WHITE BLACK LEGAL LAW JOURNAL

ISSN: 2581-8503

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

WWW.WHITEBLACKLEGAL.CO.IN

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Editor-in-chief of White Black Legal – The Law Journal. The Editorial Team of White Black Legal holds the copyright to all articles contributed to this publication. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of White Black Legal. Though all efforts are made to ensure the accuracy and correctness of the information published, White Black Legal shall not be responsible for any errors caused due to oversight or otherwise.

WHITE BLACK LEGAL

EDITORIAL TEAM

Raju Narayana Swamy (IAS) Indian Administrative Service officer

Dr. Raju Narayana Swamy popularly known as Kerala's Anti Corruption Crusader is the All India Topper of the 1991 batch of the IAS and is currently posted as Principal Secretary to the Government of Kerala . He has earned many accolades as he hit against the political-bureaucrat corruption nexus in India. Dr Swamy holds a B.Tech in Computer Science and Engineering from the IIT Madras and a Ph. D. in Cyber Law from Gujarat National Law University . He also has an LLM (Pro) (with specialization in IPR) as well as three PG Diplomas from the National Law University, Delhi- one in Urban Environmental Management and Law, another in Environmental Law and Policy and a third one in Tourism and Environmental Law. He also holds a post-graduate diploma in IPR from the National Law School, Bengaluru and a professional diploma in Public Procurement from the World Bank.

Dr. R. K. Upadhyay

Dr. R. K. Upadhyay is Registrar, University of Kota (Raj.), Dr Upadhyay obtained LLB , LLM degrees from Banaras Hindu University & Phd from university of Kota.He has succesfully completed UGC sponsored M.R.P for the work in the ares of the various prisoners reforms in the state of the Rajasthan.

Senior Editor

Dr. Neha Mishra

Dr. Neha Mishra is Associate Professor & Associate Dean (Scholarships) in Jindal Global Law School, OP Jindal Global University. She was awarded both her PhD degree and Associate Professor & Associate Dean M.A.; LL.B. (University of Delhi); LL.M.; Ph.D. (NLSIU, Bangalore) LLM from National Law School of India University, Bengaluru; she did her LL.B. from Faculty of Law, Delhi University as well as M.A. and B.A. from Hindu College and DCAC from DU respectively. Neha has been a Visiting Fellow, School of Social Work, Michigan State University, 2016 and invited speaker Panelist at Global Conference, Whitney R. Harris World Law Institute, Washington University in St.Louis, 2015.

Ms. Sumiti Ahuja

Ms. Sumiti Ahuja, Assistant Professor, Faculty of Law, University of Delhi, Ms. Sumiti Ahuja completed her LL.M. from the Indian Law Institute with specialization in Criminal Law and Corporate Law, and has over nine years of teaching experience. She has done her LL.B. from the Faculty of Law, University of Delhi. She is currently pursuing Ph.D. in the area of Forensics and Law. Prior to joining the teaching profession, she has worked as Research Assistant for projects funded by different agencies of Govt. of India. She has developed various audio-video teaching modules under UGC e-PG Pathshala programme in the area of Criminology, under the aegis of an MHRD Project. Her areas of interest are Criminal Law, Law of Evidence, Interpretation of Statutes, and Clinical Legal Education.

Dr. Navtika Singh Nautiyal

Dr. Navtika Singh Nautiyal presently working as an Assistant Professor in School of law, Forensic Justice and Policy studies at National Forensic Sciences University, Gandhinagar, Gujarat. She has 9 years of Teaching and Research Experience. She has completed her Philosophy of Doctorate in 'Intercountry adoption laws from Uttranchal University, Dehradun' and LLM from Indian Law Institute, New Delhi.

Dr. Rinu Saraswat

Associate Professor at School of Law, Apex University, Jaipur,
M.A, LL.M, Ph.D,

Dr. Rinu have 5 yrs of teaching experience in renowned institutions like Jagannath University and Apex University. Participated in more than 20 national and international seminars and conferences and 5 workshops and training programmes.

Dr. Nitesh Saraswat

E.MBA, LL.M, Ph.D, PGDSAPM
Currently working as Assistant Professor at Law Centre II, Faculty of Law, University of Delhi. Dr. Nitesh have 14 years of Teaching, Administrative and research experience in Renowned Institutions like Amity University, Tata Institute of Social Sciences, Jai Narain Vyas University Jodhpur, Jagannath University and Nirma University.
More than 25 Publications in renowned National and International Journals and has authored a Text book on Cr.P.C and Juvenile Delinquency law.

WHITE BLACK LEGAL

Subhrajit Chanda

BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

WHITE BLACK LEGAL

A CONTEMPORARY ANALYSIS OF ANTHROPOLOGICAL SCHOOL OF JURISPRUDENCE

AUTHORED BY - DIGVIJAYA SRIVASTAVA

CHAPTERIZATION:

1. INTRODUCION: In this chapter discussion about the historical as well as historical and anthropological school of law will be dealt with.
2. HISTORICAL ASPECT AND ORIGIN OFANTHROPOLOGICAL SCHOOL OF LAW- in this chapter the historical evolution of the anthropological school of jurisprudence shall be dealt with.
3. DEFINITION OF LAW ACCORDING TO ANTHROPOLOGICAL SCHOOL OF JURISPRUDENCE
4. CONTEMPORARY ANALYSIS AND JUDICIAL PRECEDENTS: It will deal with the present approach towards the historical approach of law
5. CONCLUSION: It will deal with the coverall conclusion of whole project topic
6. BIBLIOGRAPHY: here all the books that have been referred to while making the project have been mentioned.

WHITE BLACK LEGAL

ABSTRACT

Anthropological school of jurisprudence regards law to be having a biological growth, an evolutionary phenomenon and not as arbitrary, fanciful and artificial creation. They connect law with a community's past, their traditions and myths and define, identify and expound it as an expression of its instinctive senses of inner utility and a common consciousness reflected in the form of popular feeling, sentiments, beliefs and practices.

The historical jurists have expounded the law to mean a backdrop of the historic cultural matrix of a community bound by its peculiar racial outlook and national qualities which make it an entity having its own unique cultural aspect.

INTRODUCTION

Among several Schools of Jurisprudence, the Historical school holds a very importance place and is propounded by great jurists like Montesquieu, Hugo, Burke, Herder, F.K.Von Savigny and H. Maine. Historical jurisprudence, viewed law as a legacy of the past, a product of each individual community or people of nation impeding any reflecting its peculiar traits, unique customs, special habits and other peculiarities which are deeply rooted in its heritage and culture Accordingly, historical jurists regard law a biological growth, an evolutionary phenomena and not as an arbitrary fanciful and artificial creation.

Many great jurists gave their views about this school of jurisprudence some of the highlightable ones have been mentioned hereforth:

Montesquieu (1689 -1755) as Sir Henry Maine observed, that Montesquieu was the first jurist who followed the historical method. He made researches into the institutions and laws of various societies and come to the conclusion that" Laws are the creation of climate, local situations, accident or imposture" Though he did not lay any principles as to relation between the law and society, yet his suggestion that the law should answer the needs of the time and place was a step in the direction of new thinking. His famous work is the "spirit of law" approved in 1948.[1]

Burke 1 (1929.1797): He stressed the importance of tradition and gradual growth of law against wreck less shifting of political order as advocated by French revolution aries.

Hugo (1583.1645) The view of Hugo is that law like language and manners of people forms itself and develops as situated to the circumstances. The essence of law is its acceptance, regulation and observance by the people.

F.K. Von Savigny (1779.1861): He is the founder of Historical school. To him law is a product of time, the germs of which like the germs of state, exists in the nature of men as being made for society and which develops from this germ in various forms according to the environing influences which play upon it. He observed that the law is prehistoric. In all societies it is found already established

[1] V.D.MAHAJAN,Eastern Book Publication, Lucknow, Fifth Edition

like their language manners, and political organization~ Law languages customs and government have no existence but one force and power in people According to savigny, Law is a rule of human action and conduct sanctioned by national usage. It is always based on populalr support and approval. He held that all early laws was customary and the function of legalization is merely to supplement and redefine customs. Customary law is a law as an expression of the general consciousness of right and not by virtue of sanction of legislature. To him law like language, grows with the growth and strengthens with the strength of people and finally dies away as the nation loses its nationality. Law is henceforth more artificial and complex, since it has a twofold life as a part of the aggregate existence of the community which it does not cease to be and secondly as a district branch of knowledge in the hands of jurists. According to him the nature of any particular system of law was reflection of the spirit of the people who evolved it. This was later characterized as volksgeist by putcha, a disciple of savigin. Sangnys thesis has been criticized on may grounds national consciousness alone cannot make law for so also every custom has not the force of law. Volksgetist is not only the source of law similarly customs not always based on popular consciousness. As to contribution we may said that he interpreted jurisprudence and law In terms of peoples will volksgeist and this sowed the seeds of modem anthropological and sociological law in relation to society comparative is another development which has emerged as a result of saving's work.

Putchta1 (1798-1856) : To him the idea of law came due to conflict of interest between the individual will and general will. That automatically formed the state which delimits the sphare of the individual and develops into a tangible and workable system. The contribution of putcha is that he gave two fold aspect of human will and origin of state.

Sir Henery Maine (1822-1888) [2]Sir Henery Maine was the legal member of viceroys executive council in India. He is mainly associated to Historical school of jurisprudence. His main works are' Ancient Law" village community "Early History of Institution" and dissertation on early law and customs. His evolution of law is based on the evolution of spciety, may be the Hindu, Romans, Anglo Sexons celtic, Hebrew or German communities. Miane was the one to first coin the term Anthropological school of jurisprudence. He has given his theory of evolution of law based on legal anthropology. Maine made a comparative study of law of the various legal system and traced the

[2] V.D.MAHAJAN,Eastern Book Publication, Lucknow, Fifth Edition

course of their evolution, though he gave no definition of Law. As per Maine the law developed through the following stages- (1) At first the law was made by the commands of the rulers belived to be acting under the divine inspiration as the inspiration by Themistes in the Homeric poems. (2) In the second stage the command crystallise in to customary law. (3) In the third stage the knowledge and administration of customs goes into the hands of a minority usually of a religious nature, due to the weakening of the power of original law makers. (4) Then under fourth stage, comes the era of codes. Now law is promulgated in the form of a code, as solon's Attick code, or the Twelke Tables in Rome.Maine further states that the societies which do not progress beyond the fourth stage which clases the 'era of spontaneous legal development are static societies. The societies which go on developing their law by new methods are called progressive. Progressive societies develop their laws by three methods - (1) Legal fiction (2) equity & (3) legislation. Legal fiction change the law according to the changing needs of the society without making any change in the letter of law. These are innumerable examples of it in English and Roman Law. Equity consists of those principles which are considered to be invested with a higher sacredness than these of positive law. It is used to modify the last which is most direct and systematic method of law making. As to contributions of Maine, we find in him a very balanced view of history. Savigny explained the relation between community and the law but maine went further and pointed out the link between development of both and purged out many of the exaggerations which savigny had made. Maine studied the legal system of various communities and by their analysis laid down a comprehensive development of law. He reorganised legislation as a very potent source of law. He used the study of legal history mostly to understand the post and not to determine the future course and standards, and in this field he made valuable contribution to legal theory. Maine's theory preaches a belief in progress and it contained a sociological approach.[3] Modern historical jurisprudence in England was born with the publication in London of Maine's *Ancient Law* in 1861, the year of Savigny's death. Until then historical research in law had been neglected, but from that time on, the field was assiduously cultivated. In reaction against natural law and under the influence of Thomas Hobbes, the tendency in England had been to regard law as the command of the state, and the task of the jurist was conceived as a concern with the analysis of positive law without regard to historical or ethical considerations. Maine broke with these traditional attitudes. Probably influenced by Rudolf von Ihering (*Der Geist des römischen Recht*, 3 vols., Leipzig, 1852–1865), Maine was stimulated to apply the historical method to jurisprudence.

[3] http://shodhganga.inflibnet.ac.in/bitstream/10603/49120/12/12_chapter%203.pdf

Charles Darwin's *Origin of Species*, published two years before *Ancient Law*, also probably influenced Maine.[4]

Maine rejected the natural law, rationalistic, and a priori approaches to the nature of law. In his *Early History of Institutions* (London, 1875) he saw a people's law as compounded of opinions, beliefs, and superstitions produced by institutions and human nature as they affected one another. Indeed, English common law seemed better to exemplify Savigny's views than did the law of Germany, which drew heavily on Roman law. But as an Englishman, Maine saw in law more than a people's customs; he observed and took into account the creative and reforming work of Parliament, and so he was led to recognize legislation as an instrument of legal growth. And he found that equity and legal fictions played creative roles in the common law. In these respects he departed radically from Savigny's monistic approach to law and its sources.Maine's comparative historical studies, which took into account diverse legal systems, kept him from a belief in the mystical uniqueness of a people and its genius and its law; he observed uniformities as well as differences in different legal orders, and so he was led to suggest that similar stages of social development may be correlated with similar stages of legal development in different nations. Maine differed from Savigny also in believing that custom might historically follow an act of judgment, so that the jurist could be seen to have had a creative role in making the law, even though he claimed only to have found it. Maine also noted the part played in early societies by the codification of customary law. In revealing the ideals operative in a society at a particular stage of its development and in relating them to social conditions, Maine stimulated the development of the use of the sociological method in jurisprudence. It thus became apparent that just as law cannot be divorced from history, so, too, it cannot be divorced from philosophy and sociology. Thus, if Savigny's historical jurisprudence was mainly conservative in import, Maine's work had a predominantly liberalizing effect. Then too, Maine's work influenced the development of comparative legal studies.[5]

Anthropological jurisprudence, first developed as a specialised discipline in the nineteenth century, has challenged many of the paradigms of the positivist view of law and, most relevantly for this study, has produced the various theories of legal pluralism, discussed separately below under 'The legal

---

[4] https://www.encyclopedia.com/humanities/encyclopedias-almanacs-transcripts-and-maps/historical-school-jurisprudence

WHITE BLACK LEGAL

pluralist approach'. This section discusses its other major contributions to the study of non-state justice systems and also highlights its current limitations. Initially, the evolutionist school dominated legal anthropology It was believed widely that all societies passed through clear and inescapable stages of development, distinguished by increasing complexity, and this was extended to include stages of legal development. Various legal systems were studied and compared with the aim of charting a general evolutionary direction, from a primitive to a civilised state. The ethnocentric bias was such that Western European states represented the highest stage of development—a belief that was very convenient for the imperialistic policies of the European powers. [6]Since the late nineteenth and twentieth centuries, there have been three separate periods in the development of the field of legal anthropology. The first was the publication of the major empirical monographs before the 1960s that were mainly ahistorical, ethnographic descriptions of a single ethnic group and were concerned with seeking to understand whether all societies had law or its equivalent. A small number of monographs, including Maine's Ancient Law (1861), Malinowski's Crime and Custom in a Savage Society (1967) and Llewelyn and Hoebel's The Cheyenne Way (1941), provided the baseline for the discipline. These monographs set the general framework for the methods of research that continue to be employed. Malinowski's work led the movement 'out of the armchair into the village', insisting that some legal phenomena could be understood by direct observation in the field. Before him, most scholars had relied for their material on the accounts of travellers, missionaries and colonial administrators. Malinowski looked at the 'sociological realities' and the 'cultural mechanisms' acting to enforce law and demonstrated the variety of different forces that operated to maintain peace in the Trobriand Islands, including factors such as the cohesive force of relationships of reciprocal obligation. He stated: In looking for 'law' and legal forces, we shall try merely to discover and analyse all the rules conceived and acted upon as binding forces, and to classify the rules according to the manner in which they are made valid. We shall see that by an inductive examination of facts, carried out without any preconceived idea or ready-made definition, we shall be enabled to arrive at a satisfactory classification of the norms and rules of a primitive community, at a clear distinction of primitive law from other forms of custom, and at a new, dynamic conception of the social organisation of savages.[7] Following such works, the ethnocentric notion of evolutionism was criticised and writers turned their attention to the diversity of legal systems rather than their unity and to analysing them

[6] http/anthropology%20of%20law
[7] http/anthropology%20of%20law

within their own terms rather than with reference to a notional universal standard. With the exception of Malinowski, the other works during this period considered law primarily as a framework rather than as a process. Humphreys observes that through the influence of Durkheim on Radcliffe-Brown, it became a fundamental tenet of…anthropology from the 1920s to the 1950s that the anthropologist's task was to discover the "rules" governing the structure of the society' under study. The influence of such beliefs is so strong that even today what Moore describes as the 'venerable debate' on the topic of the complex place of norms in customary systems continues. Generally, however, later lawyers and anthropologists disagreed with such a focus on norms, stressing that law in traditional societies consisted of processes as well as norms.

For example, Sack argues that 'Melanesian law does not express itself in obligatory norms but in the actual social organisation of the people' Narokobi similarly pointed out that in classical Melanesia, law was not a specialist discipline, but rather 'an integral part of the way in which people went about various tasks in a community'] He comments that the emphasis 'was not on the law or the rule or the norm but on how to settle the conflict'. In the African context as well, Moore writes that It is fairly well agreed that in many (most) African settings there was much that operated in the "resolution" of disputes other than a system of norms'.[8]

In the mid-1960s, there was then a shift towards the study of dispute settlement and of law as a process, in which the study of substantive rules and concepts was subordinated to the analysis of procedures, strategies and processes. Malinowski, who was already questioning the assumption that 'savages' invariably followed the 'rules', had foreshadowed this shift. Malinowski's work thus gave rise to a new epistemological base in legal anthropology—namely, 'processual analysis', which studied the processes involved in the settlement of disputes. This contrasted with the prevailing idea of normative analysis that was based on the idea that law consisted, in essence, of a number of written and explicit norms and was often presented in codified form. Humphreys identifies two ideas behind this shift: the first is 'that social change and areas of potential instability can be best understood and identified by focussing on disputes for evidence of changing norms, areas of ambiguity in social relationships and attempts to control change'. The other idea is demonstrating that the basic principles used to investigate and adjudicate disputes in developed and less developed societies are similar.

[8] Donovan, James (2008) Legal Anthropology: An Introduction. Lanham, MD: AltaMira Press

WHITE BLACK LEGAL

Snyder observed that the studies in this period were limited because they did not acknowledge the profound social and economic changes that were occurring as a result of the colonisation process. [9]

The third period is the move since the mid-1970s towards the gradual elaboration of a plurality of approaches and more explicit concern with theory and attention to the role of the State. In the 1980s, anthropologists came to feel that 'the ethnographic case-study methodology of dispute processes was too narrow a canvas of analysis'.It was argued that local disputes needed to be analysed within their socioeconomic and historical context.Further, the case method was also criticised by some postmodernists, who claimed that 'the choice of the case as the unit of analysis shifts attention away from routine compliance with law and toward deviant and otherwise extraordinary behaviour, away from concord and to conflict'.There were two responses to this. First, as discussed below, under the term 'legal pluralism', a debate arose as to how to conceptualise local processes and norms within the wider context of state laws and domination. The second response involved a 'critique of the atemporal quality of case studies of dispute processes and their Durkheimian understanding of dispute settlement as "social control"'.

The preceding discussion demonstrates that legal anthropology has made a number of useful contributions to answering the specific questions this study is concerned with: first in research methods and second in emphasising certain aspects of the legal system that legal scholars tend to overlook, including the numerous modes of conflict management outside the courts and the general social context of the law. At present, however, legal anthropology is limited in a number of respects. First, as Zorn points out, during the period legal anthropology has developed, 'law and anthropology have proceeded from different premises and have embraced different goals'. [She further explains that anthropology's primary aim is accurate description; the pre-eminent aim of law…is prescription'.As a result, there is little general comparative work or theorising about the universal basis of norms or legal institutions in contemporary legal anthropology.[10] For example, Franz von Benda-Beckmann argues that it is rare in legal anthropology to have systematic comparisons of legal systems.Second, with the significant exception of the development of the theory of legal pluralism, discussed below, legal anthropology has been in a period of stagnation and largely devoid of

[9] Donovan, James (2008) Legal Anthropology: An Introduction. Lanham, MD: AltaMira Press
[10] Donovan, James (2008) Legal Anthropology: An Introduction. Lanham, MD: AltaMira Press

theoretical innovation in the past 20 years.[11] Riles therefore commented that in the 1980s legal anthropologists suffered a 'crisis of identity' and saw a waning of interest in their methods and subject matter. She explains that practitioners of legal anthropology now pessimistically perceive the possibilities of their discipline. Likewise, although it is now increasingly fashionable for lawyers to turn outside their discipline for grand insights, they do so with increasing wariness. The image of what anthropology might have to offer, the totally new insight, the epistemology-bursting perspective, never seems fulfilled.

In addition, legal anthropologists seem currently to be turning their attention away from their traditional focus of analysing the intersections between indigenous and European law, to analysing non-colonised societies such as Europe. and the legal system of the United States.

HISTORICAL ASPECT AND ORIGIN OF ANTHROPOLOGICAL SCHOOL OF LAW

It is difficult to say with any certainty when the anthropology of law began; scholars were conducting what today would be classified as anthropological studies of law and legal systems long before there was any self-consciousness of 'legal anthropology' as a distinct and legitimate sphere for research and writing. Some might even point as far back as the fifth century BCE in Greece (Herodotus) or eighteenth-century France (Baron Charles-Louis de Montesquieu, 16891755) in tracing the roots of comparative anthropological scholarship on law and political systems. Another notable early writer in this area was the renowned German legal scholar Friedrich Karl von Savigny (1779-1861), and Henry Maine. Savigny's 1814 anti-codification pamphlet, The Vocation of Our Time for Legislation and Jurisprudence, made the argument that law and legal institutions are the unique expressions of a people's culture and history and cannot be understood apart from them.[12]

Nevertheless, within the European and US traditions, the mid-nineteenth century marked the high point of what one can call proto-legal anthropology. Within twenty years of each other, four anthropological studies of law and legal institutions were published that had, collectively, a profound

[11] http://anthropology%20of%20law
[12] Just, Peter (1992). 'History, Power, Ideology, and Culture: Current Directions in the Anthropology of Law', 26 Law and Society Review 373-412.

WHITE BLACK LEGAL

influence on a growing body of theory about the origins and nature of human societies. In 1861, Johann Jakob Bachofen (1815-1887), a Swiss scholar, published his seminal Mother Right: An Investigation of the Religious and Juridical Character of Matriarchy in the Ancient World.11 Bachofen drew from a wide range of comparative materials in order to argue that human institutions, including law and morality, were originally conceived within matriarchies.

In this same year, Henry Maine (1822-1888) published Ancient Law, another landmark study.12 Like Bachofen, Maine used a wide range of information about different societies and historical epochs—in this case attempting to prove that cultural evolution is universally marked by a progression from status, based on kinship, to contract, which emerges with the rise of larger and more complex societies. John McLennan's (1827-1881) Primitive Marriage (1865) made an even more explicit link between anthropological studies of law and evolutionary theories of society, basing his argument for female-centered social rules on the effects of selective pressures that purportedly resulted from early conditions of material scarcity.13 Indeed, McLennan carried on a regular correspondence with Charles Darwin (1809-1882), whose Origin of Species had been published in 1859.

Finally, the American lawyer Lewis Henry Morgan (1818-1881), who was himself influenced by Bachofen, published his famous work Ancient Society in 1877, which established the relationship between law, cultural evolution, and comparative research. The shift to evolutionary models in these early works itself marked a turn toward historical context and away from abstract, timeless analyses of 'social contract' or sovereignty, which were not adequate to understanding the complexity and variability found in actual societies. This convergence in understanding emerged despite otherwise stark theoretical and political differences between scholars such as Maine and Morgan. [13]

Most contemporary anthropologists of law would not accept the validity of the armchair methodologies employed by these earlier scholars, nor, in most cases, the unilineal evolutionary conclusions reached throughout these important early works. Particularly problematic under current anthropological approaches would be older evolutionary models that erroneously viewed modern Western society as the pinnacle of an evolutionary development whose earlier stages were

[13] Just, Peter (1992). 'History, Power, Ideology, and Culture: Current Directions in the Anthropology of Law', 26 Law and Society Review 373-412.

exemplified by contemporaneous so-called 'primitive' societies. Nevertheless, the nineteenth-century scholars established one important foundation that connects their work with much contemporary research and theorizing in legal anthropology: the requirement that researchers study and analyze law in its cultural and historical contexts.

Beginnings of legal ethnography and theories of structural-functionalism -Despite the fact that Morgan spent time with the Iroquois in upstate New York and then used his experiences in his first writings, he was arguably not the first legal ethnographer. The bulk of his most important work, Ancient Society, was derived from his comparative reading and analysis in ancient history rather than from what today would be recognized as ethnographic research. On the other hand, the canonical view that Bronislaw Malinowski (1884-1942) was the first ethnographer of law (rather than Morgan) is perhaps growing less persuasive, in light of changing views within anthropology during the last twenty years on what constitutes ethnography, fieldwork, and the locations where anthropological knowledge is produced.[14]

Yet Malinowski, a Polish-born British social anthropologist, nonetheless transformed the anthropological study of law both theoretically and methodologically. Malinowski broke with the great armchair polymaths of the nineteenth century by demanding that any scientific study of law be done, not through the extremely detailed comparativism that had defined the field until that time, but through the application of three innovative methods. These were: (1) participation in the day-to-day life of the people in order to gain deeper understanding of their culture and institutions; (2) long-term residence to get a sense of patterns over time; and (3) mastery of the local language sufficient to conduct research without using translators. Using these ethnographic methods in the Trobriand Islands (1915-1918), Malinowski developed a theory of law that moved away from the cultural evolutionary approach of the nineteenth century and instead focused on how sanctions within society functioned in relation to wider social relations.[15]

---

[14] http/anthropology%20of%20law

[15] Just, Peter (1992). 'History, Power, Ideology, and Culture: Current Directions in the Anthropology of Law', 26 Law and Society Review 373-412.

WHITE BLACK LEGAL

DEFINITION OF LAW ACCORDING TO ANTHROPOLOGICAL SCHOOL OF JURISPRUDENCE

Legal Anthropology provides a definition of law which differs from that found within modern legal systems. Hoebel (1954) offered the following definition of law: “A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting”

Maine argued that human societies passing through three basic stages of legal development, from a group presided over by a senior agnate, through stages of territorial development and culminating in an elite forming normative laws of society, stating that “what the juristical oligarchy now claims is to monopolize the knowledge of the laws, to have the exclusive possession of the principles by which quarrels are decided”[16]

This evolutionary approach, as has been stated, was subsequently replaced within the anthropological discourse by the need to examine the manifestations of law’s societal function. As according to Hoebel, law has four functions:

1) to identify socially acceptable lines of behaviour for inclusion in the culture. 2) To allocate authority and who may legitimately apply force. 3) To settle trouble cases. 4) To redefine relationships as the concepts of life change.Legal theorist H. L. A. Hart, however, stated that law is a body of rules, and is a union of two sets of rules;

1. rules on conduct ("primary rules")
2. rules about recognizing, changing, applying, and adjudicating on rules on conduct ("secondary rules")

Within modern English Theory, law is a discrete and specialized topic. Predominantly positivist in character, it is closely linked to notions of a rule-making body, the judiciary and enforcement agencies. The centralized state organisation and isolates are essentials to the attributes of rules, courts and sanctions.

[16] http/anthropology%20of%20law

WHITE BLACK LEGAL

However, this view of law is not applicable everywhere. There are many acephelous societies around the world where the above control mechanisms are absent. There are no conceptualized and isolated set of normative rules – these are instead embodied in everyday life. Even when there may be a discrete set of legal norms, these are not treated similarly to the English Legal System's unequivocal power and unchallenged pre-eminence. Shamans, fighting and supernatural means are all mechanisms of superimposing rules within other societies. For example, within Rasmussen's work of Across Arctic America (1927) he recounts Eskimo nith-songs being used as a public reprimand by expressing the wrongdoing of someone guilty.[17]

Thus, instead of focusing upon the explicit manifestations of law, legal anthropologists have taken to examining the functions of law and how it is expressed. A view expressed by Leopold Pospisil[7] and encapsulated by Bronislaw Malinowski:

"In such primitive communities I personally believe that law ought to be defined by function and not by form, that is we ought to see what are the arrangements, the sociological realities, the cultural mechanisms which act for the enforcement of law"

Thus, law has been studied in ways that may be categorized by as:

1.) prescriptive rules 2) observable regularities 3) Instances of dispute.

Order and regulatory behaviour are required if social life is to be maintained. The scale and shade of this behaviour depends on the values and beliefs held by a society deriving from implicit understandings of the norm developed through socialization. There are socially constructed norms with varying degrees of explicitness and levels of order. Conflict may not be interpreted as an extreme pathological event but as a regulatory acting force.

This processual understanding of conflict and dispute became apparent and subsequently heavilytheorized upon by the anthropological discipline within the latter half of the nineteenth century as a gateway to the law and order of a society. Disputes have become to be recognised as necessary and constructive over pathological whilst the stated rules of law only explain some aspects of control

[17] http/anthropology%20of%20law

and compliance. The context and interactions of a dispute are more informative about a culture than the rules.

Classic studies deriving theories of order from disputes include Evans-Pritchard work Witchcraft, Oracles and Magic among the Azande which focused upon functional disputes surrounding sorcery and witchcraft practices, or Comaroff and Roberts (1981) work among the Tswana which examine the hierarchy of disputes, the patterns of contact and the effect norms affect the course of dispute as norms important to dispute are rarely “especially organised for jural purpose” Order and regulatory behaviour are required if social life is to be maintained. The scale and shade of this behaviour depends on the values and beliefs held by a society deriving from implicit understandings of the norm developed through socialization. There are socially constructed norms with varying degrees of explicitness and levels of order.

Conflict may not be interpreted as an extreme pathological event but as a regulatory acting force.[18]This processual understanding of conflict and dispute became apparent and subsequently heavily theorized upon by the anthropological discipline within the latter half of the nineteenth century as a gateway to the law and order of a society. Disputes have become to be recognised as necessary and constructive over pathological whilst the stated rules of law only explain some aspects of control and compliance. The context and interactions of a dispute are more informative about a culture than the rules. Classic studies deriving theories of order from disputes include Evans-Pritchard work Witchcraft, Oracles and Magic among the Azande which focused upon functional disputes surrounding sorcery and witchcraft practices, or Comaroff and Roberts (1981) work among the Tswana which examine the hierarchy of disputes, the patterns of contact and the effect norms affect the course of dispute as norms important to dispute are rarely “especially organised for jural purpose” Within the history of Legal Anthropology there have been various methods of data gathering adopted; ranging from literature review of traveller/missionary accounts, consulting informants and lengthy participant observation. Furthermore, when evaluating any research it is appropriate to have a robust methodology capable of scientifically analysing the topic at hand. The broad method of study by legal anthropologists prevails upon the Case Study Approach first developed by Llewellyn and Hoebel in The Cheyenne Way (1941) not as “a philosophy but a technology” This methodology is applied to

[18] http/anthropology%20of%20law

WHITE BLACK LEGAL

situations of cross-cultural conflict and the correlating resolution, which can have sets of legal notions and jural regularities extracted from them.[19]

Contemporary scenario and present rulings relevant to the Jurisprudential Thought

The Anthropological School of Jurisprudence has been an important set of Guiding philosophy and legal principle in the Indian Legal System, wherein many cases have been decided , keeping in view the historical aspect of the issue.

In State of Karnataka vs Appabale Ingale [20] in a soul stirring judgement passed by the apex court held, Just. K Ramaswamy observed that the agonies of black Americans to prick the conscience of upper caste Indians for their attitude towards the untouchables (dalits) in these words:

"In 1852 Sir Federick Doughlass , a leading Black abolitionist of slavery described his agony on the eve of Independence day of America in his famous speech .." This Forth of July is yours not mine. You may rejoice but I will mourn. …" The Article 17 of Constitution of India aims to liberate the society from blind and ritualistic adherence and traditional beliefs which lost all legal or moral base. State of M.P. v Ram Krishna Balothia [21] The aim of the Penal provisions like the SC/ST Act has been to mend the various kinds of discriminative effects caused to them by the so called upper class hindus in the Indian society.

In Mohammad Ahmad Khan vs Shah Bano Begum[22] it was observed that the Hindu Code Bill of 1956 was aimed to reform the hidnu society and get it out of the Grip of The Social elites and do complete social and economic justice to the Women and Adopted children.

CONCLUSION

According to the Historical school of Jurisprudence,law is not to be regarded as an arbitrary grouping of regulations laid down by some authority. Rather, those regulations are to be seen as the expression of the convictions of the people, in the same manner as language, customs and practices are

[19]https://www.encyclopedia.com/humanities/encyclopedias-almanacs-transcripts-and-maps/historical-school-jurisprudence
Jurisprudence and Legal Theory by Tondon
[20] AIR 1993 SC 1126
[21] AIR 1995 SC 1189
[22] AIR 1995 SC 1531

expressions of the people. The law is grounded in a form of popular consciousness called the Volksgeist.

Laws can stem from regulations by the authorities, but more commonly they evolve in an organic manner over time without interference from the authorities. The ever-changing practical needs of the people play a very important role in this continual organic development.

In the development of a legal system, is it the professional duty of lawyers – in the sense of the division of labor in society – to base their academic work on law on ascertaining the will of the people. In this way, lawyers embody the popular will.

One branch of this school of law is the anthropological school, according to this branch of historical school of jurisprudence, It was believed that all societies passed through clear and inescapable stages of development, distinguished by increasing complexity, and this was extended to include stages of legal development. Various legal systems were studied and compared with the aim of charting a general evolutionary direction, from a primitive to a civilised state.During these stages of legal development, customs and other forms of binding laws were developed.Custom is at the heart of this anthropological school of jurisprudence.It is one of the necessary viewpoints for better understanding of legal concepts.Thus , the Anthropological school of jurisprudence(which is an important part of historical jurisprudence) not only gives us a detailed, empirical and accurate insight into the origin and evolution of law, but it also gives us a whole new approach towards better understanding of legal concepts by answering the question 'why´ rather than 'what' .

WHITE BLACK LEGAL

BIBLIOGRAPHY

1.) Jurisprudence and Legal Theory by Tondon
1) V.D. MAHAJAN, Eastern Book Publication, Lucknow, Fifth Edition
2) S.R. Myneni Jurisprudence and Legal Theory, Asia Law House, 2nd Edition

INTERNET WEBSITES

1.) www.encyclopedia.com

2.) www.studylecturenotes.com

3.) www.legalbites.in/historical-school-jurisprudence

4.) www.shodhganga.in/historical school of jurisprudence