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Lecture I.

General Notes on the Division of the Definitions & the Lectures.

A. General Considerations of "primitive" Law as a foundation for the study of the systems of our own "primitive" people

B. Bantu Customary Law - i.e. Laws of the Bantu tribes as they existed before the influence of European government, colonisation, & propaganda & may in certain matters still exist.

C. Recognition of Bantu Customary Law.

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D. Administration Policy.

E. Special Legislative enactments.

Lecture I.

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General Considerations of "primitive" Law.

The Foundations of Customary Law.

- I. Opening up of the world
light on social institutions
i.e. on law which is a social institution.
- V. "The state is first & foremost a social union"
- V. "The principles of law are bound to be social
in their essence"
- II. To understand existing legal forms, we must first
seek to understand a) Their social purpose
b) The social conceptions of
which they are the expression.

whether primitive or
modern.
- III. Speculative legal philosophy + scholasticism replaced
by a jurisprudence which takes account of evidence
collected by a) anthropologists
b) social psychologists
c) comparative jurists.
making use of all material likely to throw light upon
the history of law + the interpretation of legal thought
& custom.
- IV. Study of jurisprudence to be attacked on same
principles as in other modern research.
Justification for legal conceptions used to be
a) Divine enactment
b) Metaphysical principles

Lecture 1.

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Part. Now

- a) Evolutionary theories must have their significance
- b) Legal forms from various peoples & communities can be compared
- c) Similarities are found to be striking & are not accidental
- d) It is possible to reduce forms & common categories & deduce common principles.
- e) Light is thrown on highly developed legal systems from analogies provided by less advanced systems
- f) Roots of our modern legal systems are deep in the soil of primitive society.

Note:- So called "primitive" society may be complete in social organisation. Nevertheless study of earlier societies & present day so called "primitive" societies will help us to trace "the incipient forms of social organisation & law in their arrangement".

"These cultural origins supply us, not only with simpler combinations & more clearly defined natural conditions, but they possess the inestimable advantage of presenting themselves in a very great number of instances & varieties which shade off one into the other & offer welcome opportunities for comparative investigation. This is so much the case that comparative jurisprudence has almost become synonymous with a study of primitive societies, although, of course, such a connotation is by no means rendered necessary by the aim of the study."

These considerations are important for the student of "modern" law

Still more for the study of "Barbarian" law which cannot be called "modern".

We must know a) Content of Barbarian Law

B) Its comparative setting in the light of modern scientific discoveries of
i) Social Anthropology
ii) Comparative Jurisprudence

Barbarian Law has considerable correspondence with other "primitive" systems of widely separated geographically e.g. North Seas, Americas.

+ also with
a) Common Law of England
of Italy, France Law
of Roman Law
of Celtic Tribal Law.

Lecture 2.

Definitions of Law.

1. The Study of Law covers

- a) Those rules which are expressly enacted by a community through a lawgiver e.g. sovereign or law-making institution, for the government or organisation of society.
- b) The solid body of customary rules which have grown around the social habits & customs of the people.

2. "Law is the aggregate of all rules directed towards ensuring order in the commonwealth, whether these rules are made by legislators, laid down by judges in their administration of justice or worked out by customary practice"

3. Modern Law differs from 'Primitive' Law

- a) Modern Law consists increasingly of rules made by legislators or laid down by judges while 'Primitive' Law consists almost entirely of customary rules.

- b) Modern Law is based upon rational considerations or a conscious adaptation to circumstances while Primitive Law is derived largely ~~from~~ authority from mystical conceptions

Note:- One may have a highly developed body of law in both cases.

Lecture 2.

(2)

H. Bantu Law belongs to the category of Primitive
~~even though it is~~ highly developed for the above reasons
notwithstanding that-

a) Chiefs & Councils are often established but
are not so much Law gives & makes as interpreters
of the conscience of the tribe, as expressed in the
custom of the people

b) In cases of doubt old men with long experience
& exceptional knowledge are sent for & appealed to
- but again it is ~~to~~ cite specific cases from
the traditional law which is based on mystical
or animistic conceptions.

Foundations of Customary Law.

Customary Law is . . . of "Customary" type i.e. it derives its authority more from custom than from express enactment.
It is necessary to understand the habit of mind from which "custom" springs.

Progress depends on balance between individual impulse & social tradition.

Hobhouse (Morals in Evolution)

"There is always the character of each individual as it has grown up under the conditions of heredity, with its sympathies & antipathies, its impulses social & selfish, its susceptibilities & feelings in which the relations of human being & human being play so prominent a part, uttering in itself judgments which praise or condemn conduct forming A. conceptions of good & bad, right & wrong as things jump with its feelings or displease them. There is always the influence of the society in which each man is born, the interaction between mind & mind & the shaping of individual opinions into a social standard, the modelling of each new generation by the heavy hand of the past."

Custom is . . . the result of the interplay between

a) Individual impulse

b) Social consciousness

making a social standard & which individuals must conform for the maintenance of the integrity of the group.

There must be

a) common conception of universe

b) common way of regarding social relations

c) common impulse for the preservation of the group.

The growth of this is rarely conscious & its origin is usually wrapped in mystery & assumes an authority which few dare dispute.

Hobhouse (Morals in evolution)

"The customary is sacred because it is customary. To the primitive mind, and in all ages there is a good deal of the primitive, it is only the mysterious that is impressive, and custom would lose half its force if its origin & meaning could be rationally explained & logically justified."

^{of their authority & acceptability to the group.}
This acceptance gives coherence to the primitive group.

From its ~~own~~ recognised rules of conduct ^{or law}

This acceptance enforces obedience to the rules i.e. There is a social reaction which the individual or the group is taught to expect from the performance of or the abstention from, an action.

This is called a "sanction" & society reacts by means of sanctions.

Definition of "sanction"

The result which ordinarily follows or is believed, or expected to follow from any act affecting the social conscience, the expectation of which is regarded as a motive for abstaining from or performing the act in question.

In advanced ^{communities} societies the motives for conduct are rational or ethical.

In primitive communities these motives are largely emotional & mystical, consequently legal sanctions have these features.

There are in primitive law instances where there is evidence of actual legal enactments e.g. by the will of a chief or council. These have not the same force as customary laws.

"The laws which enjoy the greatest respect & of which the transgressions are most severely punished are not the special decrees of the King's Council but those rules of customary law which have been in vogue from time immemorial - the law against murder & theft, for example." Lowrie (Primitive Society)

"The Basutos, among whom the chiefs have the right of making laws & publishing regulations required by the necessities of the time, regard such laws as inferior to the use & wont which constitute the real laws of the country."

(Westermarck - the origin
Development of Moral Ideas)

"Even kings, who are regarded as autocrats, are scarcely less tied to custom than their subjects" (lectures evidence before 1883 Com.)

Tribal Sanctions as the creators of customary Law.

They may be classified as

1. Social - following the tribal organisation
2. Cosmic - following the tribal ideas of the ^{universe} world
3. Economic - following the material needs of the people

But in general every sanction is influenced by belief in magic.

Social Sanctions.

- "The earliest tribal moulds of society are based on conceptions of relationships & are derived from
- V. some form of family organisation"
 - S. Sen Gupta (The Evolution of law)
 - S. "Primitive society is the family with large"

e.g. Those depending on marital unions.

Some form of social relationship necessary between man & the mother of his child & the mother stands in a depurte & to a certain extent continuous relationship to her child

- V. "Marital union is the initial institution which brings human beings together & provides for the growth of society. Whatever else men may become..... they are bound to be the offspring of some kind of union between a father & a mother & the circumstances & conditions of such unions necessarily react on all other sides of social organisation - on kinship, succession, property, social status &c."

Lecture 3.

There is still controversy as to the origins of marital relationships but it seems clear that in the earliest social organisations the mother was bound to her children by obligations - which give rise to rules or laws.

Once man entered into marital union a whole series of rights & obligations were created.

Not only do marital unions produce relationships but these in turn react on the formation & regulation of marital unions.

Rules of marriage may at first be based on blood relationship & then extended.

All the relationships involved give rise to a vast network of rules, inexorable & all powerful in their influence on the individual. They dictate whom he may or may not marry, they impose a complicated etiquette of conduct, & demand a network of obligations both to his own kindred & to his tribe. Obedience is enforced not only by the heavy hand of the past but also by the ever present magical influences which surround him.