dispute process.

(1) Authority.

As we saw in the distinctions drawn above between legal and political process, authority is often isolated as a critical variable. Fallers has argued: "there appears to be a quite clear correlation between the differentiation of the bench, in terms of authority, and the legalism of the proceedings ...."<sup>152</sup> Without inquiring here what Fallers means by legalism, it is easily

recognizable as a processual variable which he relates to the structural element of "respect and authority."<sup>153</sup> Although that notion is never explicitly defined, its content is suggested by Fallers' comparison of several African legal systems, arranged in order of increasing legalism. Among the Arusha, those persons who intervened in a dispute possessed influence by reason of their personal equalities alone, but lacked institutionalized authority. The only other pressure upon the disputants was dispersed among the totality of participants and depended upon mobilizing a consensus. Indigenous Tiv leaders possessed political authority by virtue of their positions at the apices of the segmentary lineage system; the colonial government conferred additional judicial responsibilities upon a chosen few by making them civil servant chiefs. Members of the Lozi kuta also combined adjudication with political and administrative tasks, but all these powers were derived from the traditional polity and merely recognized by European authorities. Soga judges, who otherwise resembled their Lozi counterparts, were barred from political activity under colonial

rule. It is possible to isolate several variables of authority by means of these contrasts: influence/power; authority acquired by an individual/authority attached to an office; group authority/~~group~~ individual; <sup>authority</sup> authority endogenous to a society/authority imposed from outside; authority limited to disputes/authority exerted over a broad range of activity.

Pospisil also endows the term with a multiplicity of meanings. He notes that the authority of an individual, defined as the extent to which others follow his decisions,<sup>154</sup> varies in numerous ways, of which he singles out formality and absoluteness.<sup>155</sup> An authority is formal rather than informal if its exercise is circumscribed by norms and surrounded by ceremony and publicity. An authority is limited rather than absolute if it is shared with others, controlled by society, and if sanctions are imposed when its limits are exceeded. These analyses are a fertile source of ideas. But they should also teach us the folly of trying to subsume under the single concept of authority what is in fact a composite of rather heterogeneous qualities characterizing the structure of a dispute; clarity would be advanced by using distinct terms for the different variables

(2) Training.

Weber follows a different tack entirely, perhaps explained by the fact that he was a lawyer reflecting upon European legal systems, rather than an anthropologist studying Africa or Oceania. He takes the extreme position that the nature of legal norms and the manner in which they are employed are primarily determined by the training required of legal specialists.<sup>156</sup>

[A] body of law can be "rationalized" in various ways and by no means necessarily in the direction of the development of its "juristic" qualities. The direction in which these formal qualities develop is, however, conditioned directly by "intrajuristic" conditions: the particular character of the individuals who are in a position to influence "professionally" the ways in which the law is shaped. Only indirectly is this development influenced, however, by general economic and social conditions. The prevailing type of legal education, i.e., the mode of training of the practitioners of the law, has been more important than any other factor.

The influence of training may best be apprehended in situations

where it <sup>is</sup> ~~appears to be~~ the critical determinant of <sup>a</sup> process, ~~rather~~ <sup>which appears to</sup>  
be independent of ~~than~~ the kind of authority possessed. Weber's own theory was un-

doubtedly affected by the extraordinary proliferation of "legalistic" thought which captivated Continental academic lawyers of the nineteenth century,<sup>157</sup> who were wholly isolated from the direct exercise of decisional powers. The hypothesis gains further support from an

inverse example - persons qualified by non-legal training who resist the pressure to adopt patterns of legal thought when elevated to a position of legal authority. The decision in M'Naghten's Case in 1843 required that the insanity of an accused as a defense in a criminal prosecution be determined by a typically dichotomous legal rule - that the accused did, or did not, know the nature and quality of his act; that he did, or did not, know that it was wrong.<sup>158</sup>

With the development of psychiatric knowledge during the past century and ~~and~~ its gradual acceptance by the criminal law, psychiatrists have been asked for opinions about the insanity of an accused with increasing frequency, and these opinions have been <sup>accorded</sup> ~~given~~ ever greater respect. The conflict between the psychiatric mode of assessment, employing a wide range of vaguely defined, highly abstract, partially inconsistent norms, and the legal rule, became so acute that <sup>a</sup> ~~some~~ sort of resolution was essential. But instead of judges rejecting psychiatric advice as incompatible with legal reasoning, psychiatrists had acquired such authority within the adjudicative process that their evaluations came to dominate the judicial determination of insanity without significant accommodation to the constraints of

that process.<sup>163</sup> However persuasive this illustration, Weber's claim for the centrality of training should not be accepted uncritically. My own observations about Kenya agree with Fallers' report on Uganda that the dispute process can alter significantly without any change in the preparation required for the role of intervener. And there is also a great deal of evidence that training without more fails to alter performance.

(3) An alternative structural concept: role differentiation.

Problems encountered with these two concepts may serve to point us in a more fruitful direction. Neither appears to be correlated very significantly with process; each hints at other related concepts, and yet is not broad enough to incorporate them.

I propose as an alternative a synthetic concept - role differentiation - an umbrella capable of sheltering a number of discrete variables.

Both authority and training are candidates for inclusion. Such catholicity inevitably carries a danger of vagueness. But its multifaceted nature is also what gives role differentiation the power to analyze highly disparate societies and yet to recognize complex and subtle differences among them. For this reason, the

degree of role differentiation has frequently been made the foundation of overarching social typologies intended to explain all facets of society, including its dispute process.<sup>160</sup>

Durkheim's theory of the division of labor is undoubtedly the best known example. Durkheim was primarily concerned to show how the division of social roles, consequent upon an increase in "moral density" and population size, inevitably transmuted the cement of social integration from mechanical solidarity based on likeness into organic solidarity based on complementarity and cooperation. The social index he used to chart the progress of this transformation was the ratio of repressive to restitutive law. He found occasion, therefore, to comment briefly on the differentiation of the organs which administered that law.

While repressive law tends to remain diffuse within society, restitutive law creates organs which are more and more specialized: consular tribunals, councils of arbitration, administrative tribunals of every sort. Even in its most general part, that which pertains to civil law, it is exercised only through particular functionaries: magistrates, lawyers, etc., who have become apt in this role because of very special training.<sup>161</sup>

This theory of differentiation as a universal of social evolution of course had predecessors<sup>162</sup> and has recently experienced a revival in sociological theory.<sup>163</sup> Aidan Southall has profitably

applied the concept to study change in political roles in Africa,  
a subject closely related to our present concern.<sup>164</sup>

At the lower end of the scale of role differentiation are those societies which have been variously described as stateless, acephalous, uncentralized, or lacking in government, or politically nonorganized, but which I prefer to characterize as lacking in specialized political roles. They have few or no roles whose primary goal is the exercise of authority. .... The fundamental process through which the authority disposable by a society is increased and imperative co-ordination achieved is through progressive role differentiation. The differentiation of specifically political roles is most important here, but the functional interlocking of the social system is evident in the fact that increased political role differentiation cannot occur without repercussions in the rest of the system. In particular, political role differentiation cannot proceed beyond a certain point without a complementary differentiation of economic roles. Neither political nor economic role differentiation can proceed beyond a certain point without an appropriate technology, which is itself facilitated by such role differentiation.

Richard Schwartz, finally, has stressed the differentiation of specialized roles as the critical step in legal evolution.<sup>165</sup>

In the interactive aggregates of individuals which we call social groups, two main forms of control may be distinguished: that which is carried out by specialized functionaries who are socially delegated the task of intra-group control, and that which is not so delegated. These will be respectively designated legal and informal controls.

#### V. A THEORY OF THE DISPUTE PROCESS

I will examine changes in the degree of role differentiation as a possible explanation for the characteristics of the dispute process. My starting point is a highly abstract proposition presented by Fallers as a paraphrase of Weber.<sup>166</sup>

Functionally differentiated groups tend to develop distinctive subcultures and to pursue "interests" defined by these subcultures, all the while further elaborating and refining ("rationalizing") them.

For the reasons given earlier, I will study the differentiation of the role of the intervener in disputes rather than that of the group of such persons; one significant variable, after all, is when and to what degree interveners begin to function as a group rather than as unrelated individuals. Concepts such as differentiation on the one hand and subculture or interest on the other obviously demand considerable specification in order to be measurable. Their extreme generality permits operationalization in numerous and varied ways. I will discuss separately the possible meanings of structure and process before considering how to relate these two categories. In doing so, I will draw very heavily on my Kenya data for guidance as to what the concepts might signify in an actual legal system.

#### A. Structural Differentiation

##### (1) Specialization.

Analyses of the differentiation of a particular role

may be measured in several ways.

1. How much time does the role occupant (intervener) devote to the specified function (intervening)?<sup>167</sup> Two indices may be useful: the absolute amount of time (performance may ~~simply~~ vary as the task is repeated); and the proportion of available time (all persons who devote more than fifty percent of their waking hours may show a similar style; among the unspecialized a very small increment may be significant).

2. For how many years does the role occupant engage in the performance of that task to any degree whatsoever?<sup>168</sup> Again, measures of both the absolute number of years and the proportion of the average life span may be significant.

### 3. Independence

#### 3.1 Can the role be performed independently of other roles?

To put it the other way round, are there other roles which the intervener is obligated to perform? How many roles are thus combined and what are they?<sup>169</sup>

3.2 Does performance of the role preclude performance of any other roles? which and how many? These are both aspects of one of the most common definitions of differentiation: the division of what was a single role into two roles which are, or can, or must, be performed independently.<sup>170</sup> Prescriptions may be less important than socioeconomic factors: for instance, the role of judge cannot be disengaged from the role of subsistence farmer until the judge's salary permits him to abandon the latter activity.

#### 4. Specialization within the dispute process.

4.1 Is there functional specialization within the dispute process; i.e., is each role assumed by every participant, or are different roles performed by certain individuals?<sup>171</sup> The existence of an intervener distinct from the other participants is already a form of internal functional specialization. Western courts immediately suggest the role of attorney or prosecutor as a critical sub-specialization but the presence of a bailiff or process-server may be equally important.

4.2 Does the particular process specialize in the kinds of disputes it entertains? We are familiar with the concept of subject

matter jurisdiction, which may admit only certain issues or otherwise exclude disputes by reason of the amount in controversy or the nature of the relief claimed.

4.3 Does the process specialize in hearing disputes only after they have been heard elsewhere? Appellate review is the most familiar example, but an intervener may also refuse to act until some other, non-judicial, process has first been completed.

5. What proportion of the population performs the role of intervener at all? A decline in numbers - absolute and proportional - is an obvious correlate of increasing specialization; it is also one prerequisite for the formation of a group of specialists.

The variables of specialization are frequently singled out for extensive discussion: they are unquestionably important, they are clearly distinct from process, and they are easily and precisely measured. Fallers, however, appears to claim more - a causal relationship with respect to the entire culture of the dispute process. This strikes me as a dubious hypothesis. The various roles of intervener can be differentiated in many other ways. It is certainly possible

that some such difference - for instance, an increase in the amount of remuneration - might lead to greater specialization, or to a change in performance without specialization. We clearly know too little at present about the interrelationship between functional specialization and other forms of role differentiation to assert that one is prior or more significant.

(2) Differentiation.

Nevertheless, we cannot mindlessly investigate every difference among interveners in disputes. I tentatively suggest two kinds of variables, related to those already discussed, which appear to me likely to be equally significant for an understanding of process. The first I will call the social distance of the intervener, his remoteness from the disputants. This concept might include the degree of functional specialization. The second is the cultural differentiation of the intervener. What I have done here is to take the dependent variable suggested by Fallers and used it as an independent variable to explain the dispute process. Earlier I argued the relativity of the arbitrary distinction between structural and processual variables.

If the subculture of the intervener can be seen as a processual quality resulting from functional specialization, it can also be viewed as a structural property, which perhaps incorporates functional specialization, and in turn is responsible for the characteristics of process. Social and cultural distance are both likely to be important variables in a developing society where traditional homogeneity is giving way to a pluralism engendered by changes which are, or are seen to be, imitations of an alien, competing, social or cultural model.

Specialization, as we just saw, had meaning both within and without the dispute process. The independence of the intervener, for instance, might be measured with respect to either the role of other participants in the dispute process, or roles extrinsic to it. Similarly, differentiation has two possible frames of references. One dispute process as a whole, when compared with another, may be socially more distant from disputants - for instance, by being located in a fixed, distinctive place rather than moving to the locus of the dispute. Within these processes, the intervener may be more differentiated in one than in another by being given a distinctive physical location

at a hearing. Because the structural differentiation I discuss shades imperceptibly into the processual qualities I seek to explain, I will adopt the strategy proposed earlier of proceeding from the more to the less distinct. Where it is not otherwise clear from the context, I always describe differentiation as increasing.

6. Physical locus of the dispute.

6.1 Is the site of the dispute peripatetic or fixed?

6.2 If peripatetic, is it determined by reference to the disputants (at one of their homes), the subject of the dispute (e.g., a contested boundary) or the intervener (at his home or office)?<sup>172</sup>

6.3 If fixed, is it more convenient to the disputants or the intervener? This is a function of distance, population density, ease and expense of communication. The poles might be represented by a judge from the provincial capital who periodically visits each local court of  $\frac{n}{h}$  circuit and a judge who remains at the capital and must be visited by all disputants.

7. Time of hearing the dispute. This might be analyzed in much the same way as 6, above.

8.1 Are the physical surroundings, or paraphernalia, of the dispute distinctive? The distinguishing feature could be a tree under which the participants meet or stools on which they sit or it could be the ornate courthouse they occupy; it might be significant whether the building is multi-purpose or single-purpose. Does the physical environment segregate the participants in the dispute from others, for instance by enclosing them in a house? Does it force them to associate with strangers, by opening the hearing to a community alien to the disputants?

8.2 Does the physical environment demarcate the intervener in any way? Does he sit in a circle with the other participants or does he face them; is he raised on a dias?

9. Distinguishing characteristics of the participants.

9.1 Do the participants in the dispute assume a different dress or appearance? We are accustomed to a certain formality of dress in western courtrooms.

9.2 Is the intervener so distinguished? The mark might be a mask,<sup>174</sup> the staff or blanket of the African elder,<sup>175</sup> or the wig and gown of the English judge. 176

10. Behavior of participants

10.1 Do the participants behave in a characteristic manner during the dispute? They may be more solemn, or riotous;<sup>177</sup> gestures may be exaggerated or subdued;<sup>178</sup> speech may be more or less eloquent, or employ a different vocabulary.<sup>179</sup>

10.2 Does behavior during the dispute differentiate the intervener?

He may himself act differently; for instance, he may be privileged to display emotion although others are not,<sup>180</sup> or compelled to hold aloof while the other participants socialize.<sup>181</sup> The others, too, may isolate him by their respectful demeanor or mode of address; They may even be precluded from communicating with him at all.<sup>182</sup>

11. Economic environment.

11.1 Is this dispute process distinguished from others, in terms of the cost of the process to the participants or the requirement that costs be paid in money rather than in kind or in services?

11.2 Are there differential economic consequences for the participants in the dispute? Do both disputants pay the fees, or just one? In some cases, all participants may share the costs, including the

intervener. Do all participants share equally in consuming the fees, for instance by feasting, or do only some benefit, usually the official interveners. Is this intervener distinguished from others, and from the participants in the dispute, by the enhanced status which accompanies a cash salary in a semi-monetized economy and a high salary in any society. Does he receive the remuneration from the disputants, or from another source?<sup>183</sup>

## 12. Social isolation of the participants

12.1 Some participants (the disputants, their witnesses and supporters) may be socially isolated from others (casual observers, officials) and from the community in which the dispute is held, if they travel outside their own community for a hearing.

12.2 The intervener may be isolated from the community which contains the participants in the dispute (whether defined by kinship or territory), by being posted away from his home, rotated periodically, and prevented from bringing his family with him.<sup>184</sup>

## 13. Training for the role of intervener.

13.1 a. Training may be inherent in the process of socialization experienced by all or a substantial segment of the population - dispute participants as well as others.<sup>185</sup>

b. Beyond the acculturation common to society at large, additional educational qualifications may be demanded, which are acquired by only a few. If either education, or the money necessary to obtain it, is differentially distributed according to social class, ethnic group, or religious or cultural background, membership in the role of intervener will be similarly restricted.

13.2 Occupants of the role may receive further training which accentuates these differences.

14. Community served by the intervener.<sup>186</sup>

14.1 Are there limits upon the persons who can use the dispute process (personal jurisdiction)? These may be framed in terms of kinship (actual or fictive), membership in age-groups, religion, ethnicity, etc. If an intervener is not confined to operating within one such category, how heterogeneous is the population subject to his jurisdiction?<sup>187</sup>

14.2 Are there geographic boundaries around those who can use the dispute process (territorial jurisdiction)? How large is that unit? Physical size must be interpreted in the light of population density and ease of communication.

(3) Bureaucratization.

The concept of differentiation, as applied to the dispute process or to the role of intervener, does not really satisfy me. It can refer to any difference between or within dispute processes<sup>188</sup> and this amorphousness is not significantly reduced by restricting our view to those differences I label social distance and subcultural variation. Is there another concept which will further select among differences and group them in some way? One possibility is suggested by Weber's theory of bureaucracy: the dispute process may change as the structure of the dispute, especially the role of intervener, becomes increasingly bureaucratized. Many of the variables already discussed may be encompassed in the definition of bureaucracy. Indeed, functional specialization, social distance, subcultural differentiation and bureaucratization all overlap considerably. Nevertheless, it will

be helpful to discuss the characteristics of the bureaucratic role separately. As before, I have modified and adapted Weber's theory to take account of my observations about Kenya, emphasizing some variables and adding or omitting others.<sup>189</sup> Again, I begin with variables defining the person of the intervener and proceed toward those less clearly separable from process.

15. Criteria for selecting the intervener.

15.1 Are the relevant qualities ascribed (e.g., age, sex, kinship, membership in some other group) or achieved (e.g., experience, education)?<sup>190</sup>

15.2 If ascribed, how large a proportion of the population possesses that quality? How many such qualities are considered?<sup>in selection</sup>

15.3 If achieved, are they qualities which refer to the whole person (manliness, honesty, leadership) or are they narrowly defined technical skills (literacy<sup>c</sup>, esoteric knowledge).

16. Method of choosing the intervener. Does this occur by ascription, self-selection, election or some combination, or is the intervener appointed by a superior?<sup>191</sup> This variable is obviously closely related to the preceding one.

17. Training. Once the intervener is appointed on the basis of his achievements, training emerges as an essential prerequisite.

17.1 Technical competence is emphasized rather than qualities of the whole man, such as sportsmanship or humanistic knowledge.

17.2 This competence is acquired by formal training rather than apprenticeship.

17.3 It is demonstrated by examination rather than by the accumulation of experience measured chronologically.

18. Remuneration for performing the role.

18.1 Is the amount variable or fixed?

18.2 Is it based on the services rendered (in terms of quantity or quality), or on the rank and length of service <sup>in that role</sup> <sup>192</sup>?

18.3 Is it paid out of the proceeds of the particular dispute (i.e., the contributions of disputants and other participants), or by the central treasury?

19. Occupation of the role as a career.

19.1 Preparation becomes long, arduous and expensive; it must be begun early in life; it is also constricting - transfer to another career is difficult or impossible.

19.2 The occupant progresses up a graduated hierarchy of sub-roles.

19.3 Tenure in the role is relatively secure.

20. Occupancy carries with it privileged social status<sup>in</sup> partly a concomitant <sup>of</sup> ~~upon~~ economic position but also following from the educational prerequisites of the role. This status may come to be associated with the role itself, independent of such other characteristics. In the extreme case, it may be guaranteed by express rule, enforced by sanctions.<sup>193</sup>

21. The role is defined by explicit prescriptions rather than implicit custom. These change from oral to written, vague to precise, partial and incomplete to exhaustive, few to numerous, hodge-podge to organized; thus they become a form of esoteric knowledge. The norms:

21.1 Demarcate private life from official business, especially with regard to finances.

21.2 Demand full-time commitment to and regular performance of the role in place of activity which was part-time and erratic.

21.3 Obligate the occupant to perform the role as a duty where he previously performed it of his own volition.

21.4 Circumscribe the powers of the intervener.

21.5 Regulate conduct within the dispute process.

22. Adherence to these norms is enforced by external rather than <sup>wholly</sup> internalized sanctions.

22.1 Interveners act individually rather than collegially, and can be held personally responsible.

22.2 These actions are recorded in writing in order to preserve them accurately.

22.3 They are subject to review by a superior.

23. The substantive norms which the dispute process administers come to share the same characteristics as those which govern it: They are precise, written, exhaustive, organized, numerous and esoteric.

#### B. Process

What aspects of the dispute process will respond to changes in structural differentiation? The earlier review of process forewarned us that the conceivable parameters are numerous and varied. We may be able to narrow the scope of our inquiry into those variations if we

begin by considering the mechanism whereby differentiation might affect process. H.L.A. Hart hints at such a connection in his search for "the key to the science of jurisprudence."<sup>194</sup> He postulates an imaginary society - "a small community closely knit by ties of kinship, common sentiment and belief, and placed in a stable environment;" "the only means of social control is that general attitude of the group towards its own standard modes of behaviour in terms of which we have characterized rules of obligation."<sup>195</sup> The structural quality which characterizes this society is clearly its overall homogeneity, and the concomitant lack of differentiation of the institutional framework of social control and disputing, although these concepts are not made explicit. Hart contrasts this ideal pre-legal society with the truly legal world which develops with increasing differentiation of the dispute structure.<sup>196</sup> Primary rules of obligation are no longer sufficient by themselves to direct conduct. First, this development introduces an element of uncertainty whether the newly differentiated structure will employ all the rules of the larger society, and only those rules, and whether it will

modify them in any way; norm and praxis may diverge; this additional dimension of choice is regulated by secondary rules of recognition and of change. Then there is the question of how the dispute structure is to regulate its own actions, since the larger society from which it springs contains no norms which speak directly to that problem; secondary rules of adjudication are consequently generated. If these three kinds of rules constitute the essence of the more differentiated dispute process, they are an obvious focus for our study.

(1) Generalizations about processual change.

(a) Rationalization.

Can we generalize about variations in the mode of choosing, modifying and applying norms, which might follow from these structural changes? I will pursue Weber's suggestions concerning the consequences of increasing role differentiation on the one hand, and bureaucratization on the other, although these two categories of behavior tend to merge at the processual end of the spectrum as they did at the structural. Fallers' para-

phrase of Weber refers to the growth of a distinctive subculture and of certain interests. The subculture develops in the direction of greater rationalization, which Fallers interprets in the legal context as meaning greater "legalism" - an "ability of judges to deal with moral issues 'legalistically' - that is, to deal with 'artificially' narrow moral issues ...."<sup>197</sup>

A legal culture cuts into this complex "objective" moral reality in a highly "arbitrary" way. It is characteristic of the legal mode of social control that rules are used to arrive at simple dichotomous moral decisions - "yes" or "no" decisions that in other contexts would seem intolerably oversimplified morally. The legal process does not ask: What are all the rights and wrongs of this situation - on both sides? Rather, it asks: Is John Doe guilty as charged?<sup>198</sup>

Rationalization in law is thus identified with arbitrariness and artificiality, narrowness and oversimplification, and dichotomous decisionmaking. These qualities do appear to share a common core, but they are rather vague, and the pejorative tone is heavily value laden; it is especially difficult to know what content to attribute to terms like "arbitrary" or "artificial".

Weber's own use of the concept of rationality as applied to law was very different, and considerably broader. Without exploring

all the ramifications of this extremely complex idea, it is sufficient here to observe that it can refer to logical or aesthetic form, among other things.<sup>199</sup> Although all dispute processes will possess some internal organization,<sup>200</sup> the autonomy of the logic or aesthetic, its coherence and independence from patterns in the larger society, will increase as structural differentiation increases. One example of such a transformation might be the evolution Maine claimed to see in the outcomes of disputes, from the isolated, unconnected themistes of early Roman law to the highly organized body of opinions in the late<sup>e</sup> period.<sup>201</sup> Once this coherence is achieved, Hart's secondary rule of change is essential for preserving the rationalization in an unstable environment.

Process can achieve internal structure only at the cost of turning away from the outside world. It becomes introverted, preoccupied with its own norms and activities. As a corollary, it is increasingly impermeable to external information, prescription or influence. If carried to an extreme, the dispute process becomes wholly involuted, the exclusive domain of specialists and compre-

hensible to them alone.

(b) Functional integration.

We can also view structural differentiation in functional terms as loosening the constraints which the larger society places upon the dispute process thereby permitting it to develop an autonomous internal integration. Although functional interpretation is open to serious theoretical objections,<sup>202</sup> it is nevertheless useful as a heuristic device to generate hypotheses for empirical testing. Thus in a dispute structure that was only slightly differentiated we would expect to find processual elements which satisfied demands originating in the larger society, whereas in a more differentiated structure the process would respond to needs of the structure itself. Let me illustrate this rather abstract proposition by the following hypothesis: All processes take some account of the length of time the dispute has been pending. This factor may have meaning both within the process and outside it. The larger society may be reluctant to awaken dormant grievances and aware of the difficulty of adducing evidence concerning events long past. These con-

siderations would lead to an extremely flexible attitude toward delay which would disregard the chronological dimension, no matter how great, where the sense of outrage was still acute and sufficient evidence available. By contrast, the process itself is primarily concerned to clear its docket and would tend to adopt an inflexible limitation, measured chronologically, whose duration would diminish as the number of disputes brought to the forum increased. I would therefore expect a decline in the flexibility of the process in responding to temporal factors as the structure is progressively differentiated.

(c) Bureaucratization.

Weber also associates certain processual characteristics with a bureaucratic structure. These can be divided into two general categories, efficiency and certainty. Efficiency is measurable in terms of the time, expense, or effort<sup>203</sup> expended in disposing of a case. It is important to note that only the costs to the intervener and other specialists are conserved; the process does not minimize the expenses of the disputants or other unofficial

participants.<sup>204</sup> Indeed, at one logical extreme, the dispute process may even produce an operational surplus after the costs of the specialists have been defrayed out of the contributions of the other participants.<sup>205</sup> One source of efficiency is an emphasis on finality:<sup>206</sup> economy is obviously advanced by refusing to entertain a dispute beyond a certain point. Hart, it is interesting to observe, also claims the virtue of efficiency for his secondary rules of adjudication.<sup>207</sup>

The other consequence of bureaucratization - certainty - is a commonplace in discussions of modern legal systems. Weber asserts that bureaucratic processes raise to an optimum level such qualities as "precision ... unambiguity, knowledge of files, continuity ... strict subordination" and predictability.<sup>208</sup> Again finality makes a significant contribution, insuring that a decision, once announced, will not be altered. And here, too, there is a striking agreement with Hart's assertion that secondary rules of recognition dispel the uncertainty as to which social norms will be restated by the dispute process, and in what way they will be modified.<sup>209</sup>

(3) Operational indices of processual change.

These general qualities - rationalization, logical or aesthetic coherence, functional integration, introversion or impermeability, efficiency, finality, and certainty - can be reduced to more precise measurements in numerous ways. The following is a tentative and very partial list. I have not stated explicitly how each specific measurement illustrates one of the general qualities because I believe the interconnection will be reasonably obvious. Often, moreover, a single operation lends weight to several of the abstractions, which overlap to a large extent; it may even be that some of the qualities are inseparable - different ways of stating the same thing. I have tried, whenever possible, to express the variable as a quality which increases with structural differentiation and bureaucratization. Where this is intolerably awkward I have instead defined its polar extremes, pole "a" being the process associated with an undifferentiated, non-bureaucratic structure, and "b" being its opposite; there is, of course, a continuum between them. For clarity of exposition I have

organized this discussion of the dispute process into stages which are roughly chronological.

(a) Concept of wrong

1. The universe of substantive norms involved in the dispute process is increasingly distinct from that employed by the society at large.

1.1 Not all social norms are recognized in the dispute process and the fraction so recognized continuously decreases.<sup>210</sup>

At the same time, the process increasingly develops norms peculiar to itself; as a consequence the total corpus of norms expands.

1.2 The content of each norm, which had been flexible and adaptable to the peculiarities of the case, becomes fixed in the form of a general rule applicable to all "like" cases. The number of cases which are seen to be alike, and thus governed by the same norm, increases.<sup>211</sup>

1.3 Norms which were oral and vague are defined in writing with great precision. The undifferentiated structure manipulated statutes as though they were custom, without much attention to their

precise language;<sup>212</sup> now, instead, custom is assimilated to statutory enactments. The criminal statute or administrative regulation displaces the proverb as archetype for all norms. This not only furthers certainty and ease of adjudication, but relieves the intervener of having to exercise a discretion which might lead to a reprimand.<sup>213</sup>

1.4 Uncertainty whether a given norm is recognized also decreases as the body of norms is more clearly circumscribed.

2. The appropriate concepts of wrong had emerged gradually from a discussion of the dispute among all the participants. Instead, the burden now is placed on each party to invoke the norms on which he relies, offensively or defensively, at the outset of the dispute. An error in the selection of a norm will have increasingly serious consequences - ranging from additional expense up to and including loss of the dispute - and rectification of error becomes more difficult, even impossible.

(b) Definition of issues

3. Because the normative universe has changed, the consti-

tuent issues will also be novel. It has been said, for instance, that the concept of mens rea only appears in more differentiated systems.<sup>214</sup>

4. The number of substantive issues entertained by the dispute will decline; only those issues essential to a decision will be treated.<sup>215</sup>

5. Individual issues will be defined more narrowly and precisely. The criminal charge enumerating a clearly circumscribed list of elements, and the refinements of civil pleading, are the models.

6. Multiple issues will only be joined if the proponent can demonstrate a close relationship between them.

7. The process will only respond to issues placed before it by the parties, even if those are superficial; it will not, sua sponte, seek to uncover the underlying issue.

8. Procedural issues tend to replace substantive; interest shifts from the outside world to the dispute process itself.

9. The range of issues is defined early in the dispute and cannot easily be expanded thereafter.

(c) Participation of disputants

10. The parties will be limited in number, usually to two.<sup>216</sup> Additional parties will only be allowed to participate if they are closely related to those already involved.<sup>217</sup> Groups cannot dispute; they must identify a representative to act for them.<sup>218</sup>

11. The two disputants no longer play interchangeable roles. The roles of plaintiff and defendant become demarcated, fixed, and clearly defined. A defendant will not be allowed to assert an independent claim and thus reverse those roles.

12. The definition of who is a proper party to a dispute will change.<sup>219</sup> Persons perceived by society as aggrieved will not be permitted to appear in the dispute, and vice versa. Thus society may view with compassion the woman who has been the victim of an assault, and yet the dispute process will only admit her husband as a party to pursue his own distinct interests.<sup>220</sup> On the other hand, the dispute process may create parties whose interests

are unknown or inchoate outside it - the amicus curiae in American law, the procurator in Soviet law.<sup>221</sup>

(d) Temporal limitation

13. Delay by a disputant, in presenting a dispute to the intervener becomes a factor affecting the outcome regardless of whether or not there has been injurious reliance by his opponent or another person.

14. What constitutes a significant time period is determined by simple chronology rather than in terms of events.

15. The period becomes shorter.

16. The period loses its flexibility and becomes fixed.

17. Delay is no longer merely evidentiary and therefore possible to explain away, but becomes an insurmountable barrier.

18. The limitation is applied to uncontroverted as well as controverted claims.

a. The dispute process will refuse to consider stale claims only when liability itself is in issue.

b. The process will also reject claims in which liability is admitted and the only issue is the extent to which the acknowledged obligation has been fulfilled.

(e) Attendance by the disputants

19. a. The intervener will not proceed in the absence of any of the disputants.

b. The intervener will still try to reach the merits of the dispute although a party is missing; as the structure is further differentiated he may ultimately decide against the absent party by reason of his absence alone.<sup>222</sup>

20. In order to set aside an ex parte judgment, a disputant will have to expend more time and money, and substantiate one among a limited number of weighty excuses.<sup>223</sup>

21. The converse of proposition 19 is also true.

a. The intervener will always hear a dispute if the disputants are present.

b. The intervener may not act despite their presence, for reasons of his own (the press of business, the absence of key

(f) Reception of evidence

22. a. Evidence may affect a dispute without being formally admitted, i.e., the intervener may act upon prior knowledge or on information he obtains outside the dispute process.

b. All evidence must be received during the process.<sup>224</sup>

The formality with which this occurs will increase: by noting the names of witnesses, recording the content of testimony, and reading it back to them for ratification; by prohibiting one party from addressing the intervener in the absence of the other; by insuring that the intervener is ignorant of the dispute at the inception of the hearing and thereafter controlling the information he receives.<sup>225</sup>

23. The standard of what is relevant to resolve a controverted issue becomes increasingly narrow.<sup>226</sup> The intervener is less receptive to circumstantial evidence which can only be connected to the point at issue by a lengthy set of inferences. Where circumstantial evidence is allowed, the chain of reasoning is rigid and divorced from the thought patterns of non-specialists.<sup>227</sup>

24. The standard of what is admissible also becomes increasingly stringent.

25. Certain ultimate facts come to require the proof of certain proximate facts; other evidence, no matter how persuasive, is simply insufficient. Thus treason requires two eye-witnesses; homicide, a corpus delicti, and rape, corroboration of the victim's testimony.

26. The order in which evidence is received grows in importance, to the point where certain evidence will not be heard until other evidence has been presented.

27. Limits are placed on the quantity of evidence which will be received; repetition is discouraged.

28. Participation in an <sup>u</sup>indifferentiated dispute is governed by the same constraints as would adhere to behavior occurring outside the dispute context. As the dispute is differentiated, participation is protected from some of these constraints and subjected to others peculiar to the dispute.

28.1 a. Presenting evidence to the intervener is a

sense of loyalty to the party he is supporting.

b. Presenting evidence becomes a duty owed to the court; it can and will be compelled.

28.2 a. Because of the publicity of the proceedings a witness who testifies before the intervener will suffer the same social consequences as he would had he discussed those issues outside the dispute structure.

b. The differentiated structure protect a witness from the ordinary consequence of testifying, by a grant of privilege among other things. Less publicity attends the hearing which may, occasionally, be held in camera.

(g) Evaluation of evidence

(g.1) Kinds of evidence

29. A preference for real evidence is superseded by a preference for testimonial. Instead of objects from the outside world entering the courtroom or being viewed by the intervener in situ (as in land disputes), parties and witnesses tell the court about these things.

30. Written evidence becomes more persuasive than testimony.

31. There is increasing reliance on expert evidence in place of lay testimony; ultimately, expert testimony may be essential to prove certain issues. Experts frequently become assimilated to the body of officials in the dispute process.<sup>228</sup>

32. a. Acts and statements which occur during normal social intercourse prior to the formal hearing are accorded greater weight. Testimony before the intervener is discounted by reason of the substantial temptation to perjury in the heat of controversy.

b. Statements made in the course of the dispute acquire greater significance because of the opportunity for the intervener to evaluate them himself. Ultimately, statements uttered outside his hearing may be disregarded altogether, as required by the hearsay rule.

(g.2) Standard of veracity

33. The norm itself changes.

a. The obligation to tell the truth during the hearing of the dispute did not differ significantly from expectations about veracity in other social situations.

b. The demand for truthful testimony becomes more explicit and more absolute; falsehood during the dispute is transformed from a moral infraction into a crime - perjury.

34. The means of insuring veracity change.

a. Primary reliance is upon norms of truthfulness internalized during socialization, reinforced by diffuse social sanctions. With increasing differentiation, supernatural sanctions may be superimposed in difficult cases: invoked by oath or actually inflicted by ordeal. Though these latter may be administered by the intervener, the outcome is frequently beyond his control and occurs after the formal hearing has concluded and the disputants have passed out of his jurisdiction.

b. Perjury is deterred by the same sanctions which the dispute process imposes for substantive offenses. At first, the intervener punishes perjury as it occurs during the hearing;

but as the process is further differentiated, the issue of perjury becomes a separate dispute, to be tried and corrected by an independent intervener.

(g.3) Means of evaluation

35. The burden of proof becomes increasingly rigid.

35.1 a. Every participant in the dispute, including the intervener, shares an equal obligation to contribute information relevant to the dispute:

b. This obligation is placed wholly on one of the disputants with respect to every material issue.

35.2 The demands of the burden are more clearly defined.

35.3 The amount of evidence required to satisfy it is greater.<sup>224</sup>

35.4 The consequences of a failure to do so are irremediable.

35.5 a. The burden of proof originates in a common sense notion of probabilities: the party arguing the less probable chain of events - i.e., that more contrary to ordinary expectations - bears the onus of convincing the intervener that his version is

b. This probabilistic origin is progressively forgotten. The party advancing a contention, whether commonsensical or extraordinary, must prove it. Expectations develop within the process concerning who will advance evidence; these become demands which cannot be avoided by showing that the proponent is favored by probabilities.<sup>230</sup>

36. When the evidence is inconclusive because wholly absent or equally persuasive either way:

a. The intervener refers the dispute to the supernatural, abandoning control over the outcome.<sup>231</sup>

b. The dispute is decided by the burden of proof, a rule internal to the process.

37. There is a shift in the frame of reference used to evaluate testimony, from a referent external to the dispute process to an internal referent.

a. Testimony about behavior is compared with commonly held expectations about modal behavior which would occur in similar circumstances in the outside world.

b. Instead, the totality of statements concerning a given issue is analyzed for internal consistency. Testimony before an intervener comes to assume greater weight than similar statements made outside the dispute process. Ultimately, the intervener may disregard evidence from a disputant or his witness which controverts testimony presented earlier to the same intervener, or even to another within the same system.<sup>232</sup> Expectations are still used to evaluate testimony, but now they are expectations concerning modal behavior within the dispute process: the demeanor of a witness is compared with that of the model affiant in order to determine veracity.

38. When circumstance is used to discredit testimony, the chain of reasoning is curtailed, rigidified and divorced from that which links datum and inference outside the dispute process.<sup>233</sup>

39. a. The intervener actively seeks to assess truth and falsity.

b. The intervener is passive. He relies on the disputants to adduce all the evidence, and evaluates their efforts,

rather than the evidence itself, by criteria internal to the dispute process, such as burden of proof, estoppel, and presumptions.

40. If the intervener determines that certain evidence is false, by any of the methods just discussed, the consequences he imposes are increasingly serious. These develop in the following sequence: the evidence is simply disregarded; an inference is drawn that the witness (and perhaps the party for whom he testifies) is generally untrustworthy, which affects the weight of other evidence; a judgment is expressed about the affiant which, if he is a party, may influence the outcome; sanctions are imposed on the affiant in a separate proceeding (perjury or contempt).<sup>234</sup>

(h) Significance of prior decisions of fact

41. As the scope of each dispute narrows, so will the breadth of its impact upon future cases. Thus a dispute between two parties will not affect a third; the resolution of one issue will not influence the outcome of another.

42. However, the demand for consistency, narrowly construed, will increase.

42.1 It will be increasingly difficult to persuade the same intervenuer to reconsider a dispute if the parties and issues are identical.

42.2 Other interveners within a widening ambit will be similarly disinclined to re-hear the dispute.

(1) Application of norms to facts.<sup>235</sup>

43. The focus of controversy shifts from resolving disputed facts to ascertaining the content of norms and applying them.

44. The number of norms invoked declines.

a. The intervener bolsters his decision with a large number of norms bearing little relationship to one another, and often only a peripheral significance for the controversy itself.

b. The intervener affirms only those norms essential to reaching a decision.

45. There is greater demand for consistency of norms, just as there was for decisions of fact.

45.1 The intervener is less concerned to respond to

the peculiarities of the instant case and more anxious to decide in harmony with similar cases. The purview of what is similar expands.

45.2 In order to achieve this consistency, the intervener either reduces general standards to precise norms of its own creation (precedents), or uses those promulgated by legislatures.

45.3 Norms at varying levels of generality are organized in hierarchical fashion.<sup>236</sup>

45.4 Whereas the general standards overlapped, and contradicted each other in this area of intersection, the more restricted norms tend to be compatible.

46. These developments affect the way in which norms are changed.

46.1. As long as norms are abstract, poorly defined, and mutually inconsistent, the dispute process can engage in gradual, implicit, limited change by means of choice and interpretation. A norm with a narrow, ascertainable content

unqualified by any competing rule resists change; any modification must come from outside the dispute process, but for that reason it need not be gradual or limited.

46.2 Flexible norms facilitate change through reasoning by analogy; fixed norms demand the use of fictions.<sup>237</sup>

47. As a result of propositions 45 and 46, the normative system becomes esoteric.

48. For all these reasons, the logic necessary to apply norms to facts, which had been implicit, must become explicit.<sup>238</sup>

(j) Remedies.

49. There is an increasing preference for remedies that advance the certainty and finality of a decision, e.g.:

49.1 An act which can be performed in court rather than one which must be performed outside.<sup>239</sup>

49.2 A single act rather than a course of conduct.

49.3 The transfer of property in substitution for the performance of an act.

49.4 Fungible property (i.e., money) rather than unique

50. The remedy, like the norm it subserves, is precisely defined and fixed.<sup>241</sup>

51. The remedy is a response to the dispute as narrowed by the process described above, not to the original dispute.<sup>242</sup>

52. The remedy becomes increasingly severe. One reason for this is a shift from special to general deterrence.

a. The process is primarily concerned with the instant dispute. The remedies it employs are effective only between the disputants involved. They are sufficiently mild to encourage disputants to submit to the process.

b. The process is concerned to anticipate future disputes of the same kind. The remedy serves as a warning to all those who may engage in similar conduct.<sup>243</sup> The infrequency with which it is inflicted is compensated by draconian rigor.

53. Coercion rather than persuasion secures compliance with the decision. The means of coercion become increasingly effective. Ultimately the dispute process will not only overcome resistance but also punish it.

(k) Review.

54. Many of the above variables can also serve to analyze review of the outcome. This process will change in the same ways, often more radically. Within the dispute process review bears the same relation to the initial hearing as the whole process bears to the larger society.

55. a. Review occurred at the instance of one, and often both parties, who were dissatisfied with the earlier decision.

b. Review is frequently initiated by a superior of the original intervener (revision)<sup>243</sup>.

56. The review process is progressively differentiated from a trial.

56.1 Preoccupation with facts is replaced by a concern for the content of norms. At the extreme, the first intervener can only decide the facts, and the second can only interpret the law.

56.2 Instead of reconsidering the issues decided by the trial, review considers errors in the conduct of the trial.

56.3 The reviewer will progressively narrow the scope of the evidence he will entertain:

a. He will conduct a trial de novo, re-evaluating all the evidence offered below and any additional evidence.

b. He will decline to re-evaluate the evidentiary findings below except in cases of egregious error, and will admit additional evidence only where the proponent can explain his failure to present it earlier.

c. He will refuse to hear any evidence, preferring to scrutinize the record of the trial.

56.4 a. No greater weight is attributed to the outcome below than is accorded any other opinion on the dispute.

b. The decision of the first intervener is granted increasing weight, to the point where it may be practically unalterable on some issues.

56.5 The response of the reviewer to perceived error below develops in the following sequence: he adjudicates the dispute on the merits; he corrects any error; he orders a new

trial by the first intervener or another of like rank; he punishes the first intervener. (He may, of course, do several of these.)

57. The outcome of the review is communicated more widely. Whereas the initial decision is heard only by the disputants and other participants, the reviewer communicates to interveners: initially to the one he is reviewing, then to others of similar rank within his jurisdiction, and ultimately to all. He may do so instead of communicating with the parties.

C. Testing the relationship between structure and process

Given the multitude of ways in which each of the abstractions of structure and process can be measured, the problem of relating one index to another becomes acute. Several approaches are possible. Many of the variables formulated above may quickly be discarded as irrelevant, poorly conceived, or difficult to operationalize. If the remaining concepts can be quantified, multiple constituents of structure and process can be related. Where this is not the case, all but one variable must be held constant for any correlation to be meaningful. Absent an experimental

situation, that nearly impossible goal can only be approximated by choosing for comparison either two highly similar units, or the same unit at slightly different point in time. Even these latter alternatives may not be available: judicial administrators, particularly in the developing nations, appear to have conceived their office as a license to engage in uncontrolled experimentation.<sup>244</sup> Thus a hodgepodge of innovations may have been introduced simultaneously, no unit maintained as a control, and the results not observed or recorded with insufficient accuracy.<sup>245</sup> If the rigorous standards of scientific explanation cannot be met, the best we can hope to achieve is what Merton calls post-factum sociological interpretation - an account of the observed data which makes sense but is not subject to falsification.<sup>246</sup> At the least, this points the way toward plausible hypotheses for further investigation in situations which permit greater control of the other variables.<sup>247</sup>

## VI. SOME THEORETICAL COROLLARIES

If the theory of the dispute process proposed in this paper survives the strenuous testing just discussed, it should furnish a fertile source from which to derive related generalizations. The following section contains some very preliminary suggestions.

### A. Structure

The structure of the dispute has thus far been treated as an independent variable. However, the specialization, differentiation, or bureaucratization of the intervener is itself conditioned by other factors.

1. Limiting values for the specialization of the intervener. Although my theory contemplates that a role may be performed by persons who are totally specialized as well as by those who are not specialized at all, the actual range of variation is much more confined. In most societies, it is true, there is some behavior performed equally by all. The exchange of greetings demanded by ordinary courtesy is

an example; yet even here children are usually exempted from social expectations. Moreover, some societies may construct further distinctions: the roles of recluse and politician represent familiar differences in the degree of specialization in this behavior. Just as some behavior is relatively unspecialized in all societies, so it has been argued that a few societies distribute all behavior equally among their members; in Africa, the !Kung Bushmen of the Kalahari desert<sup>247</sup> and the Bambuti pygmies of the Ituri forest<sup>248</sup> are often offered as examples. Nevertheless, all known societies of necessity recognize the biological distinctions of age and sex in allocating many functions.

2. Specialization as a dependent variable. Because the range of variation is relatively limited, slight changes may have major consequences. It therefore becomes important to understand why intervention in disputes is conducted with greater specialization in some societies than in others. In order to explain this structural variable, which has hitherto

been treated as a given, it is necessary to look beyond the dispute itself to the society in which it is situated. I offer for consideration the following set of hypotheses relating specialization in dispute intervention to overall social differentiation by means of a third concept - the social density of the unit within which disputants can, and do, resort to an intervener.<sup>248</sup> This concept is obviously derived from Durkheim's famous proposition that "the division of labor is in direct ratio to the moral or dynamic density of society."<sup>249</sup> By moral or dynamic density (which I prefer to call social density) I understand Durkheim to include such factors as the physical proximity of individuals and the outermost boundaries within which any contact occurs, as well as the likelihood that physical contact will result in meaningful interaction. Assuming, for purposes of this discussion, that social differentiation and social density are closely correlated, I suggest that an increase in either variable will lead to further specialization and differentiation of the intervener in disputes.<sup>250</sup>

1. An increase in social density and social differentiation will lead to an increase in the number of disputes occurring within the social unit.

1.1 An increase in social density means an increase in the number of social interactions.<sup>251</sup>

1.2 Because the boundaries within which interaction occurs have expanded and because, within those boundaries, social differentiation has increased, the individuals between whom such interaction occurs are likely to be more heterogeneous. This heterogeneity increases the likelihood that expectations will conflict, which in turn increases the probability that any given interaction will result in conflicting demands.

1.3 These conflicting claims are more likely to ripen into a dispute because one significant alternative - avoidance - is rendered more difficult by the increase in social density.<sup>252</sup>

1.4 The increase in the number of disputes thus requires more frequent intervention. Persons who had previously performed this function resist this increased demand on their

time. Moreover, as they specialize in other functions they are simply unable to devote any appreciable effort to intervention. Hence the enlarged requirements of the differentiated society can only be met by specialized interveners.

2. An increase in social density and differentiation will lead to an increase in the differentiation of the intervener.

2.1 Since the population engaged in disputes is no longer homogeneous, the intervener will be socially distant and culturally different from at least one of the disputants. Where he is not equally differentiated from both it may be necessary consciously to foster such differentiation in order to satisfy expectations of justice.

2.2 Social differentiation implies increasing complexity of behavioral patterns and norms, as well as more rapid change in each. The task of evaluating behavior by norm is thus more difficult and comes to require special training.

2.3 Increased specialization by itself, and as augmented by training, increases the social distance and cultural differentiation of the intervener.

There is no reason to believe that these relationships work in only one direction. Specialization and differentiation of the intervener can reciprocally affect the density and differentiation of the social unit.

3.1 The intervener successfully handles the increased number of disputes thereby avoiding secession, fission, or fighting - alternative reactions to conflict which diminish the size of the social unit.

3.2 The intervener successfully handles disputes between socially distant or culturally differentiated individuals, thus permitting physical contact to ripen into social interaction.

3.3 In the course of handling these disputes the intervener creates new norms, thus enhancing overall social differentiation.

3. Implications for the study of change. These constraints upon structure may be significant for understanding change in the dispute process, whether gradual and unconscious or deliberate and abrupt. My theory suggests the following observations, among others. The limits within which specialization, differentiation, or bureaucratization can vary are narrow. The gap which divides our society from others - even those we see as polar opposites - is not as great as imagined. Therefore change in any one of the numerous structural variables, even if quite minor, will have an impact upon process which is likely to be perceptible. At the same time, structural change does not occur in a vacuum. Change in the larger society will affect the definition of the intervener's role, and vice versa. The reciprocal interaction of these two variables will generate cumulative development toward greater specialization, differentiation and bureaucratization in each. In order to identify the factors which

might oppose this tendency we must turn toward a similar analysis of process.

#### B. Process

Just as there are inherent limitations upon the structure of the role of intervener, so there are constraints upon the associated processual qualities of the dispute. The polar types which might be conceptualized by extrapolating all of the processual qualities to their extremes are neither theoretically possible nor even remotely approximated by our empirical data. A process which was functionally integrated within the larger social environment, ordered according to the logic and aesthetic of that environment, and wholly permeable to it could not be studied. Those very characteristics defeat the attempt to isolate a pattern of behavior for observation and analysis. Moreover, the mere participation of the intervener insures that behavior within the dispute will be at least minimally differentiated from behavior out-

side it. On the other hand, a process which was internally integrated, wholly logical, perfectly well-formed and totally introverted could not interact with the larger society. It could not respond to the outside world because external stimuli would be ignored as disruptive of internal order; for the same reason it could not impinge upon that world. In the absence of interaction, it would cease to be invoked, and would atrophy. But the fact that the intervener is a person, inextricably involved in the external world, precludes this degree of isolation.

I postulated above a close relationship between the structure of the dispute and certain social structural variables. Does a similar correlation subsist between the qualities of the dispute process and the culture outside it? I fear we lack both the theory which would permit us to select a set of related hypotheses to answer that question, as well as the data to test them. Instead, therefore, I offer two

alternative and opposed viewpoints, either of which might constitute a starting point for developing a theory.

1. a. The culture of a society is relatively homogeneous. Functional integration, logical or aesthetic coherence, and bureaucratization are values which are mediated through human consciousness. They are transmitted by socialization. If they are held by the society at large they will tend to characterize each constituent process.

b. The culture of a society can be, and in many cases is, extremely diverse. Subcultures may coexist within it; indeed, an individual may himself contain conflicting values. To the extent that the social structure is specialized, differentiated and bureaucratized each component is insulated from the others thereby facilitating the growth of idiosyncratic subsets of values.

2. a. Institutional differentiation is cumulative; this is the heart of Weber's proposition. Society and culture,

structure and process, reinforce each other. Structural specialization, differentiation, bureaucratization give rise to a subculture of process which in turn requires further structural development in the same direction. As the differentiated subcultures become increasingly introverted they exert fewer demands upon each other.

b. The same tendencies which lead to subcultural differentiation also oppose it. The society as a whole develops a functional integrity and a logical and aesthetic coherence which are antagonistic to introversion.

Although the propositions advanced in this and the previous section have largely been expressed synchronically, it is clear that the connections I suggest between disputing and the larger socio-cultural environment are dynamic and can only be captured by a theory of change. It is to this that I now turn.

C. Change

Theories of change in contemporary sociological thought still reflect the enormous impact of biological evolution more than a century after Darwin, although analogies between organism and society are now much more sophisticated. Social theories of law are no exception. If few assert that all legal systems must pass through fixed identifiable stages, many still rank known societies according to a chosen variable, thereby suggesting a unilineal and inevitable progression from one end of the continuum to the other.<sup>253</sup> Durkheim believed that the forms of social organization he identified represented points in a historical progression. Aidan Southall, writing recently, appears to be no less certain with respect to one of the structural variables which I have selected for emphasis.

No doubt empirical instances could be found in which the role structure of a society changes through roles becoming more generalized, diffuse, broad in definition, and fewer in number. But such instances seem somewhat rare. ... none of these instances exemplifies a process of role generalization within a society such as to contrast with the opposite internal process of role differentiation, which has occurred so very frequently in time and space. ...

This prompts the conclusion that societies which persist through time without violent intervention from without either have been relatively stagnant, as in the case of numerous but very small and isolated non-literate societies in many parts of the world, or else have exhibited a continuous process of role differentiation.<sup>254</sup>

I believe that theories which conceive of change in the dispute process as limited to a single direction invite serious criticism. Such an approach is derived from a form of universal history which can hardly be considered sociological.<sup>255</sup> Moreover, even were macrosocial change shown to be unilinear, the path of a particular institution such as the dispute process might well be deviant. Notwithstanding the general correlations I proposed above, the relationship between social structure and institutions for disputing still has considerable give in it. For instance, a functional equivalent may substitute for the intervener - an example might be a personality disposition which internalized conflict and thereby avoided participation in disputes. Moreover, even those societies which have developed highly differentiated interveners retain instances of dispute intervention by

persons who are not specialized, differentiated or bureaucratized.

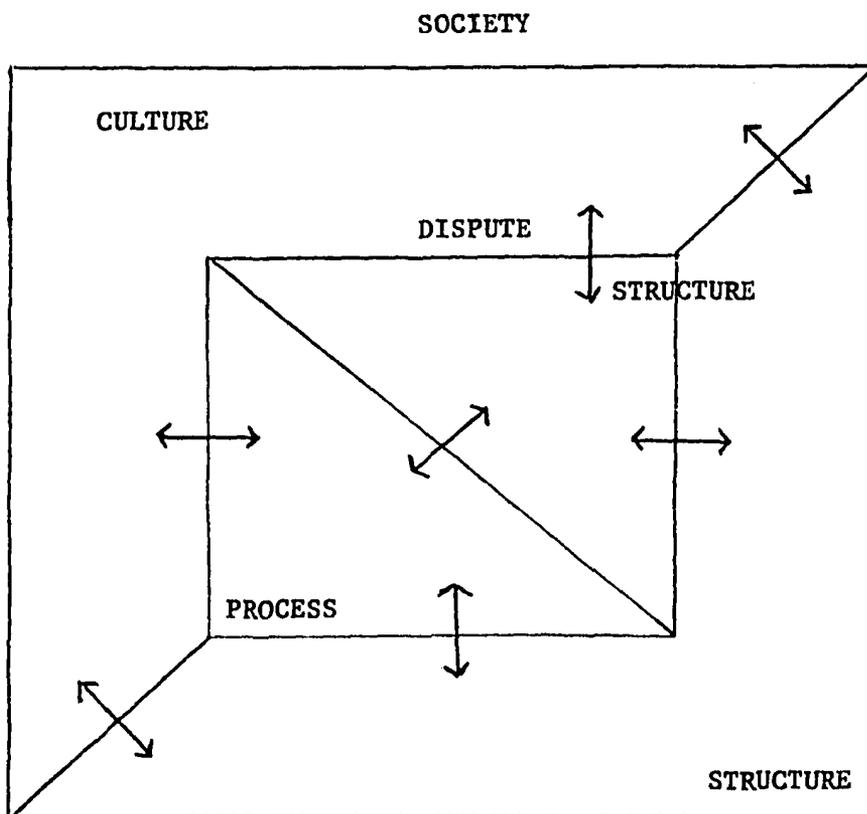
One further objection to a theory of unilineal change is the possibility of conscious manipulation of the dispute process. Deliberate attempts to structure basic institutions have always been an important strand of legal history. Men have sought to mould some particular element of the dispute process in a way which is no longer harmonious with the remainder. Examples might be found in the Napoleonic Code, which rendered substantive norms more easily intelligible to those they were to guide; in Bentham's proposal for total state subvention of the judiciary, which would have made the courts equally accessible to all classes; or in such familiar innovations as the small claims court and the juvenile or family court, which reduce procedural formality. At other times an entire dispute process has been adopted which bears no relation to its social environment. Cross-cultural trans-

plantation is frequently the source for such mismatching: courts from the metropolitan power established in a colony and further elaborated after independence; perhaps also the importation of the Scandinavian ombudsman into America. More rarely, a revolutionary regime concentrates considerable effort upon changing some or all of its institutions for handling disputes in order to achieve a fundamental change in social structure, even one which reverses the general historical trend referred to above; the popular tribunals of Russia, China, Cuba, Ceylon, or Chile may be instances of this. Of course, many of these changes may not entirely "take"; prescriptions may be ignored, in whole or in part, and if this is not permitted the altered institution may be avoided in preference to others. But even these outcomes interrupt the smooth flow of unilinear change and force us to develop a theory which will account for the existence of internal contradictions.

Indeed, I believe it is these contradictions - inevi-

tably present whether introduced by conscious design or not - which must form a primary focus for any theory of change, for it is they which divert the unilinear trends just described.

I can best express the interaction between these forces diagrammatically if we consciously reify structural and processual components of a dispute, and the social structure and culture of the surrounding society.



This schematic representation permits us to see the numerous ways in which an incongruence might arise in the fit of the various elements. Further, it suggests that a change which temporarily restores harmony will simply shift the disturbance elsewhere, thereby generating additional change.

We can now summarize the diachronic propositions about the dispute process.

1. The role of intervener in disputes tends to develop greater specialization, differentiation and bureaucratization.
2. The dispute process tends to develop greater internal functional integration, aesthetic and logical coherence, finality, certainty and efficiency.
3. There is a correlation between structure and process.
4. The larger society places its own demands upon the dispute process for functional integration and aesthetic compatibility with the external world.

5. Incongruences occur between the several elements - partly as inevitable consequence of the dynamic just described, partly as a result of conscious direction, and partly as an incidental effect of other changes.

The composite of these forces is extremely complex. Over relatively short periods of time each variable will fluctuate within a limited range in response to the conflicting pressures. Other writers have made similar, if more restricted, observations about particular qualities of the dispute process. Pound perceived "a continual movement in legal history back and forth between, justice without law, as it were, and justice according to law." And Weber argued that "all [authorities] are confronted by the inevitable conflict between an abstract formalism of legal certainty and their desire to realize substantive goals." The speed and violence of these small scale changes will be a function of the disparity between the incongruent elements. At the same

time, the point around which these fluctuations occur may also be moving. Some believe that its movement is cumulative; I prefer a cyclical theory in which extremes of specialization, differentiation and bureaucratization, on the one hand, and functional integration, introspective coherence, finality, certainty and efficiency, on the other, lead to a revulsion which we may now be experiencing.

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