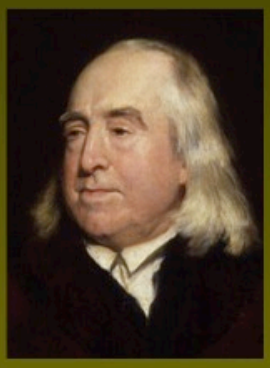
2016-05-09 From the preparatory notes for Class 03 of the introductory course on political economy: *'The evolution of property and how it rules the world'*.

Last time we were beginning to consider the argument of the 19th century English reformer **Jeremy Bentham (1748-1832)** about the relationship between ***property*** and ***law***.

The English reformer and moral philosopher JEREMY BENTHAM (1748-1832) argued that enlightened legislation could solve all social problems. In *The Theory of Legislation* he maintained:

'… there is no such thing as natural property, … it is entirely the work of law.'



'I cannot count upon the enjoyment of that which I regard as mine, except through the promise of the law which guarantees it to me. It is law alone which permits me to forget my natural weakness. It is only through the protection of law that I am able to enclose a field, and to give myself up to its cultivation with the sure though distant hope of harvest.'

'Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.'

Do we agree? Begin with the first and third quotations. Then discuss the second quotation.

Does the second quotation from Bentham sustain the first quotation, or the third?

[Class split into 2 groups for 30 minutes. Return to plenary session and receive brief report-backs.]

Does the existence of property depend on law? Does property depend on enforcement by the state?

Recall: The social basis of property illustrated by the example of **the white rhino**, and by **the titi monkeys**.

In the earliest human societies, although the property relation had yet to undergo substantial development, its rudimentary existence is nevertheless clear. Let's consider a few passages from studies by South African historians.

In *The Forgotten Frontier: Colonist and Khoisan on the Cape's Northern Frontier in the*

*18th Centur*y, **Nigel Penn** writes about the San (who were hunter-gatherers) and the Khoi (who were mainly pastoralists, dependent on grazing grounds for their cattle):

> Resource areas were not necessarily the exclusive property or territory of one particular society prior to the arrival of the trekboers. There was some idea of territoriality among the pre-colonial societies, but this did not exclude other groups from entering the area. Such visits were usually temporary and it was expected that the intrusive group should recognise the superior rights of the original inhabitants by the payment of some small, symbolic tribute. A group might be forced to leave their accustomed round by war or drought, but such inter-regional movements in pre-colonial times were usually tolerated (provided that they did not jeopardise the resources of the society already present), since they enabled the host society to make reciprocal demands on their visitors in the future.[1]

The very fact of one social group being the 'host' with superior rights and others being 'intruders' or 'visitors' shows that a sense of proprietary entitlement was very real. It was the degree to which exclusiveness was qualified, or the degree to which it might customarily be relaxed, that made property relations in these societies different from the later, more rigid and absolute forms of property or property relations that we will be studying shortly.

The idea that so-called 'primitive communist' society (as Marx and Engels termed it) knew no property is incorrect; even a society of hunter-gatherers is necessarily territorial to a significant degree, and proprietary entitlement in such societies is not confined to territory alone.

Noël Mostert, in his book *Frontiers* (evidently much admired by Nelson Mandela) writes this about the 'Bushmen' or San:

> Dependence upon the gathering of wild plant foods and other forms of veldkos necessitated extensive territory. Territories were defined by landmarks such as trees, outcrops, hills, rivers, but principally by water holes, close to which camps were usually established, though always well removed from them so as not to discourage the game. These territorial limits were strictly observed between bands. Trespass could lead to war or blood feuds. However, wounded game could be followed into an adjoining territory so long as a portion of the meat was given to the occupiers of the land.[2]

He continues:

> The 'Bushman's' individual sense of property was attached to three things: to water, first of all, and to any beehive or nest of ostrich eggs he might find in the wild. An arrow in the ground beside ostrich eggs marked ownership. Honey was a cherished luxury, to be eaten in the comb or fermented and used as an intoxicant. But water was the most jealous possession of all, with springs and pools passed from generation to generation through the group. Water was precious for itself and because it brought the game. And it was water, tragically, that began extermination of the race. When black men and white colonists moved into 'Bushman' territories, the former from the east and the latter from the west, they claimed the springs and killed off the game. The 'Bushmen' retaliated by attacking them with their poisoned arrows and, in lieu of lost game, killed or drove off

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[1] 2005. P 18.

[2] 1992. Pp 28-29.

> their stock.[3]

The pioneering Polish anthropologist **Bronisław Malinowski (1884–1942)** found that the Trobriand islanders of the southwest Pacific — clans in settled villages living mainly by fishing, and whom he studied by living among them for extended periods from 1914-1920 — did not own their canoes in common.

> [W]ithin each canoe it would be found that there is one man who is its rightful owner, while the rest act as a crew. All these men, who as a rule belong to the same sub-clan, are bound to each other and to their fellow-villagers by mutual obligations; when the whole community go out fishing, the owner cannot refuse his canoe. He must go out himself or let some one else do it instead. The crew are equally under an obligation to him. … [E]ach man must fill his place and stand by his task. Each man also receives his fair share in the distribution of the catch as an equivalent of his service. Thus the ownership and use of the canoe consist of a series of definite obligations and duties uniting a group of people into a working team.[4]

There is no reason to suppose that the socially recognised entitlement to a canoe, and the social obligations going with it, could have been fundamentally otherwise at an earlier time.

Malinowski provided this definition of law in the light of his field studies among these and other Melanesian islanders, as well as his earlier researches on the aborigines of Australia:[5]

> The rules of law stand out from the rest in that they are felt and regarded as the obligations of one person and the rightful claims of another. They are sanctioned not by a mere psychological motive, but by a definite social machinery of binding force, based, as we know, upon mutual dependence, and realized in the equivalent arrangement of reciprocal services, as well as in the combination of such claims into strands of multiple relationship. The ceremonial manner in which most transactions are carried out, which entails public control and criticism, adds still more to their binding force.

However, while this describes very well the binding force of social *custom*, it does not adequately distinguish the more concentrated, coercive enforcement that comes with the development of specific rules of *law*. Law, properly so called, emerges together with the first embryos of what later becomes the state.

The renowned American anthropologist **E. Adamson Hoebel (1906–1993)** studied the history of the indigenous social systems of the Northern Cheyenne, Northern Shoshone, Comanche, and Pueblo people of North America. In *The Law of Primitive Man*, he wrote:[6]

> Consider the case of [the Cheyenne warrior] Wolf Lies Down, whose horse was 'borrowed' by a friend in the absence of the owner. When the friend did not return from the warpath with the horse, Wolf Lies Down put the matter before his society — the Elk Soldiers. 'Now I want to know what to do,' he said. 'I want you to tell me the right thing.' The society

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[3] P 30.

[4] 1926. *Crime and Custom in Savage Society*, p 18.

[5] Id., p 55.

[6] 1954. *The Law of Primitive Man: A study in comparative legal dynamics*, pp 24-26. Footnotes omitted.

> chiefs sent a messenger to bring the friend in from the camp of a remote band. The friend gave an adequate and acceptable explanation of his conduct and offered handsome restitution to the complainant in addition to making him his blood brother. Then said the chiefs: 'Now we have settled this thing.' But they went on, half as a legislature: 'Now we shall make a new rule. There shall be no more borrowing of horses without asking. If any man takes another's goods without asking, we will go over and get them back for him. More than that, if the taker tries to keep them, we will give him a whipping.' Can anyone deny that the Elk Soldiers were in effect sitting as a court for the entire tribe? ...
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> Among the Yurok Indians of California, as typical of a less specifically organized people, the 'court' was less definite, but it was nevertheless there. An aggrieved Yurok who felt he had a legitimate claim engaged the legal services of two non-relatives from a community other than his own. The defendant then did likewise. These men were called 'crossers'; they crossed back and forth between the litigants. The principals to the dispute did not ordinarily face each other during the course of the action. After hearing all that each side had to offer in evidence and pleading as to the relevant substantive law, the crossers rendered a decision for damages according to a well-established scale that was known to all. For their footwork and efforts each received a piece of shell currency called a 'moccasin'. Here again we have a court.
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> On an even more primitive level, if an aggrieved party or his kinsmen must institute and carry through the prosecution without the intervention of a third party, there will still be a 'court' if the proceedings follow the lines of recognized and established order — there will be then at least the compulsion of recognized 'legal' procedure, though the ultimate court may be no more than the 'bar of public opinion'. When vigorous public opinion recognizes and accepts the procedure of the plaintiff as correct and the settlement or punishment meted out as sound, and the wrongdoer in consequence accedes to the settlement because he feels he must yield, then the plaintiff and his supporting public opinion constitute a rudimentary sort of 'court', and the procedure is inescapably 'legal'.
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> Consider the Eskimo [Inuit] way of handling recidivist homicide. Killing on a single occasion merely leads to feud. (A feud, of course, marks an absence of law inasmuch as the counter-killing is not recognized as privileged by the opposite kin group. The so-called law of blood revenge is a sociological law but not a legal one.) But, among the Eskimos, to kill someone on a second occasion makes the culprit a dangerous public enemy.
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> Now arises the opportunity for some public-spirited man of initiative to perform a community service. He may undertake to interview, one after the other, all the adult males of the community to see if they agree that the killer had best be executed. If unanimous consent is given, he personally dispatches the murderer at the first opportunity, and no revenge may be taken on him by the murderer's relatives. Cases show that no revenge is taken.

Hoebel goes on to provide this explanation of what makes 'law' different from mere 'custom'.[7]

> The really fundamental *sine qua non* of law in any society — primitive or civilized — is the legitimate use of physical coercion by a socially authorized agent. The law has teeth, teeth that can bite if need be, although they need not necessarily be bared.

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[7] *Id.*, pp 26-27.

… Thurnwald in his volume on the nature and growth of law emphasizes and re-emphasizes the importance of force in law in such terms as the following: 'The instance of organized force raises the legal order over and against usage and custom . . . recognized force raises it (custom) to law.'[8]

However, force in law has a special meaning. … The essentials of legal coercion are general social acceptance of the application of physical power, in threat or in fact, by a privileged party, for a legitimate cause, in a legitimate way, and at a legitimate time. This distinguishes the sanction of law from that of other social rules.

… In any primitive society the so-called 'private prosecutor' of a private injury is implicitly a public official *pro tempore* … . He is not and cannot be acting solely on his own, his family's, or his clan's behalf and yet enjoy the approval or tacit support of the 'disinterested' remainder of his society. If the rest of the tribal population supports him in opinion, even though not in overt action, it can only mean that the society feels that the behavior of the defendant was wrong in its broadest implications, that is, against the standards of the society as a whole. Thus it is in itself an injury to the society, although the group feeling may not be strong enough to generate overt and specific action by the group as a group and on its own initiative. Yet the private prosecutor remains the representative of the general social interest as well as that which is specifically his own. …

A third explicit feature of law is regularity. Regularity is what law in the legal sense has in common with law in the scientific sense. Regularity, it must be warned, does not mean absolute certainty. There can be no true certainty where human beings enter. Yet there is much regularity, for all society is based on it and regularity is a quality law shares with all other cultural norms. In law, the doctrine of precedent is not the unique possession of the Anglo-American common-law jurist. … [P]rimitive law also builds on precedents, for there, too, new decisions rest on old rules of law or norms of custom, and new decisions which are sound tend to supply the foundations of future action.

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.

[Class ended at this point. Discussion to be resumed next time…]

Reminder to read the introduction and paragraphs 1-15 of the *German Ideology* extract for next time.

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[8] 'Das Moment eines *organizierten* Zwanges hebt die Rechtsordnung heraus gegenüber Brauch und Sitte … der anerkannte Zwang erhebt sie [die Gewohnheit] zum Recht.' Richard Thurnwald, *Die menschliche Gesellschaft*, V: *Werden, Wandel, und Gestaltung des Rechts* (Berlin, 1931-34), pp. 2, 4.