

**Legal Realism and Early Law:
The influence of American legal doctrine
in the study of non-Western law 1920-1960**

Kaius Tuori

16 October 2007

Contents

1. Background
2. Objectives
3. Chapter plan
4. Methodology and Sources
5. Bibliography

Background

The purpose of this study is to examine how influences from a movement in legal studies called American Legal Realism revolutionized the study of early law and society from the 1920s to the 1960s by shifting attention from the 19th century formalistic, and in many cases, German and British, preoccupation with written law codes and legal systems to a social relations and culture based approach. This transfer could be summed up as law in action vs law in books, meaning that instead of the law codes of early societies scholars began to investigate how law worked in concrete cases and in the society itself. Furthermore, it was understood that far from being slaves to immutable customs and traditions, people worked within the legal tradition and manipulated it to their own advantage.

The significance of this transformation is demonstrated by the way lawyers still approach foreign legal cultures either by endorsing them or denouncing them. For example, a significant portion of lawyers still regard the claims of the incompatibility of democracy and human rights with the so called Asian values as feeble excuses made by brutal dictatorships. In contrast, as European countries are currently supporting the reconstruction of Afghan society by re-educating its judges, the law they teach to the Afghans is a sanitized version of traditional tribal law with the occasional sprinkling of human rights added. Both of these tendencies are continuations of long traditions that span at least to the Enlightenment. In order to have a binding effect in the minds of the people, does law need to adhere to cultural values?

When Western lawyers attempt to understand foreign legal cultures, they are faced with the same dilemmas that haunt every contact with alien traditions. In legal studies, the main opposites in this respect are universalism and particularism. Universalism is a tradition supported fervently by the advocates of human rights, as it claims that a common set of rules is applicable to all humans regardless of culture. The supporters of particularism contradict, saying that law is a part of culture and that denouncing law as unacceptable means the same as denouncing the entire culture. The law and culture puzzle is further complicated by the idea of legal pluralism, the discovery of several normative orders in existence, for example state law, indigenous law or custom, and religious rules. Who can dictate what constitutes customary law and what culture contains in a particular situation?

Historical study of law and the discovery of foreign cultures is still an emerging field: such studies like Lauren Benton's *Law and Colonial Cultures* (2002) have been overshadowed by scholarship in the field of international law, where magisterial works like Martti Koskenniemi's *The Gentle Civilizer of Nations* (2002) have outlined the development of intellectual history in great detail. The history of primitive law remains to be told.

In anthropology proper, the intellectual history has been marked by controversy about the complicity of anthropologists in colonial enterprises, which have been outlined in numerous studies since the 1970s.¹ The study of early law in general has become specialized in different culture specific sub-fields, with the result that like in anthropology, the common intellectual roots have been largely forgotten. As a result of this amnesia, scholars working in the field of law and social science studies usually describe the beginnings of the movement in the 1970s, while overlooking the fact that similar studies begin to appear already a hundred years earlier. The fact that the common roots of the

¹ Asad 1973; Vincent 1990.

study of law and society are in the controversy between legal formalism and realism in the late 19th and early 20th centuries means that law and anthropology share a common intellectual background in the way things like culture were perceived.

Objectives

The current research project on the impact of American Legal Realism on the study of early and non-Western law 1920-1960 is a part of a larger post-doctoral project on the intellectual history of the study of primitive law from the nineteenth century to the 1960s. As the final chapter of the book to be written, its purpose is to explore the transformation from formalism to empirism or realism, in practice the transformation from colonial studies showing traits of Darwinian evolutionism to modern studies in legal anthropology.

The main aim of this study is to examine the influence of Legal Realism in the study of early and non-Western law² and its consequences. This main theme can further be elaborated into three separate questions: a) how these connections between students of early law and legal realism happened, b) what consequences did it have for the understanding of law, both then, and in the current scholarship, and c) what kind of intellectual baggage was imported along with these influences.

The study of 'primitive' cultures was not simply a way of making observations about far-flung peoples that lived in uncivilized dwellings, it was also a form of social criticism of the

² From the late nineteenth century, the students of primitive law could be divided into those examining ancient or early civilizations, such as Henry Sumner Maine, and those studying contemporary primitive societies, such as Henry Lewis Morgan. The division was not absolute and many combined both fields.

modern society.³ Just like the reformers of modern art reached for primitive or native art for inspiration and renewal during the 1920s, the works of ethnographers were significant in ways that are perhaps difficult to grasp now. For example, Margared Mead's *Coming of Age in Samoa* (1928), an anthropological study of adolescent behavior in the Pacific, became an instant classic and a strong statement in the contemporary debate over freedom of sexuality. Although anthropology and law were separated by the thick walls of faculty separation at universities, legal realists and anthropologists shared several common denominators, such as progressive reform-mindedness, leftist and cultural leanings, and Columbia University.

The most famous example of the co-operation between legal realists and anthropologists was culminated in the seminal joint study *The Cheyenne Way* (1941), by Karl Llewellyn, a leading legal realist from Columbia, and E. Adamson Hoebel, one of the main anthropologists of the era, a student of Franz Boas, also from Columbia. It was by no means an isolated case of co-operation, although not all legal realists saw anthropology useful.⁴ Llewellyn's and Hoebel's book was a self-conscious effort to break from the normative mold established by earlier anthropologists. In it, the laws of the "primitive" culture were collected and presented as in a codification. When no clear rules were to be found, it was at times determined that the primitive people simply had no laws. For example, a Comanche informant was asked, "What kind of law did you have?" He answered simply that "We didn't have any law in the old days." At that, the matter was

³ "Primitive" as a concept is currently deemed very non-PC. Its use was, however, a sign of a more sympathetic approach to the cultures it referred to, considering that it superseded words like "rude" and "retarded" in scientific parlance.

⁴ Kalman 1986, 18.

closed.⁵ What Llewellyn and Hoebel wanted to do was to observe the law as it manifested itself in the cases.

Legal Realism is commonly defined as a belief that law is a product of human action and therefore it is the result of the aims of different groups and individuals. Legal realists wanted to emphasize the importance of human will and fallibility both in the law making and interpretation processes. However, there is a fundamental difficulty in this premise. Like Morton J. Horwitz has written, legal realism was and is notoriously hard to define, as the movement had no clear leader or programmatic texts.⁶ An early influence to legal anthropology was Justice Oliver Wendell Holmes, a precursor of the realist movement, whose words were quoted on numerous occasions by authors outside strictly legal studies. Many of the realists had active interests in the use of social sciences in the study and understanding of law.⁷ Besides Llewellyn, other realists interested in legal anthropology and Native American issues were Felix S. Cohen, who worked on legal issues dealing with Federal Indian law, and Huntington Cairns.⁸

It has been my impression that legal anthropologists prefer to position themselves as exponents of the study of law understood as social relations and behavior, and opposed to the idea of law as an autonomous legal system that exists as the creation of professional lawyers. Even an author as recent as Sally Falk Moore saw it necessary to reiterate her

⁵ Hoebel 1964, 736. The conviction that native Americans did not have any law was widely shared. For example the American Bar Association passed a resolution in 1891 that demanded that the federal government should without delay give laws and courts to the poor Indians. Transactions of the 14th Annual Meeting of the American Bar Association, Aug. 26 1891.

⁶ Horwitz 1992, 208-212 (secondhand quote, book not available at the time of writing). Laura Kalman (1986, 4-44) dubs the legal realists as functionalists, whose greatest common denominator was their opposition to the reigning Langdellian formalism, or as Kalman calls it, conceptualism.

⁷ Schlegel 1995.

⁸ Cohen 1935; Cohen 1942; Cairns 1931.

belief that law exists in the actions of the people in her classic study of 1978.⁹ Perhaps unknowingly, Moore was actually repeating the claims presented over a century earlier in Germany. Then, advocates of early legal nationalism like von Savigny asserted that law should be found in the common conviction of the people rather than the abstract theories of scientists.¹⁰

The common intellectual roots of law and anthropology can be found in the nineteenth century romanticistic movement called the Historical School of Jurisprudence, which was founded by von Savigny and dominated continental European jurisprudence for the better part of the century. The same Hegelian intellectual currents that were the foundations of the Historical School of Jurisprudence in Germany also strongly influenced the founding fathers of American anthropology, some of whose founders, like Franz Boas, were actually trained in Germany. American Legal Realism was in turn very much constructed on the writings of such 19th century thinkers like Rudolf von Jhering, whose intellectual roots were in the Historical School of Jurisprudence.¹¹

It is, therefore, not at all clear where and how these influences traceable to the Historical School were transferred to the study of law and anthropology. The main options are either through the social sciences route through Boas, Post, and Weber, or the legal studies route through Jhering, Kantorowicz, Weber and Llewellyn. To claim, as Hoebel does, that legal anthropology is unmistakably following Llewellyn is to jump to conclusions.¹² It would nevertheless be wrong to assert that the Realists and Anthropologists simply continued on the lines of the Historical School and its successors. As Moore has asserted, there is a

⁹ Moore 1978, 78-79. See also Merry 1999, 117-120 on the influence of theories like CLS.

¹⁰ von Savigny 1814, 11: '... der eigentliche Sitz des Rechts das gemeinsame Bewußtseyn des Volkes sey.'

¹¹ Kantorowicz 1934, 1241.

¹² Hoebel 1964, 737, 742.

paradigmatic shift in their work, as they denied the all-binding role of custom and recognized the active use of traditional elements by different actors in concrete situations.¹³

Through this study in intellectual history, I wish to prove that many of the models and hypotheses prevalent in the study of early and non-Western law today are, in fact, partly inherent in the tradition itself and therefore prone to be unconsciously repeated. For example, the idealization of original and untainted folk customs at the expense of rational reasoning is one of these models. Because we are dealing with unconscious processes, it is helpful to examine their effects through other, more practical matters. In this study, I will present two examples of transitions, dispute settlement as the definition of law and the law of contract formation, as viewpoints on more fundamental matters.

The first example deals with dispute settlement and the way of studying law through and as demonstrated by the disputes. Even though this is clearly an innovation that transformed the study of early law by freeing it from the preoccupation with rules, especially with written laws, its provenance is a more difficult question. Is it possible to deduce from the fact that this methodology spread at the same time as American Realism that it was inspired by it? Making these claims may also be difficult because it is also true that the case method was an innovation of Christopher Columbus Langdell, a pre-eminent legal formalist who held sway over the US legal education during the last decades of the nineteenth century. Or should we simply say that observing cases was a method inherent in the common law, as it was first used in anthropology by Malinowski in Britain during the 1920s?¹⁴

¹³ Moore 199, 102.

¹⁴ Malinowski himself does refer to several legal realists by name, and continues: "Where there are no books, we have only law in action." Malinowski 1942, 8.

One of the most concrete results of this transformation was that suddenly, the native Americans had law. Earlier, the literature on tribal laws dealt exclusively with rules given by and treaties made with whites.¹⁵ The essential questions here are the separation between laws and social norms and the binding nature and effect of custom.

My second possible focus would lie on the law of contract formation. Formalistic jurisprudence of the 19th century, both in Germany and the US, adhered to the will theory. According to it, a contract was formed by the meeting of the minds of the parties.¹⁶ This view was fervently criticized by legal realists, who claimed that in real life no such meetings occur. In most contracts either or both of the parties are unaware of the particular rights and duties they might have, and if they would be aware of them, they would be unable to change these provisions because of their unequal standing.¹⁷ The authors of the most traditional of literature on early law, such as Henry Sumner Maine, were convinced that contracts did not exist in primitive societies, which they held to be essentially static.¹⁸ The freedom of contract was manifestly contrary to their ideas of primitive law, because it presupposed private ownership and the capacity to dispose of property, and more fundamentally, a dynamic society.

Contract formation is also a fruitful example to investigate the impact of American Legal Realism, since contracts were one of their main issues. It could be too much to expect the full spectrum of development from Williston to Corbin to show up on the material, and to even assume that beyond Llewellyn legal anthropologists would have been aware of the intricacies of US contract law with their mail box rules and other provisions. However, I

¹⁵ See, for example, *The Constitutions and Laws of the American Indian Tribes* series.

¹⁶ Horwitz 1977, 170-201.

¹⁷ Holmes 1897, 463-464.

¹⁸ Maine 1872, 110.

have indications to believe that the transformation of the idea of contract in the study of early law would be a case in point, as things like gift exchange began to be seen as a form of contract, precisely because there was no requirement of consensuality.

Other students of non-Western law such as Max Gluckmann, who went on to found the Manchester School of anthropology, used variously Roman and British law as a point of comparison, as is fitting to a South African lawyer. Paul Bohannan, writing on about the Tiv in Nigeria, tried to explain how the Tiv had no word for contract and wrote how he will be applying the English notion of contract to make his case intelligible to the readers.¹⁹ Contracts were also a point of interest in the other legal realist movements, such as Scandinavian Legal Realism, where Hägerström sought to prove that a contract essentially derived its binding nature from the magical connection it placed between the parties.

Chapter Plan

This list illustrates the different elements that will go into the study. It will most likely bear little resemblance to the finished work, but seeks to demonstrate the different levels of argument.

1. The Lure of Romanticizing Primitivism or Originalism
2. The Study of Early Law during the Nineteenth Century: Historical School and Evolutionary Dogmas
3. New Trends in the Study of Law and Society: Legal Realism
4. New Trends in the Study of Law and Society: Legal Anthropology
5. Evidence of Cross-pollination: Cases on Disputes and Contracts

¹⁹ Gluckman 1965, 175, 242-272; Bohannan 1957, 104.

The final structure of the study will revolve around a case or another obscure detail, through which the interconnectedness of it all is explored. Something along the lines of "Scalp-taking as a contractual obligation", or "Do Supernatural Beings Have Contractual Powers?"

Methodology and Sources

Studying the transmission of ideas is a notoriously dangerous enterprise. Intellectual history tends to overemphasize the currents and positions that have later become dominant, while schools of thought since forgotten are omitted altogether. The methodological roots of this study are in the Cambridge School of intellectual history, and especially in the works of Quentin Skinner. Skinner warns that when tracing the development of certain ideas and interpretations, there is always a distinct danger of falling in to the temptation of a mythology of coherence. In it, authors of a certain period or description are stereotyped as representatives of a school of thought and their views are made to coherently reflect the modern reconstruction of what the basic tenets and questions of that school were.²⁰ What often follows is a series of fruitless debates over who is a legal realist, functionalist, processualist, or formalist. Another danger is that of overemphasising what readers see as the sense of a given work or its relationship with other works from their modern vantage point. As one of the stated intentions of the current work is to describe a genealogy of ideas and their relationship with the general intellectual climate, these considerations are of utmost importance.

In the field of the intellectual history of law a comparison can be found in the works of James Q. Whitman, who has written also on the history of anthropology. In history, an

²⁰ Skinner 2002, 67-79.

important precedent is Richard Hingley's book *Roman Officers and English Gentlemen* (2000), which traces the influence of modern events and ideas in the interpretation of history. There are a few innovative works on the history of legal anthropology, such as June Starr's article on the invention of early legal ideas and parts of Kuper's *The Invention of Primitive Society*, but on the whole there is still work to be done.

There have been numerous studies that have described the life and works of Karl Llewellyn, as well as his scientific influences and connections. Mehrotra's article on the legacy of the Cheyenne Way and Llewellyn's move into anthropology has the biographical side quite well covered. Also, the roots of the provisions of the Uniform Commercial Code that Llewellyn drafted have been sought both among German lawyers and Cheyenne tribesmen.²¹ It is, therefore, questionable how much truly new can be gained from this direction. However, the other direction, how much realists like Llewellyn influenced the examination of the "primitive" law and how much legal theory they brought with them remains to be seen. The most recent inquiry into the matter, Laura Nader's description in her partly autobiographical *The Life of the Law* leaves still many questions unanswered.²²

Intellectual history is anything but straightforward and most results should be taken with a grain of salt. Therefore, it is essential that all findings should be based on a wide selection of materials. The corpus of earlier work accepted by the legal anthropological community as their predecessors has been rather limited. It is my intention to go through not only those works but also works that are currently seen as of lesser importance to the development of the science, such as the practical works of tribal law, both in the US and elsewhere. Now shunned by the community because of their linkage with colonialistic

²¹ Papke 1999; Whitman 1988-1989.

²² Nader 2002, 85-101.

enterprises and lack of theoretical finesse, these works are fundamental in the true understanding of the intellectual history. From the 16th century legal Humanists onwards, legal literature and science can be roughly divided into the mainstream black-letter law and the current fad, and should one examine one without the other, the picture will be seriously lopsided.

Bibliography

- Gregory S. Alexander, *Commodity & Propriety. Competing Visions of Property in American Legal Thought 1776 – 1970* (1997).
- Karl von Amira, *Grundriß des germanischen Rechts* (3rd ed. 1913).
- Talal Asad (ed.), *Anthropology and the Colonial Encounter* (1973).
- Patrick S. Atiyah, *The Rise and Fall of the Freedom of Contract* (1979).
- Alan Barnard, *History and Theory in Anthropology* (2000).
- Thomas W. Bechtler, ‘American Legal Realism Reevaluated’, in Thomas W. Bechtler (ed.), *Law in a Social Context. Liber amicorum honouring Professor Lon L. Fuller* (1978), 7–48.
- Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (2002).
- Huntington Cairns, ‘Law and Anthropology’, *Columbia Law Review* 31 (1931), 32-55.
- Carla Silvana-Faralli Castignone, ‘Legal Realism in Italy’, *Rechtstheorie Beiheft* 19 (1995), 167-180.
- Morris R. Cohen, ‘The Basis of Contract’, *Harvard Law Review* 46 (1933), 553–592.
- Felix S. Cohen, ‘Transcendental Nonsense and the Functional Approach’, *Columbia Law Review* 35 (1935), 809-849.
- Felix S. Cohen, *Handbook of Federal Indian Law* (1942).
- Arthur L. Corbin, ‘Recent Developments in the Law of Contracts’, *Harvard Law Review* 50 (1937), 449–475.
- Vivian Grosswald Curran, ‘Rethinking Hermann Kantorowicz: Free Law, American Legal Realism and the Legacy of Anti-Formalism’ in Annelise Riles (ed.), *Rethinking the Masters of Comparative Law* (2001), 66–91.
- Marie Theres Fögen, *Römische Rechtsgeschichten* (2002).
- Max Gluckman, *The Ideas in Barotse Jurisprudence* (1965).

James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (1991).

Jan Hellner, 'Scandinavian Legal Realism in the Law of Contract', in Peter Cane, Jane Stapleton (eds.), *Essays for Patrick Atiyah* (1991), 53–69.

Richard Hingley, *Roman Officers and English Gentlemen* (2000).

E. Adamson Hoebel, *The Law of Primitive Man* (1964).

E. Adamson Hoebel, 'Karl Llewellyn: Anthropological Jurisprude', *Rutgers Law Review* 18 (1963-1964), 735-744.

Oliver Wendell Holmes, 'The Path of the Law', *Harvard Law Review* 10 (1897), 457-473.

Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (1977).

Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (1992).

N. E. H. Hull, *Roscoe Pound and Karl Llewellyn. Searching for an American Jurisprudence* (1997).

Axel Hägerström, *Inquiries into the Nature of Law and Morals*, Karl Olivecrona (ed.), translated by C. D. Broad. (1953).

Rudolf von Jhering, *Law as Means to an End*, (translated by I. Husik), (1968).

Laura Kalman, *Legal Realism at Yale 1927-1960* (1986).

Hermann Kantorowicz, 'Some Rationalism About Realism', *Yale Law Journal*. 43 (1934), 1240–1253.

Paul Koschaker, *Rechtsvergleichende Studien zur Gesetzgebung Hammurapis: Königs von Babylon* (1917).

Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2002).

Adam Kuper, *The Invention of Primitive Society: Transformations of an Illusion* (1988).

C.C. Langdell, *Summary of the Law of Contracts* (1880).

Karl Llewellyn, 'What Price Contract? – An Essay in Perspective', *Yale Law Journal* 40 (1931), 704–751.

Karl Llewellyn and E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (1941).

Karl Llewellyn, *Jurisprudence. Realism in Theory and Practice* (1962).

Henry Sumner Maine, *Village-Communities in the East and West* (1872).

Bronislaw Malinowski, *Crime and Custom in Savage Society* (1926).

Bronislaw Malinowski, 'A New Instrument for the Interpretation of Law — Especially Primitive', *Lawyers Guild Review* 2 (1942), 1-12.

Michael Martin, *Legal Realism. American and Scandinavian* (1997).

Ajay K. Mehrotra, 'Law and the "Other": Karl N. Llewellyn, Cultural Anthropology, and the Legacy of The Cheyenne Way', *Law & Social Inquiry* 26 (2001), 741-775.

Sally Engle Merry, 'Pluralizing Paradigms: From Gluckman to Foucault', *The Political and Legal Anthropology Review* 22 (1999), 115-122.

Sally Falk Moore, *Law as Process. An Anthropological Approach* (1978).

Sally Falk Moore, 'From Lawyer's Law into the Academic Zoo', *The Political and Legal Anthropology Review* 22 (1999), 101-105.

Laura Nader, *The Life of the Law. Anthropological Projects* (2002).

William M. O'Barr, 'Back to the Trobriands: the Enduring Influence of Malinowski's Crime and Custom in Savage Society', *Law and Social Inquiry* 27 (2002) 847-871.

David Ray Papke, 'How the Cheyenne Indians Wrote Article 2 of the Uniform Commercial Code', *Buffalo Law Review* 44 (1999), 1457-1485.

L. Polverini (ed.), *Aspetti della storiografia di Ettore Pais. Università degli Studi di Perugia. Incontri perugini di storia della storiografia antica e sul mondo antico VII* (2002).

Roscoe Pound, 'The Call for a Realist Jurisprudence', *Harvard Law Review* 44 (1931), 697–711.

Jane Richardson, *Law and Status among the Kiowa Indians* (1940).

Mathias Reimann, 'Continental Imports. The Influence of European Law and Jurisprudence in the United States', *Tijdschrift voor rechtsgeschiedenis* 64 (1996), 391–410.

Friedrich C. von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (1814).

John Henry Schlegel, *American Legal Realism and Empirical Social Science* (1995).

Quentin Skinner, 'Meaning and understanding in the history of ideas', in Q. Skinner, *Visions of Politics I* (2002), 67-79. This article appeared originally in *History and Theory* 8 (1969), 3-53.

Rune Slagstad, 'Norwegian Legal Realism Since 1945', *Scandinavian Studies in Law* (1991), 217–233.

June Starr, 'The "Invention" of Early Legal Ideas: Sir Henry Maine and the Perpetual Tutelage of Women', in June Starr, Jane Collier (eds.), *History and Power in the Study of Law* (1989), 345-368.

Edward B. Tylor, *Primitive Culture* (1871).

Kaius Tuori, 'Weber and the Ideal of Roman Law', *Law and History: Current Legal Issues* 6 (2004), p. 201-214.

Joan Vincent, *Anthropology and Politics* (1990).

James Q. Whitman, 'Commercial Law and the American *Volk*: A Note on Llewellyn's German Sources for the Uniform Commercial Code', *Yale Law Review* 97 (1987-1988), 156-175.

James Q. Whitman, 'The Neo-Romantic Turn', in P. Legrand and R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (2003), 312-344.