

BOOK REVIEW

Alison Dundes Renteln and Alan Dundes (Editors), *Folk Law: Essays in the Theory and Practice of Lex Non Scripta*. New York and London: Garland Publishing (1994).

Gordon R. Woodman

This collection of essays will significantly advance the general study of folk law. The work does not claim to contain all the central, most seminal writings, but aims rather to illustrate the extent and variety of folk law as a field of study. Drawing upon the editors' remarkable knowledge of a vast field of literature, it is instructive and stimulating.

Most research projects in this field have focused on one of a number of topics, primarily ethnic groups' laws in developing countries ('traditional laws'), the laws of indigenous peoples in North American and Australasia, and (to a lesser extent) some ethnic and other folk laws in industrialised countries. Much of this work has contributed to our understanding of law and society, but studies would have been even more informative, and political activity concerning the recognition of folk law might have been more effective if everyone concerned had been familiar with varieties of folk law other than those which were their particular specialities. The selection by Renteln and Dundes itself demonstrates the need for a wideranging selection: the essays reproduced here, although nearly all of high quality, frequently do not advance our understanding quite as far as they might have because of their lack of comparative perspective. Useful ideas and insights tend not to be widely disseminated, and questionable hypotheses are not critically analysed and disposed of.

The first section, entitled "What is Folk Law?" plunges immediately into the debates over whether it is possible to identify a discrete category of law under the title of folk laws. It includes critical discussions by G.C.J.J. van den Bergh, J.P.B. de Josselin de Jong and Alan Watson of commonly suggested definitions of folk law or customary law. Questions about the relationship between folk law and the state are mooted, with papers suggesting that endorsement by state courts is necessary to validate customary law, either for certain purposes (M.P. Jain with a

generously documented introduction to customary laws in Indian state courts, and Woodman on lawyers' customary law in West Africa) or in general (Alan Watson, advancing an argument which is in my view mistaken, but which merits consideration). It also includes A.W.B. Simpson, "The common law and legal theory", advancing a compelling case for characterising English common law as a type of folk law. It is worth noting that this essay does not argue that the common law was historically the folk law of the English people. That proposition is to be found nowhere outside the rhetoric of the more aggressive proponents of the supremacy of the common law such as Chief Justice Coke. Simpson's claim is that the common law may be seen as having developed as folk law of the English Bar.

The next section, "Pioneers in the study of Folk Law", provides accounts of the work of scholars who advanced the study of folk law in Europe in general, Russia, Germany, the Netherlands, India (examined, refreshingly and perceptively, not by a British or Indian writer but by C. van Vollenhoven) and Africa. The essays in this section introduce folk law studies of geographical areas so selected that most readers will be introduced to at least one new area. The variety makes up for the fact that this is hardly a comprehensive, world-wide survey, and in any case the lack of coverage is amply made good in other sections. However, little would have been lost in my view if the paper on Africa, Irina Sinitsina, "African legal tradition: J.M. Sarbah, J.B. Danquah, N.A. Ollennu", had been omitted. It lacks the knowledge and insight to be found in others on the same subject.

The section on "The Ascertainment of Folk Law" provides more familiar material, at least for Africanists. It consists largely of known writings by well-known scholars - A.N. Allott, T.O. Elias, Simon Roberts, Muna Ndulo and Robert J. Gordon - on well-known issues of method in the investigation and clarification of customary law. The one new discovery for me was Obeid Hag Ali, "The conversion of customary law into written law". This is a finely composed, learned and devastating critique of the methodology of the Restatement of African Law in Kenya.

The editors note that their selection in this section contains a preponderance of material on Africa, but explain that this was "part of a general difficulty we encountered...[since] more has been written about African folk law than about the folk law of any other area" (xiii), a statement which non-Africanists will perhaps agree to be true.

"The Expression of Folk Law in Folklore, Symbol, and Ritual" is a collection of brief accounts of curiosities rather than studies of law and society. This comment is not to deny the potential contribution of research in these topics to our understanding of folk law. Many ethnographic studies have made fruitful use of

these aspects of social activity to explain particular legal processes. But the selection here, which is representative of the field, suggests that study directed specifically to these matters has not yet produced many interesting comparative hypotheses.

The next two sections are designed to help the reader understand the struggle in thought about folk law between the 'law as rules' and the 'law as process' schools. "Codes of Folk Law" is intended to represent discussion based upon the 'law as rules' view. It contains a number of attempts to state particular folk laws in the form of sets of rules, which may or may not form coherent wholes. In several instances the 'codes' appear to have consisted of rules created by legislation, not folk law rules. Each of the codes was written, although some may have been attempts to make written compilations of existing folk laws. This section is informative, but it hardly makes out as strong a case as might have been for the 'law as rules' view.

The 'law as process' view more effectively represented in the section on "Cases of Folk Law". Legal anthropology has made considerable advances here, and the editors' problem must have been to make a selection. Again the variety offered is remarkable and illuminating, ranging from anthropologist J.F. Holleman on "trouble-less cases" to historian Hendrig Hartog on the social norms of pig-keeping in nineteenth-century New York. The latter is the first in the collection to discuss specifically the phenomenon of legal pluralism under that name. It provides evidence also of the lack of contact between legal historians and legal anthropologists: Hartog makes as little reference to anthropological literature as most legal anthropologists do to historical literature.

"Folk Law in Conflict" moves directly into the field of legal pluralism, although I find it in some respects disappointing. The editors' introduction shows that they regard legal pluralism as entailing conflict. This is surely to overlook historical and contemporary instances of the coexistence of different bodies of law without conflict. Coexistent laws may each acknowledge that its sphere of jurisdiction is limited in ways which avoid clashes; although one law may impose duties in circumstances where the other does not, they need not impose incompatible duties. In this section L.C. Green's paper contains interesting new information on the coexistence of state laws and 'traditional' laws of ethnic groups, although much of it is elementary and unordered, and it makes no claim to comprehensiveness. R.D. Kollwijn's contains a useful discussion of whether non-Western 'law' often merits description as law, and introduces the issue of immigrant groups in European countries. E.G. Unsworth's essay on "The conflict of laws in Africa" is perhaps less useful. It was unsophisticated even when first published in 1944, and its attitude towards 'native law' patronising at best. But it serves to show how, from the point of view of state courts, legal pluralism is seen as entailing conflicts of laws. Robert B. Seidman is represented by one of his papers exploring the

distinctive policy foundations of the different types of laws which are or might be applied in Africa. Roy Carleton Howell's paper on the Kenyan *Otieno* case is not the best of the many writings on this subject. Poorly written, inadequately researched, and showing no flicker of sympathy with African communities facing acute problems of social change, it falls below the standards of the rest of the work. Alec Samuels' contains some useful information about, as well as opinionated discussion of minority customs in English law. The paper by Alison Dundes Renteln provides an instructive introduction to the issue of the cultural defence in western state laws.

The final section, "International Folk Law", concerns not folk laws which are international in observance, but that part of international law in the technical sense which is said to be based upon custom. It offers several stimulating observations about folk law, but in general it prompts the reflection that the study of this international law may have limited use for the understanding of folk laws. The extracts demonstrate that definitions of folk law in terms of the concept of *opinio necessitatis* result in incoherence - but this had already been sufficiently proven by papers in the first section, especially that by Alan Watson.

The work ends with a note, "Suggestions for further reading". The reader looking for further literature should note also the editors' introductory notes to each section and each individual paper. In these they provide a wealth of references to relevant, high-quality, and often little-known work. While the collection comprises English writings, they refer to many in French and German.

To make a selection of readings it is not essential to have a precise or unchallengeable delimitation of the field. However, the editors propose a definition of folk law which appears to be open to objection. They write:

Folk law is a socially defined group's orally transmitted traditional body of obligations and prohibitions, sanctioned or required by that group, binding upon individuals or subsets of individuals (e.g. families, clans) under pain of punishment or forfeiture.

The subtitle of the work also confirms that they see folk law as coterminous with unwritten law. This may attach too much significance to the difference between written and oral records. A body of laws may be developed through oral processes, and later be recorded in writing without being radically changed in nature. The date of the written recording may be an historical accident. The processes from which a folk law emerges may be partly written, partly oral. Simpson's essay shows that the common law, the substantive norms of which have emerged largely through written texts, can be argued to be a form of folk law. But

a good part of the characteristic thought-patterns of the common law, like those of 'codified' laws, have never been set out in authoritative writing.

Indeed the case of the common law provokes doubt about whether the assumed distinction between state law and folk law can withstand rigorous analysis. Perhaps folk law tends to be generated by a large part of the community which it orders, although it can very rarely be said to be generated by the entirety of the community, while state law usually is generated by a relatively small group within the community, although sometimes the group is quite large. The distinction is of degree only, and seems to be of limited significance for the characteristics of the laws.

The rest of the editors' definition is also open to question. First, the reference to obligations and prohibitions makes this a view of law as consisting of imperatives. Yet lawyers and anthropologists have produced many accounts of norms which define concepts, transactions, processes and powers, and generally of the 'secondary' and other non-imperative rules found in every law. Second, the definition conveys a view of self-consistent, reasonably clear and systematic 'bodies' of rules. This may not be the editors' view, however, since elsewhere they note that folk law is often not systematic (119). Third, reference to the "socially defined group" may also imply more rigidity than exists in fact. It reflects the conceptual schemes of social scientists, who find it methodologically convenient to define their objects of study as clearly bounded groups. But the evidence is that many folk law groups are not clearly defined, and that individuals of subgroups may join and leave them, or may maintain ambiguous status as both members and strangers.

The last criticism might have been avoided if the selection had included more material representative of recent trends of social thought. Current critical work in legal and anthropological theory, feminism and postmodernism is not represented. This work shows the indeterminacy of laws and of law-groups. The selection contains relatively little on the folk laws which abound in contemporary western, industrialised societies, in professional, recreational, political, religious and ethnic groups, and which also illustrate the problematic nature of any categorisation of folk laws and folk groups.

However, it is a merit of this work that, while some topics may not be well represented, the gaps are noticeable. The very breadth of the selection induces reflection about the whole field and its furthest boundaries. The work provokes only occasional criticism. In general it evokes admiration and the hope that yet more of the same nature will be provided. There is room for a third volume to fill some of the gaps. There is room also for a volume or two of readings of extracts from some of the leading books, since this selection includes only complete essays. But perhaps of the greatest interest and value would be a selection of

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essays - as large as possible - in translation from languages other than English, including many of those which are referred to in this volume.

This work ought to be widely and intensively studied. We must be grateful to the editors, and hope that they will bring us more collections of readings of such interest and quality.