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F. S. C. Northrop

Book Review

The Method and Some Findings of Anthropological Jurisprudence*

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Anthropological, or sociological, jurisprudence affirms the thesis that positive law cannot be understood apart from its relations to the particular culture or society out of which it grows or to which it is applied. When the content of the norms specified in the positive law are reinforced by the content of the norms embodied in the culture or the social behavior of the society, positive law is effective; when this is not the case, it tends, as Ehrlich emphasized, to become ineffective. Ehrlich called this underlying cultural or sociological factor the "living law" to distinguish it from the positive law. He defined the living law as "the inner order of the associations" of the individual people making up the society. What Ehrlich called the "inner order of the associations," the anthropologists call the "pattern of a culture."

One of the main problems of anthropological and sociological jurisprudence becomes that, therefore, of specifying the method by which the inner order of the living law or the ethical content of the pattern of a culture is to be specified. The first major contribution of Professor Hoebel's recent book, *The Law of Primitive Man,* is that in its first chapter it describes this method. Quite independently, in his study of the living law of Continental Europe in its bearing on the proposed positive legal constitutions of Continental European Union, this reviewer came upon the same method.[1] This method involves a specification of the qualitative norms held in common by a given people in a given area and the quantitative support which each set of norms enjoys.

* Review of THE LAW OF PRIMITIVE MAN, A STUDY IN COMPARATIVE LEGAL DYNAMICS, by E. Adamson Hoebel. Cambridge, Harvard University Press, 1954. Pp. viii, 357.

** Professor of Law, Yale Law School. The author is gratefully indebted to the Wenner-Gren Foundation for Anthropological Research, Inc., for grants which have made this study possible.

1. NORTHROP, EUROPEAN UNION AND UNITED STATES FOREIGN POLICY cc. 3, 6, 7, 8 (1954).

Thus the living law of a given society is specified by the method of sociological or anthropological jurisprudence when the set of postulates of that particular culture or society is indicated and that set is shown to enjoy the acceptance and support of most, but never all, of the people. Thus Professor Hoebel points out that for an anthropologist, "the measure of integration of [any] culture" will be given by the "consistency between basic postulates and . . . the specific selected behavior patterns"[2] and that the norm as specified by the basic postulate set is both a description of what is and a quantitative concept. He writes: "Norm, in its statistical sense, is a strictly neutral term. It merely expresses what *is*, on the basis of a numerical count. It says nothing of what ought to be or what people think ought to be. It is a quantitative concept."[3]

It is in the quantitative component of the qualitative and neutral postulate set expressing an *is* that the oughtness of the norm finds its origin. When the normative content of a given postulate set becomes accepted by a statistically large portion of the people in a society, it transforms itself into an imperative *ought*. Then, as Professor Hoebel writes, following Sumner, "in society what *is* takes on the compulsive element of *ought*.... What the most do, others should do."[4] In this manner contemporary anthropology and sociology show how their empirically verified indicative sentences, concerning the *is* of a given people's shared meanings, are turned into imperative sentences by the majority of the people in their relation to the minority. Sumner's theory of the relation between indicative and imperative does not explain, however, why the quantitatively large portion of the people accept the *is* designated by the postulate set of their culture as an *ought* for themselves. At this point anthropological and sociological jurisprudence need to be supplemented with psychological jurisprudence after the manner of Underhill Moore and Leon Petrazycki.[5] We shall return to this point later in con-

2. Hoebel, p. 14.
3. *Ibid.*
4. *Id.* at 15.
5. See Northrop, *Underhill Moore's Legal Science: Its Nature and Significance*, 59 YALE L.J. 196 (1950) and Northrop, review of LEON PETRAZYCKI, LAW AND MORALITY, translated by Hugh W. Babb, Introduction by Nicholas S. Timasheff, 20th Century Legal Philosophy Series: Vol. VII, Cambridge, Harvard University Press, 1955, to appear in a forthcoming issue of the *University of Pennsylvania Law Review*.

nection with Professor Hoebel's use of the expression "social power" and his definition of law.

The second major contribution of Professor Hoebel's book is by way of illustration of this method of anthropological jurisprudence when applied to the study of seven specific primitive societies. In each case he spells out the specific postulates and their corollaries in terms of which the social relations of the people take on a normative inner order or cultural pattern. These seven primitive societies are the Eskimo; the Ifugao of the Philippines; the Comanche, the Kiowa and the Cheyenne Indian societies of the American Plains; the Trobriand Islanders of the Southwest Pacific; and the Ashanti of Africa. In each instance the norms are unique, as are the procedures by which they are applied. Some of these societies are patriarchal, others matriarchal in their familial living law. In some of these societies the normative family ties between different generations are unilateral, moving largely or entirely through the male members or largely or entirely through the female; in one of these societies, they are bilateral. The procedures for dispute settling differ also. In some societies mediation is never used — in others there is usually a "go-between" who serves to bring the disputants together but does not pass judgment, whereas in others the go-between may at first mediate and then enforce a judgment if the disputants themselves do not come to an agreement.

The latter differences are important. They become accentuated when one compares the patriarchal or matriarchal societies described by Professor Hoebel with patriarchal or matriarchal societies of the Buddhist or Confucian cultures. Then it becomes evident, as this reviewer has indicated elsewhere,[6] that law falls into three major species, rather than merely the two noted by Sir Henry S. Maine in his classic work, *Ancient Law*. These three species are: (1) The mediational types of dispute settling in which the resort to codes is regarded as immoral or as a second best as exemplified by classical Buddhist and Confucian teaching and by the later Gandhi in more recent times. (2) Dispute settling by law of status rules or codes in which patriarchal or matriarchal familial relations play a major role, as exemplified

6. Northrop, *The Philosophy of Natural Science and Comparative Law*, PROCEEDINGS AND ADDRESSES OF THE AMERICAN PHILOSOPHICAL ASSOCIATION, *1952-1953*, Vol. XXVI of the combined proceedings of the several divisions, 5; NORTHROP, THE TAMING OF THE NATIONS 56-65 (1952).

in all the societies described by Professor Hoebel. (3) Dispute settling by law of contract codes in which legal norms are broken free from color of skin, familial or tribal associations and expressed in terms of axiomatically constructed constitutional utopias whose authority is not tradition but the consent of those to whom they apply.

Professor Hoebel's anthropological findings show also that between groups with different norms war occurs and behavior, which would be outlawed if applied to one's own people, is accepted as quite proper when applied to another tribe or nation. Also some societies show greater integration and harmony than others and succeed in settling disputes with less rebellion and emotional disturbance on the part of the disputants. A comparison of these differences with differences in the respective postulate sets shows a dependence of the behavioral and practical differences upon the differences in the theoretical assumptions. For example, the Comanche tribe of Plains Indians fails to achieve the social integration and deference to individual feelings obtained by the Cheyenne Indians. An examination of their respective postulates shows the former to be excessively individualistic, whereas the latter have stronger interpersonal normative assumptions which prepare the individual members to accept the order necessary for greater social integration and stability with less inclination to private emotional psychological rebellion. The Kiowa tribe of Indians on the other hand are mid-way between the extreme individualism and lack of social coordination of the Comanche and the greater social sense and collaborative spirit of the Cheyenne. As examination of their postulate set of assumptions shows them to be ambiguous both with respect to individualism and to social collaboration. From this Professor Hoebel concludes, "When cultural goals are not clear-cut, it is not likely that social action will be either."[7]

These anthropological materials have several important implications with respect to legal philosophy. The Comanche Indians treat animals as legal objects.[8] This brings into question those legal theories which affirm every legal relation to be a relation between persons. There are natural law elements in many of these societies.[9] Professor Hoebel concludes also that primitive

7. Hoebel, 176.
8. Hoebel, 140.
9. Hoebel, 131, 138, 142, 144, 145, 224-225, 264-265.

peoples legislate;[10] all is not mere frozen custom. He suggests in Part III that a sociological *jus gentium, i.e.,* what is common to all social systems, must be defined more in terms of function than in terms of common, normative content.[11] His description of a respected and able Cheyenne chief demonstrates that personality structure is a function of the postulate set of beliefs of a given people.[12] This shows that a natural law jurisprudence must refer to "the essential nature of man" with considerable caution. Certainly these case studies establish the main point of anthropological and sociological jurisprudence which is that the positive law is meaningless by itself and can be understood only in connection with the implicit postulate set of the culture or the society which is its background.

Professor Hoebel's book as a whole divides into three major parts: I, The Study of Primitive Law; II, Primitive Law-ways; and III, Law and Society. Part II contains the aforementioned anthropological materials. Part III draws several general conclusions. Part I includes, in addition to the aforementioned Chapter 1 on the method of determining the inner order of the living law, three chapters on (1) what law is, (2) the methods and techniques for studying its relation to the cultural assumptions of any people, and (3) the legal concepts of Hohfeld as a tool of the empirical anthropologist in his study of the law of primitive peoples. Some queries need to be raised with respect both to the definition of law in Chapter 2 and to the cultural anthropologists' application to primitive societies of Hohfeld's technical legal concepts which are described in Chapter 4.

The Hohfeldian concepts are the product of the abstract technical analytic form of scientific philosophical and legal thinking which characterizes one particular group of legal philosophers in the Anglo-American modern West. If, as Professor Hoebel's empirical studies in Part II demonstrate, no people in any culture can be correctly understood in conceptual terms other than their own, is it not dangerous for the cultural anthropologist to approach primitive cultures through the Hohfeldian conceptual spectacles of traditional Anglo-American legal theory? As the anthropologist A. R. Radcliffe-Brown writes in his article, "Patrilineal and Matrilineal Succession," to which Professor

10. Hoebel, 167.
11. Hoebel, 285-291.
12. Hoebel, 145.

Hoebel refers, "If we are to understand aright the laws and customs of non-European peoples we must be careful not to interpret them in terms of our own legal conceptions, which, simple and obvious as some of them may seem to us, are the product of a long and complex historical development and are special to our own culture."[13]

The aforementioned query becomes the more pointed when one notes Professor Hoebel's unexpected departure from his usual sober objectivity in his chapter on the Trobriand Islanders. Instead of proceeding to specify their basic postulate set and the way it operates in settling their disputes, we are confronted in the very first sentence of the very first paragraph with Malinowski rather than with Malinowski's anthropological subject matter, the Trobriand Islanders. As one reads beyond the first paragraph, the concern with Malinowski turns into a criticism and the criticism seems to be tinged more with emotion than supported by evidence. Something in Malinowski's account of the Trobriand Islanders seems to be emotionally disturbing Professor Hoebel for reasons that are not made clear. Why this, the only, departure from sober objectivity to be found in the entire volume?

Usually when anyone is emotionally disturbed by a professional colleague it is well to see if the colleague has not presented some evidence which brings into question certain assumptions of the disturbed person. What is the thesis of Malinowski, based on his study of the Trobriand Islanders, which Professor Hoebel criticizes with touches of feeling? It is that in Malinowski's book on these people, "the reader is definitely given to believe that law operates without the aid of physical force, although it does bind behavior."[14] This reviewer must confess that the evidence given by Malinowski seems convincing. Moreover, Professor Hoebel's own material in his chapters on other primitive peoples supports the Malinowski thesis that in some cases, at least, force is not the source of legal sanction. In the case of the Ashanti, to give but one example, Professor Hoebel writes that "the thought that his ancestors are watching him . . . is a very potent sanction of morality."[15] Many similar examples occur in Professor Hoebel's data.

13. 20 IOWA L. REV. 286 (1935).
14. Hoebel, 181.
15. Hoebel, 217.

Why then does he become so disturbed by Malinowski's similar conclusion? Why does he brush Malinowski off rather brusquely by quoting Seagle to the effect that Malinowski is guilty of "the pathetic fallacy of primitive jurisprudence" which consists in "transfer[ring] to primitive law the legal emotions of his own culture."[16] The answer to these questions is not far to seek. It is to be found in Professor Hoebel's definition of law in Chapter 2, a definition which, like his Hohfeldian concepts, he brought to his anthropological studies. This definition he describes in the last paragraph of Chapter 2 as follows: "[L]aw may be defined in these terms: *A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting.*"[17]

The source of this definition is well known to students of modern legal theory. It is the basic thesis of both the eighteenth century legal idealists, such as Kant, and nineteenth century and early twentieth century legal positivists, such as Austin or Hohfeld. According to these thinkers, what distinguishes law from morality is that whereas the sanction for morality is in the ethical content of the moral norm and the internal acceptance of that moral content as binding by the moral individual, the source of the sanction for law is external physical force or power. Naturally, therefore, Professor Hoebel was slightly disturbed emotionally when Malinowski brought forth facts which were difficult to reconcile with Professor Hoebel's preconceived definition of law. Having himself committed the pathetic fallacy by accepting a definition of law peculiar to his own Anglo-American culture and held only by some schools of legal thinkers in that culture, one need hardly wonder that Professor Hoebel was pushed out of his normal sober objectivity when Malinowski confronted him with facts that brought that definition into question.

Professor Hoebel's error is the more remarkable in that he is an anthropological jurist. Certainly the major contribution of anthropological and sociological jurisprudence to contemporary legal theory is its demonstration that instead of positive law getting its sanction from the power it attaches to itself, the positive law only succeeds in attaching power to itself when the ethical content of its norms correspond to that of the inner

16. Hoebel, 181.
17. Hoebel, 28.

order of the underlying living law. As the self-reformed legal positivist, Professor A. L. Goodhart, has recently written: "It is because a rule is regarded as obligatory that a measure of coercion may be attached to it: it is not obligatory because there is coercion."[18] In his first chapter and at many other places in his book, Professor Hoebel implicitly asserts this theory, only to allow his uncritical acceptance of the Hohfeldian and Austinian positivistic definition of law to force him to throw away this, the major, contribution of anthropology to contemporary legal science.

Petrazycki has shown conclusively that the difference between law and morality does not center in the sanction for the former being external force and the sanction for the latter being internal personal commitment to the ethical content of the norm, but centers instead in the fact that ethical commitment to a moral norm is merely unilateral whereas in the case of a legal norm it is bilateral. By unilateral, Petrazycki means that in the moral relation between *A* and any object *B*, *A* merely places an obligation upon himself while ascribing no right to *B* to conduct on *A*'s part in accordance with the obligation which *A* places upon himself. By bilateral, Petrazycki means that when *A* commits himself to a legal obligation, this carries with it the converse right of *B* to demand behavior on *A*'s part in accordance with the ethical obligation which *A* places upon himself.[19]

In any event, it is difficult to believe that, if Professor Hoebel had put his case studies first and allowed his findings as a cultural anthropologist to determine his definition of law instead of committing the pathetic fallacy of uncritically assuming a definition of law peculiar to one or two schools of legal thinking in his own Anglo-American culture, he would have come out with a different definition of law in Part III of his volume than appears at the end of Chapter 2 in Part I. Also the chapter on the Trobriand Islanders could have been solely on the Trobriand Islanders.

The foregoing critique should be kept within a proper sense of proportion. It is likely that the ambiguity of the book with respect to what it means by the words "social force" or "social

18. GOODHART, ENGLISH LAW AND THE MORAL LAW 17 (1953).

19. PETRAZYCKI, LAW AND MORALITY, translated by Hugh W. Babb, Introduction by Nicholas S. Timasheff, VII 20th Century Legal Philosophy Series, Cambridge: Harvard University Press (1955). See also note 5 *supra*.

power" results from the failure of its author and most legal thinkers of the recent past to give a semantic analysis of these abstract nouns. Clearly the expressions "social power" or "social force" are metaphors. As Petrazycki has shown, their reification into a concrete entity is one of the major errors of the theory of law of Kant, the Hegelian idealists and the British legal positivists. Clearly society is not a concrete entity; it is a theoretical construct. The same is true of a society's "power."

This becomes evident when one notes that the biological bodies of the individual person in any society are not tied to one another by rods of steel or bones or muscles or tissues to generate a single concrete entity or organism with its physical power after the manner in which the organs of the human body are tied together by bones and muscles and tissues to generate the concrete entity which is the individual person's biological body with its physical power. As Professor Hoebel's own studies make clear, there is no society or culture with power except as a statistically large majority of its members share common meanings and norms for ordering their relations to one another. From this it follows necessarily that power is an effect of these commonly shared meanings and norms, specified in Professor Hoebel's postulate sets of the cultures he describes. Furthermore "power" receives its existence, effectiveness and sanction from those commonly shared meanings and hence cannot be the sanction for the ethical content of the positive or the living law.

These considerations show that nothing is more needed in the contemporary world than a semantic analysis of the words "social power" and "national power." Contemporary students, not merely of law, but of foreign policy and international relations are still laboring under the semantic error of reifying these abstract words into a concrete entity with results that may well be tragic for the whole of contemporary humanity. In his final chapter, "The Trend of the Law," Professor Hoebel points up the obvious need to extend positive legal norms and institutions from the domestic to the international field. "The science of comparative legal dynamics," he writes, "is called upon to add its catalytic effect to the crystallizing metamorphosis from primitive law to modern on the plane of world society."[20] If this "trend" is to reach "fulfillment," cultural and positive legal

20. Hoebel, 333.

norms must find the source of their effectiveness and their sanction in their ethical content. Force between nations cannot be brought under ethical and legal control if the sanction for the ethical content of legal norms is force. Such a theory of law makes force King.

The reader should not allow these qualifications to distract his attention from Chapter 1 and Part II of Professor Hoebel's book. The content of these portions of his volume is exceedingly important. Providing, therefore, that the reader discounts the pre-conceived ideas of Chapters 2 and 4 of Part I, which Professor Hoebel brings *a priori* to his anthropological findings, and allows the empirical findings of Part III to speak for themselves, he will find this a rewarding and a trustworthy book.