

The Differing Realms of the Law

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ANTHROPOLOGY, including legal anthropology, is faced with a problem that may be unique in social science: in order to present the results of our field research without seriously warping the ideas, we must undertake a second job of research, on the homologous institutions of our own society, and in the scientific disciplines that have investigated those institutions. This paper is an exercise in the anthropological investigation of jurisprudence. It investigates three things: (1) definitions that jurisprudence has used, and the anthropological usefulness of such definitions, (2) the "double institutionalization" of norms and customs that comprises all legal systems, and (3) some of the problems of the association between legal institutions and certain types of political organization.

Legal Language

It is likely that more scholarship has gone into defining and explaining the concept of "law" than any other concept still in central use in the social sciences. Efforts to delimit the subject matter of law—like efforts to define it—usually fall into one of several traps that are more easily seen than avoided. The most naive, on the one hand, beg the question and use "law" in what they believe to be its common-sense, dictionary, definition—apparently without looking into a dictionary to discover that the word "law" has six entries in Webster's second edition (1953), of which the first alone has thirteen separate meanings, followed by five columns of the word used in combinations. The most sophisticated scholars, on the other hand, have been driven to realize that, in relation to a noetic unity like law, which is not represented by anything except man's ideas about it, definition can mean no more than a set of mnemonics to remind the reader what has been talked about.

Three modern studies, two in jurisprudence and one in anthropology, all show a common trend.

Hart (1954) concludes that there are three "basic issues": (1) How is law related to order backed by threats? (2) What is the relation between legal obligation and moral obligation? (3) What are rules, and to what extent is law an affair of rules? Stone (1965) sets out seven sets of "attributes usually found associated with the phenomena commonly designated as law": Law is (1) a complex whole, (2) which always includes norms regulating human behavior, (3) that are social norms; (4) the complex whole is "orderly" and (5) the order is characteristically a coercive order (6) that is institutionalized (7) with a degree of effectiveness sufficient to maintain itself. Pospisil (1958) examines several attributes of the law—the attribute of authority, that of intention of uni-

versal application, that of *obligatio* (the right-obligation cluster), and that of sanction. In his view, the "legal" comprises a field in which custom, political decision, and the various attributes overlap, though each may be found extended outside that overlapping field, and there is no firm line, but rather a "zone of transition," between that which is unquestionably legal and that which is not.

It was Hermann Kantorowicz (1958) who pointed out that there are many subjects, including some of a nonlegal nature, that employ a concept of law. He proceeded to a more questionable point: that it was up to "general jurisprudence" to provide a background to make these differing concepts sensible. Kantorowicz' method for supplying such a jurisprudential background is very like Pospisil's in anthropology—examination of some characteristics of law that are vital to one or more of the more specific concepts. Law, he tells us, is characterized by having a body of rules that prescribe external conduct (it makes little immediate difference to the law how one feels about it—the law deals in deeds). These rules must be stated in such a way that the courts, or other adjudging bodies, can deal with them. Each of the rules contains a moralizing or "ought" element—and Kantorowicz fully recognizes that this "ought" element is culturally determined and may change from society to society and from era to era. Normative rules of this sort must, obviously, also be distinguished from factual uniformities by which men, sometimes with and sometimes without the help of courts and lawyers, govern their daily round of activity. Law is one of the devices by means of which men can reconcile their actual activities and behavior with the ideal principles that they have come to accept in a way that is not too painful or revolting to their sensibilities, and a way that allows ordered (which is to say predictable) social life to continue.

Double Institutionalization

Law must be distinguished from traditions and fashions and more specifically it must be differentiated from norm and from custom. A norm is a rule, more or less overt, which expresses "ought" aspects of relationships between human beings. Custom is a body of such norms—including regular deviations and compromises with norms—that is actually followed in practice much of the time.

All social institutions are marked by "customs" and these "customs" exhibit most of the stigmata cited by any definition of law. But there is one salient difference. Whereas custom continues to inhere in, and only in, these institutions which it governs (and which in turn govern it), law is specifically recreated, by agents of society, in a narrower and recognizable context—that is, in the context of the institutions that are legal in character and, to some degree at least, discrete from all others.

Just as custom includes norms, but is both greater and more precise than norms, so law includes custom, but is both greater and more precise. Law has the additional characteristic that it must be what Kantorowicz calls "justici-

able," by which he means that the rules must be capable of reinterpretation, and actually must be reinterpreted, by one of the legal institutions of society so that the conflicts within nonlegal institutions can be adjusted by an "authority" outside themselves.

It is widely recognized that many peoples of the world can state more or less precise "rules" which are, in fact, the norms in accordance with which they think they ought to judge their conduct. In all societies there are allowable lapses from such rules, and in most there are more or less precise rules (sometimes legal ones) for breaking rules.

In order to make the distinction between law and other rules, it has been necessary to introduce furtively the word "institution." I use the word in Malinowski's sense (Malinowski 1945; Bohannan 1963).

A legal institution is one by means of which the people of a society settle disputes that arise between one another and counteract any gross and flagrant abuses of the rules (as we have considered them above) of at least some of the other institutions of society. Every on-going society has legal institutions in this sense, as well as a wide variety of nonlegal institutions.

In carrying out the task of settling difficulties in the nonlegal institutions, legal institutions face three kinds of tasks: (1) There must be specific ways in which difficulties can be disengaged from the institutions in which they arose and which they now threaten and then be engaged within the processes of the legal institution. (2) There must be ways in which the trouble can now be handled within the framework of the legal institution, and (3) There must be ways in which the new solutions which thus emerge can be reengaged within the processes of the nonlegal institutions from which they emerged. It is seldom that any framework save a political one can supply these requirements.

There are, thus, at least two aspects of legal institutions that are not shared with other institutions of society. Legal institutions—and often they alone—must have some regularized way to interfere in the malfunctioning (and, perhaps, the functioning as well) of the nonlegal institutions in order to disengage the trouble-case. There must, secondly, be two kinds of rules in the legal institutions—those that govern the activities of the legal institution itself (called "adjectival law" by Austin and procedure by most modern lawyers), and those that are substitutes or modifications or restatements of the rules of the nonlegal institution that has been invaded (called "substantive law").

Listed above are only the minimal aspects that are all shared by all known legal institutions. There may be other aspects, as for example the commonly recognized fact that legal institutions on both the procedural and the substantive side can be in the fullest sense innovatory.

Seen in this light, a fairly simple distinction can be made between law and custom. Customs are norms or rules (more or less strict, and with greater or less support of moral, ethical, or even physical coercion) about the ways in which people must behave if social institutions are to perform their tasks and society is to endure. All institutions (including legal institutions) develop customs. Some customs, in some societies, are reinstitutionalized at another

level: they are restated for the more precise purposes of legal institutions. When this happens, therefore, law may be regarded as a custom that has been restated in order to make it amenable to the activities of the legal institutions. In this sense, it is one of the most characteristic attributes of legal institutions that some of these "laws" are about the legal institutions themselves, although most are about the other institutions of society—the familial, economic, political, ritual, or whatever.

One of the reddest herrings ever dragged into the working of orderly jurisprudence was Malinowski's little book called *Crime and Custom in Savage Society*. It is unfortunately almost the only anthropological book that appears on the standard reading list used in many law schools, "The Dean's List," and it has had an undue and all but disastrous influence on the rapprochement between anthropology and jurisprudence. Malinowski's idea was a good one; he claimed that law is "a body of binding obligations regarded as right by one party and acknowledged as the duty by the other, kept in force by the specific mechanism of reciprocity and publicity inherent in the structure of . . . society." His error was in equating what he had defined with the law. It is not law that is "kept in force by . . . reciprocity and publicity." It is custom, as we have defined it here. Law is, rather, "a body of binding obligations regarded as right by one party and acknowledged as the duty by the other" *which has been reinstitutionalized within the legal institution so that society can continue to function in an orderly manner on the basis of rules so maintained*. In short, reciprocity is the basis of custom; but the law rests on the basis of this double institutionalization. Central in it is that some of the customs of some of the institutions of society are restated in such a way that they can be "applied" by an institution designed (or, at very least, utilized) specifically for that purpose.

One of the best ways to perceive the doubly institutionalized norms or "laws" is to break up the law into smaller components, capable of attaching to persons (either human individuals or corporate groups) and so to work in terms of "rights" and their reciprocal duties or "obligations." In terms of rights and duties, the relationships between law and custom, law and morals, law and anything else, can be seen in a new light. Whether in the realm of kinship or contract, citizenship or property rights, the relationships between people can be reduced to a series of prescriptions with the obligations and their correlative rights that emanate from these presumptions. In fact, if it is not carried too far and unduly formalized, thinking in terms of rights and obligations of persons (or role players) is a convenient and fruitful way of investigating much of the custom of many institutions (Hohfeld 1923; Hoebel 1954). Legal rights are only those rights that attach to norms that have been doubly institutionalized; they provide a means for seeing the legal institutions from the standpoint of the persons engaged in them.

The phenomenon of double institutionalization of norms and therefore of legal rights has been recognized for a long time, but analysis of it has been only partially successful. Kantorowicz, for example, has had to create the concept of "justiciability" of the law. It would be better to say that legal rights have

their material origins (either overtly or covertly) in the customs of nonlegal institutions but must be *overtly restated* for the specific purpose of enabling the legal institutions to perform their task.

A legal right (and, with it, a law) is the restatement, for the purpose of maintaining peaceful and just operation of the institutions of society, of some but never all of the recognized claims of the persons within those institutions; the restatement must be made in such a way that these claims can be more or less assured by the total community or its representatives. Only so can the moral, religious, political, and economic implications of law be fully explored.

Law is never a mere reflection of custom, however. Rather, law is always out of phase with society, specifically because of the duality of the statement and restatement of rights. Indeed, the more highly developed the legal institutions, the greater the lack of phase, which not only results from the constant reorientation of the primary institutions, but also is magnified by the very dynamic of the legal institutions themselves (Stone 1964: Chapter 1, Section 1).

Thus, it is the very nature of law, and its capacity to "do something about" the primary social institutions, that creates the lack of phase. Moreover, even if one could assume perfect legal institutionalization, change within the primary institutions would soon jar the system out of phase again. What is less obvious is that if there were ever to be perfect phase between law and society, then society could never repair itself, grow and change, flourish or wane. It is the fertile dilemma of law that it must always be out of step with society, but that people must always (because they work better with fewer contradictions, if for no other reason) attempt to reduce the lack of phase. Custom must either grow to fit the law or it must actively reject it; law must either grow to fit the custom, or it must ignore or suppress it. It is in these very interstices that social growth and social decay take place.

Social catastrophe and social indignation are sources of much law and resultant changes in custom. With technical and moral change, new situations appear that must be "legalized." This truth has particular and somewhat different applications to developed and to less highly developed legal systems. On the one hand, in developed municipal systems of law in which means for institutionalizing behavior on a legal level are already traditionally concentrated in political decision-making groups such as legislatures, nonlegal social institutions sometimes take a very long time to catch up with the law. On the other hand, in less developed legal systems, it may be that little or no popular demand is made on the legal institutions, and therefore little real contact exists or can be made to exist between them and the primary institutions (Stone 1965: Chapter 2, Section 17). Law can, as we have seen in another context, become one of the major innovators of society, the more effective the greater a people's dependence on it.

Beyond the Austinian Sovereign

To summarize the position so far, it is the essence of "law" to present a double institutionalization of norms. A secondary criterion was added: a uni-

centric political unit (no matter how pluralistic) is the device most commonly utilized to carry out the secondary or legal institutionalization (a "sovereign"). Such a theory—although it may be charged with being simplistic—is, it would seem, consonant with the state type of organization. However, the theory of double institutionalization seems inadequate thus far to explain three related situations: the situations of (1) law in a stateless society, (2) law in a colonial society, and (3) international law.

So far we have two assumptions. First, we have assumed a power or a state, whether it be seen as an Austinian sovereign, or as the greater entity that assumes the court whose actions are to be predicted with greater or lesser accuracy. Second, we have assumed that there is also only one legal culture in such a situation—no matter, for the moment, how many contradictions are to be found in it. A legal culture, for the present purposes, is that which is subscribed to (whether they know anything about it or not, and

	Unicentric Power	Bicentric (or Multicentric) Power
One culture	Municipal systems of "Law"	Law in stateless societies
Two (or more) cultures	Colonial Law	International Law

FIG. 1. The legal realm.

whether they act within it or "agree" with it or not) by the people of a society. The secondary institutionalization forms a more or less consistent cultural unit.

With these ideas in mind, it is possible to question both assumptions and hence to build a four-square diagram in order to extend our views for examining the realm of the legal (See Fig. 1). Municipal systems, of the sort studied by most jurists, deal with a single legal culture within a unicentric power system. Subcultures in such a society may create vast problems of law's being out of phase with the customs and mores of parts of the society, but it is a problem of phase.

Colonial Law. Colonial law is marked by a unicentric power system, with greater or lesser problems of conjoining the colonial government with the local government, and more and less overt theories (such as the British "indirect rule") of accomplishing the conjunction. All are marked, however, by two (or more) legal cultures. Sometimes this situation is recognized, as it was in preindependence Kenya with its two hierarchies of courts, one for "European" law and the other for African law joined only at the top in the Supreme

Court. The mark of a colonial situation might be said to be a systematic misunderstanding between the two cultures within the single power system, with constant revolutionary proclivities resulting from what is, at best, a "working misunderstanding."

In colonial law, the problem of disengaging a problem case from the milieu in which it arises is often complicated by the existence of directly opposed ideas about the motives and goals to be achieved in resorting to court action. Once disengaged, the culture of the court officials may be completely different from that of the principals and witnesses in the cases, so that the outcome at best may seem arbitrary. Once "settled" in this more or less arbitrary way, the re-engagement in the institutions of society may be very imperfect, because of lack of consensus about what was decided or lack of agreement about the binding qualities and the justice of it.

We are only now far enough removed from colonies—now that they are obsolete—to begin a thorough examination of the effect that colonial powers had, via such a system, on the legal systems of the countries in which they were found.

Law in Stateless Societies. The mark of the stateless society is the absence of a unicentric power system. All situations of dispute that occur between people not within the same domestic unit *ipso facto* occur between two more-or-less equal power units. The prime example of a bicentric system is, of course, the lineage system based on the principle of segmental opposition, but there is no reason that this type of solution need be limited to such situations. There is, however, only a single culture: the principals and witnesses in a case may be at vast odds about who did what and to whom, and hence where justice lies. But they understand one another's activities and plots—perhaps they understand them only too well.

In such a situation, all trouble cases are settled by some form of compromise, more or less in accordance with a set of overt "rules." Instead of "decisions" there are "compromises." In a unicentric system, it is possible to have judicial decision and a recognized mechanism of enforcement which presents problems merely of efficiency, not of substance. In a bicentric situation, nobody can be in a position to make decisions—it is organized so that there cannot be. The "judges" must make compromises, and their compromises must be enforced from two power centers, which often—to a citizen of a "state"—looks like no enforcement at all. Instead of implementing decisions, the parties are made to accept the principles and provisions of a compromise.

It is my feeling—but I cannot claim it is any more than that—that the compromise, bicentric solution of problems leads to very much less precise re-statements of norms as law than does the decision-based unicentric solution. Bodies of rules in stateless societies seem to be less precise, scarcely made into anything resembling a *corpus juris* although, of course, the anthropologist or the intellectually inclined informant can create a system—even a system of precedents—from the regularities that result from compromise between units in terms of their common cultural recognition of their common institutions.

In some societies the compromiser may be quite firmly institutionalized.

Among the Nuer (Evans-Pritchard 1940) for example, the leopard-skin chief is a firmly institutionalized compromiser who may or may not be resorted to in any specific instance. If he is, his task is to create a compromise to which both parties will concur, saving the face of all by his religious position and "sanctions."

Most specifically, perhaps, the court—a body of men representative of the political power—cannot have any part in a bicentric system, unless there is some mode of organizing multiple judges. The more common methods of procedures are moots, contests, oracles, and self-help. In short, the bicentric, unicultural system may not have a very great potential for organized, neat systems of "law."

International Law

This section is set forth with great circumspection, because I know very little about international law. Yet it is obvious, even to a rank amateur, that there has been a long dispute in jurisprudence about whether international law is *really* "law" (Williams 1945–1946).

The difficulty arises among scholars who derive their model too narrowly from that law which is associated with a unicentric power system. It is undoubtedly true that the most "developed" legal systems occur within organizations such as states that have a single power system—indeed, the growth of states has been coincident with the growth of such legal systems. For all that such a power system may be pluralistic, it nevertheless is not legally divisible into warring and treating factions. "Law" is seen as one of the supreme activities of such an institution. The elements of coercion and prediction that have been emphasized in the definitions of law have lent credence to the point. These qualities have carried over and indeed obscured discussions of international law.

The situation in international law is, however, made more complex in that two or more unicentric power systems are bound together by means other than a more inclusive unicentric power system. In each of them, custom is "legalized." In international law, then, the process of "reinstitutionalization" must take place yet again—but with the qualitative difference that this time it must be done within the limitations of a multicentric power system. The difficulties in this secondary reinstitutionalization of international law are compounded because there are likely to be cultural differences in the two or more primary legal systems.

The "law" must, in short, be reinstitutionalized not out of a single related set of institutions, but rather out of two separate sets of interrelated institutions, including the interrelationship of the two unicentric power systems. Many cultures can exist within a unicentric system—the United States provides a vivid example; moreover, what might in other aspects be neatly regarded as a single culture may be representative of two or more states. However, it is usually reasonable to assume that the two separate but interrelated sets of institutions on which international law must draw in the process of

legalization, exhibit somewhat different cultures. Therefore legalization must take place in terms of two cultures that are often vastly foreign to one another.

Obviously the legal institutions of a bicentric and bicultural system exhibit different types of organization, different goals—different customs all round—from those of unicentric systems. More specifically they must have different ways of disengaging the trouble situation from its matrix. Probably those ways must be more subtle precisely because the power distribution stems from two centers, and a preliminary legalization has likely been made in each. We do not as yet have adequate legal institutions for bicentric systems nor do we have agreed ways for legalizing international law that is sufficiently subtle and consonant with multiple cultural evaluations (Jones 1962). The problem will not be solved merely by the creation of a single “sovereign” as was supposed only a few years ago.

It is a characteristic of unicentric legal systems that they are empowered to reach and enforce decisions. It is, just so, characteristic of bicentric systems that they must reach legal compromises that are sufficiently compatible with both cultures as to be acceptable and ultimately enforceable from the two power centers. Western judges have lost and are just regaining some of their rights to compromise within the framework of the adversary procedure. Other societies such as some of those in Africa, are only beginning to adopt a “decision” procedure in place of or in addition to a compromise procedure.

In short, it would appear that in international law—or at least in the old-fashioned view of it—there is a *treble* institutionalization: once at the level of custom, once at the level of the legal institutions of states, and again at the level of the bicentric, bicultural “international” accord.

The Differing Realms of Jural Ethnography

It is a truism to say that if the law is to be discovered in differing realms, that legal ethnography must also be found there. But the question comes up: What should we and our students be doing? Without in any sense wanting to close any avenues, it seems possible to list several important tasks:

(1) First of all we must study the relationship between the social institution and the legal institution in which some of its norms are (doubly or trebly) reinstitutionalized. We must know the relationships between families and family law or between received behavior and criminal law.

(2) We must get a full range of the types of institution that fulfill legal functions, and the social situations under which each is either tried or has proved successful.

(3) We must discover which customs are reinstitutionalized into law in different social, cultural, and political situations, and in accordance with what postulates. We must examine the institutions that precede and follow from such reinstitutionalization.

(4) We must seek out situations of cross-cultural conflict resolution and examine them against a set of legal qualities. (Anthropologists have been lax here.)

In short, jural ethnography, like the law itself, has no bounds. It is, on the one hand, as broad as life itself; on the other, as narrow as the recognizable re-institutionalization in given situations of power structure and cultural field. There are three grave dangers: We may, like Barton, report all our ethnography as if it were law. We may, like Gluckman's first book, cut our insights short by defining the "legal" too rigidly before we start to write. Or we may, like my own *Justice and Judgment* (1957), stop a chapter too soon so that neither does the ethnography fit easily into the main stream of jurisprudence nor are methods made overt that allow ready comparison among legal systems, of all the sorts discussed here.

REFERENCES

- BARTON, R. F.
 1919 Ifugao law. University of California Publications in American Archaeology and Ethnology, Vol. 15.
- BOHANNAN, PAUL
 1957 Justice and judgment among the Tiv. London, Oxford University Press.
 1963 Social anthropology. New York, Holt, Rinehart and Winston.
- EVANS-PRITCHARD, E. E.
 1940 The Nuer. Oxford, The Clarendon Press.
- GLUCKMAN, MAX
 1955 The judicial process among the Barotse of Northern Rhodesia. Manchester, Manchester University Press; Glencoe Illinois, Free Press.
- HART, H. L. A.
 1954 Definition and theory in jurisprudence. Law Quarterly Review 70:37.
- HOEBEL, E. ADAMSON
 1954 The law of primitive man: a study in comparative legal dynamics. Cambridge, Mass., Harvard University Press.
- HOHFELD, W. N.
 1923 Fundamental legal conceptions as applied in judicial reasoning and other essays, W. W. Cook, ed. New Haven, Yale University Press.
- JONES, HARRY W.
 1962 Law and the idea of mankind. Columbia Law Review 62:752-772.
- KANTOROWICZ, HERMAN
 1958 The definition of law. Cambridge, University Press.
- MALINOWSKI, BRONISLAW
 1926 Crime and custom in savage society. London, Routledge and Kegan Paul.
 1945 The dynamics of culture change. New Haven, Yale University Press.
- POSPISIL, LEOPOLD
 1958 The Kapauku and their law. New Haven, Yale University Contributions to Anthropology, No. 54.
- STONE, JULIUS
 1964 Legal systems and lawyers' reasoning. Stanford, Stanford University Press.
 1965 Social dimension of law and justice. Stanford, Stanford University Press.
- WILLIAMS, GLANVILLE
 1945-1946 Language and the law. Law Quarterly Review 61-62.