

## P&B Chapter 11 (Last Section=Law)

### I.) Social Control & Law

A.) Social Control constrains the free behavior of individuals by the demands of the group: **norms\*** are upheld by both:

1.) Sacred or Supernatural measures:

a.) **taboos** [from Polynesian **tapu**]-for magical systems, purely a **warning**, "you better not" (or face consequences)

b.) **sins** (for religious systems), a **moral** dimension, "thou shalt not"

2.) Profane **rewards** (social promotion, public esteem, etc.)

3.) Sacred **rewards** (felicity in afterlife, rebirth, etc.)

4.) Profane **sanctions\***

a.) as **children**, Scolding

b.) Ignoring

c.) Corporeal correction or punishment

d.) as **adults**, use **negative withdrawal of rewards or favors** that would otherwise be enjoyed

e.) or **positive painful psychological or physical punishment** like gossip

e.) **ostracism**

f.) physical or spiritual intimidation (i.e., the "conditional curse")

f.) **accusations of witchcraft**

g.) physical attack or force (E. Adamson Hoebel, a modern American ethnologist, defined "law" as the regular (not haphazard) application of force, or fear of its application, by some socially-recognized body or individual if a norm is neglected or if an infraction of it occurs\*)

i.) inducing humiliation (i.e., marching up & down)

ii.) restraint (i.e., "stocks")

iii.) beating

iv.) rape (gang rape & "wantons")

v.) mutilation (in Islam cutting off the left hand, branding)

h.) or destruction of property (Halloween "Trick or Treat")

i.) fines or **indemnities**

j.) banishment (mechanism for discoveries by Vikings)

- k.) killing defendant or proxy killings of relatives, co-ethnics, etc.

## B.) Elements of Law

- 1.) The **Defendant**, the suspected offender
- 2.) The **Plaintiff**, the offended party

## C.) Requirements for Law

- 1.) Socially recognized agent to render judgement/punishment\*
  - a.) ad-hoc (in traditional society)\*
    - i.) the victim
    - ii.) the victim's kin
    - iii.) a third party, a recognized authority
  - b.) institutionalized (in modern society, a jury, judge)
- 2.) Non-arbitrary application ("universal application"), altho all cases are different, similar cases will be treated similarly, arbitrary sanctions are not legal\*
- 3.) Precedent (what happened before)-Leopold Pospisil
- 4.) Rules of Evidence
  - a.) Empirical
    - i.) Eskimo Song Duel
    - ii.) DNA, fingerprints, composite sketches, etc.
  - b.) Non-Empirical (Magical & Religious)
    - i.) **divination** (magically determining defendant)
    - ii.) **oaths** (sworn statements with sacred or spiritual connotations)
    - iii.) **ordeal** (poison, hot knife, boiling oil, etc.)
    - iv.) **conditional curse**
    - v.) **trial by Combat** (Medieval West)
- 5.) Witnesses & cross-examination

## D.) Types of Law

- 1.) **Procedural Law** (the manner in which a breach of law is resolved, or "adjudicated")
  - a.) Who assumes the role of authority?
  - b.) How is it determined that a breach of law has taken place?
  - c.) How is the proper sanction determined?
  - d.) Who imposes or actually executes the sanction?
- 2.) **Substantive Law** (defining the types of behavior that are categorized as illegal, e.g., the violations of **rights** & **duties**-this differs among cultures)
  - a.) **Criminal Law** (against society as a whole)
    - i.) witchcraft (may or may not be denied)

- ii.) robbery
- iii.) murder, etc.
- b.) **Civil Law** or **Torts** (against individuals or groups)
  - i.) adultery (may or may not be punishable)
  - ii.) defamation of character
  - iii.) wife-stealing, etc.
- c.) Some cultures do not make this distinction; there is only torts, even murder (band & tribal)

E.) Forms of Law:

- 1.) **Ad-hoc Systems of Justice** (in the absence of centralized authority, i.e., band & tribal cultures, only Torts)
  - a.) **Familial**, all actions instituted by kin, all sanctions imposed by the plaintiff (the offended party assumes the role of authority)
    - i.) Usually backed by community norms and/or consensus
    - ii.) The Feud (might, as in Eskimo case, lead to murder of entire family)-we know in the southern case of the Hatfields & the McCoys.
  - b.) **Mediator** (a 3rd party is added, often called by the defendant to forstall more stringent sanctions)
    - i.) Most famous is the Nuer Leopard Skin Chief, among pastoralists of Sudan, E.Africa no supra-village authority except for this figure of no power but ritual authority (bless or curse), **corporate guilt**=any patrilineal kinsmen may be killed, hence leads to willingness to pay compensation. Use **sanctuary**=the hut of the chief is a safe house.
- 2.) **Court Legal Systems** (authority invested in a formalized institution, the "court" that can unilaterally decide cases & impose sanctions-found in complex tribes (where mechanisms of corporate authority & enforcement exist), chiefdoms & states, the emphasis shifts from mediating disputes to regulating behavior as kin-based units are too weakened to continue to fulfill that function)
  - a.) Uses **formal public hearings**
  - b.) and **judges**
  - c.) makes distinction between **criminal & civil (Tort)**

- i.) **Incipient courts** (customary law + concept of "crime against society")  
-can occur in some tribal societies such as Cheyenne with Council of Elders & Warrior Societies as enforcers
- ii.) **courts of mediation** (much latitude, applies a "reasonable person model" to examine each case as unique & return to equilibrium, not "punish", Barotse of S.Africa, a small & ethnically homogenous state; junior to senior judges, give opinion in that order & most senior decides-**no lawyers present**, just judges Defendant & Plaintiff)
- iii.) **courts of control\*** (much latitude, but for control apparatus only, not counter-balanced, as in totalitarian states, ancient or modern)
- iv.) **courts of regulation** (little latitude in ethnically diverse states like empires & modern nation states)

F.) Functions of Law:

- 1.) Returns society to equilibrium, the state **before** the delict occurred.
- 2.) Upholds social norms
- 3.) Defines social boundaries, only applicable **within** society outside is raiding or war

G.) Mechanisms of Law:

- 1.) Customary Law
- 2.) Codification of law (Legal Codes-requires writing)
  - a.) 1st law code of Hammurabi in Babylon, 2nd millennium B.C. (**eye for an eye**=corporeal punishment, cut of the hand of the offending surgeon); death for many kinds of offences
  - b.) modern law tends to replace corporeal punishment with **rehabilitation, incarceration and parole**
  - c.) Depersonalization to accommodate anonymous persons
  - d.) Politization (separation from norms & values), to favor certain groups like the nobles, the rich