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# ANTHROPOLOGY AND LEGAL THEORY

I WOULD like to explore, in a general and to some extent tentative fashion, the help which anthropology may provide for those inquiring into the nature of law. It is necessary first to define the material relevant to the inquiry. Anthropologists study societies of widely different types. From the Western point of view they are technologically simple, with agricultural or pastoral economies. But they often have complex forms of social organisations, and some have elaborate political structures. On the whole I have not found relevant studies of societies with forms of central government. This is because anthropologists studying them have not had to think very precisely about problems of the nature of law. Problems, of course, do arise, especially in relation to what is often called custom, that is, a collection of rules not derived from the enactments of the central government or its agencies.[1] But it has been relatively easy to avoid problems of the "What is law?" type, because it has seemed obvious that there is law in the enactments of the chief and the decisions of the courts. On the other hand, studies of societies which lack central government, especially those which lack any form of political institution (which I call "simple" societies), are relevant to my inquiry. There are two reasons for this: (i) if the anthropologist is interested at all in law he is forced to give some attention to the problem of classification and determine whether and how the legal is to be identified in a situation where the usual criteria supplied by legislature and courts are missing; (ii) a study of these societies allows one to discern the minimum forms of behaviour that need to be observed if a group is to be viable. This has important implications for some versions of natural law.

These two reasons supply the theme of this paper. First I consider what may be learnt as to the operation of "law" in simple societies. It is essential to make a preliminary distinction which may seem obvious and yet is often overlooked or not sufficiently observed. This is the distinction between the external and the internal approach to the study of a society other than one's own. The external approach may be manifested in a number of ways. At its most extreme it takes the form of the application to the

[1] *Cf.* the discussion of customary law in I. Hamnett, *Chieftainship and Legitimacy*, Chap. 1.

society under investigation of a theory of law formulated in the context of a different society or culture.[2] But it may take less overt forms; an investigator after describing the social life of a people may use a criterion not recognised by the people themselves to divide the legal from the non-legal.[3] The internal approach is adopted where an investigator, working without preconceptions, attempts to discover the classifications which members of the society use in applying normative notions to behaviour.

There is nothing startling in the proposition that an investigator of a society different from his own should adopt the internal approach. But its implications require some thought. In order to understand and make intelligible the data he discovers, the investigator has to use some concepts derived from his own culture. He would find it impossible to avoid altogether the words "ought," "rule," "right" and "duty." The point is that such words, although indispensable, need to be used with caution. The investigator must try to make sure that the word he chooses to describe a state of affairs does not convey an impression which is misleading. A particular danger arises with the use of the words "rule," "right" and "duty." These are terms with which the investigator is so familiar from his own culture that he may take them as a self-evident means of describing what he finds in the society investigated. But in fact these terms may not be suitable, because of the implications which they carry. A rule implies the existence of conduct which ought to be followed where "ought" has a mandatory or imperative sense. Likewise a right implies strongly that one may require another to behave in some particular way, and duty has a corresponding implication. These terms may be unsuitable for application to behaviour observed in simple societies, both because of their strongly imperative overtones and because they convey a sense of a clearly defined aspect of behaviour to which a mandatory "ought" attaches. If one says there is a rule which requires X to be done, or that people are under a duty to do X, one implies that the range of behaviour which is mandatory (expressed by X) is clearly understood.

I hope I can illustrate what I mean from the way in which a

[2] A recent interesting example is supplied by S. Schlegel's application of Hart's rule of recognition theory to the Tirurary, a Philippine people: *Tirurary Justice* (1970).

[3] B. Malinowski, for example, in his study of the Trobriand islanders uses both the principle of reciprocity and rules placing limits on man's fundamental drives as criteria of law. See especially *Crime and Custom in Savage Society*, and his introduction to H. Ian Hogbin, *Law and Order in Polynesia*.

North Alaskan Eskimo community looks at dealing with property. Among this community it is expected that normally one person will not take or destroy another's property. Cases occur in which A believes rightly or wrongly that he has a grievance against B. To work off the grievance A may destroy some valuable piece of property (a canoe) belonging to B. A typical reaction on the part of B is to take no steps against A, but to proclaim to the community in general that he has all along acted properly. He is satisfied if he is able to get public opinion on his side. I think that it would be a distortion to attribute to this community a rule requiring people to refrain from destroying or taking the property of others, or a rule requiring compensation or return if another's property is taken or destroyed. One needs instead to speak of the way in which people are expected to behave, and to recognise that a certain degree of vagueness or fluidity attaches to what is expected. It would be misleading to impose a sharp dividing line between behaviour which ought to be observed with respect to property and that which ought not to be observed, and to describe such behaviour in terms of rights and duties.[4]

Once the investigator has completed his analysis and unravelled so far as he can the indigenous modes of classification, he will be faced with a variety of behavioural patterns to each of which an " ought " may be attached. In some cases he may conclude that the behaviour forms the subject-matter of a rule, or rights and duties, in others that the " ought " is less prescriptive and justifies a description more in terms of expectations than in terms of rules prescribing behaviour. Expectations may be, and commonly are, generated by rules. But these need to be distinguished from expectations derived from the belief that a particular form of behaviour is proper or appropriate. His problem is to decide which part of his material is to be classified as legal or as constituting the law. To solve the problem he will, I suggest, have to resort to the external approach. In other words, the investigator in constructing his " test " for law has to take into account matters other than the conditions of the society he has studied. But he cannot present his test as self-evident; he needs to recognise the fact that he has adopted an external approach, and to give reasons for the particular approach adopted.

[4] R. F. Spencer, *The North Alaskan Eskimo*, pp. 97 *et seq.* The author wisely does not use the language of " rules," " rights " and " duties," although he does speak of " social norms."

Anthropologists who have adopted the internal approach have not, it seems, been fully aware of the problems involved.[5] It is difficult for anyone who has not conducted fieldwork to judge the accuracy of the data presented, but one cannot escape a suspicion that some of the complexities arising in the description of normatively-regarded behaviour have been overlooked. There does not always seem to have been sufficient attention paid to the distinction between rules and other "ought" statements which, with little violence to the facts, might be used to describe beliefs and evaluations of conduct. Further, when applying what is in effect an externally-constructed criterion for the identification of law, anthropologists neither make clear that they are applying an external approach nor give reasons to justify the criterion selected. Thus one sometimes finds an anthropologist taking law to be a set of rules deemed by the members of the society to be the most important. Importance is evidenced by the fact that the rules have the backing of the whole community.[6] What is happening is that the anthropologist takes rules falling within one of the categories he has found operating in the society and deems these to be law. But he has not said why such a category should be singled out as the hallmark of law.

Suppose one wishes to construct a theory of law applicable to simple societies. One first has to conduct an internal investigation designed to uncover the indigenous approaches to normatively-regarded behaviour. This will yield for each society investigated information on the extent to which it has adopted rules which prescribe behaviour, the way in which it classifies such rules and the varieties of behaviour to which a less prescriptive "ought" attaches. The investigation will necessarily include the study of procedures for the settlement of disputes, since it is through disputes that reliable information relating to rules and other "ought" statements is most readily obtained. Once the information has been gathered the investigator will have to adopt an external approach, and select a criterion by which to distinguish the legal from the non-legal phenomena in the material before him. His most difficult task will be to justify the criterion which he selects.

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[5] *Cf.* the remarks of S. Roberts, "Law and the Study of Social Control in Small-Scale Societies" (1976) 39 M.L.R. 667 *et seq.*

[6] *Cf.* D. Tait, *The Konkomba of Northern Ghana*, pp. 62 *et seq*, 141 *et seq.*, speaking not of law but of "jural activities," "quasi-legal" or "para-legal methods"; M. Fortes, *Kinship and the Social Order*, p. 89; J. G. Peristany, "Pokot Sanctions and Structure" (1954) 24 *Africa* 25.

It is perhaps worth considering some of the possible approaches that might be taken. One approach is to select the dispute process, or an element of it, as the criterion of law.[7] Although there is some attraction in the argument that the way in which a society resolves its conflicts is an essential, if not the essential, element in law, there are reasons for regarding this approach as inadequate. The problem may be put in this way: why should a procedure for the settlement of disputes be singled out as the hallmark of law? The answer might be that the main task of " law " in society is to prevent and control the outbreak of conflict between members of the society. If this is not done the society is likely to disintegrate. Hence the procedures which the society evolves for the treatment of " trouble cases " may properly be called " law " in that society.

An answer along these lines is not entirely satisfactory. The reason is that insufficient attention is paid to the rules or expectations regarding behaviour current within the society. This is obvious in those versions of the dispute approach which seeks to locate law in the actual decisions of the person resolving the dispute. But even the more flexible theories which stress the need to consider the whole history of a dispute are still too narrowly based. They recognise that a dispute arises because people think that they have not received their due, or that others have behaved wrongly towards them. To understand the cause of the dispute, the investigator has to establish the standards of behaviour accepted by the society and determine the degree of " obligation " attached to them. In establishing these standards the investigator of dispute processes has collected part of the material which needs to be scrutinised before a judgment on the nature of law within the society can be made. The difficulty lies in the fact that investigators of dispute processes are generally more interested in giving an account of the relationship of the parties than in examining the way in which the society evaluates conduct to which an " ought " is attached. One can see the reason for the emphasis on the actual course of the dispute. If one wishes to investigate the rules or other

[7] For a variety of approaches, see A. L. Epstein, " The Case Method in the Field of Law," in Epstein, *The Craft of Social Anthropology*, p. 205; P. H. Gulliver, " Case Studies of Law in Non-Western Societies " (Introduction), in L. Nader, *Law in Culture and Society*, p. 11; K. F. Koch, " Law and Anthropology: Notes on Interdisciplinary Research " (1969) 4 *Law and Society Review* 11; V. W. Turner, " Law, Primitive," in *New Catholic Encyclopaedia*; N. Tanner, " Disputing and the Genesis of Legal Principles: Examples from Minangkabon " (1970) 26 *Southwestern Journal of Anthropology* 375; L. Pospisil, *Anthropology of Law*, Chaps. 2, 3; G. Cochrane, " Legal Decisions and Processual Models of Law " (1972) 7 *Man* (N.S.) 50.

" ought " statements accepted by a society it is natural to start with a dispute. A situation in which people have quarrelled about the behaviour either has observed or failed to observe towards the other is likely to focus sharply on such rules as either party alleges the other has not observed. Yet the fact of the quarrel provides merely an appropriate start to an investigation of normatively-regarded behaviour. Where the main object of the investigation is the nature of law, the emphasis should be on the manner in which conduct is evaluated within the society and not on the circumstances which give rise to particular disputes and the methods by which they are resolved.

A better approach is to cast one's net more widely, and consider the rules and other " ought " statements accepted by a society. If, for the moment, one concentrates on rules, can one say that the rules which the members of a particular society regard as most important constitute law for that society? An obvious difficulty is the selection of a criterion by which to determine degrees of importance. One is unlikely to find within a society a neat division of rules into those regarded by the society as important and those regarded as of significantly less importance. Certainly one can look at the way the society employs sanctions for breach, and conclude that the most important rules are those which engage the whole society in their maintenance. This looks well in theory, but in practice even an anthropologist might find it extraordinarily difficult to determine when the society as such is operating a sanction.

A different standpoint might be adopted, and one might look at the advantages of a criterion supplied by the notion " essential to the survival of society." Where one is looking at a simple society, can it be said that its law consists of those rules whose maintenance is essential for its survival? It is again necessary to distinguish between such rules as the external observer finds to be essential for the survival of a particular society, and such rules as the members of the society deem to be essential for its survival. If one presents the rules devised by an external observer as law, one has to accept that the members of the society may themselves not be conscious of these rules. On this view there may be a significant difference between the rules which constitute the law of the society and the rules which the members of the society deem themselves to be following. On the other hand, an investigation of the rules which the members of the society regard as

essential for its survival is also not without difficulty. In particular the investigator may find that the members of the society do not explicitly use the notion of " essential for survival " as a criterion by which one group of rules may be distinguished from another. Hence he will be forced to substitute " most important " for " essential for survival."

An alternative approach is to concentrate on the notion of a rule as such, rather than upon the division of the class of rules into distinct categories. From this point of view it may be possible to draw a distinction between rules and a wide range of expectations to which are attached the notion of " ought." The essence of the distinction lies in the degree of prescription conveyed by the " ought." In the case of a rule the " ought " is mandatory. Where a rule states that a particular form of behaviour ought to be followed, those subject to the rule are required to behave in the way defined. Normally compliance with the requirement is secured through the availability of sanctions. Indeed, in a society which lacks a legislature and a court, it is difficult to see how one could speak of behaviour required of members of the society unless sanctions to secure compliance are available and regularly applied. In the case of an expectation one might still say that behaviour ought to be followed, but one would not go so far as to say that it was prescribed or required or mandatory. Evidence that behaviour was regarded as the object of an expectation and not as a rule may be found in the lack of sanctions. Members of a society might regard certain behaviour as proper, and yet there might exist no means specifically designed to ensure that the behaviour was observed, even though adverse reaction such as criticism might follow upon a failure to behave in the way expected.

An illustration may be taken from J. M. Meggitt's account of the Wa!biri, an aboriginal people of central Australia.[8] He attributes to this people a distinction between an obligation entailed by a particular status, and the manner in which such an obligation is performed. Failure to perform the obligation is treated as a breaking of the law; performance of the obligation in an unusual way is treated as odd, but not as a breach of the law. The difference is reflected in the nature of the community's reaction. For example, a man is under an obligation to give meat to his wife. If he fails to do this he will be physically coerced by his wife's male relations; if he gives her meat derived from an improper source (payment for

[8] J. M. Meggitt, *Desert People*, pp. 251 *et seq.*

a circumcision) he will be exposed to ridicule but not to physical pressure.

A further difference between a rule and an expectation relates to the content of the behaviour prescribed or expected. In a simple society, one would not say that behaviour was required by a rule unless there was general agreement on the specific kind of behaviour required. This does not mean that there would not be cases in which it was unclear whether the rule applied or not. But there should be a clear understanding of the central features of the behaviour required by the rule. Where behaviour is expected but not prescribed, there may also be a clear understanding among the members of the society of the specific content of the behaviour. But I think it will often be the case that considerable vagueness and flexibility are found. There may be an expectation that people should behave in a proper or appropriate way towards their kin. But what in a particular instance is regarded as proper or appropriate behaviour may be the subject of legitimate doubt, that is, there may be a wide range of responses each of which arguably qualifies as proper or appropriate. There will, consequently, be greater scope for disagreement about whether behaviour conforms to what is expected than about whether it complies with what is prescribed.

Personally I am inclined to think that an approach which distinguishes between rules and other " ought " statements governing human behaviour,[9] and locates law in the former, is the most fruitful. I realise that it may not be easy for the anthropologist investigating a simple society to discern whether the behaviour which he observes is the object of a rule or an expectation. But the attempt to classify normatively-regarded behaviour in accordance with such a distinction seems to me a more realistic enterprise than the attempt to classify rules according to the degree of their importance.

An important point still needs to be stressed. Such conclusions as one reaches on the basis of societies which lack legislatures and courts cannot be applied to societies which possess these legal institutions and therefore can be said to possess legal systems. In so far as one wishes to defend the conclusion that the law of a society is those rules which regulate human behaviour, one must accept that it is inapplicable to societies which have legal systems. Once

[9] I am not considering " ought " statements relating to the behaviour of natural phenomena: *cf.* the reference cited in the previous note.

a society has developed specific criteria for the identification of rules of law (for example by means of a law-enacting or a law-enforcing body), the investigation of law in that society is determined, though not exclusively so, by the boundaries inherent in the criteria of identification.

Although I have suggested that anthropologists in their studies of simple societies have not always distinguished with sufficient care between rules and other " ought " statements regarding human behaviour, I think that they do have a significant contribution to make with respect to the analysis of normatively-regarded behaviour. Not until anthropologists have scrutinised a number of societies from this point of view does it seem possible to say anything conclusive about the law of those societies. A rather different type of contribution that anthropology has to make is the opportunity it provides for an empirical verification of some versions of natural law theory.[10] The versions I have in mind are those which offer a set of rules deduced by reason and grounded upon the natural characteristics of man. As an illustration of this approach I have taken the version of natural law put forward by Professor Hart in *The Concept of Law*, which in turn draws heavily on the work of Hobbes and Hume.[11]

In offering what he calls a description of " the minimum content of natural law," Professor Hart's starting-point has been the use of reason in establishing conditions relating to human behaviour which must be met if man as a species is to survive. So far as I can see, his argument is that man, impelled by a wish to survive, has reasons for establishing such rules of behaviour as are necessary to ensure his survival. Since man lives in groups, these rules are those which permit co-existence within the group. In order to arrive at the content of the rules, Professor Hart combines man's wish to survive and certain fundamental facts of his nature and environment in the following way. The fundamental facts are human vulnerability, approximate equality, limited altruism, limited resources and limited understanding and strength of will. Of these the most significant is the " approximate equality " of man with man. No individual possesses by nature such physical and mental superiority over his fellows that he is able to keep them in a permanent state of subjection. If he is to live at peace with his

[10] See also the remarks of M. Mead, " Some Anthropological Considerations concerning Natural Law " (1961) 6 *Natural Law Forum* 51.

[11] H. L. A. Hart, *The Concept of Law*, pp. 181–195.

neighbours and so fulfil his wish to survive, he has to pursue a policy of co-operation and not domination. Man's wish to survive, together with the fundamental facts of his nature and environment, supply reasons for holding that men should adopt certain rules in their relations with each other. Viewed as a whole these rules constitute what Professor Hart describes as "a system of mutual forbearance and compromise."

The rules constructed in this fashion by Professor Hart relate to an individual's person, property and promises. There should be rules which prohibit indiscriminate killing or infliction of violence, and rules which ensure a man's peaceful enjoyment of his property. The latter require a short comment. Professor Hart specifically mentions rules which impose respect for such property as an individual acquires. He does not say anything about rules which ensure the more or less equal distribution of a group's resources among its members. Possibly one is entitled to infer from his remarks on "approximate equality" and the need for "a system of mutual forbearance and compromise" that he would have included such rules in "the minimum content of natural law." With respect to promises, Professor Hart's argument is that the division of labour obtaining in all but the smallest groups, together with the need for co-operation, supply reasons for the development of rules about the exchange of goods and the keeping of promises. Finally Professor Hart adduces the fact that men are prone to temptation and to prefer their own interests to those of others. In this may be seen a reason for the establishment of an organised system of coercion, to ensure that those willing to observe the rules of the society will not be exploited by a dissident minority. A coercive system is required in all societies except small closely-knit groups.

In putting forward his version of natural law, Professor Hart is careful not to commit himself to any particular view of social evolution, or to a view which treats the development of certain rules as necessarily entailed by the occurrence of certain social conditions. He concerns himself merely with the question: given certain facts about man's nature and environment, what rules would it be rational for man to adopt, granted that he wishes to survive? Professor Hart's thesis allows for the fact that men in any particular society might adopt rules which are not rational, and certainly this could be shown to be true in societies where the fact of "approximate equality" was not the dominant characteristic. In societies where power is monopolised by a few, it is possible for

the rulers to govern the society in accordance with rules that would conflict with Professor Hart's " minimum content of natural law." Those with the power may be in a position to reserve for themselves the bulk of the society's resources and to treat in a cavalier fashion the persons and property of those who do not have the power.

However, in societies where there is no power structure and no monopoly of power in the hands of a few, the dominant characteristic is the " approximate equality " of man with man. Consequently one would expect the rules adopted by the members of such a society to be those for whose adoption Professor Hart adduces reasons. His thesis is not disproved should it turn out that the members of a society have adopted rules different from those included in the " minimum content of natural law." But should it be the case that these societies commonly adopt rules not included by Professor Hart in his account, or commonly do not adopt rules which are included, the thesis loses something of its general persuasiveness. One might be able to put the position more strongly. It is difficult sometimes to resist the inference that Professor Hart does suppose there to be a necessary connection between given social conditions and the adoption of certain rules.[12] That is, it seems to be implied in his account that a society based on " approximate equality " of man with man would not be viable unless the rules which he specifies were observed. If one does interpret Professor Hart's thesis as a thesis about the viability of societies which lack power structures, it is possible to seek verification through the investigation of such societies which have existed in the past or still exist today.

Anthropological studies of simple societies, those without power structures, are relevant to Professor Hart's thesis in two ways. If one limits the thesis to a statement of rules derived by reason from man's wish to survive and certain facts about his nature and environment, one may assess its persuasiveness against the results obtained by anthropologists. If the thesis is interpreted as a statement of the rules relating to human behaviour which a society of this type needs to adopt, its accuracy can be verified by reference to these results. The former interpretation I shall call version A and the latter version B.

The question is: how do versions A and B fare in the light of

[12] *Cf.* the remarks on primitive societies at p. 89 of *The Concept of Law.*

data obtained from the anthropological studies of simple societies? Anthropologists have not been explicitly concerned to prove or disprove theories of natural law. Where they have been interested in law they have concerned themselves with the question: what counts as law within a particular society or range of societies? Yet the result of their investigations is often to produce a list of rules which can be construed as necessary conditions for the survival of the human group.[13] In many other writings which are not specifically concerned with law, one can find relevant material. From studying accounts of a large number of simple societies one is able to compile modes of behaviour common to all. Where common modes of behaviour are found, the suggestion appears reasonable that they constitute necessary conditions for the survival of the society.[14]

The first proposition that may be asserted is that all societies without power structures have a rule prohibiting one member of the society from killing another.[15] I think it is reasonable to state the position in this apparently dogmatic manner. A full discussion of the topic would need to investigate such difficult questions as the way in which the boundaries of the society or group were to be drawn, and the actual attitudes exhibited in particular groups to the killing of one member by another. For my purpose I hope that these questions may be left aside. It also has to be recognised that the rule prohibiting killing is frequently qualified. The group accepts that certain categories of person may be killed with impunity. Nevertheless in all simple societies, even those much given to fighting and aggressive activities, the killing of one member by another is regarded as wrong. The same attitude may not be taken to killings which occur between groups. There may be no rule which prohibits the members of one group from killing the members of another, at least where the groups are not closely connected through blood or marriage. Thus one may say that version B of the natural law thesis receives confirmation in respect of a rule prohibiting killing, and that what version A puts forward as a rule derived from reason is in fact observed.

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[13] Apart from the works of Malinowski cited in note 3, *cf.* the approach to law taken by K. N. Llewellyn and E. A. Hoebel, *The Cheyenne Way*, Chaps. 10, 11; and M. G. Smith, *Corporations and Society*, pp. 87 *et seq.*, 94 *et seq.*

[14] Colin Turnbull's study of the Ik, a nomadic, hunting people of the Sudan, is instructive: *The Mountain People*. He shows how a prolonged famine, which leads to a policy of each for himself and a breakdown of normal family and communal life, is causing the dissolution of the whole society.

[15] *Cf.* Mead (1961) 6 *Natural Law Forum* 52.

Physical injuries are not treated in quite the same way as killings. They naturally give rise to quarrels and provoke retaliation, and there may be scales of compensation applicable to different types of injury. But at least in some societies the infliction of an injury is not treated as a serious matter unless it is likely to lead to death.[16] Consequently I think it doubtful whether one can postulate a rule prohibiting the infliction of physical injury as common to all simple societies. As against version B it cannot be said that a general rule prohibiting violence is necessary for the viability of a society or group, and with respect to version A it has to be said that there are societies in which men have not appreciated the reasons for adoption of a rule prohibiting violence in general.

In relation to resources, the most significant point that emerges is the equal distribution and the emphasis on sharing to be found in simple societies.[17] For example, members of the society have equal opportunities to obtain food. There is commonly found a great deal of co-operative activity in cultivating crops, gathering roots, nuts and berries, herding cattle and hunting animals. The products of this co-operative activity are commonly shared among those taking part and their kin. Within the group no one is allowed to go without food unless he is ejected from it. If one were to speak of a rule or rules with respect to resources, I think that the formulation would be in terms of a requirement for co-operation in obtaining food and for sharing what was obtained. Of course one could say that each was entitled to keep such food as he was allocated. But it seems to me that it would be a mistake to treat as primary a rule requiring respect for property acquired by the individual. The emphasis should be placed not on what the individual is entitled to keep, but on what he is expected to share with or contribute to others. Hence, if one were considering the conditions necessary for a viable society, one would have to include a rule requiring co-operation and sharing with respect to resources, even though one were not disposed to exclude a rule requiring respect for property obtained by an individual. Likewise, if one

[16] See W. Goldschmidt, *Sebei Law*, Chap. 8.

[17] A great deal of material on food sharing has been collected by Marshall Sahlins in the appendices to " On the Sociology of Primitive Exchange," in M. Banton, *The Relevance of Models for Social Anthropology*, p. 139. Much variation is found in the degree of co-operation and sharing practised in simple societies. In most there seems to have been considerable emphasis on co-operation but some appear to have been more " individualistic." But even in these support and help were given to those in need. *Cf.* R. Landes, " The Ojibwa of Canada," in M. Mead, *Co-operation and Competition among Primitive Peoples*, p. 87. The other essays in this volume also contain relevant material on the allocation of resources.

were thinking of rules for the adoption of which good reasons could be advanced, the rule about co-operation and sharing should be included.

Promises and organised sanctions form part of Professor Hart's "minimum content of natural law," though their inclusion is subject to qualifications not made in connection with the rules concerning person and property. One of the facts that supplies a reason for the keeping of promises is the division of labour, a fact not present in the smallest groups. Consequently Professor Hart allows for the fact that in some groups there may not exist a reason for the keeping of promises. One problem in assessing this argument is the vagueness of the phrase "division of labour." In all groups there is at least a division of labour between man and woman and adult and child. It is only if one restricts the notion of division of labour to work undertaken by men, that one may say many simple societies have no division of labour and therefore, on Professor Hart's argument, no reason for the development of a rule requiring the keeping of promises. As will be seen, on both interpretations difficulties are created for Professor Hart's thesis.

The anthropological evidence shows that neither the most simple societies nor sometimes even those that technologically and politically are more advanced have explicit rules about the keeping of promises. This does not mean that promises or agreements are not made, or that, when made, they are never kept. Nor does it mean that a person who fails to do what he has said he would do incurs no censure. Occasionally, indeed, the matter can be put more strongly. Among the Ifugao a person who makes a promise to sell land is held to be bound by the promise, and to be liable in damages where he had been the first to broach the matter with the prospective buyer.[18] One notes, however, that even here it is only within strictly defined conditions that a promise is held to create an enforceable obligation. The point is that promises as such do not play a significant role in simple societies. Accordingly, one cannot say that these societies have a rule that promises should be kept. The reason is that emphasis is placed upon something more tangible, namely the giving and receipt of property. People are expected to give to others, not because they have promised or agreed to give, but because of the relationship of blood or marriage which exists between them. This expectation, and often one might

[18] R. F. Barton, *Ifugao Law*, p. 52.

be able to describe it as an obligation, is reinforced by the " obligation " to make a return for what has been received.[19]

If all simple societies are held to have division of labour, at least in the sense that the men do different work from the women, version B of Professor Hart's thesis requires modification and version A becomes less cogent. If Professor Hart were right in arguing that reason suggests the development of a rule about the keeping of promises, it is at least odd that no society characterised primarily by the fact of " approximate equality " should have appreciated and acted upon reason. If the notion of division of labour is applied only to work undertaken by men, many simple societies can be held to have no division of labour. In these societies there is, on Professor Hart's argument, no reason for the development of a rule requiring that promises be kept. The evidence supports this conclusion. But there remains a difficulty. There are societies in which the men specialise and perform different tasks and yet no clear rules about the keeping of promises are found.[20] If, as I suspect, quite a number of such societies have existed, one would again have the oddity of a widespread failure to appreciate the reason for the adoption of a rule requiring promises to be kept. A further difficulty also arises on this interpretation. The " minimum content of natural law " is constructed by reference to two types of group: that with and that without division of labour. Why should the inquiry be restricted to just these groups?

In so far as Professor Hart distinguishes between small, closely-knit groups which lack organised sanctions and other groups which require them, the same objection may be taken. If one is constructing a " minimum content of natural law " on the basis of fundamental facts of human nature, it is not easy to see why groups other than the simplest which allows for the survival of man should be relevant. The simplest societies in fact cannot be said to operate organised sanctions or systems of coercion. They do have sanctions, in the sense that people who do not behave in the way prescribed by rules are subjected to physical compulsion or other forms of pressure specifically designed to ensure compliance or to impose a punishment for breach. But such sanctions are imposed by various persons related to the offender or the

[19] Some of the relevant literature is mentioned in my article on " Reciprocity " (1976) 11 *Man* (N.S.) 89.

[20] *Cf.* M. Gluckman's discussion of contract among the Lozi: *The Ideas in Barotse Jurisprudence*, pp. 180 *et seq.*

victim, or sometimes by members of the group as a whole. They are not activated by a particular person or body whose duty it is to institute sanctions under defined circumstances. On the other hand, what the simplest societies do all possess is some procedure for the settlement of disputes. Each society needs to evolve or practise some means by which disputes between its members may be contained or settled. No group can be viable unless it has a means of permitting the continuation of co-operation despite the occurrence of disputes. And if one is thinking of rules for the conduct of life suggested by reason on the basis of "approximate equality," rules providing procedures for the settlement of disputes have a stronger claim on one's attention than rules establishing a system of organised coercion.[21] The point is that once a society develops an organisation for the infliction of sanctions a power structure emerges and the natural fact of "approximate equality" ceases to be of primary importance.

In general, consideration of the anthropological evidence suggests that version B of Professor Hart's thesis requires modification and that version A loses something of its persuasiveness, since members of simple societies have not always appreciated the reasons said to stem from man's wish to survive and the fundamental facts of his nature and environment. I do not want to say anything further of the relevance of anthropology to the particular thesis presented by Professor Hart. But I should like to pose two questions which require answers if one attempts generally to utilise the results obtained by anthropologists for the construction of a "minimum content of natural law." The first question concerns the distinction between rules observed by members of the same group and rules observed by members of different groups in their dealing with each other. On the basis of studies made by anthropologists, one may be able to construct a set of rules which needs to be observed by the members of a group if the group is to survive. An argument that these rules constitute "a minimum content of natural law" has to meet the objection that the rules have a restricted ambit. They apply only to members of a group in their dealings with each other. How can they be relevant where one is considering relationships between groups? A possible line of argument is the following. Just as life within the group can be maintained only if certain rules are observed, so can the group

[21] In some societies, as in a number of those found in Papua and New Guinea, it is difficult even to detect *rules* which establish procedures for the settlement of disputes.

itself, once it has come into contact with other groups, survive only if it is able to apply similar rules to its relationship with these groups. For example, as between groups indiscriminate killing has to be avoided, and in so far as they are competing for the same resources the distribution must be more or less equal. If these conditions are not observed, in the long run one or perhaps both groups will break up and their members either die or merge with another group or found a new group.

The second question concerns the nature of the data utilised by the person wishing to construct a "minimum content of natural law." Is it the behaviour alone which is relevant, or is it the rules observed by the members of the groups? Does the investigator argue that everywhere members of the groups studied refrain on the whole from killing each other, and that therefore everywhere man ought to refrain from killing man? Or does he argue that all groups studied accept a rule that members should refrain from killing each other, and that therefore such a rule forms part of the minimum content of natural law? In fact the investigator will have to adopt both approaches. He has to start by looking at the way members of the groups actually behave. In so far as he is able to isolate behaviour common to all groups, he will find it impossible to separate the question of what is done from the question of what ought to be done. Members of the group practise the behaviour because they regard it as behaviour which ought to be practised. One might press the investigation further, and ask why they attach an "ought" to the behaviour, but the answer does not seem to be relevant to the construction of a set of natural laws. What is relevant is the investigator's conviction that the behaviour is necessary for the survival of the group.[22] *

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[22] I am most grateful to my colleague Dr. M. Dalgarno, for his searching criticisms of an earlier version of this paper.

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