

**Bronisław Malinowski's Concept of Law from the Native's Point of View:
A Workshop Held on 12–13 September
2014 in Krakow, Poland**

Bronisław Malinowski is one of the few Central Europeans whose ideas have had a significant impact on 'Western' academia. That was almost 90 years ago. Some people say that he actually belongs to the British tradition and that he is somewhat of an exception, since no other scholar from Central Europe has ever achieved the same relevance in the social sciences. But the opposite appears to be true if we focus on law as the primary subject of social enquiry. The workshop entitled 'Malinowski's Concept of Law from the Native's Point of View' attempted to look at the issue from this perspective. The event was organised to commemorate the 130th anniversary of Malinowski's birth by the Department of Sociology of Law at Jagiellonian University in Krakow (Poland), and the International Institute for the Sociology of Law in Oñati (Spain), represented by Adam Czarnota. This unique interdisciplinary forum brought together scholars and researchers from Poland, the United States, Spain, and the Czech Republic (although the largest number of participants came from Polish institutions), representing four disciplinary traditions: the sociology of law, legal science, the anthropology of law, and political theory. The event was organised around the idea that whereas Malinowski's views on religion, magic, totemism, and culture occupy a prominent place in the social sciences, his studies on law are less noticed and less discussed, and this part of his oeuvre has yet to be fully recapitulated. The workshop's aim was thus to create an interdisciplinary space to discuss this usually overlooked theme.

In his welcome speech, Krzysztof Pałeczki (Department of Sociology of Law, Krakow) explained that the idea for this anniversary event came from an academic

visit to Chernivtsi (Чернівці), a cultural centre in western Ukraine and the former capital of the Duchy of Bukovina (once a part of the Austro-Hungarian Empire), where a community of disciples of Eugen Ehrlich, one of the founders of the modern sociology of law, have kept his work alive. In comparing Ehrlich and Malinowski, Pałeczki considered the relationship between masters and their disciples and provocatively argued that everyone is a disciple of someone. In the discussion that followed, this view was countered by Pospíšil's position that 'true science needs independently thinking scholars and not disciples of academic ancestors, no matter how illustrious'. This controversy of autonomy vs. imitation in science appeared later as a quite workable central theme. It must be also added that the workshop was excellently moderated by Professor Pałeczki.

The introductory keynote lecture was given by Mark Goodale (The School for Conflict Analysis and Resolution, George Mason University), who emphasised legal anthropology's interdisciplinary character and described how Malinowski is usually understood by American academia. In his lecture, entitled 'The Hold That Law Has', Goodale suggested a political reading of Malinowski and a re-contextualisation of Malinowski's 'Crime and Custom in Savage Society' against the idea of primitive communism. Goodale argued that the book should be situated within the era when Marxism and the Soviet Union were still very popular in the West (1920s) and speculated on what ideology Malinowski would direct his book against today. Neoliberalism? From an ethnographic point of view, it was interesting to note that all references to Marxism and communism were met with disapproving growling by the Polish professors, showing that anti-Marxist sentiments are still very strong in that country. Nevertheless, the argument for a political reading of Malinowski was not contested.

The workshop was divided into two sessions. The papers in the first panel (entitled 'The Intellectual Background') dealt with the historical and personal context of Malinowski's studies in Krakow. Although there was no department of anthropology at Jagiellonian University in Malinowski's time, there were numerous outstanding personalities who undoubtedly influenced him and turned him towards his future project of social and cultural anthropology. It was in the scientifically turbulent and exciting atmosphere of the early 20th century that Malinowski came into contact with these people.

Michał Dudek (Faculty of Law, Jagiellonian University) focused on the work of Lotar Dargun (1853–1893). Dargun made important contributions to the intellectual atmosphere at Jagiellonian University 'not so long before Malinowski', and we can find many traces of his scientific ambitions and interests in Malinowski's anthropological project. Most significantly, Dargun introduced legal comparisons into legal history and ethnology into legal sciences. Dargun was also the one who, contrary to Westermarck, argued that early legal systems knew only private property, whereas common property developed as a higher stage of socio-legal development.

Krzysztof Pafecki then introduced Malinowski's 'forgotten master', Stanisław Estreicher (1869–1939). This Renaissance man with many interests was Dargun's successor. His unfinished scientific project was based on a study of the history of German and Polish law and the way they mutually influenced one another. He also stressed the comparative method and the sociological dimension of legal research in his investigation of the Assyrian, Babylonian, and Hittite legal systems in antiquity. Estreicher's work was cut short in 1939, when he was captured during the Sonderaktion Krakau operation and was transported along with his brother to Sachsenhausen concentration camp, where he died soon

after. Malinowski's early work shows clear traces of the influence of Estreicher, who had even arranged the publication of Malinowski's only book in Polish, *Wierzenia pierwotne i formy ustroju społecznego* (Primitive Beliefs and Forms of Social Structure, 1915).

Jacek Kurczewski (Department of Sociology and Anthropology of Custom and Law, University of Warsaw) explored the influence of Leon Petrażycki (1867–1931)—the 'unrecognized father of the sociology of law'—on Malinowski's oeuvre. For instance, he examined Malinowski's application of Petrażycki's understanding of law, which had been formulated within the historical and political context of the multiplicity of legal systems in the western regions of Tsarist Empire, to his ethnographic studies of Melanesia. His paper also established the different meanings that ostensibly solid terminologies such as *obligatio* and obligations can take on under different disciplinary conditions and in different research constellations.

In a similar vein, Krzysztof Motyka (Faculty of Law, John Paul II Catholic University of Lublin) suggested that the roots of Malinowski's conception of law stem from Petrażycki's work on law, morality, reciprocity, and obligations, and focused especially on the species of law established by Petrażycki.

The second session was opened by James M. Donovan (University of Kentucky College of Law), author of a popular introduction to the anthropology of law (2008), who suggested re-contextualising Malinowski's anthropologically most famous concept of reciprocity as a form of fairness. Since much of Donovan's presentation could be classified as lying somewhere between law and anthropology, it must actually be seen as taking a step towards legal philosophy. Donovan's use of anthropological concepts in his rather philosophical considerations could be seen as a refined test of whether the other scholars

were capable of identifying with his normative framework beyond the terminology of reflexive social science. It is in this vein that we should read Donovan's fairness-centred anthropology of law. Still, we can respect the desire to associate law exclusively 'with the unique goal to foster perceptions of fairness about structural inequalities'.

Tomáš Ledvinka (Faculty of Humanities, Charles University in Prague) introduced two new concepts that arose from his ethnographical observations of the application of foreign law—the way in which judicial experts in foreign law study the law 'outside-in' and 'inside-out'. In comparing these approaches to the study of foreign law to anthropological approaches, he found that Malinowski's understanding of culture has been warped by Western juristic concepts of law, which are predominantly constructed from the inside out while Malinowski's general view of culture was from the outside in. Ledvinka stressed that the leading figure of cognitive ethnography, Edwin Hutchins, used the opposite approach in his study of the Trobriand legal system of land tenure, and suggested a retrospective interpretation of Malinowski's legal anthropology in light of Hutchins' cognitive ethnographical study of the Trobriand Islands.

Filip Cyuńczyk (Faculty of Law, University of Białystok) investigated Malinowski's dynamics of law in relation to memory. He also posed the important question as to whether state law always chronologically follows tribal law, even in situations when state law is weak or has failed and tribal law allegedly makes a return from hidden fountains of collective memory (the concept of survival), or if it is created *de novo* as a post-state tribal law from a zero-point in memory. Cyuńczyk also discussed the experiences of African nations and

their colonial encounters with law in terms of how legal institutions protect or destroy memory.

The final presentation—and the first professorial lecture by Mateusz Stepień (Department of Sociology of Law, Jagiellonian University)—focuses on the factors that ultimately thwarted the reception of Malinowski's legal anthropology and ethnography within the field of legal science. The reasons for Malinowski's marginal status as a legal scholar were seen more in his orientation towards the social, psychological, and biological dimensions of law than in offering a specific theoretical variation on conventional jurisprudence. As the adoption of Malinowski's anthropology among jurists amounts to a clear break with the limits of technical legal analyses, he examined this inclination as an incentive for the larger project of engaging in an interdisciplinary understanding of law.

The final debate extended the scope of the workshop in that it included experiences from multiple disciplines, with a view towards the various fields' internal disciplinary limitations to the study of law within the context of culture and society. This ever-increasing gap between legal theory and the anthropology of law led professor Pafecki to summarise that, as a legal scholar, Malinowski should be approached primarily from the position of the philosophy or sociology of (legal) science à la STS. Another proposed idea was to think about Trobriand's legal system as a yet unexplored aspect of the islands' culture, while scholars' renewed interest in Malinowski's Polish intellectual background can be seen as starting point from which to relativise his placement within the British tradition.

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