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# Anthropology of Law and Practical Jurisprudence: Regarding the Removal of One of the Barriers in Their Interaction

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*With this article the authors attempted to make the achievements of the anthropology of law in the study of primitive society more accessible to lawyers. Currently these achievements are mainly not used by lawyers because of the difference in defining law: legal anthropologists consider it to be a broader phenomenon than it is usually considered by lawyers. As a result, lawyers quite often do not pay proper attention to the anthropologists' data concerning law in primitive society. To overcome this negative effect, the authors have revealed and characterized certain rules covered by law as it is defined by most lawyers, based on the critics of the American legal anthropologist E. A. Hoebel's definition of law. The above mentioned norms include the rules concerning stealing, adultery, incest in the societies of primitive Australians and the norms forbidding recidivist homicide, murder of one person and wounding some others, sorcery, chronic lying, refuse of rich people to share their belongings at request of others among the Eskimos. This example of legal regulation may serve to improve the modern law. The authors consider, for example, the formulation of new norms concerning stealing and homicide. They also approach the question whether it is necessary to legislate when the society has a conviction that certain human acts threat the existence of the society.*

*Keywords: law, legal regulation, primitive society, legal norm, governing bodies of the whole society.*

*Research area: theory and history of law and state; the history of the teachings of law and the state.*

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**Introduction to the research problem**. If a legal norm is formulated in a society, then it should be created on the basis of all the experience of mankind in the legal regulation of the behaviour it normalizes. This is a prerequisite for ensuring the effectiveness of the constructed legal rules.

So far, as it is applied to a number of such norms, ordering social ties that are important for people, it cannot be implemented for an obvious reason. The creators of law in modern societies do not have the information on legal regulation in the remote past, which is necessary for their successful work.

There are many factors that determine this state of affairs. One of them is the situation that has developed in the anthropology of law as a science, designed to accumulate the historical experience of legal regulation and provide it for practical jurisprudence to use.

It is about the following. Today in a study of a primitive society the achievements of foreign and domestic anthropology of law (see e. g. Rulan, 2005a; Rulan, 2005b; Kovler, 2000; Gillin, 1934; Hoebel, 1954; Pospisil, 1971; Pospisil, 1978; Tuori, 2017; Karpiak, Garriott, 2018: 1–20), which is also called legal anthropology and ethnology of law, are partly not applied in general theoretical and sectoral jurisprudence due to the following circumstance that hinders the interaction of anthropology of law and practical jurisprudence. Compared to most lawyers, many prominent representatives of legal anthropology have identified a broader social reality as law (see: Hoebel, 1954: 300; Pospisil, 1978: 54–59; Pospisil, 1971: 112; Radcliffe-Brown, 1935: 48; Malinowski, 1942: 8, 1243, 1246, 1254; Seagle, 1937: 2, 277, 281; Pospisil, 1973: 4, 539–547; Hoebel, 1962: 4, 836–837). In this situation, most lawyers are often inclined to ignore what anthropologists understand by legal norms in a primitive society.

In the scientific literature, the noted fact, in particular, is expressed by these words of E. A. Hoebel, "The fruitful opportunities in the study of primitive law for the knowledge of law in general have hardly been recognized. In the end … law scholars … usually consider the area of primitive law to be an undeveloped and barren desert" (Hoebel, 1942: 6, 951).

**Conceptual basis of the study**. In order to make progress in practical jurisprudence in the application of the achievements of legal anthropology in the knowledge of law in a primitive society, it is relevant to establish precisely, which part of the social reality that is called law by anthropologists is covered by law according to the views of most lawyers and which is not. It is the way that can help most lawyers to "see" law in a primitive society in the form of a list of specific legal norms that existed there in

the interpretation of the latter by these jurists and thereby remove the highlighted obstacle to the interaction of anthropology of law and practical jurisprudence, giving law creators the opportunity to use these rules to improve legal regulation in modern societies.

Solving the problem of such differentiation into two parts of reality, regarded as law by anthropologists, is not easy. After all, it is inconceivable without a critical analysis of the understanding of law by a number of leading experts in the field of legal anthropology, who have written numerous profound works. It is in these works where you need to find the rules that are legal norms in the interpretation of the latter by most lawyers, delimiting such norms from others.

**Statement of the problem**. In the following statement, the formulated problem is solved in relation to the understanding of law and scientific works of the classic of American legal anthropology E. A. Hoebel. Moreover, only a small part of legal norms is characterized in their interpretation by the majority of lawyers, which can be identified in the works of this researcher.

**Methodology**. The applied methods for solving this problem are determined by its specifics. The latter led to the widespread use of general scientific and special legal research methods. Observation, analysis, synthesis, and comparison are most used among the first; while among the second ones, these are an analysis of the dogma of law and a comparative law method.

**Discussion**. E. A. Hoebel defined law as part of norms in a society that are implemented through physical coercion or its threat (see: Hoebel, 1954: 26, 29.300; Hoebel, 1966: 440). Moreover, from his point of view, not all physical coercion in a society is carried out in support of legal norms (see: Hoebel, 1954: 27; Hoebel, 1966: 440). For example, "coercion by gangsters is not" (Hoebel, 1954: 27) used to enforce legal rules. The reason is the following. One "who is generally or specifically recognized as… exerting an element of physical coercion" (Hoebel, 1954: 27) for the implementation of legal norms "is a splinter of social authority" (Hoebel, 1954: 27).

The definition of law by E. A. Hoebel is significantly different from the usual definition in jurisprudence as a science. Thus, according to the mentioned usual definition, law is considered as a system of social norms, which is formulated and implemented with the necessary participation of special bodies in a society. The latter rule it all. At the same time, society is interpreted by the majority of jurists in accordance with the tradition, coming, in particular, from J. Austin. According to it, society is a self-governing human collective, including the governing bodies that rule

it all and the normative regulation undertaken by such structures. Moreover, the norms created and implemented during this normative regulation of the bodies governing the whole society are called legal and their totality is defined as law (see: Austin, 1869: 237–239).

But E. A. Hoebel claimed otherwise. Although part of law in a primitive society, namely public law, falls under the interpretation of law by most lawyers (see: Hoebel, 1954: 50; Hoebel, 1966: 440, 451), there is another part of law in this social organism. It exists without participation of the bodies governing the whole society in the formulation and implementation of the constituent rules. What E. A. Hoebel had in mind is "private law" (Hoebel, 1954: 27–28, 50; Hoebel, 1966: 415). Moreover, in some cases he also understood society differently from most lawyers.

For example, E. A. Hoebel found the mentioned private law in the following situation. The totality of all members of the Ifuga ethnic community who led a primitive life in the northern part of the Philippine island of Luzon, is understood by him as a primitive society (Hoebel, 1954: 102, 125), although E. A. Hoebel also admits that these people are not united by the bonds of general management (see: Hoebel, 1954: 101). From the presentation of the noted researcher, it is clear that societies in the interpretation of most lawyers among the discussed Ifugao are associations of relatives that are independent from each other (Hoebel, 1954: 101–104). Society in the understanding of E. A. Hoebel does not interfere with communication between the latter. He considers the norms of this communication, the violation of which supposes physical coercion to be "private law" (Hoebel, 1954: 100) in relation to his interpretation of the society of primitive Ifugao.

According to E. A. Hoebel, private law is also valid in the local group of primitive Comanchean hunters who lived in the North American prairies, which, as can be seen from his story, acts as a society, based on the interpretation of the latter by most lawyers. In this local group, as E. A. Hoebel writes, "the law of the Comanche was neither legislative, nor judge-made" (Hoebel, 1954: 133), and was "almost exclusively a system of private law: a system of individual responsibility and individual action; the law that was case made" (Hoebel, 1954: 133). Concretizing this thought, E. A. Hoebel noted that in the local Comanche group, culture provided for legitimate methods of procedure and determined the content of illegal acts. But the primacy of the sibling group came forward whenever the prosecutor, against whom the accused had committed an offense, thought that he had exhausted the possibilities of negotiations with the accused and turned to force. Relatives of the accused, whom

the prosecutor killed, did not accept this murder as a proper punishment for the offense, although public opinion did. The relatives of the murdered person killed the prosecutor. As a result, after applying private law, the prosecutor lost his life (Hoebel, 1954: 139).

Since E. A. Hoebel strives to give a universal definition of law for all societies; his task can be successfully completed only if he regards the reality inherent in any society, both primitive and civilized, as law. It follows that private law in a primitive society in the understanding of E. A. Hoebel should not be included in his definition of law for all societies. After all, he recognizes that the reality making up private law ceases to exist as society becomes civilized (see Hoebel, 1954: 50, 327, 329).

It should be noted that this recognition is reasonable. At least, this is the case if the thesis that the law in civilization is present in the formal sources of law created by the activities of governing bodies of the whole society is true.

In the works of E. A. Hoebel it is possible to identify numerous legal norms in primitive societies, which are covered by the mentioned usual definition of law in jurisprudence. In particular, some of these rules streamline the social connections of hunters.

The information about these people cited in the works of E. A. Hoebel in some cases can solve three problems. The first is the separation of the society of primitive hunters as a self-governing human collective and bodies governing all this alliance. The second is the establishment of the rules of law in it. As for the latter, it refers to the norms in the specified society, which have the following features. Firstly, the governing bodies of the whole society are included in their formulation. Secondly, the norms under consideration are enforced with the participation of these bodies. Thirdly, this enforcement is carried out by such bodies forcibly, including when applying physical coercion, if the addressees of the rules do not obey these standards voluntarily. Finally, the third task is a more or less complete description of the legal regulation in the noted society, that is, a description (albeit with gaps) of how the legal rules are formulated and implemented in practice.

For example, E. A. Hoebel quoted the similar data about primitive Australian aborigines. According to this information, a local group is their society. As E. A. Hoebel put it, primitive "Australians live the greater part of the year in small, isolated, roving local groups or camps" (Hoebel, 1954: 301). Moreover, he calls such a local group "independent" (Hoebel, 1954: 306) and "sovereign" (Hoebel, 1954: 309), although he recognizes that the latter exists within the Australian aboriginal "tribe" (Hoebel, 1954:

306). In primitive Australian aborigines, it is "looked upon as constituting the largest effective social unit" (Hoebel, 1954: 306).

According to E. A. Hoebel, the governing body of the entire local group is usually the council of old men or elders (see Hoebel, 1954: 302), for "gerontocracy is the rule" (Hoebel, 1954: 302). However, a "headman" can also be such a body (Hoebel, 1954: 302). However, no information is given that the powers and responsibilities for creating and enforcing the legal norms of the headman, on the one hand, and each other senior man, on the other hand, are different.

As for the specific legal rules in force in the primitive Australian aboriginal society, the information cited by E. A. Hoebel allows us to characterize the norms that are applied within the same local group. The data about them is taken from Central Australia. E. A. Hoebel provided information that allows ascertaining the existence of three such norms.

One of them prohibits the secret appropriation of someone's belognings or theft. Its existence is evident from the following ethnographic material about this kind of behaviour in the local group.

In the event of theft from the hut, if the accused confesses when he is facing the prosecutor, the thief must return the stolen item and stone his head in front of the hut of the injured party. If he does not punish himself after the confession, the victim of his theft can hit the thief with a boomerang or stick a spear in his leg. If a person named as a thief refuses to confess to theft, then a battle will probably take place resulting in the wounding or death of the accused or prosecutor. In this case, the elders organize a true trial. They confer about the facts to determine whether a theft really happened. If they decide that the charge is true, and if the accused is injured or killed, then they decide that causing death or injury is the privilege-right of the punishing person, and no further step is taken. If the accuser was injured and his charge is considered fair, then the convicted thief is ordered to expose the same part of the body to be injured from the blow of the accuser to the same extent with the same type of weapon. If the thief killed the prosecutor in battle, the thief is executed by stabbing him with a spear. If the thief escapes to avoid punishment, then he becomes a person outside the law, deprived of his life when he is discovered by any armed member of this local group.

The process is therefore going through three stages. Stage 1. Evil is corrected through the recognition of the accusation at the initiative of the injured party in the return of stolen property by a thief and his self-punishment. Stage 2. In the absence of such a correction of evil, the injured party undertakes to redress their grievances by

injuring, or, possibly, causing death to the accused. Stage 3. When the victim fails to achieve these results and he is injured or loses his life in the collision with the accused, the council of elders begins a trial supposed to ensure that justice is carried out by punishing the thief physically, which is equivalent to the physical damage sustained by the prosecutor, whom the stolen property is returned to.

Making amends with the injured party is supported by activities on behalf of the community if necessary (Hoebel, 1954: 302–303).

From these data, it is clear that the local group has not only the rule of law enforced by the governing bodies of this entire society, but also non-legal theft rules. Moreover, the rule of law prohibiting theft is applied only when their action does not lead to the realization of the goals of the governing body of the whole society.

According to E. A. Hoebel, the local group of primitive Australian aborigines also has non-legal rules along with the rule of law to regulate adultery by members of this collective. At least, such a conclusion, which means that there is one rule of law to regulate adulter within the local group, is obvious, judging by the following statement of the noted researcher.

"Adultery, seems to be handled in much the same way" (Hoebel, 1954: 303) as theft, except that the repentant offender, as expected, will not just beat his own head, but will expose his sacrum to strike with a spear by the offended man. An open battle "leads to consequences similar to those just described" (Hoebel, 1954: 303) in case of a theft (see Strehlav, 1915: 9ff).

Finally, based on E. A. Hoebel's available ethnographic materials, there is a third legal rule for use within a local group of primitive Australian aborigines. It prohibits incest, which is "crossing" (Hoebel, 1954: 303) the boundaries of the ban on sexual intercourse between relatives.

The conclusion about the presence of the noted rule of law follows from the following words of E. A. Hoebel. "Incest … results in the spearing to death of both offenders after judgement by the elders" (Hoebel, 1954: 303).

Moreover, the formulated conclusion is not refuted by the following fact. Often, several acts of this violation are required to force a local group "to destroy one of its own members" (Hoebel, 1954: 304).

Thus, an aborigine named "Cones on the Body" was in incestuous relations with his relatives. In the end, the elders consulted and announced that they were going to decorate him for a totemic ceremony. He innocently succumbed to this deception, and when he sat down to be decorated, the elders held him tightly, cutting his throat. Then

the elders "cut him in pieces and hung the bits in trees" (Hoebel, 1954: 305; see also Róheim, 1942: 458–459).

E. A. Hoebel also provided information to describe the legal rules as interpreted by most lawyers among uncivilized Eskimos. The society of the latter in mentioned meaning of the majority of jurists is either a local group of several dozen people, or a village that is usually a little larger.

According to the data of this researcher, the governing body of the whole so interpreted primitive Eskimo society is the totality of adult men living here (see Hoebel, 1954: 25–89). E. A. Hoebel made the following statement about how these males participate in the implementation of a legal norm prohibiting and punishing repeated murder.

Among the Eskimos, killing a person for the second time makes the perpetrator a dangerous public enemy. Immediately, a favorable opportunity arises for some proactive person approved by society to provide services to it. He can talk in turn with all the older men in the society to find out if they agree that it would be best to execute the killer. If unanimous consent is given, then he personally takes the life of the killer at the first opportunity, and no revenge can be taken against him from the relatives of the killer. Concrete facts show that no revenge is taken (Hoebel, 1954: 25–26).

This is the case because the recidivist killer becomes a social threat, that is, a person capable of hitting another victim at any time. Being a general threat, he becomes an enemy of society. As an enemy of society, he is the object of public action. This action is a legal penalty (Hoebel, 1954: 88; see also: Hoebel, 1954: 329; Hoebel, 1966: 446).

According to E. A. Hoebel, its "classic case" (Hoebel, 1954: 88) was described by F. Boas. Moreover, Boas personally observed this incident (see Hoebel, 1954: 88). It is about the following.

There was a native from Padli named Padlu. He persuaded the wife of a native from Cumberland Sound to leave her husband and follow him. The abandoned husband plotting revenge visited his friends in Padli, but before he could fulfil his intention to kill Padlu, the latter shot him. The brother of the murdered man went to Padli to avenge his brother, but he was also killed by Padlu. A third native from Cumberland Sound, who wanted to avenge the death of his relatives, was also killed by him.

Because of all this violence, the natives wanted to get rid of Padlu, but nevertheless they did not dare to attack him. When the headman of the Akudmirmiut community learned about these events, he went south and asked each man in Padli whether Padlu

should be killed. Everyone agreed; so he went with Padlu to hunt deer and shot Padlu in the back. (Boas, 1888: 668; Hoebel, 1954: 89).

As stated by E. A. Hoebel, "Similar practices exist among all the Eskimos" (Hoebel, 1954: 89) that we have reports of, with the exception of residents of East Greenland. An important element is that the executioner, who carries out the deprivation of life, seeks and obtains the approval of the community in advance regarding his act of deliverance. When such an approval is reached, no vengeance can be taken against the executioner, for his act is not a murder. This act is the execution of a community's sentence in the name of the people, and the responsibility lies with the people. In addition, revenge is prevented for the simple reason that unanimous consent also includes the consent of the murderer's relatives, if they exist in the society.

As an enhanced guarantee against the blood feud of the executioner, close relatives of the person to be executed may be invited to fulfil the will of the community. For example, in 1921, the headman of the Arviligjuarmiut community was empowered by fifty-four residents of his village to execute his own brother, who was temporarily infuriated by killing one person and injuring others in his fits. The leader went reluctantly to his brother and, explaining his position, asked how he chooses to die: from steel, a belt or a shot? His brother chose the latter method and "was killed on the spot" (Hoebel, 1954: 89).

The last case cited testifies to the existence of another legal norm in the community of primitive Ekimos. According to this rule, a set of acts, including the murder of one person and wounding some others, is punishable by deprivation of life.

E. A. Hoebel cited data on the effect of the legal rule on witchcraft in the primitive society of the Eskimos (Hoebel, 1954: 90). This information is as follows.

F. Boas reported the destruction of the sorcerer who tried to kill a lot of people with magic by the Eskimos of Baffin Land. The society discussed this and decided that he was to die. The sorcerer was stabbed in the back by an old man who was thanked for such an act (see Boas, 1907: 117–118). K. Rasmussen noted a similar case among the Polar Eskimos (see Rasmussen, 1908: 156). However, in West Greenland, the natives interpret "all sorcery as an offence against a group punishable by death" (Hoebel, 1954: 90).

It is this information that allows us to conclude about the presence and content of the norm under discussion. As for the reasons for the presence of the latter, then, according to E. A. Hoebel, in particular, it refers to the following. The governing body of the whole primitive Eskimo society punishes the person for committing witchcraft

actions aimed at causing death to several people, because witchcraft is a form of murder, and recidivist homicide should not be tolerated by society (Hoebel, 1954: 261).

The primitive Eskimos also have a legal norm that punishes a person for repeatedly lying to other people. Judging by the works of E. A. Hoebel, there are both facts that allow us to ascertain the functioning of this rule and a reason that explains its existence.

The facts are as follows. E. A. Hoebel stated that "the execution of liars is reported from Greenland to Alaska" (Hoebel, 1954: 90), that is, from all regions where primitive Eskimo societies inhabited (see also Hoebel, 1966: 446). The reason for the presence of this norm is as follows. Its functioning follows from one of the postulates of Eskimo life. This postulate reads, "For the safety of a person and a local group, individual behaviour must be predictable" (Hoebel, 1954: 70). That is why people who have the habit of lying to others "raise themselves to the status of "the not-to-be-borne-any-longer" (Hoebel, 1954: 90), for they are considered as a danger to society (Hoebel, 1954: 90). In this situation, it is natural that they fall into the same category as repeat killers who must be removed from society for the benefit of all (Hoebel, 1954: 90), and shall be executed by order of society (Hoebel, 1954: 90).

According to E. A. Hoebel, one of the ideas underlying the social life of primitive Eskimos, is as follows. "Private property is subject to use claims by others than its owners" (for use by non-owners" (Hoebel, 1954: 69)). It was this idea that brought to life a rule of law in a society of primitive Eskimos in the event of a rich man's refusal to share his property with others.

Regarding its action, E. A. Hoebel reported that a person who "accumulated too much property, i. e., kept it for himself" (Hoebel, 1954: 81), was considered not working for a common purpose. "Ultimately, he was forced to give a feast under pain" (Hoebel, 1954: 81) depriving him of his life by other members of society, "distributing all his goods with unrestrained largess" (Hoebel, 1954: 81).

According to E. A. Hoebel, postponing this distribution for too long was a crime punishable by death in Western Alaska, and the property of the owner was publicly confiscated. Throughout the rest of the Arctic an ethic of generosity and hospitality was enough to ensure that those "who had gave" (Hoebel, 1954: 81).

**Conclusion**. As for the conclusions of this work, the described legal rules in a primitive society are enough to make the following statements clear to many lawyers. 1. The study of the achievements of legal anthropology in the research of such a social organism can help them in solving their professional task of improving modern law in general. 2. The above data on primitive legal norms regarding theft and murder is an

experience in legal regulation, which can be used with benefit in modern law-making in these areas. In particular, the solution of the following question is implied: is it necessary to legally prosecute for theft if the thief confesses and returns the stolen? 3. In determining the need for specific legislative acts in modern societies, one should take into account a circumstance that is obvious in the conditions of primitiveness. Law-making should be resorted to if society is convinced that specific social actions undermine this social organism, putting it on the brink of death. It is exemplified by the given data on the legal regulation of deadly witchcraft and deception between people in primitive societies.

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## Антропология права и практическая юриспруденция: об удалении одного из препятствий их взаимодействия

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*В статье осуществлена попытка сделать достижения антропологии права в познании первобытного общества более доступными юристам для применения в их профессиональной деятельности. Сегодня эти результаты в основном не используются ими потому, что многие антропологи права определили его гораздо шире, чем обычно принято в юриспруденции. В итоге юристы зачастую не уделяют должного внимания данным антропологии о функционировании права в первобытном обществе. Чтобы преодолеть это негативное последствие антропологических изысканий, в статье в результатах исследований американского ученого Э. А. Хобеля на основе критики его понимания права установлен ряд правил, которые подпадают под определение права, типичного для юриспруденции, и дана их характеристика. Они включают нормы*

*о воровстве, нарушении супружеской верности и кровосмешении в обществах австралийских аборигенов, а также нормы о рецидивном убийстве, убийстве одного человека и ранении нескольких, колдовстве, о многократной лжи и об отказе богатого человека делиться своим имуществом с остальными людьми в обществах эскимосов. Этот опыт первобытного правового регулирования может служить для совершенствования современного права. Например, имеется в виду, во-первых, создание новых норм о воровстве и убийстве; во-вторых, решение вопроса о необходимости обращения к правотворчеству в ситуациях, когда общество убеждено, что определенные человеческие действия ставят этот коллектив на грань гибели.*

*Ключевые слова: право, правовое регулирование, первобытное общество, юридическая норма, органы управления всем обществом.*

*Научная специальность: 12.00.01 — теория и история права и государства; история учений о праве и государстве.*