

Fall 1965

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Recommended Citation

Ronald L. Akers, Toward a Comparative Definition of Law, 56 J. Crim. L. Criminology & Police Sci. 301 (1965)

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TOWARD A COMPARATIVE DEFINITION OF LAW*

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Although American criminology has produced few cross-cultural studies, some criminologists have seen the potential value of comparative analysis to the development of universally valid generalizations about the nature of crime.¹ In the sociology of law also, there is need for comparative work to answer theoretical and practical questions about the growth of legal institutions and the place of law in society. Before the diversity of legal forms can be treated comparatively, however, it is necessary to define law in terms that are applicable to all or most societies. This paper begins the task by applying one possible minimum definition of law to a primitive tribe of the Philippines, the Kalingas, and then suggesting a modification of the definition on the basis of actual cases in that society.

DEFINITION, CLASSIFICATION, AND THE COMPARATIVE METHOD

Criminologists can learn much from social anthropology about the comparative method, which was the cornerstone of Radcliffe-Brown's "natural science of society."² The comparison of many societies reveals the underlying patterns in the diverse and complex variations in human behavior. Ethnographic materials are the basis of comparison, but comparative studies do not proceed directly from ethnographic descriptions. For the perception of patterns and fruitful comparison, there must be classification of the various aspects of whole systems.³

* This is a revision of a paper prepared for a seminar in Social Anthropology under the direction of Dr. Marion Pearsall. Grateful acknowledgement is made to Dr. Pearsall for her invaluable criticisms, suggestions and editing of the paper in various stages of preparation, especially the final stage. Any shortcomings of course remain my responsibility.

¹ Clinard, *Criminological Research*, in MERTON (Editor), *SOCIOLOGY TODAY* 509-535 (1958).

² Radcliffe-Brown, *Preface* to FORTES & EVANS-PRITCHARD (Editors) *AFRICAN POLITICAL SYSTEMS* xiii (1950).

³ *Ibid.*, vii.

Law is the aspect under consideration here; and it is part of the larger system of pressures toward conformity and attempts to prevent deviation from social norms that are termed "social control."⁴ The questions that must be answered as a prelude to adequate comparative studies are: (1) What part of the system of social control is law and what part custom; and (2) What is a legal norm and sanction as distinct from other norms and sanctions? For comparative purposes, law must be separated from other kinds of social control.

The classification must start with a search for the essential elements of law among the diverse legal procedures and other forms of social control in many societies. A minimum definition incorporating these elements would then be a first step toward understanding underlying uniformities in law and law-violation and toward meaningful comparisons of legal institutions among primitive, folk, and modern peoples. The difficulty of studying law cross-culturally has been precisely this lack of clarity about the class of behavior or the part of the whole meant by the term "law."

With greater clarity about the class of phenomena to be considered under law, important theoretical questions can be asked. For instance, we may hypothesize that law becomes more important as a social control as technological development increases, but only if we know what is meant by law. If the definition includes all sanctioning and enforcing devices, the statement is doubtful and too diffuse to test readily. On the other hand, if the definition includes only the kind of legal machinery found in advanced societies, the hypothesis is a tautology.

Or we may ask other questions. Is there a linear relation between law and technological development, or do some pastoral societies perhaps have more complex legal systems than some of the relatively advanced agricultural societies? How

⁴ DAVIS, *SOCIETY AND THE LAW* 39-61 (1962).

are size and density of population and other demographic factors related to law? What is the relation between law and other substructures of society, and what variations are there from one society to another? Is law more systematically organized with tightly-knit kinship systems or with loosely-knit ones? Does law vary with the relative importance of kinship and territory as bases for social structure? What is the relation between supernatural sanctions and legal sanctions? How do the range of legal norms and rates of offenses vary in different societies? And many more.

These are comparative questions of theoretical importance to comparative law. The answers depend upon the definition of law; and the purpose of this paper is to develop a widely applicable, theoretically sound classifying definition. It is recognized that no concept dealing with the vagaries of human behavior can have completely neat, exact, mutually exclusive categories. Nevertheless, there is need for a definition that minimizes confusion and borderline cases while allowing for a sufficiently wide range of behavior to include all or most societies. Too narrow a concept would exclude too many societies while too broad a concept would not permit clear delineation of a class of behavior in any society; either would limit the extent to which meaningful comparisons could be made.

The plea made here for a precise definition of law should not obscure the fact that for some purposes such a definition is unnecessary, irrelevant, or even an impediment. If the interest is in social control in general, the distinction between legal and other norms is not necessary. Similarly, where law is studied as part of political structure, the distinction between law and custom may be unnecessary or of only secondary concern. Nor is the sort of minimum definition proposed here necessarily relevant for the study of law and law-violation in a single society or between societies with very similar, perhaps historically related, legal institutions. It is at the point of asking comparative questions about law in a whole range of varied societies that a minimum yet precise definition of legal behavior is essential.

We can begin defining law by saying that it differs from many other social controls in being *external, formal, and negative*.

Social controls are both internal and external. Observance of the law by most members of a society may be largely a matter of controls internalized in the course of socialization. However, no social control system depends entirely on internal controls. There are always imperfect or incomplete

internalizations, and external controls are invoked both directly and indirectly.⁵ One characteristic of law is that its enforcement is predicated primarily upon the external application of sanctions.

Some norms are informally understood customs carrying customary, informal, or diffuse sanctions. Others are formal, explicitly stated, and often written; they carry regular, organized, and specifically applied sanctions. Legal norms and sanctions are of the latter, formal type.⁶

Lastly, in the sense that legal sanctions include punishment for delict rather than reward for right behavior, they are negative. In law no provision is made to reward the obedient; there is only negative reaction to lawbreakers.

These characteristics are not sufficient for distinguishing legal behavior. External controls serve other institutions also. Many norms are formal, and many negative sanctions occur outside the law. The definition must be further refined.

In modern civilized societies it is possible to define norms as laws if sanctions are applied for their violation by a legally constituted court set up by the political state.⁷ Similar formulations are possible for those non-literate societies with formal systems of social control and readily recognizable courts,—many of the African tribal societies, for example. But such definitions are of no use in distinguishing between custom and law in societies which are not “states” or “political communities” and which have no easily recognized courts. For comparative purposes, a definition is needed that satisfactorily classifies law and custom in primitive societies while remaining applicable to Western society.

Several students of primitive society have attempted such definitions. Malinowski, for example, states that, “The rules of law stand out from the rest in that they are felt and regarded as the obligations of one person and the rightful claim of another.”⁸ Driberry suggests that, “. . . law comprises all those rules of conduct which regulate the behavior of individuals and communities.”⁹ Their definitions are certainly too broad. Are not table manners also rules of conduct that regulate behavior? What is the difference between the informal mutual obligations and claims of brothers,

⁵ NYE, *FAMILY RELATIONSHIPS AND DELINQUENT BEHAVIOR* 5-8 (1958).

⁶ RADCLIFFE-BROWN, *STRUCTURE AND FUNCTION IN PRIMITIVE SOCIETY* 206-208 (1959).

⁷ Davis, *op. cit. supra* note 4, at 41.

⁸ MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* 55 (1959).

⁹ A definition by J. H. Driberry quoted in HOEBEL, *THE LAW OF PRIMITIVE MAN* (1954).

spouses, or business partners and those required by law?

Hoebel has more recently proposed a concept that seems broad enough to apply to many societies but narrow enough to distinguish between law and other kinds of norms and sanctions.¹⁰ He identifies *privileged force*, *official authority*, and *regularity* as the common elements; and of these, the *sine qua non* of law is, "the legitimate use of physical coercion by a socially authorized agent."¹¹ The force may be actual or implied but must be for legitimate cause. Physical coercion otherwise is feud, vendetta, abuse, gangsterism, or something else—not law.

Hoebel's emphasis on force resembles Weber's "coercive apparatus" in readiness for norm enforcement.¹² The coercion need not be applied, but the probability of its application must be recognized. Also, the enforcing agency need not be the judicial bodies familiar to the West.¹³ In Hoebel's terms, *no special* agency is needed; the coercive agent may change with the offense. Moreover, the authority to exercise legal sanctions may be allocated to the offended person or his kin group. Indeed, he maintains that this is a principal characteristic of law in primitive societies.

The present study starts with Hoebel's concept, examines it with reference to one primitive society, and suggests modifications in the light of that examination. The approach is the simple one of trying to classify as law or custom, according to Hoebel's definition, the cases reported in Barton's *The Kalingas*.¹⁴ If the definition is useful for comparative purposes, it should differentiate between law and custom in the society with a minimum of confusion. If it does not, its utility may be questioned. If it does, its applicability may be tentatively accepted pending further testing in different societies.

KALINGA CUSTOM AND LAW

Hoebel's definition affirms that norms are identified as law at the point of their breach. If the

¹⁰ *Ibid.* 26.

¹¹ *Ibid.* 28.

¹² WEBER, *LAW IN ECONOMY AND SOCIETY* (Translated by Shils and Rheinstein) 13 (1954).

¹³ WEBER, *BASIC CONCEPTS IN SOCIOLOGY* (Translated by Secher) 77 (1962).

¹⁴ BARTON, *THE KALINGAS: THEIR INSTITUTIONS AND CUSTOM LAW* (1949). All information about the Kalingas presented in this paper is taken from this book. Reference is to the native system which at the time the field work was done (1930's) was still functioning as a separate entity alongside the American system.

breach is met with force, in threat or in fact, by a socially recognized agent, the norm is a law. Thus, use of his definition requires identification of socially authorized coercion. It is necessary to ascertain the sanctioning agents and determine whether their exercise of coercive sanctions is socially approved; that is, is the agent's right to apply such sanctions recognized by members of the societal group, including the offender?

In the case of the Kalingas, offenses are liable to retaliation by the offended person or his kinsmen even when a third person intervenes as discussed below. Also, the principle of collective responsibility may extend the application of sanctions to relatives of the offender up to third cousins. In theory and often in practice, the whole kin group is the unit of legal action and responsibility; but there is a tendency to center responsibility on the actual offender or his closest relatives. In addition to the kin group, three types of "third persons", or special agents of norm enforcement, figure prominently in the cases: the *pangat*; the *mangi-ugud*; and the "pact-holder."

The *pangat* are community leaders who have emerged through a long process of proving their worth. Their authority is far from absolute; but they perform important functions, especially peace making and mediation. They are called on to discover the culprit in cases of theft, property damage, wounding, and the like as well as to settle both major and minor disputes. The *pangat*'s services may be requested by the offended person or his kinsmen; but usually it is the offender's kin who, fearing retaliation, request one or two *pangat* to make peace proposals for them. In some instances, the offender himself calls the *pangat*. In disputes of various sorts, either side may call the *pangat*; or he may be called by persons other than the disputants who wish a peaceful settlement of the disturbance.

In the most serious rivalries, a formal truce is declared and the *pangat* in the case appoint *mangi-ugud*, or go-betweens for each side. In woundings and killings, there are usually two go-betweens appointed for each side; but in adultery cases there is usually only one, who is sent by the offender. The *mangi-ugud* is usually also a *pangat*, though this is not an essential requirement. However, he should possess the leadership qualities of a *pangat*.

If a truce is broken while negotiations are in progress, the *mangi-ugud* has both the right and the duty to kill or wound the violator. According to the Hoebel definition, truce breaking is clearly a

law-violation. There is full social approval for the physical coercion exercised by the go-between in such cases. The sanction may exist more as a threat than an actuality, however, as Barton was unable to find actual instances of this use of legal force.

Although the go-between is the only agent with the unqualified right of execution in intratribal disputes, his role on the whole is less important than that of the *pangat* since go-betweens are rarely used. On the other hand, the *pangat* has a relatively permanent position and is consulted in many matters. Moreover, the *pangat* is backed by real legal sanctions; it takes a brave soul to question his decisions in regard to the paying of fines or other forms of retribution. His decisions are supported by public opinion and by the considerable power that resides in the *pangat* and his whole extended kin group. The decreed punishment is further backed by the potential force of the offended party.

There is some doubt about the legality of retaliation by a kin group on its own. Following Hoebel, the sanctioning agent must have social approval. The *pangat* and the *mangi-ugud* have that approval; and in their roles there is at least an incipient tendency to establish a class of personnel with a public mandate to intervene and to adjudicate—thus approaching Weber's conception of law. But the same cannot be said when a kin group acts to avenge a wrong done to one of its members.

If there is some uncertainty about law and law enforcement within a given tribal region, there is little doubt that law and legal machinery occur at the inter-regional level. There are peace pacts between several regions, and each region has several "pact-holders." Indeed, most of Barton's cases are cases of pact violation. However, kinship and intratribal structure remain important in inter-regional contacts; and most pact-holders are *pangat* or nearly so in their own region. In fact, possessing one or more pacts is a means to becoming a *pangat*. In addition to general acceptance, the pact-holder must have the approval of the *pangat* in both communities involved in the pact. The *pangat* thus have veto powers over pact-holders.

The pact-holder supervises relations between his home region and the other pact region and is expected to enforce the terms of the pact. He must investigate offenses by members of his group against anyone in the other region and mete out punishment to offenders or their relatives. Failure

in this duty leads to disgrace for himself and his family and may result in a broken peace pact. Punishment usually takes the form of indemnification. If the offense is that of killing or wounding, however, the pact-holder must either (1) kill or wound the offender or one of his kin, or (2) collect fines both for the relatives of the offended person and for himself (as a pact-holder he stands in a fictitious kinship relation to the corresponding pact-holder in the other region).

When the pact-holder exercises his right of execution he often, though not always, pays "wergild" to the victim's kin, which casts some doubt on the degree to which his authority to exact punishment is publicly acknowledged. Yet the pact-holder has a clearer mandate than the go-between, who never pays for his executions. The pact-holder is selected publicly while the go-between is simply appointed by the *pangat* for a particular case. Barton maintains that both have the right of legal execution since "both are agents of the regional unit, of the police power of a budding state."¹⁵ In Hoebel's terms also, their authorization by society to apply such sanctions makes both legal executioners.

Having identified the sanctioning agents and their degree of social approval, we turn now to the problem of classifying Kalinga norms as law or custom.

Some of Barton's cases are clearly custom rather than law; that is, they do not involve real or implied physical sanctions as a rule. Relations between men and their mistresses, for example, follow custom. Neither the mistress nor her children can legally enforce demands on the man, and she is free to accept or reject *his* demands. By custom a man should take care of his mistress, provide for her in illness, avenge her injuries, and leave a little something to their children. But no legal sanctions compel him in these matters; no threat of force is involved, and he is subject only to the informal pressures of their kin groups to do what is "right". (See Barton, Case 17).¹⁶

Custom also governs broken engagement contracts. When either family breaks such a contract, the other family is usually reimbursed for expenses incurred during the engagement. But there is no threat or use of force; the reimbursement is simply

¹⁵ *Ibid.* 199.

¹⁶ The cases of law and custom among the Kalingas listed by Barton are numbered consecutively. References to cases here are by number and appear in parentheses in the text.

the "genteel" way to soothe the injured pride of the jilted party. Other customary norms are invoked in cases of parental forcing of a marriage, divorce, parent-child relations in various conflicts, certain boundary regulations, and many other situations.

A number of the cases illustrate norms that seem to lie on the border between custom and law according to our definition. In childless marriages, for instance, the norm is for husband and wife to retain separate rights to the property each brought to the marriage; and neither may use the other's property without permission. (Case 7) In breaches of this norm, the offended party may call on his (or her) kin to punish the offender. But his threat or use of force does not go unchallenged since the offender may in turn call on relatives to fight back. Community recognition of the right to enforce the norm is thus not complete. At the same time, the norm borders on law since the offense is recognized as a theft; and the offender usually offers indemnity, thus acknowledging, however grudgingly, the other party's right to exact retribution. The theft of small objects from non-relatives is also a borderline example. Such thefts are often settled informally by simple restitution; but at other times, *pangat* and even go-betweens are called and indemnity exacted.

Rape cases also involve norms which, using the present definition, it is difficult to assign certainly to law or custom. (Cases 102, 103, 104) The Kalingas consider rape impossible since they believe the cooperation of the woman is necessary to achieve penetration. Yet they recognize that a woman can be terrorized into submitting, in which case she and her kin group may retaliate or demand indemnity. Their right of coercive punishment is not fully acknowledged, however. Not only may no indemnity be forthcoming, but they in turn may face retaliation.

Even in serious cases of wounding and killing, the definition does not permit clearcut classification in all instances. The offending party may offer "wergild." If this were accepted without further action or if retaliation on the offending group ended the affair, we might say law was involved. Unfortunately, acceptance of wergild does not insure an end to hostilities. Retaliation may still be resorted to, leading to more retaliation from the other group and eventually to a full-fledged blood feud. (Case 79) Other cases also illustrate the tenuousness of the right to exact regularized and fully accepted punishment. (Cases 3, 20, 22, 30,

31, 63, 88, *et passim*) Thefts, failure to pay debts, wounding and killing, rape, and other acts are breaches of accepted norms; but they do not confer on the injured party an unequivocal right to apply physical force in punishment. Hence we cannot say without reservation that the norms involved are laws by our definition. They may be on the way to becoming laws since wergild frequently is accepted as ample payment and no further retaliation occurs, but at present their status is uncertain.

A more clearly legal norm states that one must not violate *apa*, a temporary injunction against using an unowned place within the region where a relative has died. An *apa* on a location applies to all until it is lifted, and the right to declare a place *apa* is sanctioned by public opinion. In practice, only men with sufficient power to enforce it ever invoke *apa*; but the fact that they are privileged to use force for this purpose suggests that a legal norm is involved. (Cases 22, 23, 24, 25, 27)

Adultery seems to be a special type of law-violation. Adultery is a crime of unfaithful wives only, and a husband may divorce such a wife. For her part, the wife has no claim to her husband's fidelity; and so long as he philanders with unmarried women, no point of law is involved. An aggrieved husband, however, may kill the adulterer on the spot if caught *in flagrante*; or he may accept indemnity from the man. In neither punishment is he ordinarily aided by his kin, which makes adultery something of a special and private case. But public opinion supports the husband as the punishing agent.

Truce breaking during negotiations is clearly illegal by our definition since the go-between has the socially approved power to execute the violator. Another class of truly legal norms surround the peace pacts since pact-holders are authorized to enforce the provisions of the pact which may include boundary definitions, guarantees of neutrality, guarantees of services and safety to visitors in the territory, and other general and specific items. The pacts also charge the pact-holder to recover lost or stolen goods, facilitate the collection of debts, and procure indemnities and revenge where members of his own region have offended persons in the other region.

Many of the offenses which are ambiguous in nature at the regional, or tribal level are clearly offenses against legal norms when the parties involved come from different regions united by peace pacts. The socially authorized agent is the pact-holder who has the ultimate power of physical

force in enforcing the provisions of the pact. (Cases 49, 51, 57, 58, 59, 82, *et passim*)

DISCUSSION AND CONCLUSION

The foregoing attempt to apply Hoebel's definition of law to the classification of norms in a particular primitive society indicates some need for modification. Difficulties and confusion arose especially in cases where the "socially authorized agent" of coercion was the offended person himself or his kin group. A definition that allows the real or implied physical force to be exercised by the injured party seems too broad to be useful. At least for the Kalinga data, it becomes ambiguous where kin groups have some sanction for punishing offenders against their members but not enough to protect them from retaliation by the original offender's kin group. Another formulation seems in order; namely:

A social norm is law if its breach is met by physical force or the threat of physical force in a socially approved and regular way by a socially authorized third person.

"Third person" is a generic term for persons or agencies other than the offender and offended or their relatives—unless the kinship role is transcended by an "official" role as is the case with the *pangat*, go-betweens, and pact-holders among the Kalingas. Furthermore, the third person need not apply the force directly himself. He may use others, including the offended and his kin group to exact punishment; but when they apply such sanctions, it must be at the direction of the third person. Lastly, the authorized agent need not stand in constant readiness to enforce norms, as Weber would have it; he may be simply a person who is sometimes called on to settle disputes or adjudicate other cases. At the same time, he must be more than a mediator; his decisions should be respected

and considered binding by both parties. Socially sanctioned physical coercion is still the essential ingredient, but it must be authorized by someone other than the offended person or group.

Following the proposed definition would lead to the conclusion that some societies have no law. These societies would have no place in comparative law, but their number is probably not great. The gain in clarity far offsets the loss of range in social forms. Radcliffe-Brown would limit the definition even more:

" . . . the field of law will therefore be regarded as coterminous with that of organized legal sanctions. The obligations imposed on individuals in societies where there are no legal sanctions will be regarded as matters of custom and convention but not of law; in this sense some simple societies have no law, although all customs are supported by sanctions."¹⁷

One further point may be made. The definition suggested here opens the way to systematic study of linkages between legal and political systems, which are often considered together.¹⁸ The third person may well also be an administrator of political, economic, military, legislative, ritual, and other public affairs; or the third person may be an agent or agency of the political organization assigned specifically to judicial duties. Whatever the relation, attention to it opens up other theoretical problems. For instance, more detailed study of the enforcing roles of *pangat*, go-between, and pact-holder among the Kalingas might show that their interrelations form an incipient political structure based on both kinship and territory.

¹⁷ RADCLIFFE-BROWN, *STRUCTURE AND FUNCTION IN PRIMITIVE SOCIETY*, *op. cit.*, *supra* note 6, at p. 212.

¹⁸ PERISTIANY, "LAW" IN *THE INSTITUTIONS OF PRIMITIVE SOCIETY* 39 (1956).