Political Science
Legal Studies 217

Customary Law

Law in Developed Societies
- Law often associated with developed democracies
- “Government of law and not of men”
- “Rule of law”

Early manifestations of law
- Early examples of written law
  - The Torah
  - Roman law—Justinian code
- Law in early societies
  - Ancient Athens
  - Development of Common Law in England
- Canon Law in the Catholic Church
Human society without law?

- Earliest writers on political life imagined a role for law
  - Plato’s *Republic*
  - Aristotle’s *Politics*
- Thomas Hobbes, *The Leviathan*
  - State of nature
  - “Life is nasty, brutish, and short”
- Machiavelli, *Discourses*
- Focus on natural law

Concept of Customary Law

- Law as it exists in societies without formal processes for creating law
- **Definition**: Customary law refers to the body of traditional rights and obligations that is binding on a distinct society, culture, or community, the violation of which results in the application of sanctions that are themselves accepted as appropriate within the relevant group.

Manifestations of Customary Law

- Not unique to “traditional” societies
- International humanitarian law
  - War crimes tribunal for the former Yugoslavia
- Essay on “customary law in cybercommunities on the internet”
Enforcement of Customary Law in the Cybercommunity

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Customary law in “traditional” societies
- Primary research on customary law by anthropologists
- Typically in small scale societies
  - South Pacific
  - Africa
  - Southeast Asia
  - Indigenous communities in the Western Hemisphere
- May coexist with state-based system

Key Characteristics
- Rules regulating social life
- Recognized by the community as obligatory
- Organic in nature
- Unwritten
Hallmarks of Customary Law

- Law arises through customary practices
- Law reflects the norms embedded in those customary practices
- Law “enforced” by community processes rather than formal institutions
- Institutions involved in enforcement not specialized

Features of Customary Law

- Emphasis is on relationships
- Status is extremely important
  - “Personal status” law
- May be closely linked to religious norms
  - Religious traditions define status within familial units
  - Often specify rules of inheritance ("succession")
- Distinguishable from “state law”

Sanctions in Customary Law

- Community-based sanctions are common
  - Shunning
  - Banishment
- Sanctions may involve physical punishment, including death.
- May involve acceptance of private justice
  - Private revenge
  - Feuds
Caste Council in India

- “Criminal cases”
- Community status/solidarity issues
- Role of advocacy
- Role of decision-making

Cheyenne Way

- Karl Llewellyn
- Adamson Hoebel
- "trouble case"
- Collecting cases

Red Robe and Two Twists

- What are the appropriate forms of mourning?
- What is appropriate as revenge?
- What is appropriate response to someone who seeks revenge on your behalf?
Punishment and Redemption

- Pawnee, the rebellious youth
- Punished by the Bowstring soldiers
- Found by a hunter, High Backed Wolf, near death
- Confessed his deeds
- Accepted into the Fox troop

Hunting Alone

- Hunting buffalo was a communal activity
- Brave went hunting alone expelled from the tribe and shunned
- Appeal by brother-in-law
- Brave renounced earlier action

Murder

- Cries Yia Eya had been banished after killing Chief Eagle in a whiskey brawl
- Sought to be allowed to return
- Soldier societies convened to consider request
- Family of Chief Eagle vowed to kill Cries Yia Eya if he returned
- Father of Chief Eagle agreed to allow return on promise of good behavior
Adultery

- Walking Rabbit’s sweetheart had married another
- Spirited her away when he left with a war party
- Others in war party upset that Walking Rabbit had not offered compensation
- Sent woman home on captured horses as form of compensation
- Walking Rabbit’s father settled matter in his absence

The Different and the Familiar

- Criminal vs. civil matters
- Nature of punishment
- Remedies and compensation
- Who exercises authority
- Reference to status of actors
- Creation of precedent
- Absence of systematic procedures and administrative machinery
- Religious vs. secular roots

Why Is Customary Law Important?

- Law is endemic to human society
- Law is probably as old as human society
- Law takes on many forms
- Emphasis in law can vary from society to society
- Law reflects the “politics” of its community