THE ANTHROPOLOGY OF LAW

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Summary

Anthropology emerged as a modern discipline in the late nineteenth century. Nearly all anthropologists in the early decades were from Western Europe and North America, and nearly all were interested in cultures and societies that were far removed and seemed very different from their own. The anthropological focus on law emerged when early anthropologists became interested in understanding how order was maintained in small-scale societies without centralized governments or formal legal systems. This chapter presents a historical discussion of the development of the field of the anthropology of law from the middle of the nineteenth century until the present. Throughout, this chapter emphasizes the importance of understanding law as part of culture—anthropologists argue that law does not exist separately from culture. In the nineteenth century, the paradigm of evolution dominated the natural and social sciences, and early anthropologists tried to understand law as corresponding to different stages of evolutionary cultural development. In the early twentieth century, anthropologists moved away from a focus on evolution to understand culture, and focused on law as means to maintain social order. In the mid-twentieth century, we see anthropologists starting to focus on law as dispute resolution, and the case study method of disputes gained prominence, particularly among American anthropologists. In the mid to late twentieth century, an interpretive approach to studying law in culture took hold in some circles, through which aimed to understand law as cultural knowledge. The late twentieth century also saw a focus on legal pluralism, or the existence of multiple overlapping legal orders, particularly in post-colonial contexts. This period also saw an increasing interest in anthropologists in understanding law in transnational and

international contexts. The chapter concludes with an examination of the contemporary anthropology of human rights as an aspect of the anthropology of law.

1. Introduction

In many Western contexts today, the popular understanding of law is fairly narrow and state-oriented: many Westerners would define law as a binding set of rules that are enacted, supported, and enforced by a centralized state. Anthropologists, however, generally have a much broader view of what counts as "law" or falls under the umbrella of the "legal." As we shall see, some of the earliest anthropological studies of law sought to understand how social order was kept in the absence of a state. As with other topics in anthropology, anthropologists have seen no shortage of debate about what does, or should, constitute our understanding of law and the legal. Of course, state sanctioned rules are part of what anthropologists consider under the umbrella of law, but anthropologists of law also consider various other means of establishing or maintaining social order, social norms and custom, and processes of handling disputes as part of law.

Most important, perhaps, is the fact that anthropologists view law as a cultural construction—law is developed in cultural contexts, and must be understood as part of culture, not distinct from culture or hovering over it to be drawn on at will. Law is always created in cultural and historical contexts. The anthropologist Lawrence Rosen, who is also trained as a lawyer, writes in his book *Law as Culture: An Invitation* that "Law does not exist in isolation. To understand how a culture is put together and operates…one cannot fail to consider law; to consider law, one cannot fail to see it as part of culture" (2006: 5). Because law is very much a part of culture, studying law can enhance our general understanding of culture. In much of his work, Rosen has argued that legal reasoning is culturally located, and that processes of legal reasoning can teach us a great deal about what cultures value. Law teaches about the standards and expectations for behavior that communities hold, what constitutes an offense against the group, another person, or perhaps the supernatural, and what kind of punishment or sanction and offense deserves, and many other things. An anthropological approach to the study law as part of culture can similarly shed light on how norms and values change over time. Take, for example, the change in state and federal laws regarding same-sex marriage in Europe, South Africa, and the Americas since 2000 until the present.

2. Anthropology and Law in the Nineteenth Century

Anthropology started to emerge as a modern academic discipline in the middle of the nineteenth century. However, as we shall see, nineteenth century anthropologists were heavily influenced by earlier thinkers in philosophy, law, and other fields. At this period in the Western philosophical and academic tradition, the idea of *natural law*—that law was derived from nature and therefore universally applicable across time and place—had been prominent for quite some time. However, a century earlier, the French thinker Charles-Louis Montesquieu (1689-1755) had questioned this by arguing that law was not natural but rather human-made, and was therefore not universal. In *The Spirit of the Laws* (1748) Montesquieu moved away from universalist ideas of law to argue for considering law as a cultural construction. As noted above, this eventually

became the dominant understanding of law in anthropology. Indeed, prominent legal anthropologist Sally Falk Moore writes that Montesquie's "way of thinking about legal diversity around the world, and his rejection of a universal natural law made an immense mark, and are the link between him and anthropology" (Moore 2011: 12).

Sir Henry Maine (1822-1888) was one of the first notable nineteenth century contributors to what became the anthropological study of law. A professor of jurisprudence at Oxford University, he developed an influential theory of the progressive evolution of law in his major work *Ancient Law*, published in 1861. Maine's *Ancient Law* developed the notion that "archaic law," as evidenced by his comparative study of law in ancient Greece, Rome and India, gradually developed in the modern legal systems of Western Europe. Although he was not technically an anthropologist, Maine's work emphasized a comparative perspective to the study of law and a commitment to understanding law as part of culture.

Sir Henry Maine was not alone in his evolutionary approach to understanding law. Because of the work on biological evolution by Charles Darwin and others, a great interest in evolution took hold of the academic mind and the popular imagination in the nineteenth century, and social scientists and early anthropologists were no exception. Indeed, the theory of unilineal cultural evolution emerged as the dominant theoretical model of understanding cultural similarities and differences in anthropology. In short, this theory proposed that all human societies were part of one human culture that was evolving along a predictable evolutionary path. Perhaps the clearest example of the application of unilineal cultural evolution in the anthropology of law in the nineteenth century comes from the American lawyer and anthropologist Lewis Henry Morgan (1818-1881). As a practicing lawyer in upstate New York, Morgan had a keen interest in the Iroquois people and culture, and he worked with the Iroquois Nation on many issues as a legal advocate and anthropologist. Morgan's influential work *Ancient Society* (1877) is a classic example of the unilineal evolutionary approach in anthropology. The book develops an evolutionary scheme based on his comparative study of kinship and kinship terminology among Native American groups that recognized three major stages: savagery, barbarism, and civilization, and identified the legal systems that he thought were representative of each stage. Although Morgan did conduct what might be called fieldwork among the Iroquois and was very interested in Iroquois law, his approach was more broadly comparative. His evolutionary scheme relied very much on differentiating what he thought were the evolutionary stages of kinship systems (including kinship terminology) and political systems, and focused on the regulation of property as distinctive in evolutionary stages: "The growth of the idea of property in the human mind commenced in feebleness and ended in becoming its master passion. Governments and laws are instituted with primary reference to its creation, protection, and enjoyment" (Morgan 1877: 511).

3. The Early Twentieth Century: The First Ethnographers

In the beginning of the twentieth century, the models of unilineal cultural evolution that had dominated nineteenth century anthropology came under attack. One of the main critics was the highly influential German-American anthropologist Franz Boas (1858-1942), who argued that cultures should be understood as developing along their own

historical paths, rather than along an evolutionary model. In addition, the early twentieth century heralded the dawn of ethnographic fieldwork as the dominant methodology in cultural anthropology. Fieldwork called for anthropologists to fully immerse themselves in the culture they studied by learning the language, living in the community, and spending an extended time period in the "field." Until this point, the work of most anthropologists came to be called "armchair anthropology," which was the method of learning about other cultures through library research and reading accounts of missionaries, explorers, and travelers who had visited far-off places. Boas was the first prominent advocate of fieldwork in the United States, and the father of fieldwork in British anthropological circles was Bronislaw Malinowski (1884-1942), who developed the method of participant-observation, in which anthropologists took part in what they observed to the greatest extent possible. With this, early twentieth century anthropology moved from the library to the field. And importantly for the anthropological study of law, anthropologists were able to observe legal proceedings in cultural contexts.

3.1. Bronislaw Malinowski

While nineteenth century anthropologists were interested in understanding how "primitive" legal systems and forms developed into "modern" legal systems and forms, twentieth century anthropologists were more concerned about the function of law and legal forms in particular social contexts. Many of the first anthropologists who forayed into serious ethnographic work on law were interested in understanding what kept societies in good working order. In part, this interest can be traced to the influence of the nineteenth century French sociologist Emile Durkheim (1858-1917), whose work on social solidarity, the collective conscience, and group cohesion were inspirational to anthropologists like Malinowski. Malinowski embraced a theoretical approach in anthropology that came to be known as functionalism, in which aspects of culture, such as law, are understood in terms of how they fulfilled individual or societal needs.

Malinowski conducted approximately two years of fieldwork in the Trobriand Islands, in Melanesia, from 1915-1917. He was a prolific writer, and his anthropological theories and ideas drew from his ethnographic work among the Trobrianders. Anthropologists of this time period were no longer interested in law and evolution, but were primarily curious about how social order was maintained in small scale societies that did not have centralized governments, police forces, or formal court systems. And just has Franz Boas had criticized the unilineal evolutionary approach in anthropology, Malinowski was critical of an evolutionary approach to law as in Sir Henry Maine's work. The conception of what counted as "law" in anthropology expanded accordingly. Malinowski's *Crime and Custom in Savage Society* (1926) was one of the first to consider law in such a society, and was perhaps the first to be grounded in ethnographic fieldwork. He proposed a definition of law as "a body of binding obligations" (1926), and focused on law and social cohesion, reflecting his functionalist approach and the influence of the great sociologist Emile Durkheim. *Crime and Custom* was a consideration of how order was maintained among the Trobrianders, and Malinowski's general conclusion was that this was done through a complex system of reciprocity: he observed that among the Trobrianders there was a remarkable cultural emphasis on the value of reciprocity and a failure to reciprocate would be met by some sort of social sanctions.

At this point in the history of anthropology, at the peak of the modern European imperial age, most European anthropologists conducted research in the colonial holding of their home countries; at the same time, many American anthropologist conducted research with Native American communities. In many cases, anthropologists were keen on comparing the legal systems of the cultures they studied to the legal systems of their home countries. In some instances, as will be discussed below, anthropologists took into account how the legal systems they studied were influenced by the colonial project, but in other cases, their work reflects a perception of a legal system, or cultural system as a whole, as untouched by colonialism. As Sally Falk Moore observes in *Law and Anthropology: A Reader*, Malinowski acknowledged the colonial presence in, but did not reflect on how this influenced, the legal system: "Yet what Malinowski concentrated on in the 1926 book was an attempt to reconstruct the whole fabric of reciprocal obligations as it might have been in pre-colonial times" (2011: 69).

3.2. Isaac Schapera

Another early example of legal ethnography comes from Isaac Schapera (1905-2003), a South African anthropologist trained in the British tradition. Schapera studied at the London School of Economics under the influence of both Malinowski and A. R. Radcliffe-Brown, who emphasized a structural approach to functionalism. The structural-functionalists were interested in how cultural traits functioned to keep societies in working order, and students trained in this approach, like Schapera, tended to view law as a mechanism to keep social order. Schapera conducted fieldwork among the Tswana in southern Africa in what is today Botswana. Schapera's major contribution to the anthropology of law was *A Handbook of Tswana Law and Custom* (1938), which was essentially a manual for judges and other government officials—both the Tswana and British colonial officers. Schapera conducted ethnographic work among the Tswana, and proposed that for the Tswana, laws are essentially rules about conduct that can be enforced by judges; he wrote that it was difficult to separate "laws" from other rules about social life (1938).

More so than Malinowski, Schapera recognized the impact of colonial rule on Tswana life and legal culture, and he thus took more of an interest in a historical approach to studying culture and law rather than a functionalist one. In his textbook on the anthropology of law, James Donovan writes that with his emphasis on a true holism that accounted for all elements influencing a particular culture, "Isaac Schapera can be seen as both a retreat from and an advance over Malinowski's functionalist ethnography" (2008: 80). This emphasis on history and culture embraced by Schapera will become evident in the next generation of anthropologists, such as his students John and Jean Comaroff.

4. The Case Method Approach in the Anthropology of Law

The mid-twentieth century saw the development of a highly influential new methodological approach to the ethnographic study of law: the case method. In this method of studying law, anthropologists tried to learn about legal rules and procedures through studying individual cases. Most often, they studied how individual disputes were resolved.

4.1. Edward Adamson Hoebel and Karl Llewellyn: The Trouble-Case

The first notable advocates of the case method approach were the team of anthropologist Edward Adamson Hoebel (1906-1993) and law professor Karl Llewellyn (1893-1962). Together, they studied law among the Cheyenne; as noted previously, American anthropologists of this period typically studied Native American communities, often in an effort to document cultures that were thought to be disappearing. Llewellyn and Hoebel's major publication was *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (1941), which was modeled to some extent after law school textbooks. Llewellyn and Hoebel conducted ethnographic work among the Cheyenne in Montana in the 1930s, but it is important to note that they did not observe actual cases. Rather, they asked elderly Cheyenne informants to describe how "trouble cases" from the past were handled; most of the cases they collected were from the nineteenth century, and they were related to Hoebel and Llewellyn through an interpreter (1941: 29).

Through examining and analyzing these trouble cases, many of which are described in detail in their book, Llewellyn and Hoebel attempted to both understand how the Cheyenne of the nineteenth century resolved disputes and to offer a general approach to studying law. They proposed that although one of the key purposes of law is to encourage acceptable behavior and avoid conflict, law also has "the peculiar job of cleaning up social messes when they have been made" (1941: 20). With this, a focus on dispute resolution and the "trouble-case" method became a dominant means of doing legal anthropology for quite some time. James Donovan has observed out that, despite this dominance, an important criticism of the focus on trouble cases is that this method can result in a disregard or a complete dismissal of the more "positive aspects of law"—those norms or rules that prevent trouble—limits an understanding of law to only the resolution of social problems (2008: 90).

4.2. Max Gluckman

Another advocate of the case method approach was Max Gluckman (1911-1975), a prominent South African anthropologist and student of Isaac Schapera. Gluckman was well-known for his fieldwork among the Barotse people (he worked in particular with the Lozi ethnic group) in Northern Rhodesia, in what is today Zambia. Gluckman used the case method developed by Hoebel and Llewellyn, but conducted field research in working courts, where he listened to cases in the Lozi language, rather than learning about trouble cases from the memories of elders.

Gluckman's first primary publication was *The Judicial Process among the Barotse of Northern Rhodesia* (1955), in which he argued for a cross-cultural approach to the study of law, and looked for key ideas that might be found in various legal systems. A primary example of this was the figure of the "reasonable man," to whom the behavior of a suspect would be compared to judge whether his conduct was blameworthy or not:

> The reasonable man is a recognized as the central figure in all developed systems of law, but his presence in simply legal systems has not been noticed. My experience with Lozi and Zulu emboldens me to assert that he is equally

> important in these systems. We have met the Lozi reasonable man…in the guises of the impartial father-headman, the respectful and helpful son, the loving brother, the polite teacher, and the reasonably faithful husband (1955: 83).

Gluckman argued that there were significant parallels between Barotse and Western jurisprudence, and the conclusion to the book lists numerous several ways in which they are similar. "On the whole," he proposes, "it is true to say that the Lozi judicial process corresponds with, more than it differs from, the judicial process in Western society" (1955: 357). Critics have noted, however, that by the time when Gluckman was conducting his research, the Lozi legal system had certainly been altered by the colonial administration, which perhaps resulted in the similarities (Donovan 2008). Gluckman was very interested in judicial reasoning and argued that even though colonization had altered judicial procedure, judges were still applying Lozi principles to cases. In his later work, Gluckman moved away from just examining trouble cases to thinking about the web of relationships in tribal societies that emphasize negotiation and mediation. Moore proposes that Gluckman's later work should have received more attention than it did from anthropologists, but likely did not since so few anthropologists are well versed in comparative law (2011: 72).

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