E. ADAMSON HOEBEL AND THE ANTHROPOLOGY OF LAW

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"Like it or not — and many from Plato to Marx have disliked it — law is a central concept in human society; without it, indeed, there would be no society." The truth of this statement from the jacket of Lloyd's *The Idea of Law* (1966) is implicitly borne out by the fact that, prior to the emergence of social science as a discipline, an empirically minded member of Western society, interested in the function and structure of his civilization, had to turn to the study of law as the only avenue to this knowledge. This was my experience (there was little of modern social science in Czechoslovakia in 1945), and that of many social scientists of the past. It is then no surprise that many anthropologists of the nineteenth century were either practicing lawyers or had a solid legal education, as, for example, Adolf Bastian, Lewis Henry Morgan, Sir Henry Sumner Maine, Johan Jakob Bachofen, and John Ferguson McLennan, to name a few. It is only interesting to note that Morgan's epochal *Ancient Society* (1877) was preceded by Maine's famous treatise *Ancient Law* (1861), which he wrote rather than one on ancient social structure, ancient religion, or some other cultural specialty.

It therefore comes as a surprise that such a crucial field as law was later deserted by ethnologists and shunned to the extent of being regarded as a monopoly of ethnologically nonrelevant lawyers. The result has been a "legal" vacuum in the ethnological literature which, with the noteworthy exception of Barton's (1919) and Malinowski's (1926) writings, persisted into the middle of the present century. Otherwise outstanding ethnographic studies, which described in great detail even the most obscure aspects of tribal cultures, systematically failed to account for their most fundamental part — their law. These studies, shockingly enough, even avoided detailed analyses of laws of inheritance and land tenure, which certainly must be held crucial to a proper presentation of social and kinship structures and tribal economic systems. Thus Hoebel could write in 1942 (p. 951): "Sir Henry Maine's work *Ancient Law* [1861] still remains after eight decades the preeminent work on the origin and nature of primitive legal institutions."

This situation changed radically in 1941 when *The Cheyenne Way,* now a classic in its field, was published by Karl N. Llewellyn, a professor of law, and E. Adamson Hoebel, a professor of anthropology. This *opus magnum* marks, in Gulliver's words, "the beginning of modern studies in the anthropology of law" (1969a: 11), and in my opinion it opened a new era of anthropological inquiry into law and its relation to the culture of which it is a constituent part. Its great theoretical advance was achieved through the cooperation of a lawyer, with his wealth of refined theoretical hypotheses and concepts and his emphasis upon the investigation of particular trouble cases, and an anthropologist who set the analysis of law into its cultural matrix and subjected Western juristic generalizations to a comparative test in a tribal society (see esp. Nader, 1965b: 3; Gluckman, 1969: 349; Moore, 1970: 262). It broke with the unfortunate traditions of Western ethnocentrism and nonempirical speculations which until then had cluttered the science of law and inhibited any significant factual or theoretical advance (see also Hallowell, 1943: 272). Once again law became an integral part of the culture and a commodity not monopolized by "civilized" societies.

While *The Cheyenne Way* concentrates upon law as an analytical isolate and relates it to the wider Cheyenne culture and its other modes of social control such as mores, taboos, and what the authors called "by-law-stuff," it does not commit the error of dissolving law into ubiquitous social obligation or omnipotent "custom," as for example Malinowski did. The emphasis upon analyzing law does certainly not mean that "law has been treated as isolated from other social control systems," as Laura Nader states (1965b: 18). The comparative, empirical, and inductive case-law approach provided such profound stimulus that its immediate consequence was to induce a generation of anthropologists to turn once again to law. Several major works in that field were produced in the following decade (Hoebel, 1954; Howell, 1954; Smith and Roberts, 1954; Gluckman, 1955; Bohannan, 1957; Pospisil, 1958; Gibbs, 1960). Indeed the impact of the Cheyenne volume was so impressive that already in 1963 Bohannan could write: "Law is one of the best-studied subdisciplines of anthropology; the literature is small but of high quality" (p. 284).

Early in his anthropological career Hoebel, the junior author of the famous work, recognized the great potential of working with a trained lawyer for the development of the

field of anthropology of law. In 1933, still as a graduate student, Hoebel enthusiastically accepted an invitation to cooperate in the investigation of tribal law proposed to him by Llewellyn, at that time Betts Professor of Law at Columbia University. Llewellyn first became Hoebel's thesis advisor, and Hoebel's first substantial contribution to the developing field — *The Political Organization and Law-ways of the Comanche Indians* — was published in 1940. Subsequently the advisorship developed into the long partnership of the two scholars and its main product was *Cheyenne Way.* It is no wonder that after such a successful start Hoebel became an ardent proponent of the collaboration of the two disciplines (1946: esp. 840), envisioning an importance that would transcend the two fields and become relevant also for professional training for governmental and political science careers (Hoebel and Rossow, 1963: 513; Nader, 1965b: 10). The lasting influence of this cooperation stimulated Hoebel into another major venture, *The Law of Primitive Man,* a study in comparative legal dynamics which was the first of its kind in the twentieth century. Because of these major works and a wealth of published articles, Hoebel is regarded by Nader as one of the three leading legal anthropological pioneers of this century (1969a: ix). I go even further and, without diminishing the accomplishments of the other two scholars, dare to regard Hoebel as the patriarch of the anthropology of law.

HOEBEL'S APPROACH TO THE STUDY OF LAW

Aside from his concern with contemporary jurisprudence, Hoebel's approach to the study of law can be characterized by at least three major attributes. First, his law is not an autonomous phenomenon separated from its cultural matrix. Hoebel remains true to his anthropological training; he studies various tribes in their total cultural perspective, building, so to speak, his legal specialty upon a solid, broad, ethnographic foundation, of which law is but one of many aspects (Hoebel, 1963a: esp. 780; 1969: 95). Indeed, his formulation of the concept of basic cultural postulates, whose essence is maintained and enforced by the law, requires a thorough knowledge of the culture as a whole.

Second, being at heart a theoretician, he avoided Malinowski's pitfall, and did not expend most of his energy on an intensive study of one simple culture. His work does not concentrate on the Cheyenne but includes also the Comanches, the Keresan Pueblo Indians, and the Pakistanis, which he has

studied in the field, as well as many other societies studied from library sources. The last range from the nomadic Eskimo and Kiowa Indians, including such tribal horticulturalists as the Ifugao, Kalinga, and Trobriand Islanders, and to several state civilizations like the Indonesians and Ashanti (esp. Hoebel, 1954: 67-256; Hoebel and Schiller, 1948). As a result of this endeavor, his *Law of Primitive Man* constitutes, in Moore's opinion, one of the two best-known comparative studies on law. It includes and compares systems of peoples of varying complexity (Moore, 1969a: 338; Nader, 1969c: 86) and, according to Nader, parallels in importance the famous *African Political Systems* (Nader, 1965b: 13).

Third, Hoebel is a strong protagonist of a real science of law in that he collects anthropological data and employs empirical methods not simply for descriptive purposes but also for arriving at valid cross-cultural generalizations and a comparative theory of law. In his opinion a true student of anthropology of law may not stop at describing a folk system. Indeed, an "acceptance of anyone's folk system as being an end rather than the starting point of research . . . would preclude the development of any useful theory of anthropological jurisprudence" (1961: 432). Thus he has always been critical of scholars who either speculate without a firm foundation of empirical facts, or who reject scientific generalizations and claim that the folk systems they have isolated in the investigation of a particular people are *sui generis* and lend themselves to no cross-culturally valid concepts and generalizations (esp. Hoebel, 1961: 428-429). Also, and quite sensibly, Hoebel does not visualize that a special new anthropological-legal esperanto needs to be devised to be used in such analytic theories and conceptualizations. He clearly states that the analytical concepts are and shall be abstractions from the strata of the various folk conceptual schemes; in other words, those concepts shall be elevated to the analytical level which empirically proved themselves to be cross-culturally valid (see esp. Nader, 1969b: 4). Accordingly, he does not hesitate to employ for analytical purposes Western folk concepts, such as those of Hohfeld, which possess the required qualifications (Hoebel, 1954: esp. 46-63; Gluckman, 1969: 350; Nader, 1969b: 2).

The Case Study Method. Probably the greatest and most lasting impact that Llewellyn and Hoebel's writings had on anthropology was their introduction of the case method of study into the discipline (esp. Hoebel, 1964a: 739). Here, con-

trary to Hoebel's statement (p. 743), I give as much credit to Hoebel as to Llewellyn since neither of them discovered the method and both were instrumental (in *Cheyenne Way* and Hoebel's other writings) in influencing the anthropologists. True enough, if Llewellyn had not been the academic partner of Hoebel, the latter might not have stressed the case approach so decidedly. However, it is equally true that had it not been for Hoebel and his work in anthropology, anthropologists might have neglected the brilliant legal writings of Llewellyn as they have neglected, for example, the legal realism of Justice Holmes.

The emphasis upon the study of legal cases — the American legal realism represented so ably by Llewellyn — is in Hoebel's words "not a philosophy, but a technology" (1964a: 738). It is a method for the study of law — an avenue through which law may be approached and investigated most exactly. Llewellyn and Hoebel conceive of three such "roads into exploration of the law-stuff of a culture": an investigation of (1) the abstract rules, (2) or abstractions from actual behavior of members of a society, or (3) legal cases with the principles abstracted therefrom (Llewellyn and Hoebel, 1941: 20-21). When considering the three possibilities, they rejected the idea of law being an abstract rule because there are societies such as the Comanche or Barama River Carib who do not employ abstract explicit rules; or others, like the Cheyenne, who use them only sparingly. Also, even when there are rules in a society, the crucial question is how and whether they are enforced. Rules not enforced by authorities cannot be regarded as legal (Llewellyn and Hoebel, 1941: esp. 22-23). The second road toward investigation of law is also rejected on the ground that abstractions from actual behavior are sociological rather than laws as means for social control (Llewellyn and Hoebel, 1941: 24). This criticism of the "second road" is important and well aimed at writers (sometimes as famous as Malinowski or Ehrlich) who fail to make the basic distinction between scientific and jural law. In anthropology of law we deal with jural law, which we subject to an analysis in order to arrive at "scientific laws" — generalizations about the studied jural phenomena.

This leaves us with the third road of inquiry, that of the "trouble cases," which the authors adopt for their approach when they write: "The trouble-cases, sought out and examined with care, are thus the safest main road into the discovery of law. Their data are most certain. Their yield is richest.

They are the most revealing." Moreover, "not only the making of new law and the effect of old, but the hold and the thrust of all other vital aspects of the culture, shine clear in the crucible of conflict" (Llewellyn and Hoebel, 1941: 29). It is in the courts and the conflict settlement that cultural values are tested, changed, and consolidated: "It is therefore to the Courts and not to the Legislature that we must go in order to ascertain the true nature of law" (Hoebel, 1946: 840). According to Hoebel, no matter how well codified abstract rules may be and their principles identified, "unless a dispute arises to test the principles of law in the crucible of litigation, there can be no certainty as to the precise rule of law for a particular situation, no matter what is said as to what will or should be done" (Hoebel, 1946: 847). Having accepted this approach to the study of law and thus adopted a case study as the unit of analysis, Llewellyn and Hoebel generalize from particulars — from the cases (Gulliver, 1969a: 11; 1969b: 25). This methodological procedure resulted in the excellent analysis of the legal system of the Cheyenne Indians as well as of other societies previously and subsquently studied by Hoebel (for evaluation of these, see esp. Gluckman, 1965: 173; Pospisil, 1971: 32).

The use to which the case approach may be put is by no means exhausted by the examples enumerated above. In his recent study, for example, Fallers uses a "close analysis of bodies of related cases" for the identification and understanding of legal concepts as they are employed by courts of law (1969: 57). Neither should it be understood that a casuistic approach means "an exclusive consideration of legal cases." Indeed, in Hoebel's words, only an "emphasis was placed on trouble cases" (1964a: 743), while the three approaches are functionally related and neither can be fully understood without a reference to the others (Llewellyn and Hoebel, 1941: 21). In *The Cheyenne Way* the authors discuss not only the various legal cases and the pertinent abstract rules, but they also show their interrelatedness and at least in one instance they demonstrate how a new specific rule has been created on the basis of a decision of a legal case (1941: 79).

Having identified the method for the study of law, Hoebel, like many other scholars before him, faced the problem of the definition of his subject of study. Unlike many others (see esp. Radin, 1938: 1145), he did not shun the problem. "Yet it cannot be," he wrote, "that law is incapable of definition, for a definition is merely an expression of the acknowledged at-

tributes of a phenomenon or concept" (1954: 18). From what has been stated above, it can be deduced that for Hoebel the essential quality of law was not merely normative, in that it exhibited regularity, but also imperative — it had to be linked with authority and sanctions (Hoebel, 1963a: 781; see also Lowie, 1942: 478). Law had not only to state the norm for behavior but also had to have the power to exercise the actual social control — to enforce it. It had to prevail in case of conflict; it had to have "teeth," be part of a group order, and possess an aspect of officialdom. Accordingly, *"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"* (Hoebel, 1954: 28). Once the form of phenomena from which law can be abstracted has been identified as legal decisions, and law is defined in terms of the three criteria, lawless tribal society becomes a myth created by even such renowned scholars as Benedict, Linton, and Hartland (Hoebel, 1964a: 736; 1969: 92).

Hoebel's definition of law also sheds light on the nature of feud in that it characterizes it as strictly nonlegal. To him "feud marks an absence or breakdown of law" and certainly not an early form of law as many "evolutionists" assumed (1953: 20; 1954: 330; 1963a: 782; 1963b: 803). However, "if the kin group of the original killer customarily accepts the action of the avengers as just, and stays its hands from further counterkilling, then we have legal law" (1949b: 3). Of course, in congruence with Hoebel's definition, such customary acceptance must include not only the parties to the dispute but also the official authority of the group, who tacitly or explicitly approves of the action. In such a case we deal with what I would call legal self-redress (Pospisil, 1971: 9-10).

CRITERIA OF LAW

Regularity. The first of Hoebel's three "essential elements of law," which may be used as criteria in identification of legal phenomena, is "regularity": law is a social norm (1963a: 781). It is a standard for behavior and as such it needs regular application as an "imperative with teeth." The term "regularity" unfortunately suggests that a criterion of law would be a repetition of a decision, that a law would require two or more trouble cases of the same type for its existence. Although in a great majority of laws this would be the case,

there is "the fact that the result in a trouble case drives so strongly toward becoming precedent gives the imperative or standard repeatedly a chance to leap ahead of the actual behavior pattern — not to flow from a behavior pattern, but perhaps to create a pattern on the model of even a single instance" (Llewellyn and Hoebel, 1941: 287). In Hoebel's and Llewellyn's terms then, the criterion of regularity is probably meant not only as an accomplishment, but apparently also as an intention.

Official Authority. The second essential attribute of law is "official authority" (1963a: 781). In *Cheyenne Way,* Llewellyn and Hoebel defined authority as a legal characteristic which possesses four elements: the "must element" or an enforceable imperative issued to the members of the group concerning their behavior; the "supremacy element" or the characteristic of authority that must prevail if appealed to in a conflict; the "system element" which means that the described legal characteristic makes the legal phenomenon "part of the going order"; and the "element of officialdom" — a "quality which holds the legal whole and all its parts into the whole order of the group, which it is recognized as representing" (Llewellyn and Hoebel, 1941: 284).

In his later writings Hoebel replaced this too comprehensive definition of authority, which became almost identical with the concept of "legal," by a workable concept defined as "the explicit capacity to direct the behavior of others" (1958: 222; 1960: 555). He also noted that so defined authority was present not only in human societies but also among "infrahuman primates" for example, where, as in human society, it is unthinkable (becomes "an empty name") without the next legal criterion — the sanction (1958: 223-224), which is applied by authority in an official way — "on behalf of the entire society and with general social acceptance of its legitimacy" (1963a: 781).

Authority is universal to human groups. It is certainly present among the Eskimo whom some writers would label anarchistic (Hoebel, 1954: 81). Of course, as Hoebel and several other ethnographers have shown, true anarchy even in such a simple society is a myth (p. 82). There are excellent hunters and rich men who assume the position of real but informal leadership, whose actual power, no matter how informal their status, may amount sometimes to tyranny (see esp. Pospisil,

1971: 73-78; Freuchen, 1931). From Hoebel's definition and use of the concept of authority I assume that in most instances this "explicit capacity to direct the behavior of *others*" (italics mine) belongs to an individual or a group of individuals in a society or its subgroup. Therefore I find the earlier statement by Llewellyn and Hoebel that "in many groups and cultures it has happened that authority has become attached less to persons than to patterns of action ('procedures') or to norms for action," incongruous with Hoebel's later definition, and an "'ancient law' (*e.g.*, tabu) with no standing officials to enforce it" as nonlegal in nature (1941: 286). Also, and for the same reason, I agree with Gluckman and "would not classify such institutions as the Eskimo song-contest under the rubric of 'legal' as Hoebel tentatively does" (Gluckman, 1965: 190; Hoebel, 1954: esp. 98). I assume that the seeming incongruence of Hoebel's more recent definition with the instances of taboos and the Eskimo song contest is mainly due to Hoebel's change in the definition of authority after the publication of *Cheyenne Way* in 1941 and *The Law of Primitive Man* in 1954.

Sanction. Third, Hoebel's major criterion of law is sanction (1963a: 781). As far as its nature is concerned "the distinctive and ultimate sanction of law is the application of physical force, be it whipping, mutilation, imprisonment, exile or death" (1963a: 781; also 1940: 47; 1946: 843; 1954: 28). Of course, not every application of physical force is legal: "To be legal the application of physical coercion must have the quality of being applied officially or quasi-officially on behalf of the entire society and with general social acceptance of its legitimacy" (1963a: 781). In my writings I have been critical of the emphasis upon physical force to the exclusion of economic or psychological sanctions (Pospisil, 1971: 89-95). Hoebel's insistence upon the ultimate use of physical force can be correct, of course, when taken as a criterion of a whole legal system rather than of individual laws.

Law, characterized and defined by the three "essential elements" has been found by Hoebel applicable to investigated tribal data. Although Timasheff seemed to have difficulty in discerning the pertinent elements of law in the Cheyenne material, complaining especially about the lack of the official aspect of the authority (1942: 130), an anthropologist with an adequate experience of tribal cultures can hardly share in this criticism. Officialdom in nonstate societies need not always be formal. Its informal variant is present in the Cheyenne

cases as in those of other tribal societies, and is certainly of equal importance.

Except for "the very most primitive societies" law performs, according to Hoebel, the following functions essential to the maintenance of human societies: first, it defines relationships among the members of a society and separates accepted and permitted behavior from that which is "ruled out." Second, it allocates authority and thus determines "who may exercise physical coercion as a socially recognized privilege-right," and the effective forms of sanctions. Third, it disposes of trouble cases. Fourth, it maintains adaptability in that it redefines "relations between individuals and groups as the conditions of life change" (1964a: 741).

It can be seen that in his definitions of law and of the "official authority," and in his identification of the functions of law, Hoebel emphasizes society as the carrier of law. When he speaks of subgroups and law of the society, the law regulates relations between the subgroups rather than within them (1954: 26-28). For example, one reads that one of the law's functions is "to maintain at least minimal integration *between the activities of individuals and groups within the society*" (italics mine; 1964a: 741), or that, "to be legal the application of physical coercion must have the quality of being applied officially or quasi-officially *on behalf of the entire society* and with general social acceptance of its legitimacy" (italics mine; 1963a: 781).

This preoccupation with "the society as a whole" aspect is also apparent from his treatment of the various types of coercion in a society. Accordingly he writes: "There are, of course, as many forms of coercion as there are forms of power. Of these, only certain methods and forms are legal. Coercion by gangsters is not legal. Even physical coercion by a parent is not legal if it is too extreme" (1954: 27). On the basis of these quotations one would assume that Hoebel regards law to be a property of the whole society, that its subgroups, such as a family (with its father as authority) and a gangster organization (with its leader as authority) have no legal systems of their own — that behavior of gangsters is not only relatively (from the point of view of the legal system of the state), but absolutely illegal. Nevertheless, such an abrupt conclusion seems erroneous when one considers other writings of Hoebel and Llewellyn. In my *Anthropology of Law* I cited Hoebel and Llewellyn as supporters of legal thought that is

characterized by the idea of a multiplicity of legal systems within a society, and defined by such scholars as Gierke, Ehrlich, and Weber (Pospisil, 1971: 107). Indeed, I hold the writings of Hoebel as important as those of these scholars in influencing me to recognize the existence of the multiplicity of legal systems within a society, and of the relative rather than absolute nature of law (Pospisil, 1971: 97-126).

My firm belief in Hoebel's agreement with these conceptualizations stems from several brilliant comments on the subject expressed in his and Llewellyn's writings. For example, the emphasis upon the subgroups and their autonomy within a social control structure of the all-embracing society is stressed by Hoebel's following definition of political structure: "Where there are subgroups that are discrete entities within the social entirety there is political organization — a system of regulation of relations between groups, or members of different groups within the society at large" (1949a: 376). That these subgroups have their own systems of social control, which are very close in nature to those of the law, was recognized by Llewelyn and Hoebel when they wrote: "What is loosely lumped as 'custom' can become very suddenly a meaningful thing — one with edges — if the practices in question can be related to a particular grouping" (1941: 53). Llewellyn and Hoebel, although not going all the way toward the recognition of these social controls as law, call these "practices with edges" of the subgroup as "the sublaw-stuff or bylaw-stuff of the lesser working units" (1941: 28).

CHANGE OF LEGAL SYSTEMS

So far I have dealt with law as if Hoebel conceived of it as a static social feature of some of the famous structuralist models produced by European scholars. Nothing can be further from the truth. Actually, Hoebel's greatest accomplishment (and here I separate his from those he achieved in collaboration with Llewellyn) lie in the field of legal change, as the subtitle of his work *The Law of Primitive Man: A Study in Comparative Legal Dynamics* suggests. In this comprehensive field Hoebel concentrated upon the changes and development of legal systems rather than on individual laws. At the onset he rejected the pleasing and oversimplified theories of nineteenth-century evolutionism by bluntly stating that "there has been no straight line of development in the growth of law" (1954: 288). Even in the more materially bound economy, "in its own particular history a society does not have to go through

all the successive steps of the technological sequence" (1954: 292). This is even more true in case of the legal development, where "there is no automatic connection between any legal measures or machinery and level of cultural development. There are only general associations and trends" (1954: 325).

To emphasize the nature of change of legal systems Hoebel constantly uses the word "trend," and avoids "evolution" which implies a set of universal evolutionary stages (1954: esp. 288-289, 327-330). As a consequence of these basic assumptions, supported by ample empirical evidence, Hoebel turns his criticisms against the best and most respected evolutionary theory of law — that of Sir Henry Maine and his famous status-contract dichotomy. "Maine's model," he writes, "is no more adequate than it proved to be when applied to actual primitive societies. In other words, contemporary empiricists have demonstrated that Maine's concept taken as absolute historical dogma will not stand up in detail." It can be highly useful, but only "as a model of ideal types" (1968: 532). The dichotomy of Maine's scheme, which claims a consistent and universal change of primitive status-oriented law toward the contract-dominated legal systems of advanced societies, is amended by Hoebel in the sense "that the contrast of Status as against Contract legal forms is not one of mutual exclusiveness but of degree" (1964b: 292). Accordingly, and contrary to Maine's primary tenet, he speaks of "status-oriented civilizations" as well as of primitive peoples who think in terms of contract, and of the occurrence of free contract in primitive systems (1964b: 288, 291-292; see also 1954: 327-328). In addition to this major critique he also objects to "Maine's failure to appreciate the extent of criminal law in many primitive systems" (1964b: 289). The empirical and comparative orientation of Hoebel leads him away from traditional, folk, Western-biased thinking in terms of dichotomies to cross-cultural approaches, such as that of Hobhouse, Wheeler, and Ginsberg (1930), which are more consistent with current knowledge from a wealth of comparative ethnographic material (esp. 1954: 309 ff.).

Besides being comparative, inductive, and empirical in nature, Hoebel's theory of the trend of law rests upon several additional assumptions. He postulates that the cultures of contemporary primitive peoples exhibit characteristics that are similar "to those that presumably prevailed in the early cultures of the infancy of mankind" (1954: 290). According to him, primitive law belongs to peoples without writing (1963a:

780). This law, however, is not primitive in its "substance" but rather in its "procedure" (p. 781). Indeed, the substantive law of the Cheyenne, for example, as well as the legal reasoning connected with it, was found brilliant and comparable even with the legal system of classical Rome by Llewellyn and Hoebel (1941: 313; see also Moore, 1970: 262)! The procedural (or adjective legal) difference between primitive and advanced or civilized law lies, according to Hoebel, mainly in the fact that "in primitive law the primary authority for institution of most legal actions is the kinship group in support of its individual members. Hence, private law, so-called, dominates most primitive law." As a consequence in primitive law "private law litigation involves direct negotiation and arrival at mutual agreement by two parties who are in mutual disagreement and conflict to begin with." Consequently, Hoebel writes: "The defendant must agree to some form of punishment or restitution or there can be no settlement" (1963a: 781).

Having worked among various tribal societies, I must disagree on this point with Hoebel. First, anthropologists have usually underestimated or even neglected the magnitude of negotiation a Western judge often has to undertake. Indeed, in New York most cases are actually settled through negotiation in the judge's chambers rather than adjudicated formally in the courtroom. Second, many of the tribal negotiated "private law cases" are not legal at all, because the negotiation occurs between autonomous kinship groups which have no authority in common and therefore do not belong to the same legal system. Accordingly, for example, there is no law on the society level of the Kapauku tribe. Nevertheless, law does exist on their "political confederacy level," composed of several allied lineages. Whereas within a political confederacy most of the trouble cases are solved through adjudication — that is through application of the confederacy's law by the confederacy's headman — disputes between parties of different confederacies are necessarily settled by diplomatic negotiations in which "the defendant must agree to some form of punishment or restitution or there can be no settlement." This is simply because there is no law on this level, not even a "private law" (Hoebel, 1963a: 781; Pospisil, 1971: 97-126).

In his actual description of the trend of law Hoebel "attempts to relate the degree of complexity in procedural law with different levels of subsistence" (Nader, 1965: 9). He classifies legal systems into a whole social series based on

morphological and historical criteria, which Moore regards as "orderly and consistent" (1970: 255). Development of law becomes thus "another facet of the evolution of social structure" (Hart, 1956: 567). The first developmental level, labeled by Hoebel as "lower primitive societies," may be exemplified by the cultures and legal systems of the Andamanese Islanders, Shoshone Indians, Australian Aborigines, and Barama River Carib (Hoebel, 1954: 293). Since the bilateral social organization of these tribal peoples is characterized by autonomous communities consisting of a few related families who constitute a kindred, the leadership rests with a local headman whose powers are so weak that "both the means to exploit and the means to judge" are wanting. Because of the limited amount of power Hoebel speculates that those societies "are democratic to the point of anarchy," there being little need for any suprafamilial authority (1954: 294). If this generalization were taken literally, it would be untenable on the basis of empirical evidence from the most primitive peoples, supplied by such ethnographers as Freuchen, Gusinde, and Graburn. However, in his subsequent exposition Hoebel himself mitigated this statement by showing how the leader of a local group of the Andamanese Islanders could easily stop an outrage, how offenses were punished even physically among Australian Aborigines, and how the opinion of the Barama River Carib headman was respected and implemented (1954: 297-298, 305).

Another characteristic of the embryonic law of this developmental level is almost complete absence of the conceptualization of crime. There is, however, one exception: a repetitive and excessive offender of customs and laws may be beaten or killed by community action. Thus we certainly deal, according to Hoebel, with definite law even on this most primitive level. Consequently, it may be reasonably assumed that Hoebel would agree with the claim that there is no law-less human society in the world, and that most likely there never has been one.

Societies belonging to the next, more complex developmental type Hoebel calls "more highly organized hunters." They may be exemplified by the Cheyenne, Comanche, Kiowa, and Northwest Coast Indians of North America. Because of a richer food supply the local groups of these societies increased in size. As a consequence of their greater interaction they aggregated into more inclusive, politically organized bands.

In some instances the interaction was so widespread and vigorous that several bands became welded into what Hoebel calls a "tribal state" (*e.g.,* Cheyenne Indians; 1954: 309-311). Even in these structurally more complex societies kinship plays a significant role in the legal system. The local components of these societies are led by headmen who, especially in the case of the Northwest Coast Indians, used shaming rather than physical punishment as a sanction. Because of Hoebel's insistence on the physical nature of legal punishment, he regards such types of conflict resolution as nonlegal (1954: 316). As a contrast, on the band and tribal levels, formalized chieftainship developed, with a tendency toward hereditary succession (Hoebel, 1954: 309-310). Law on these levels still exhibits, according to Hoebel, the primitive characteristics because of the presence of so-called private law, the necessity for the defendant to accept the sanction, and a weak development of criminal law.

In the sphere of tribal civil (noncriminal) law, the laws of persons still constitute the greatest bulk because a lack of diversification of property, and a consequent paucity of economic conflicts, precluded the development of laws of property and contracts (Hoebel, 1954: 310-311). On the positive side of legal advance we find a wide use of payment of damages as compensation for physical hurt and as a substitute for physical retribution (p. 310).

In this developmental sequence the next more advanced type in Hoebel's scheme is that of "gardening-based tribes." One might well consider this legal retrogression. If Hoebel's sequence of legal complexity is correct, the law of the Plains Indians, who prior to the introduction of the horse into the Plains were mostly sedentary or seminomadic agriculturalists and therefore already belonged to the next developmental type, must have regressed as they took up their nomadic life.

True expansion and elaboration occurs, according to Hoebel, on the level of gardening-based tribes such as the Ashanti, Samoans, Trobriand Islanders, and Iroquois. Introduction of gardening provided a steady food supply and a secure economic basis for sedentary societies whose populations, as a consequence, started to expand. Because of the growth, the population found it harder and harder to maintain face-to-face relations, and thus a more impersonal social control through law became a necessity. At this point of development, kinship does not diminish in importance but begins to play an even greater role as a criterion for membership in social groups, such as

unilineal clans, into which the societies become segmented. Since clans often act as parties to a dispute, the role of law seems to be primarily to keep an equilibrium among interacting and conflicting unilineal groups. The authorities adjudicating the disputes are either members of tribal councils or institutionalized chiefs, some of whom have been elevated to royal status (Hoebel, 1954: 322). Because of the importance of land, structures, domesticated animals, and tools, the law of things begins to compete with the law of persons. Also, criminal law becomes well defined and actions for damages are frequent (Hoebel, 1954: 316-318).

Since the next level of development is marked by the emergence of urbanized cities, thus terminating the leading role of kinship in the social organization and law of the peoples, the societies cease to be primitive and the object of Hoebel's study of the dynamics of the law of primitive man.

From his comparative study of societies of varying complexity Hoebel draws several generalizations about the "trend of law." First, throughout the development of the law of man there is a marked increase in its complexity and heterogeneity. Second, the right to prosecute shifts from the individual and his kin to a well-defined public official. Third, there is a steady trend to extend the judicial and executive powers beyond the local group. Fourth, payment of damages generally becomes a substitute for the death penalty in civil suits (Hoebel, 1954: 327-329; for an earlier version of the trend of law, see Hoebel, 1953). These changes did not occur in the same way in individual societies — there was no single line of development with universally valid stages. On the contrary, the trend exhibits only in general the direction and changes described above.

Paradoxically enough, according to Hart, this trend of law has not occurred in the law itself but only "in the law-enforcement machinery" (1956: 567). Actually the paradox is not a real one. The change did occur in the realm of law, namely in the law of procedure (Hoebel's "adjective law"), that regulates the machinery of enforcement. Consequently there is one more reason to agree with Hart and his evaluation of Hoebel's work on legal dynamics as "a great improvement over Maine" (Hart, 1956: 568). Indeed, in my *Anthropology of Law* I went even further and regarded Hoebel's dynamic theory as superior to theories of all other scholars writing on the same subject, including Durkheim, Savigny, Marx, and Hobhouse (Pospisil, 1971: 190).

Hoebel's theoretical advancement into one of the two

major subdivisions of legal dynamics — the "Change of Legal Systems" (Pospisil, 1971: 127-192) — should not imply that his contribution to the second major subdivision — the "Change of Laws" (see Pospisil, 1971: 193-232) — is negligible or nonexistent. He has not explored systematically the theoretical aspects of the second field, but he and Llewellyn made several introspective statements and in at least one instance made a significant factual contribution (Llewellyn and Hoebel, 1941: esp. 128). However, in the field of legal dynamics the main importance of *Cheyenne Way* lies in the authors' emphasis upon the individual and his role in the judicial as well as legislative process. In other words, they have effectively rejected an erroneous position often taken by anthropologists, sociologists, and philosophers, whose extreme emphasis upon the Durkheimean "society and social forces" approach led them to embrace what Stone has so aptly called "legislative impotence" (1950: esp. 444).

With Hoebel and Llewellyn, law does not always just develop in a socially amorphous way by small steps, so that one can say "society decided" or "a law developed," without identification of the circumstances and persons who shaped and promulgated the new law. Hoebel acknowledged the possibility of an abrupt legal innovation by a gifted tribal individual: "In the primitive world volitional inventiveness is truly a rare occurrence. Conscious tinkering with the social structure or with gadgetry improvement is not the order of the day. Most primitive inventions are nonvolitional" (1949a: 470). Indeed, Llewellyn and Hoebel (1941: 128) were able to record one of these "rare occurrences" in the promulgation of a new law (abstract rule) by Cheyenne Indian chiefs in the adjudication of a case of horse theft. This promulgation is a truly formal and explicit statement, almost unique in anthropological literature. The chiefs declared: "Now we shall make a new rule. There shall be no more borrowing of horses without asking. If any man takes another's goods without asking, we will go over and get them back for him. More than that, if the taker tries to keep them, we will give him a whipping" (Llewellyn and Hoebel, 1941: 128). Aside from the importance of this quotation for the theory of change of laws and legislation in tribal societies, the statement shows the basic empirical attitude of the two scholars who, faced with factual evidence, did not hesitate to contravene well established and popular Durkheimean dogma.

SUBSTANTIVE LAW

In spite of Hoebel's emphasis upon the laws of procedures (adjective law) when depicting and analyzing the trend of law, in his comparative-theoretical interests he has not neglected the sphere of substantive law, as many other legal scholars have done. Indeed, his contributions to the theory of this field have been significant. Basically they fall into two categories: contentual and methodological.

Content. As far as the content of substantive law is concerned, Hoebel tried to identify the legal universals present in any system of substantive law. His findings are summarized in his *The Law of Primitive Man* (1954: esp. 286-287) and include the following generalizations pertaining to legal systems of tribal societies: the almost universal treatment of "excessive abuse of personal control of supernatural powers (sorcery out of hand)" as a crime; a prohibition of homicide of one type or another in every society, combined with every society's permission for what it terms justifiable types of homicide; universal assumption of social inferiority of women; universal acceptance (on a primitive level) of the right of the husband to kill his adulterous wife caught *in flagrante delicto,* coupled with an almost absence of such right on the part of the wife; universal conceptualization of adultery with its criteria varying from culture to culture; and existence of universal rights to private property in some goods.

Method. Hoebel's methodological contributions to the theory of substantive law are dominated by two major interests. He attempts to demonstrate an applicability of Hohfeldian concepts to cross-cultural research, and an elaboration upon the concept and methodological use of "jural postulates." As far as the first interest is concerned, Hoebel accepts the Hohfeldian scheme of legal concepts as a workable tool for a cross-cultural comparative work. In other words he defends the use of a set of originally Western folk concepts as analytical conceptual tools by a law scholar or an ethnologist. These concepts, although not used exactly in the same way (with the same meaning and application) by practicing lawyers, have been formulated by a lawyer who intended to use them as analytical devices by which all legal relations could be precisely defined (Hoebel, 1942; 1946: esp. 848-849; 1954: 46-63). As they stand, they seem to lend themselves to analyses of even nonlegal relations and thus, as Nader says (1969b: 3), "they seem . . . to belong more than half way in the social

sciences." Their cross-cultural applicability "is amply illustrated in Hoebel's 'Law of Primitive Man'," in spite of the fact that Hoebel discontinued the illustration, as Hart charges (1956: 566), on page 63. In my own work I found most, but not all, of the Hohfeldian terms highly applicable and analytically valid.

Hoebel's second methodological interest in the field of comparative substantive law concerns "jural postulates," a term used by Josef Kohler (1914: 4; 1909: 38), Roscoe Pound (1942: 112-118, 133-134), and Julius Stone (1950: 337). Pound applies the term to generalizations abstracted from *de facto* claims made upon the legal system by members of a society. In contrast, Kohler, and with him Stone and Hoebel, view the essential meaning of the term, in Stone's words, as "generalized statements of the tendencies actually operating, of the presuppositions on which a particular civilization is based . . . they are ideals . . . directives issuing from the particular civilized society to those who are wielding social control through law within it" (1950: 337). Hoebel himself contributed to changing the lofty concept into a more workable and concrete anthropological tool. He argues that, "underlying every culture is a body of basic postulates implicit in the world view of the members of the society in question. These are broadly generalized propositions as to the nature of things and what is qualitatively desirable and what is not" (1958: 225; also 1954: 13 ff.). These postulates, close to what Opler called "themes" and others called "values," may be abstracted from explicit statements made by informants as well as from substantive case material (see also Nader, 1965b: 9; Moore, 1969b: 375; 1970: 276). They are also implicit as guiding principles in the cultural institutions of the society in question. Unfortunately, Hoebel himself is not too explicit about the technique of identifying these principles and about the selection of those of basic importance (Moore, 1970: 263). Nevertheless, even if his selections of jural postulates appear to be on the intuitive side and somewhat subjective, the results achieved by Hoebel's postulates in his analysis of seven tribal societies in *The Law of Primitive Man* proved to be so impressive that even so rigorous a critic as Hart is willing to forgive the author's intuition (1956: 566). [For additional successful applications of the jural postulational method see Hoebel's writings on the Keresan Pueblo Indians (esp. Hoebel, 1969: 115) and Pakistan (esp. 1965: 53).]

JUSTICE

Hoebel's postulational approach may be used also in an area of inquiry grossly neglected in modern jurisprudence and anthropology — that of the theory of justice. To be sure, Llewellyn and Hoebel wrote on this subject, differentiating justice of the fact from justice of the law, and primitive justice from legal justice (1941: esp. 304-305), distinctions of categories which I have found applicable in cross-cultural research (see esp. Pospisil, 1971: 233-272). However, Hoebel's postulational method is of particular importance here because it may well be an objective and cross-culturally applicable measure of justice if combined with the general principles abstracted from case decisions (see esp. Smith and Roberts, 1954: 124-148; Pospisil, 1958: 285-288; 1971: 269-270, 345). A just law would be one whose content comprises legal values (identified by Smith and Roberts as being abstracted from legal decisions; in Stone's terms postulates *of* law) which are in conformity with (do not contradict) Hoebel's jural postulates — principles (values) implicit or explicit in the people's morality and institutional structure (postulates *for* law). A test of just law would be, then, essentially a comparison of basic cultural values with what Rheinstein calls *ratio decidendi* (1967: xlviii) — principles that actually permeate legal decisions.

Hoebel gives us an example from Pakistan where indeed jural postulates *for* law, as contained in the Islamic religion, are implemented in legal decisions, thus making them just and therefore binding: "The High Court of West Pakistan has torn itself loose from the old self-delusion of Anglo-American juristic dogma that courts do not make the law but only state it and enforce it. The court is ostensibly seeking to identify the basic postulates of Islam as set forth in the Quran and to relate them to contemporary needs through the Formal National Law" (1965: 53; for comments see: Nader, 1965a: 1; Gluckman, 1967: 379; 1969: 363). In the West it is often assumed that through a broad and thorough education of judges in nonlegal subjects such as philosophy and social science (which actually is often alarmingly lacking) the basic jural postulates enter into the court decisions and thus are firmly embedded into the legal system. Of course this assumption, whether true or not, can be objectively assessed by comparative tests of legal justice.

CONCLUSION

This statement on Hoebel's theoretical contributions to the growing field of anthropology of law is necessarily selective and thus incomplete. Nevertheless, it is safe to claim that his contribution to this discipline, by resurrecting it from the obscurity into which it had fallen after the great achievements of early anthropologists, has been unique. There is possibly no aspect of modern anthropology of law to which he has not given, if not a decisive impetus, then certainly a substantive contribution. It is not surprising that there is scarcely a book or an article on the subject that does not cite or refer to Hoebel or present his theoretical arguments. In the history of any academic discipline there are generally two types of scholars: those who advance it along an established path, and those who set the path itself or change its direction. In my opinion Hoebel definitely belongs to the latter.

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