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PART ONE

Customary Law in Perspective

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Anthropology Custom in Preliterate Societies

All law begins with custom. Anthropologists know this, and see the role of custom in law as part of a larger phenomenon of the law of primitive peoples, or even more simply “primitive law.”¹ While that label for this subject is admittedly preferable to older references to the “law of savages,”² it is not the terminology adopted here because of the value judgments and moral freightings of distinguishing between human societies that are “primitive” and “modern.” For the purposes of considering this topic, it seems unnecessary to denominate any jurisprudence as “primitive,” and it also deflects focus from the real attributes of these societies: the nonliterate or preliterate character of their material and legal culture. This is not just “political correctness”; it is a search for an accurate and neutral term-of-art. So, to the extent that anthropological and ethnographic scholarship has informed our understanding of custom’s role in law, it seems best to describe this subject as part of the law of preliterate societies. This is so, irrespective of whether such groups ultimately make the transition and reach a level of literate legal culture, are nomadic or sedentary in character, or are tribal or semipermanent in structure.

Presumably all law in preliterate culture is custom. But, as a matter of ethnographic study, that may not always be the case, and it leads to a central quandary explored in this volume: Is custom always unwritten or unenacted law? A related question to be addressed in this chapter is whether customary norms of behavior should be a more important source of law in preliterate societies, as opposed to those with a vibrant, literate legal culture.

Another significant aspect of an anthropological view of custom is that it should help discern the strengths and weaknesses of the use of custom in preliterate societies. After all, custom should reinforce what people really *do*, rather than what they *say* they do. If a society’s law is based nearly exclusively on custom, it should, at least notionally, succeed in perfectly tracking human behavior or, at least, social expectations of proper social norms. The problem

is distinguishing between binding customs and mere habits of a group (or subgroup) in a particular culture. A theme that runs throughout this volume is to identify what I have already called the “extra ingredient” that converts a helpful or gracious usage or practice into a binding norm of customary law.³ In preliterate cultures, it might be especially daunting to identify a social or psychological element of coercion in behavior that accounts for this transformation, but that has been a major task for ethnographers working in the field.

If there are signal strengths in the use of custom by preliterate societies, so, too, must there be substantial weaknesses, and these observations have come to dominate the ethnographic literature on this subject. Custom, one might presume, cannot easily change to meet new social patterns or challenges. Custom can become hardened into formalism and ritual, empty of meaning and divorced from social context. A related concern is that custom that is appropriate for one type of social behavior is incorrectly applied (by analogy or other means) to an unrelated social situation. In such a manner reasonable usages can become unreasonable customs.⁴ Finally, custom can be used as a method of social control by elites. Since customary law in preliterate cultures is definitionally unwritten, it falls to “keepers” of custom to maintain its integrity and substance – and to apply and enforce it. Whether these are aristocracies or sacerdotal colleges, as Sir Henry Maine described in his 1861 volume *Ancient Law*,⁵ they effectively exercise monopolies on legal knowledge and can be responsible for the maladministration of justice or, even worse, corruption of the entire legal system. In short, if customary law is unwritten and unenacted, how can it be consistently and fairly administered across a wide population over a long period?

To grasp the vast anthropological literature on sources of law in preliterate societies, it makes sense to start with the theories of custom on this subject as they have evolved over the past century or so. My goal here is not so much to chart an intellectual history of custom in “primitive law,” but rather to stake out the main contours of the debate that has defined what legal custom really is in these societies. That should allow a fresh look at how ethnographers have understood the proof, applications, and evolutions of custom in a variety of preliterate societies. Lastly, we can see how many preliterate societies made the transition to literate legal cultures and the consequent effects this has had on the role of custom as a source of law in their jurisprudence.

THEORIES OF CUSTOM IN THE LAW OF PRELITERATE SOCIETIES

For anthropologists and ethnographers, developing a working theory of custom in preliterate societies has been mostly a matter of a preoccupation with,

and a struggle over, definition. As one might expect, H. L. A. Hart, in his magisterial *The Concept of Law*, captured the wide nuances of the debate in a few well-chosen words:

It is, of course, possible to imagine a society without a legislature, courts or officials of any kind. Indeed, there are many studies of primitive communities which not only claim this possibility but depict in detail the life of a society where the only means of social control is that general attitude of the group towards its own standard modes of behaviour in terms of which we have characterized rules of obligation. A social structure of this kind is often referred to as one of “custom”: but we shall not use that term because it often implies that the customary rules are very old and supported with less social pressure than other rules. To avoid these implications we shall refer to such a social structure as one of primary rules of obligation. If a society is to live by such primary rules alone, there are certain conditions which ... must clearly be satisfied. The first of these conditions is that the rules must contain in some form restrictions on the free use of violence, theft, and deception.... Such rules are in fact always found in primitive societies.... Second, though such a society may exhibit the tension ... between those who accept the rules and those who reject the rules except where fear or social pressure induces them to conform, it is plain that the latter cannot be more than a minority ... for otherwise those who reject the rules would have too little social pressure to fear. This too is confirmed by what we know of primitive communities where, though there are dissidents, the majority live by the rules seen from the internal point of view.

... It is plain that only a small community closely knit by ties of kinship, common sentiment, and belief, and placed in a stable environment, could live successfully by such a régime of unofficial rules. In any other conditions such a simple form of social control must prove defective and will require supplementation in different ways.⁶

In Hart’s conception, societies employing custom – or only “primary rules of obligation” – are “primitive” and merely a “simple form of social control.” In such societies, custom “arises,” whereas in more complex polities, law is “made.”⁷ Such primitive communities can only subsist within a small, “stable” ambit, where custom is sanctioned by ties of “kinship, common sentiment, and belief.” Moreover, the primary norms of obligation must be kept limited – literally to the prohibition of lying, cheating, stealing, and killing – and there is always a subversive challenge to these customary norms by a large part of the community, who may only observe them out of a sense of “fear or social pressure” but not actual obligation or approval. Hart believed that custom was inflexible because it was not under anyone’s rational control, and that without a prescribed procedure for changing custom, reform would be frustrated.⁸

Hart's standard critique of primitive custom was a caricature when initially written in 1961, and certainly completely outmoded when revised a decade later. And yet it continues to exert a substantial influence on the subject, far out of proportion to its limited engagement with anthropological and ethnographic empiricism. Despite his invoking⁹ the great writers in this area – Bronislaw Malinowski, A. S. Diamond, Karl Llewellyn, and E. Adamson Hoebel – Hart does not appear to have read these works in any great depth. Had he done so, he would have discovered both methodological and substantive divisions in authority on the underlying question he was essaying: Can custom endure as a significant aspect of any legal system, whether “primitive” or “modern”?

Indeed, the debate goes back as far as Sir Henry Maine's 1861 treatise, which is only tangentially related to matters of custom and the preliterate legal cultures of ancient Greek, Roman, and Hindu societies. Maine does offer a distinction between “made” and “implicit” law,¹⁰ and from this legal writers turned their attention to the problems posed by the use of custom in preliterate societies.¹¹ It was only with Bronislaw Malinowski's slim, provocative, and utterly subversive 1926 volume, *Crime and Custom in Savage Society*, that this subject came, finally and at long last, into ethnographic focus.¹² The reason is that Malinowski took sharp aim at previous scholars' critiques of primitive custom (later adopted by Hart), and did so through the lens of empiric observation of the Trobriand Islanders of New Guinea.¹³

Rather than viewing custom in preliterate societies as some sort of automatic and reflexive submission to immutable and outdated modes of behavior or social expectations,¹⁴ Malinowski saw customary rules as the fulfillment of reciprocal social relationships. The intricate trade patterns between coastal and upland Trobriands were premised on the notion that “[e]ach community has ... a weapon for the enforcement of its rights: reciprocity.”¹⁵ This, in turn, affected all customary obligations of the Trobriands, leading to “rules [that are] essentially elastic and adjustable, leaving a considerable latitude within which their fulfillment is regarded as satisfactory.”¹⁶ This principle of “give and take” in reciprocal customary relationships was enforced through sanctions of ostracism and removal from the community.¹⁷

“If we designate,” Malinowski wrote,

the sum total of rules, conventions, and patterns of behaviour as the body of custom, there is no doubt that a native feels a strong respect for all of them.... The force of habit, the awe of traditional command and a sentimental attachment to it, the desire to satisfy public opinion – all combine to make custom be obeyed for its own sake. In this the “savages” do not differ from the members of any self-contained community of a limited horizon, whether

this be an Eastern European ghetto, an Oxford college, or a Fundamentalist Middle West community.¹⁸

Malinowski believed that “the main factors in the binding machinery of primitive law” were “reciprocity, systematic incidence, [and the] publicity and ambition” of the participants in the customary social system.¹⁹ Far from seeing law as a unitary phenomenon, Malinowski saw the law of preliterate societies as “not a homogeneous, perfectly unified body of rules, based upon one principle developed into a consistent system. [Rather,] the law of these natives consists ... of more or less independent systems, only partially adjusted to one another.”²⁰

In short, Malinowski’s ethnography of the Trobriands – developed through two years of continuous field study – culminated in three main empiric observations: that Trobriand society was generally orderly, that such order was not derived from such Western “trappings as police and courts,” and that “despite the general prevalence of order, [Trobriands] regularly tested its limits by self-interested acts of deviance and resistance.”²¹ The Trobriands were, according to one set of later commentators, neither “primitive communists [nor] ‘slaves to custom.’”²²

Although Malinowski’s rudimentary methodologies for legal ethnography have been criticized,²³ along with his emphasis on “structural-functionalism” of reciprocal relations,²⁴ he reached some crucial conclusions about custom in preliterate societies. The first of these was that custom is a source of positive law, imposed not from the “top down” in an Austinian sense, but from the “bottom up” in the unique context of tribal cultures and values. In making this observation, Malinowski was marking a deep departure from the writings of earlier scholars such as Sidney Hartland.²⁵ Second, Malinowski acknowledged that custom requires obligation to be enforceable as law – whether as reflected in reciprocity, publicity, or ostracism as the sources of sanction. So, in this respect, he was the first to articulate a theory of custom in preliterate societies that distinguishes it from “mere” usages or practices,²⁶ and comes close to an *opinio juris* requirement that we will see in other customary law contexts. The chief problem of custom was, as Malinowski saw it, to distinguish between “rules implicitly followed and rules formulated.”²⁷ Lastly, Malinowski reminded his audience that customary law patterns of organization were hardly unique to preliterate societies, although he spoke chiefly of “the members of any self-contained community of a limited horizon.”²⁸

Malinowski’s open-textured theory of custom in preliterate societies would not go unchallenged, however, and in 1941, Karl N. Llewellyn and E. Adamson Hoebel published *The Cheyenne Way: Conflict and Case Law in Primitive*

Jurisprudence, which would set in motion a disciplinary revolution in legal ethnography and also a new perspective on the role of custom in tribal cultures. That this volume was issued by one of the then-leading American philosophers of the legal realism school (as well as an authoritative law reformer)²⁹ and by a young fieldworker who would later become the preeminent legal anthropologist of his generation³⁰ only magnified its subsequent influence.³¹

It is no surprise that *The Cheyenne Way*'s primary contribution to the literature was methodological, insofar as the book's exposition emphasized a "realistic sociology" presented through "cases of trouble and how they were resolved" in Cheyenne society.³² Based on fieldwork conducted over two summers in the Cheyenne country,³³ and the taking of oral histories of "trouble cases" from the past decades of Cheyenne Indian experience,

the manner of interpretation rests in the first instance on the technique of the American case lawyer, save that each case is viewed not lopsidedly and solely as creator and establisher of correct legal doctrine, but is viewed even more as a study of men in conflict, institutions in tension, and laymen or craftsmen at work on resolution of tension. Law-stuff, seen thus, is seen more deeply and more sharply, simply as law-stuff. It is our firm conviction that to see it thus is to see it also in its working relation to social science at large. Modern American jurisprudence can thus enrich, and be enriched by, the study of non-literate legal cultures.³⁴

The "trouble case" methodology, replete with a Case-Finder thoughtfully provided in the book's index,³⁵ was fully consistent with Llewellyn's legal realist bent and his emphasis on how particular legal cultures actually resolve disputes among their constituents.³⁶ It also reflected the prevailing tendencies of such ethnographers as Franz Boas, Llewellyn's and Hoebel's colleague at Columbia.³⁷ But Llewellyn and Hoebel's volume also exposed fatal flaws in their scholarly method. Not the least of these was the failure to fully capture the provenance and context of the "law stories" they collected through their oral histories (what they called "memory cases").³⁸ Many of these anecdotes ranged from the Cheyenne experience between 1820 and 1880, even before sustained contact with European intruders, and so may have reflected a Cheyenne way of life that was long gone by the time Llewellyn and Hoebel visited the reservation in 1935 and 1936.³⁹

Qualms of methodology aside, the authors of *The Cheyenne Way* acknowledged their intellectual debt to Malinowski,⁴⁰ even as they aggressively contested his views on custom. The reason for this schism was apparent. It was essential for Llewellyn's jurisprudence to draw a sharp distinction between law and custom, between what participants in a legal culture *sense* are their rights

and obligations and what they *know* for certain are.⁴¹ Llewellyn and Hoebel thus sought to disprove a role of custom in Cheyenne folkways. By implication, they viewed Malinowski's theories of reciprocity with distrust since, they asserted, such theories depended on a clear expression of interests and persons involved in a customary usage that are notably absent in Cheyenne legal culture. Far from such usages being a "neutral custom" (as Llewellyn and Hoebel characterized Malinowski's theory⁴²), there was no evidence of the validity of customs being reflected in the Cheyenne cases.⁴³

Llewellyn and Hoebel's book is as flat a renunciation of the idea of customary practices in preliterate societies as any anthropologist could aspire to. "Custom" is a "slippery" "concept," they concluded.⁴⁴ For starters, custom is "ambiguous" – it *fuse[s]* and *confuse[s]* the notion of 'practice' (say, a moderately discernible line of actual behavior) with the notion of 'standard' (say, an actually held idea of what the proper line of actual behavior should be).⁴⁵ Second, "such terms as 'custom' ... lack edges. They *diffuse* their reference gently and indiscriminately over the whole of relevant society.... [T]hese concepts obscure that great range of trouble in which practices ... plus their appropriate standards ... can conflict within a [complex] society."⁴⁶ Llewellyn and Hoebel went on to observe that

such terms as "custom" ... have come to lend a seeming solidity to any supposed lines of behavior to which they are applied, and a seeming uniformity to phenomena which range in fact from the barely emergent hit-or-miss, wobbly groping which *may* some day find following enough to become a practice, on through to an established and nearly undeviating manner in which all but idiots behave.⁴⁷

And so, if it were not enough that the concept of custom in preliterate societies was ambiguous, ill-defined, and both over- and underinclusive in content, it also "lead[s] attention and emphasis away from the fact that the firmest and clearest practice or standard operates only upon and through the minds of persons. Nowhere is the fact more basic to understanding than in regard to law-stuff."⁴⁸

Of course, the metaphysical language employed by Karl Llewellyn, as principal investigator of *The Cheyenne Way*, became the gist of jurisprudential legend – and the butt of criticism. Nowhere defined or otherwise explained in the book was the meaning of his curious phraseologies of "law-ways" or "law-stuff," which Llewellyn gleefully used to debunk Malinowski.⁴⁹ And while these circumlocutions may have been intended to blur the edges between "complex" and "primitive" legal cultures and demonstrate a common set of sociological values among various legal rules, norms, and institutions,⁵⁰ the

result is a pervading sense of ethnographic imprecision in the book.⁵¹ Even more damning, in their pursuit of a neoevolutionary view of culture, Llewellyn and Hoebel may have raised a romantic vision of the “noble savage,” praising Cheyenne law-ways in a manner not supported by the empiric evidence or truly deserving of such jurisprudential favor.⁵²

The last half-century has seen notable advances in methodologies for legal ethnography, including further refinements on “case studies” for the transcription of tribal legal usages and practices.⁵³ It would be difficult to say that much has been added to the Malinowski-Llewellyn-Hoebel debate on the general role of custom. Indeed, R. F. Barton in his 1949 volume, *The Kalingas: Their Institutions and Custom Law*, seemed to disclaim that there could even be a coherent theory of custom for preliterate societies.⁵⁴ Other writers tended to align themselves with Malinowski’s reciprocity views,⁵⁵ and A. S. Diamond in the 1971 revision of his book, *Primitive Law Past and Present*, indicated that custom only matters if “there are breaches and sanctions follow breaches.”⁵⁶

Perhaps the fullest view of customary norms in the legal cultures of pre-literate societies can be found in the work of Max Gluckman, including his *Politics, Law and Ritual in Tribal Society* (1965) and *The Judicial Process Among the Barotse* (2nd ed., 1967). Like Llewellyn and Hoebel, Gluckman was also jurisprudentially aligned with the legal realism school, in the wing led by Benjamin Cardozo. Gluckman embraced Cardozo’s notion of “the creative energy of custom” and that “[i]t is ... not so much in the making of new rules as in the application of old ones that the creative energy of custom manifests itself today. General standards of right and duty are established. Custom must determine whether there has been adherence or departure.”⁵⁷ For these reasons, Gluckman decried the false distinction between law and custom drawn by Llewellyn and Hoebel, “as if they are in some sense antithetical concepts.... Custom has the regularity of law but is a different kind of social fact.”⁵⁸ But Gluckman took seriously the idea of legal man as a social animal – a reasonable person, unlike Malinowski’s atomistic and autonomous creature who followed custom out of a reciprocal need for material necessities. Custom thus has an obligatory character of legal sanction, even though it is unenacted and not necessarily “court-enforced.”⁵⁹ “[L]aw,” according to Gluckman, “is a body of binding rules and includes ‘custom.’”⁶⁰

This intellectual history sketch of custom’s legal ethnography has a point: arriving at a working definition of custom in preliterate legal cultures. If law is not, as Harold Berman has forcefully argued, “a body of rules imposed on high[,] but ... rather an integral part of the common consciousness, the ‘common conscience’ of the community,”⁶¹ then custom can have a notable resilience in societies facing profound change, not the least of which is

transition to literate material culture.⁶² The balance of this chapter explores both the strengths and weaknesses of custom in these contexts.

PROOF, APPLICATIONS, AND EVOLUTIONS OF
 PRELITERATE CUSTOM

Preliterate legal cultures all evinced similar responses to common challenges: organizing family structures, allocating communal property, ensuring respect for authority, and suppressing crime (especially homicide). These themes can be traced back to the early twentieth-century ethnography of Bronislaw Malinowski, who studied the Trobriand Islanders, a Melanesian society living off the northeast coast of New Guinea. The Trobriands recognized no political overlordship and instead were organized into distinct tribes and subtribes with a matrilineal organization of family units within tribes.⁶³ There was a strict hierarchy of relations within tribes (led by a chieftain), and low-grade disputes between villages of the same tribal organization were generally resolved amicably by procedures that we would recognize today as being a form of ritualized arbitration. Likewise, in the writings of Max Gluckman, who observed the customary law practices of the Barotse and Tiv peoples of what was then northern Rhodesia (now Zimbabwe) and the Tswana tribes of Bechuanaland (today's Botswana), he found common patterns of property rights and economic entitlements, order-maintenance strategies, and dispute settlement devices.⁶⁴

For example, a crucial part of Trobriand family and property law was customs enforcing matrilineal authority and prohibiting incest among individuals in the same extended family unit. Indeed, both of these were subjects of the three customary case studies recounted by Malinowski, the first such attempt in legal ethnography. Prohibitions against incest are a feature of virtually every human community, and the Trobriands' absolute taboo on such conduct appeared to be vigorously enforced. But appearances were deceiving, and an apparent toleration for incest was found by Malinowski in the case of Kima'i, who had sexual relations within his exogamous unit (with the daughter of his mother's sister). "This had been known but generally disapproved of," according to Malinowski, but nothing was done until the maternal cousin's jilted lover publicly denounced Kima'i.⁶⁵ In response, Kima'i "put on festive attire and ornamentation, climbed a coconut palm and addressed the community," and after "launch[ing] forth a veiled accusation against the man [and invoking] the duty of his clansmen to avenge him," he flung himself sixty feet to his death.⁶⁶ Kima'i's rival was then repeatedly assaulted, seriously wounded, and then ostracized from the community.⁶⁷