

Anthropological Approach

Towards Jurisprudence

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HISTORY

Sir Henry Maine developed the anthropological approach to the historical school and expounded the theory by stating "the movement of the progressive societies has hitherto been a movement from status to contract." Custom according to him, naturally played a predominant role in the formulation and evolution of law, justice and procedure.

Sir Henry Maine observes that the earliest notions connected with the conception of a law or rule of life are those contained in the Homeric words "Themis" and "Themistes". Themis appears in the later Greek pantheon as the Goddess of Justice. We then arrive at the epoch of customary law. From the period of customary law we come to another sharply defined epoch in the history of jurisprudence. We arrive at era of codes, those ancient Codes, those ancient Codes of which the twelve tables of Rome were the most famous specimen.

The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency, and the growth of individual obligation in its place. The individual is steadily substituted for the Family, as the unit of which civil law take account. It is not difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have origin in the family, it is contract.

The anthropological Approach to the historical school was developed by English jurists like Holdsworth and Maitland with a view to clarifying the origins of law, and the notions of law and equity.

The original idea of Sir Henry Maine that early development of law passed through the successive stages of personal judgements, oligarphic monopoly and Code appears to be not quite true about complex primitive societies. Maine had wrongly assumed a single pattern of primitive societies and primitive societies themselves exhibit a wide range of institutions depending upon the degree of economic development.

Mains observation that progressive societies develop the law by legal fiction, equity and legislation in this sequence, has been descredited to a certain extent, in as much as legislation has also been found to be an early period of law making with fiction and equity coming in at a later stage.¹

¹ Jurisprudence and Legal Theory by Tondon

The legal anthropological approach

Anthropological jurisprudence, which first developed as a specialised discipline in the nineteenth century, has challenged many of the paradigms of the positivist view of law and, most relevantly for this study, has produced the various theories of legal pluralism, discussed separately below under ‘The legal pluralist approach’. This section discusses its other major contributions to the study of non-state justice systems and also highlights its current limitations.

Initially, the evolutionist school dominated legal anthropology. It was believed widely that all societies passed through clear and inescapable stages of development, distinguished by increasing complexity, and this was extended to include stages of legal development. Various legal systems were studied and compared with the aim of charting a general evolutionary direction, from a primitive to a civilised state. The ethnocentric bias was such that Western European states represented the highest stage of development—a belief that was very convenient for the imperialistic policies of the European powers.

Since the late nineteenth and twentieth centuries, there have been three separate periods in the development of the field of legal anthropology. The first was the publication of the major empirical monographs before the 1960s that were mainly ahistorical, ethnographic descriptions of a single ethnic group and were concerned with seeking to understand whether all societies had law or its equivalent. A small number of monographs, including Maine’s *Ancient Law* (1861),

Malinowski's *Crime and Custom in a Savage Society* (1967) and Llewelyn and Hoebel's *The Cheyenne Way* (1941), provided the baseline for the discipline. These monographs set the general framework for the methods of research that continue to be employed. Malinowski's work led the movement 'out of the armchair into the village', insisting that some legal phenomena could be understood by direct observation in the field. Before him, most scholars had relied for their material on the accounts of travellers, missionaries and colonial administrators. Malinowski looked at the 'sociological realities' and the 'cultural mechanisms' acting to enforce law and demonstrated the variety of different forces that operated to maintain peace in the Trobriand Islands, including factors such as the cohesive force of relationships of reciprocal obligation. He stated:

In looking for 'law' and legal forces, we shall try merely to discover and analyse all the rules conceived and acted upon as binding forces, and to classify the rules according to the manner in which they are made valid. We shall see that by an inductive examination of facts, carried out without any preconceived idea or ready-made definition, we shall be enabled to arrive at a satisfactory classification of the norms and rules of a primitive community, at a clear distinction of primitive law from other forms of custom, and at a new, dynamic conception of the social organisation of savages.

Following such works, the ethnocentric notion of evolutionism was criticised and writers turned their attention to the diversity of legal systems rather than their unity and to analysing them within their own terms rather than with reference to a notional universal standard.

With the exception of Malinowski, the other works during this period considered law primarily as a framework rather than as a process. Humphreys observes that '[t]hrough the influence of

Durkheim on Radcliffe-Brown, it became a fundamental tenet of...anthropology from the 1920s to the 1950s that the anthropologist's task was to discover the "rules" governing the structure of the society' under study. The influence of such beliefs is so strong that even today what Moore describes as the 'venerable debate' on the topic of the complex place of norms in customary systems continues. Generally, however, later lawyers and anthropologists disagreed with such a focus on norms, stressing that law in traditional societies consisted of processes as well as norms. For example, Sack argues that 'Melanesian law does not express itself in obligatory norms but in the actual social organisation of the people' Narokobi similarly pointed out that in classical Melanesia, law was not a specialist discipline, but rather 'an integral part of the way in which people went about various tasks in a community'¹ He comments that the emphasis 'was not on the law or the rule or the norm but on how to settle the conflict'. In the African context as well, Moore writes that '[i]t is fairly well agreed that in many (most) African settings there was much that operated in the "resolution" of disputes other than a system of norms'.

These early ethnographies were critical in establishing methodological approaches to the study of non-state justice systems. *The Cheyenne Way* was 'the first systematic anthropological attempt to study law by a careful analysis of "trouble-cases"'—namely, looking at disputes and inquiring into 'what the trouble was and what was done about it'. The data produced by this method were found to have been the most revealing in exposing the nature of law in Cheyenne society. The 'case method' approach has continued to be a standard method of research and is used in this study, particularly in Chapter 6. Max Gluckman, Philip Gulliver and Paul Bohannan produced important studies during this era. Such studies were essentially critical ethnographic descriptions of non-European societies.

In the mid-1960s, there was then a shift towards the study of dispute settlement and of law as a process, in which the study of substantive rules and concepts was subordinated to the analysis of procedures, strategies and processes. Malinowski, who was already questioning the assumption that 'savages' invariably followed the 'rules', had foreshadowed this shift. Malinowski's work thus gave rise to a new epistemological base in legal anthropology—namely, 'processual analysis', which studied the processes involved in the settlement of disputes. This contrasted with the prevailing idea of normative analysis that was based on the idea that law consisted, in essence, of a number of written and explicit norms and was often presented in codified form. Humphreys identifies two ideas behind this shift: the first is 'that social change and areas of potential instability can be best understood and identified by focussing on disputes for evidence of changing norms, areas of ambiguity in social relationships and attempts to control change'. The other idea is demonstrating that the basic principles used to investigate and adjudicate disputes in developed and less developed societies are similar. Snyder observed that the studies in this period were limited because they did not acknowledge the profound social and economic changes that were occurring as a result of the colonisation process.

The third period is the move since the mid-1970s towards the gradual elaboration of a plurality of approaches and more explicit concern with theory and attention to the role of the State. In the 1980s, anthropologists came to feel that 'the ethnographic case-study methodology of dispute processes was too narrow a canvas of analysis'. It was argued that local disputes needed to be analysed within their socioeconomic and historical context. Further, the case method was also criticised by some postmodernists, who claimed that 'the choice of the case as the unit of analysis shifts attention away from routine compliance with law and toward deviant and otherwise extraordinary behaviour, away from concord and to conflict'. There were two

responses to this. First, as discussed below, under the term ‘legal pluralism’, a debate arose as to how to conceptualise local processes and norms within the wider context of state laws and domination. The second response involved a ‘critique of the atemporal quality of case studies of dispute processes and their Durkheimian understanding of dispute settlement as “social control”’. The preceding discussion demonstrates that legal anthropology has made a number of useful contributions to answering the specific questions this study is concerned with: first in research methods and second in emphasising certain aspects of the legal system that legal scholars tend to overlook, including the numerous modes of conflict management outside the courts and the general social context of the law. At present, however, legal anthropology is limited in a number of respects. First, as Zorn points out, during the period legal anthropology has developed, ‘law and anthropology have proceeded from different premises and have embraced different goals’.¹ She further explains that ‘[a]nthropology’s primary aim is accurate description; the pre-eminent aim of law...is prescription’. As a result, there is little general comparative work or theorising about the universal basis of norms or legal institutions in contemporary legal anthropology. For example, Franz von Benda-Beckmann argues that it is rare in legal anthropology to have systematic comparisons of legal systems. Second, with the significant exception of the development of the theory of legal pluralism, discussed below, legal anthropology has been in a period of stagnation and largely devoid of theoretical innovation in the past 20 years. Riles therefore commented that in the 1980s legal anthropologists suffered a ‘crisis of identity’ and saw a waning of interest in their methods and subject matter. She explains that practitioners of legal anthropology now pessimistically perceive the possibilities of their discipline. Likewise, although it is now increasingly fashionable for lawyers to turn outside their discipline for grand insights, they do so with increasing wariness. The image of what

anthropology might have to offer, the totally new insight, the epistemology-bursting perspective, never seems fulfilled.

In addition, legal anthropologists seem currently to be turning their attention away from their traditional focus of analysing the intersections between indigenous and European law, to analysing non-colonised societies such as Europe. and also the United States. ⁱ

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