Edited by Paul Bohannan

Law & Warfare

Studies in the Anthropology of Conflict

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INTRODUCTION

Paul Bohannan

IN WESTERN society—and perhaps in most others, but that is beside our immediate point—conflict is unequivocally "a *bad* thing." It is typical that Western society tends to moralize about bad things—and, having salved its collective conscience, do nothing else. Westerners as a congeries of peoples do not like to think about or talk about cancer or hate or death—or conflict.

In the nineteenth century, we did it with sex—and are now putting up with the pendulum swing the while we congratulate ourselves on being "modern." In this mid-twentieth century, it is conflict and aggression that we have banished from polite society. And that is a tactical error, because conflict is just as basic an element as sex in the mammalian and cultural nature of man.

We shall never banish conflict. Indeed, it is wrongheaded and blind of us to think that we should. Rather, conflict must be controlled and must be utilized profitably in order to create more and better cultural means of living and working together—in short, conflict, whether it be marital or political, can, if it is adequately institutionalized, be used as the growing point of culture and of peace.

One of the important lessons to be gained from this book is the vision of how some societies of the world are racked by conflicts which other societies of the world have "solved." Headhunting and feuding, wager of battle, ordeals and contests—all, in the West, have been replaced by the rule of law. And, indeed, to the lawyers and jurists of the world belongs a major part of the credit for the fact that some peoples of the world have man-

aged to create institutions in which law and justice are on the same side, at least much of the time.

The West—and the world—need a new "code of aggression." We urgently need an institution that will control power institutions in which the power is inherent in two (or more) approximately equal political agents. In short, the next great step in legal institutions *must* be in the field of international law and other bicentric power situations. Bicentric power situations can be solved in some small-scale societies; but those which have developed the intricate national state have not yet solved the problems of the institutionalization of aggression.

The horizon is becoming clear. We know that mankind evolved to his present condition because he invented tools, and that one of the major types of tools to give him "survival value" was the weapon. We also know that every individual human creature must be "socialized"—which means that he must be taught the use of his society's tools, including weapons, and its concepts, including those about conflict. We are coming to know that conflict is not something to be "stopped," for that is merely wishful thinking of the blindest sort. Rather, society and individuals should be equipped to deal with it and profit from it.

Conflict is useful. In fact, society is impossible without conflict. But society is worse than impossible without control of conflict. The analogy to sex is relevant again: society is impossible without *regulated* sexuality: the degree of regulation differs among societies. But total repression leads to extinction; total lack of repression also leads to extinction. Total repression of conflict leads to anarchy just as surely as does total conflict.

We Westerners are afraid of conflict today because we no longer understand it. We see conflict in terms of divorce, rioting, war. And we reject them out of hand. And, when they happen, we have no "substitute institutions" to do the job that should have been done by the institution that failed. In the process—and to our cost—we do not allow ourselves to see that marriage, civil rights, and national states are all institutions built on conflict and its sensible, purposeful control.

This book examines conflict from the anthropological—which is to say, comparative—point of view. There are basically two forms of conflict resolution: administered rules and fighting. Law and war. Too much of either destroys what it is meant to protect or aggrandize.

I am interested, in this book, in bringing together good examples of various ways in which conflict is evaluated and handled. The book opens with three anthropological discussions of the nature of legal phenomena. Institutions and means of conflict resolution are then examined, most of them from several parts of the world: courts, middle men, self-help, wager of battle, contest, ordeal. Anyone can find gaps in either the geographical or the institutional coverage. Probably the biggest gap geographically is China and Russian Asia.

War—a word about which some purists make very restricted definitions (Turney-High 1949)—is represented by fewer articles, in part because there is so much smaller a literature from which to select. Here I have included articles on raids, either for heads or for livestock, and others on ways in which peoples organize for aggression in fairly large groups, and still others on tactics. I have also included an article on Albanian feuds, which are neither law nor war, but which rest uneasily—and most instructively—between the two.

Interestingly enough, warfare is seldom handled in the anthropological literature. With some noteworthy exceptions, the ethnography on it is of poorer quality than that on law, and the theoretical and comparative essays are comparatively rare. Turney-High's is probably the best book, but it runs to description and classification rather than to social and cultural analysis.

As in all American Museum Sourcebooks, an attempt has been made here to cover the phenomena in question as widely as possible, from as wide an ethnographic base as practical, and not to tout any particular area or any particular theoretical point of view. We recognize, of course, that mere arrangement presents a point of view, but this one seems minimally demanding. These articles are meant to present material for thought, discussion,

and term papers. Most have been chosen from sources that are not readily available and certainly are scattered. I think they show how far we, as anthropologists and as Westerners, have come and how far we have to go.

PAUL BOHANNAN

Northwestern University
February 1966

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Part I | THE NATURE OF LEGAL ANTHROPOLOGY

PRIMITIVE LAW

Robert Redfield

ONE WHO SETS out to talk about primitive law has a choice of three roads. The road to the right recognizes law to exist only where there are courts and codes supported by the fully politically organized state. This road quickly becomes a blind alley, for only a few preliterate societies have law in this sense, and these few are not characteristically primitive. Making this choice amounts to saying that there is no law in truly primitive society and that therefore there is nothing for one to talk about.

The road to the left has been recently opened with a great flourish by B. Malinowski (1926; 1934) and is apparently preferred by Julius Lips (1938). He who takes this road does not identify law with courts and codes. To Malinowski law consists of "the rules which curb human inclinations, passions or instinctive drives; rules which protect the rights of one citizen against the concupiscence, cupidity or malice of the other; rules which pertain to sex, property and safety." These rules are of course found everywhere, and in this sense law exists in the most primitive society. Malinowski (1938: lxii) notes that primitive people, like other people, are kept from doing what their neighbors do not want them to do chiefly not because of courts and policemen, but for many other personal and social reasons. In effect he bids us investigate the ways in which social control is brought about in the simpler societies, or at least the mechanisms whereby the individual is induced to do what people expect of him even

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though through selfish interest he is tempted to do otherwise. This conception requires us to include under "law" any norm of conduct conformity to which is, as Malinowski puts it, "baited with inducements." If we take this road we find ourselves concerned with all the complicated and varying considerations of personal motivation and social advantage or disadvantage which are involved in deciding to do or not to do what people expect of us. Following him down this road, one has not too little to talk about but far too much.

There is no reason why one who wishes to do so should not study the mechanisms of social control. The effects of conventionalized relationships between members of a society in restricting the impulses of human nature and in bringing about established modes of conduct is an important subject. It is indeed highly desirable that we should study the functioning of law in its total social and personal setting, not only in primitive societies but in our own society. But to identify this subject matter with "law" has the great disadvantage of ignoring the special peculiarities of law as it is represented by what we know by that name in civilized societies. To us, who live under a developed system of law, law appears as something very different from the personal and cultural considerations which motivate our day-to-day choices of action. It appears as a system of principles and of restraints of action with accompanying paraphernalia of enforcement. The law is felt to be outside, independent, and coercive of us. Within its labyrinths we find our way as best we can.

This criticism, and others, of Malinowski's viewpoint with regard to primitive law have been effectively made by a lawyer, William Seagle (1937: 285). That writer also points out to students of the subject a middle road to follow. Along it at least one anthropologist, Radcliffe-Brown (1933: 202–6), is already going; it seems to me that this middle road is the wisest choice, so here I set out upon it.

I shall adhere to the idea of law that is derived from our acquaintance with the phenomenon as we know it in civilized societies: the systematic and formal application of force by the

state in support of explicit rules of conduct. Like other institutions, law is represented on two sides, as Sumner (1906: 53) said: concept and structure. The concept consists of the principles and the rules restricting or requiring action; it is characteristic of law that these develop an explicitness and internal consistency, and that the maintenance and development of this internal organization becomes to the society, or at least to the lawyers, an objective in itself. The structure of the law is, of course, chiefly, process and court. Law is therefore recognizable in form: in formal statement of the rules, and in forms for securing compliance with the rules or satisfaction or punishment for their breach. The student of primitive law who follows the middle road will not expect to find among the simpler peoples a full development of something which he has first recognized in the complex and literate societies any more than he will expect to find double-entry bookkeeping there, or the outstanding examples of theology. But he may look for the modes of conduct in the simpler societies which in rudimentary form represent or anticipate law. He will not report as "primitive law" all socially or personally induced restraints upon human impulse to do something to the disadvantage of somebody else, but only such rules or procedures which, by their formal or systematic or coercive nature foreshadow our law and seem to illustrate the simpler modes of conduct out of which a law such as ours might develop. Our problem is, in Seagle's words, to determine "whether in the absence of full political organization and of specific juridical institutions such as courts and codes, certain modes of conduct may be segregated from the general body of conduct as at least incipiently legal" (Seagle 1937: 280).

There is, of course, no one "primitive law," any more than there is one primitive society. The preliterate societies vary greatly, and present us with many degrees and kinds of difference with regard to the presence of unwritten codes, of process, and of courts, and with many different forms and combinations of modes of conduct which foreshadow the juridical institutions of our own society. Here I may assemble and compare some of the rudiments

of law as they are variously represented in very various societies. Only at the end of this paper shall I say something in general terms about what the rudimentary law found in primitive societies tends typically to be. The paper is chiefly devoted to pointing out that the beginnings of law are diverse, not unified, and to citing some instances of some of the principal elementary juridical, or proto-legal, institutions. The subject might be stated to be "rudimentary law as represented in some of the simpler societies." Rudimentary law might also be studied in such groups within the modern state as clubs, gangs and families. The highly developed state with its powerful law looms so large that perhaps we do not always see that within it are many little societies, each in some ways a little primitive society, enforcing its own special regulations with a little primitive law of its own. But here I stand as an anthropologist, and speak to the subject from what are sometimes called the "savage societies."

As the philosopher has been said to be able to begin any paper with Aristotle and the biologist with the amoeba, so the anthropologist is likely to start off with the Andaman Islanders; in the present instance this very primitive people is at hand to provide an instance of a society without even the most rudimentary elements of law, as I have just defined it. These natives have no means of composing disputes, and no specific sanctions which may be brought to bear on one who commits generally condemned acts. Apparently, quarrels are not infrequent, and may lead to considerable violence: a man may attack his adversary, or he may become so angry that he runs about ragefully destroying property, and not merely that of the immediate object of his anger, but any property that comes in his way. Yet a careful and critical student of the Andamanese (Radcliffe-Brown 1922: 48) tells us that there is no authority to intervene and no procedure to deal with the situation. The conventions of the society include no formal definition of appropriate compensation for the damage such a man may do, nor any specific procedure by which the injured party may secure revenge or damages, nor any way by which the group as a whole may punish the delinquent or secure itself against

repetition of the act. A man who feels aggrieved may take whatever measures occur to him, acting for himself. If one man kills another, there are no consequences that are to be called "legal." A murderer will leave the camp and hide until he thinks he will be allowed to re-enter; or else the kinsmen of the dead man will take private vengeance. A man who makes himself generally disliked by violence or bad temper is visited by no specific sanction. Sorcery is recognized and is generally reprehensible, but no measures are taken against the sorcerer. In this particular society, therefore, the diffuse sanctions sometimes loosely lumped as "public opinion" (and the considerations of personal advantage and disadvantage which Malinowski is so interested in) are enough to keep the society running, and the people get along without any law at all.

There are other societies in which law is minimal not because conventional remedies are lacking but simply because controversy is strongly disapproved. This appears to be the case among the Zuni Indians. Here legal process is represented in simple form, for secular officials impose fines (Parsons 1917: 278–79), organizations of religious dancers may punish people who are delinquent in the performance of their ritual duties by ducking them (Parsons 1917), and cases of formal procedure against suspected witches are known (Stevenson 1901–2: 393–98). The Zuni constitute a more highly developed society than do the Andaman Islanders; there is a tribal organization, and certain functionaries are invested with authority on behalf of the tribe and may bring a formalized procedure to bear upon delinquents. Yet such occurrences are apparently rare, and this is so because of the strong dislike of controversy and indeed of any conspicuous behavior. Among the Zuni a man is not supposed to stand up for his rights; he is looked down upon if he gets into any sort of conflict or achieves notoriety. The best that one Zuni may say of another is that he "is a nice polite man. No one ever hears anything from him. He never gets into trouble. He's Badger clan and Muhekwe kiva and he always dances in the summer dances" (Bunzel 1929–30: 480).

The case of the Zuni Indians is probably more exceptional than typical. In a great many primitive societies one is supposed to stand up for one's rights and those of one's kinsmen, even if one makes a great disturbance doing so. There is probably a general human tendency to resent an injury and to strike back at the injurer. If a delict is regarded as an injury or a danger to the entire group, the demand of any specially injured party receives more general support. Yet I think it may be declared that in the primitive societies, on the whole, the specific secular sanctions that are likely to qualify as rudimentary law play a larger role in connection with private delicts, or torts, than they do in connection with public delicts, or crimes. What we so often find in the case of offenses against the entire group is that supernatural or ritual sanctions take care of these. Incest is typically regarded as a crime in primitive society. There are certainly plenty of cases where incest is punished by the society, but on the other hand the sometimes specified, sometimes vague results that are supposed automatically to follow, or to be inflicted by the supernaturals upon one who commits such a delinquency, are apt to be a very large part, or even all, of the sanctions which support the rule as to sex relations.

However this may be, the point to be made is that some of the most rudimentary legal institutions appear in connection with the systematization of the retaliative sanctions. *A* has done some injury to *B; B* is disposed to retaliate; the customs of the group say how he is to do it; and we have a very simple anticipation of law. If not curbed by convention a retaliation is likely to lead to a counter-retaliation, and so to public disorder. The Zuni tend to check the tendency at the outset by frowning upon controversy; it is probably commoner to allow the retaliation but to define its terms.

The conventionalization of the retaliative sanctions may involve the way in which the injured party may strike back at the injurer, or it may take the form of a scale of compensation to be paid and accepted in settlement of the claim. In the former case the principle involved is that of meeting force with force, but in