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Comparative Judicial Behavior (Book Review)

Donald P. Kommers

Notre Dame Law School, donald.p.kommers.1@nd.edu

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always flourish in the rocky soil of communal habit; this idea was developed with special fervor a generation or two back by both Sumner and Ehrlich (whose views are taken as the starting point of the discussion of folkways and lawways in Professor Geoffrey Sawer's book on *Law in Society* (1965), a discussion that incidentally touches on many points made by Professor Jones). Nevertheless, the climate of opinion seems to have suddenly become especially favorable to speculation and research along these lines. It may be simply a matter of professional fashion. But no doubt it also owes something to a growing feeling that across whole areas of social life the law has tended to overreach itself or to go out of control or, in the case of the criminal law, to do both simultaneously. Perhaps it is essentially the same feeling that has led in the field of foreign affairs to a tendency to emphasize the value of prudence and restraint and the need to bring commitments more nearly into line with capabilities. At one time it would have been natural to state the problem in terms of a failure to observe those limits to what is possible in social life that are set by a principle of order in the world lying beyond the desires and machinations of mortal men. One may insist that the problem is of far greater complexity than this statement generally allows and yet still agree that there are limits to what law and government can do, that wisdom and virtue lie in seeking to discern those limits and abide within them.

EDWARD M. WISE

COMPARATIVE JUDICIAL BEHAVIOR. By Glendon Schubert and David J. Danelski (eds.). (New York: Oxford University Press, 1969). Pp. 412.

This book consists of several cross-cultural and exploratory studies of judicial decision-making, and is one of the first to appear in the developing field of comparative judicial politics. A product of many months of collaboration between American and Asian scholars at the East-West Center, University of Hawaii, it deals chiefly with decision-making processes in the high courts of Japan, Hawaii, India, Canada, Australia, and the Philippines. The Asian contributors are mainly law teachers with a strong interest in the sociology of law; the American scholars are mainly teachers of political science whose special interest is the study of judicial behavior.

If this book has a common denominator besides that of decision-making by courts it is the attempt by each author to employ or to fashion empirical tools for the study of the judicial process. Beyond that the essays differ markedly in their focus and methodological refinement. Pyong-Choon Hahm's essay, based on opinion surveys, is a study of Korean public attitudes toward law as a method of conflict resolution and how these attitudes are affected by modernization or social change. Four essays, among the best in the book, deal with Japan. The first, by Zensuke Ishimura, traces the development of empirical jurisprudence in Japan and then discusses some examples of this work, focusing on criminal sentencing behavior of judges for the purpose of identifying a set of variables that explain differential sentencing patterns. James Allen Dator's study is an adaptation of Eysenck's liberalism-conservatism questionnaire to Japanese high court

judges,* coupled with an attempt to correlate the scale positions of the judges with their party affiliation. Takeyoshi Kawashima uses the votes of Japanese Supreme Court justices from 1947 to 1962 to define, in statistical terms, the relationship between majority, concurring, and dissenting votes with the justices' political ideology and prior career patterns.

The judicial vote is also a basic unit of analysis in David Danelski's study of the Supreme Court of Japan, Abelardo Samonte's report on the Philippine Supreme Court, George Gadbois' essay on the Supreme Court of India, Donald Fouts' and Sidney Peck's respective surveys of the Supreme Court of Canada, and Glendon Schubert's treatment of the High Court of Australia. The general pattern of these studies is to describe the socio-politico-legal setting within which each court functions; to show how and under what circumstances judges are recruited; to sketch the court's internal deliberative processes; to identify individual judicial attitudes, values, and background characteristics; and to relate these personal traits to judicial policies contained in court decisions.

Research techniques used to explain these relationships include — in the measure of their complexity — personal interviews, content analysis of judicial decisions, linear cumulative scaling, multivariate analysis, and causal analysis. Although comparisons are drawn frequently between the findings of this research and related data about the United States Supreme Court these studies are not systematically comparative. The only essay in the book that might fit this description is Victor Flango and Glendon Schubert's study of simulated judicial decision-making in Hawaii and the Philippines. On the basis of a hypothetical law case submitted to Hawaiian and Filipino judges their research design sought to measure the effect of the judges' policy influences and their attitudes toward *stare decisis* on decisional outcomes. Finally, Edward Weissman and David Danelski contribute concluding essays on the direction of comparative judicial research, Weissman sturdily defends the use of mathematical models in comparative judicial research as a means of achieving optimal precision in any statement of the relationship between variables, while Danelski discusses some of the requisites incident to the building of scientific theories of comparative judicial behavior.

Traditional legal scholars may view with alarm this attempt to quantify judicial values. Political scientists may doubt the desirability or even the reliability of certain mathematical applications to judicial research. Students of jurisprudence may question the epistemological assumptions of such research. Nevertheless, this is an enterprising volume, filled with enough intriguing hypotheses about the judicial process to keep the skeptics wondering and judicial researchers at work for a long time. The merit of the volume is its conscious effort to develop concepts and methods that will make the *comparative* study of judicial decision-making empirically more reliable; for it seeks to specify and define variables that can more readily be studied in contrasting environments. One does not have to denigrate the value of intuitive insight to acknowledge the feasibility of operationalizing concepts and of developing research instruments that will render these concepts susceptible to systematic investigation in opposing cultures.

* See Hans J. Eysenck, *The Psychology of Politics*, London: Routledge and Kegan Paul (1954).

The editors have stated that the emphasis of the volume is one of explanation rather than description. It is only fair to say, however, that even for the mathematically uninitiated student of comparative judicial systems, among whom the reviewer would include himself, this volume manages to contain much descriptive information about foreign judiciaries that he is likely to regard as useful and unlikely to find elsewhere. Lastly, the editors have the reviewer's assurance that their book was no less favorably received because of the unpardonable error of misspelling his name in the preface.

DONALD P. KOMMERS

CUSTOM, LAW, AND MORALITY. By Burton M. Leiser. Garden City, New York: Doubleday & Company, Inc. 1969. Pp. 185. \$1.45.

In the preface to the book, the author accomplishes two things: (1) to state that ". . . until now, there has been no philosopher of custom and very little has been written on custom and its relation to law and to morals"; (2) to frame the nature of his philosophical search as ". . . if we are to understand the nature of morals and laws, it is essential for us to concentrate first on the nature of custom and its place among human practices." One would have to agree that little of significant value has been produced with regard to customary practices, but there is hardly a dearth of material relating to customs.

Certainly, no philosopher has published any extensive works classified as dealing with customs,¹ but in legal studies custom has received more than its ordinate share of attention.² As to the task ahead in the book itself, the reader may be somewhat confused as to whether the author intends to discuss customs, or if he is indirectly trying to find a justification for law and morals where the law tends to produce a result inconsistent with either the will of the majority or the minority in a given political group. Implicit in such an undertaking is the predicate that a condition or fact such as the collective will of a political group exists, and whether morality can achieve a definition without a primary concession of existence having a religious or theological goal not ordinarily having recognition within the term "philosophy."³

Chapter One, entitled "What is Custom," is a detailed study and exemplary presentation of the classification scheme of the author in his attempt to distinguish

¹ As regards the law, custom has largely been dealt with in the framework of the historical school. See Maine, *Ancient Law* (1930); W. Holdsworth, *History of English Law* (1926); T. Davitt, S.J., *The Elements of Law* (1959).

² See S. Simpson & J. Stone, *Law and Society* (3 vols. 1948); Schechter, *Popular Common Law in Medieval England*, 29 Col. L. Rev. 269 (1928).

³ One of the more challenging discussions of existentialism in its historical, triadic form is made by P. Tillich, *The Courage To Be* (1952), pp. 123-154. Leiser does not reach back to lay a foundation for his philosophy of custom, but one must assume from the rejection of natural law that he is logically placed within the ordinarily linear historical ontology of Jewish theology, or perhaps in the idealist schools of positivism which are predicated upon a transcendent duality of existence: God in heaven, and man on earth. Our reflection of God being that innateness or potentiality reposed in mankind to develop toward something better. See 3 K. Rahner, *Theological Investigations* (1967), pp. 54-85; A Maritain Reader, *Selected Writings of Jacques Maritain* (1966), pp. 232-244.