



Legal anthropology, legal pluralism and legal thought

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You may cite this version as :

Fuller, C. (1994). Legal anthropology, legal pluralism and legal thought [online]. London: LSE Research Online.

Available at: <http://eprints.lse.ac.uk/archive/00000538>

This is an electronic version of an Article published in Anthropology today, 10 (3). pp. 9-12 © 1994 Blackwell Publishing.

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Chris Fuller

In RAIN 25 (April 1978), Simon Roberts observed that 'most British anthropologists seem pretty uninterested' in the anthropology of law, and nothing much has changed in the sixteen years since. In the United States, by contrast, anthropological interest in the law remains lively, so that this article is mainly about an indifference that has become pervasive, within Anglo-American anthropology, only on this side of the Atlantic. For Roberts, who developed his argument in greater depth in Order and Dispute (1979), the sterility of legal anthropology was responsible for the dismal state of affairs he described and his radical cure was abolition of the subdiscipline itself, whose 'law-centred' perspective fatally impedes the proper study of social order and dispute. Roberts's argument opened with the claim that the cross-cultural definition of 'law' and legal institutions such as 'laws', 'courts' or 'judges' is peculiarly problematic. It is true that by conventional definition 'law', like 'government', is not a universal category, whereas 'politics', which is often understood to encompass both of them, is, so that 'legal anthropology', unlike 'political anthropology', appears restricted in scope. Yet that does not make the definition of law, in descriptive rather than analytical terms, particularly treacherous; nor is there any reason why every subdiscipline of anthropology has to have a universal, cross-cultural coverage. Rather than reopen the largely

unproductive matter of definition, however, I want to argue in this belated reply to my colleague that Roberts, in pronouncing the death sentence on legal anthropology, encouraged indifference to the law as a fascinating and important subject that anthropologists should not leave aside.

Legal anthropology

It was not always like this, and for the social theorists who laid the foundations of modern anthropology in Britain and elsewhere, law was a central preoccupation. Thus in Durkheim's The Division of Labour in Society, law was proclaimed as the 'visible symbol' of social solidarity (1984: 24), and Weber wrote extensively on the sociology of law in Economy and Society (1978: ch. 8). A concern with law and legal scholarship was also particularly apparent in the development of kinship studies, from Morgan to Fortes and beyond. As a distinctive subdiscipline, legal anthropology's intellectual ancestry is generally traced to Maine's comparative, evolutionist Ancient Law (1861). Early modern anthropologists took it for granted that the comparative, ethnographic study of 'primitive law' was important and worthwhile, even if 'law' was understood by some writers, like Malinowski, to refer to mechanisms of social control in the widest sense. From Malinowski himself (1926), as well as many other anthropologists, came a series of detailed legal ethnographies and the best of these - such as Schapera (1938),

Llewellyn and Hoebel (1941), Gluckman (1955; 1965), Bohannan (1957), Gulliver (1963) and Fallers (1969) - established legal anthropology as a genuine subdiscipline whose substantive content was primarily defined by the analysis of 'traditional' processes of dispute settlement. Obviously, legal anthropology was always a fairly small specialisation, but it used to occupy a more influential place in British anthropology than it does today.

Sometime around 1970, legal anthropology began to lose its cutting edge, partly because - as Roberts says (1978: 4) - it became caught up in 'some of the most wasteful and debilitating quarrels' within anthropology. The most notorious of these was between Bohannan and Gluckman - who both have polemical articles in Nader (1969) - about the salience of western judicial categories, ancient or modern, for the understanding of non-western law. In some respects, the argument concurrently raging between formalists and substantivists in economic anthropology, in which Bohannan played a leading role on the substantivist side, had its legal equivalent in the dispute between Bohannan and Gluckman, even if the latter's advocacy of cross-cultural legal comparison is not strictly formalist (cf. Comaroff and Roberts 1981: 4). The eventual outcome of the formalist versus substantivist controversy in economic anthropology is a matter for debate, but in legal anthropology, despite the level-headed efforts of a few scholars like Moore (1978: chs. 4, 7) to show a path forward, the argument over comparative methodology was

mostly deadening and this contributed to the subdiscipline's desultory state in the 1970s, as described by Roberts.

Of course, there were some useful publications in that decade, such as Hamnett (1977), but since 1980 work in legal anthropology has become much more innovative and the renewed progress is apparent in several valuable monographs, such as Comaroff and Roberts (1981), Moore (1986), Rosen (1989), Conley and O'Barr (1990), Merry (1990) and Starr (1992), as well as the edited collection by Starr and Collier (1989). This modern literature, however, has not been widely read in Britain. Indeed, even the older classic texts of legal ethnography are no longer required reading for contemporary British anthropologists, as once they were, and legal anthropology is increasingly treated as a minority specialisation, probably commanding less general attention than a rising subdiscipline like medical anthropology. The majority of British anthropologists - like the students taught by them - blithely ignore the subject, forget about its classic monographs, overlook new publications and do no original research on legal topics.

Legal pluralism

One reason why legal anthropology may appear to be dormant if not dead, even though it is patently alive in the United States, is that so much of its subject-matter has been taken over and developed within the framework of 'legal pluralism', a large and

expanding field of research dominated by academic lawyers rather than anthropologists. Two fundamental and indisputable facts underlie the developing study of legal pluralism, whose literature has been excellently reviewed by Merry (1988). First - as the final sentences of Roberts's Order and Dispute stress (1979: 206) - everyone in the world today is formally subject to a national legal system. Secondly, as is most plainly true in post-colonial nations but not only there, state law - which itself is often a pluralistic amalgam of western law and other systems such as Islamic law - normally coexists with non-state 'law'; over these customary, indigenous, folk or informal legal and normative orders, state law, contrary to its own ideology, never enjoys unambiguous and unchallenged dominance. The interaction between state and non-state law, or more precisely 'the dialectic, mutually constitutive relation between state law and other normative orders' (Merry 1988: 880), most succinctly defines the current research agenda in relation to legal pluralism (cf. Merry's survey [1992], incorporating an extensive bibliography).

'Legal pluralism' is a diffuse, contested and arguably unsatisfactory phrase, as we shall see below. Initially, however, Merry's distinction between 'classic' and 'new' forms of legal pluralism (ibid.: 872-4) is helpful. The analysis of classic legal pluralism primarily focuses on the relation between indigenous and originally foreign (European) law in colonial and

post-colonial societies. It is mainly in this area of study that older legal ethnographies remain important sources, as for Chanock (1985) who uses them as material to show that Central African 'customary law' was in significant measure the historical product of colonialism. Moore's impressively detailed study (1986) of a single group, the Chagga of Tanzania, which draws heavily on her fieldwork as well as historical data, is a work of legal ethnohistory in a similar vein.

Undoubtedly, among the most important results of modern research in classic legal pluralism are, first, its demonstration that 'traditional' law was constructed, partly through the dialectical relation with state law, during the colonial period, and secondly, that this fact is crucial for the analysis of law, as a plural phenomenon, in post-colonial countries. In addition to work on Africa, the research on India by Galanter (1984; 1989) and before him Derrett (1968), as well as by Cohn (1989), may be cited for their penetrating scholarship in a complex field wherein 'traditional' law encompasses the classical Hindu and Islamic legal systems, as well as the 'customary' law prevailing among ordinary people at the local level. A comparable perspective also frames Starr's historical ethnography (1992) of Turkish law, where the relation between the Ottoman past and the secular present, rather than colonialism and its legacy, defines the problem for analysis.

The concept of new legal pluralism pertains to the existence

of plural normative orders within modern, western societies in particular. Often allied with the school of critical legal studies, scholars of new legal pluralism normally reject the preoccupation with state law characteristic of conventional jurisprudence, and are themselves critics of the official legal ideology proclaiming the law of the state as the only normative order. Because the study of new legal pluralism is mainly concerned with western society, its connection with older legal anthropology may not be very close (cf. Moore 1978: ch. 2), although two recent ethnographic studies of ordinary people's experience in American lower courts by Conley and O'Barr (1990) and Merry (1990) could reasonably be classified as works of new legal pluralism that also develop the anthropology of law. Moreover, studies of new legal pluralism do draw heavily on those of classic legal pluralism, and they are conversely relevant to the investigation of plural normative orders within non-western societies as well.

As an analytical concept, however, legal pluralism is faulty. First, because the coexistence of plural legal or normative orders is a universal fact of the modern world, the concept points to nothing distinctive; it merely reminds us that from the legal perspective (as from any other) isolated, homogeneous societies do not actually exist. Secondly and more significantly, the concept - precisely because it is 'legal' - may serve to reproduce the law-centred misconstructions that

Roberts criticised so strongly. Merry's use of the phrase 'normative orders' is designed to evade that danger by avoiding any imputation to non-state 'law' of the attributes of state law: a definitive body of laws, specialised institutions and personnel, and so on. Thus it plainly is important to recognise, for instance, that even among the relatively 'legalistic' Tswana, their 'law and custom' or mekgwa le melao, 'constitute an undifferentiated repertoire, ranging from standards of polite behavior to rules whose breach is taken extremely seriously', which does not correspond to 'a specialized corpus juris' (Comaroff and Roberts 1981: 9-10). Moreover, even this loose repertoire of rules reflects the overall impact of colonialism, for during the nineteenth century, mekgwa le melao, an old 'body of conventions', 'was now rising in consciousness, in increasingly reified form, under the impact of the colonizing culture' (Comaroff and Comaroff 1991: 212-3). Tswana 'law and custom', in other words, became more law-like as the indigenous normative order was reconstituted within the new colonial environment, in which Christianity and trade were at least as crucial as the colonial legal system itself. Even from this brief example, it is clear not only that 'legal' orders are not all equally legal, but also that legal pluralism is at least partially a relation of dominance, and possible resistance, that must be understood as such, and that it has to be situated within and largely explained by its wider, non-legal context.

It follows that Merry's focus on the relation between state law and other normative orders, as she herself acknowledges (1988: 891), potentially narrows to a single, legal dimension something that is far more complexly constituted. Legal pluralism, if it is to be used as a master concept for characterising the relation between state law and alternative normative orders, has to be deployed so that it does not inherently rely on judicial premises that are constitutive only of state law and therefore distort the understanding of those other, non-state orders. Among anthropologists, the veracity of this conclusion is unlikely to be contested, but the intellectual predominance of academic lawyers in the study of legal pluralism means that it can be too readily ignored.

Legal thought

In her article, Merry also suggests (ibid.: 889), that 'viewing situations as legally plural leads to an examination of the cultural or ideological nature of law and systems of normative ordering', for law is not just a set of coercive rules but also 'a system of thought by which certain forms of relations come to seem natural and taken for granted'. In cases of legal pluralism, there are therefore two or more such systems of thought, and they and the relation between them are important subjects for investigation.

It is questionable whether a focus on legal pluralism really

has much to do with the interpretation of law as a system of thought. On the one hand, such interpretation has always characterised much jurisprudential scholarship and it has probably reached its apogee in the work of Dworkin (1986), who deals exclusively with Anglo-American law. On the other hand, especially among legal anthropologists as Merry's own monograph (1990) amply illustrates, growing interest in the interpretation of legal thought has been directly stimulated by contemporary preoccupation with the interpretation of culture, discourse and modes of thought. Not all of this preoccupation is really new, as Gluckman's monograph (1965) of thirty years ago demonstrates; nonetheless, Merry is addressing an important aspect of law that I shall now discuss.

In my opinion - although it may be an unfair projection of my own boredom threshold - one cause of fading interest in legal anthropology has been the tedium of its descriptions of dispute settlement procedures, in which I at least often fail to get much sense of people struggling with their complex ideas and beliefs in relation to the world they live in. Turner's monograph (1957) is a patent exception to this generalisation, but then it is not usually celebrated as a classic of legal anthropology. Be that as it may, the progressive narrowing of legal anthropology to the comparative study of dispute settlement surely deprived it of much of its potential interest, partly because it was biased 'toward the examination of behavior and away from an analysis of

either the substance of rules or the meanings of law' (Merry 1990: 91). Over the last decade or so, research on law as a system of thought has become increasingly important, and developments in this area are being sadly neglected by British anthropologists uninterested in legal studies.

As even an elementary knowledge of jurisprudence reveals, legal reasoning in, say, Anglo-American law is a very complex matter, far removed from the more-or-less mechanical application of rules to facts that is widely assumed by the lay public. Moreover, as a system of thought, the law is actually counter-intuitive in fundamental respects, not least in how it initially constructs the 'facts' of a case. This contention admittedly touches on problematic areas of legal theory, especially how far any such theory should depend on the interpretation of 'hard cases' settled by the higher courts, as opposed to the far more numerous run-of-the-mill cases disposed of either by the lower courts or even without recourse to them.

Yet even in these ordinary cases, something both significant and largely unnoticed occurs, as Conley and O'Barr explain (1990: 168): 'Professional legal discourse finds its raw materials, indeed, its very reason for being, in the everyday discourse of disputes. But, through a process that is remarkable as well as largely unremarked upon, the law selects among [the voices of litigants], silencing some and transforming others to conform to legal categories and conventions'. How we normally discuss our

affairs - broadly in terms of relationships among people - is thereby converted into a specialised discourse of rules, which is then subject to interpretation by legal professionals. In Conley and O'Barr's analysis, a fairly clear line is drawn between lawyers and clients, although some clients can express themselves in legal terms. In partial contrast, Merry (1990) shows that when ordinary Americans enunciate their problems to lawyers and court officials in legal terms, the latter frequently try to persuade them to accept a moral or therapeutic framing. Taken together, however, both studies show that a legal or rule-governed discourse, as opposed to a moral or relational one, is not necessarily the sole preserve of lawyers, although they alone, of course, are normally able to command legal discourse authoritatively.

The crucial point here, though, is that the authoritative legal discourse of the professionals is, particularly in civil law, a complex and counter-intuitive transformation of everyday relational or moral understandings. Admittedly, other authoritative discourses controlled by professionals, such as that of medicine, give rise to comparable transformations of everyday understandings, so that the law, in many of its features, is not a unique case. Furthermore, what is true of modern western law is not true everywhere else and especially in non-western 'customary' systems, such as those typified by African informal courts, the transformation wrought by legal

reasoning is less far-reaching because explicit 'legal' rules more closely conform to implicit social norms. Nevertheless, all judicial processes, to a greater or lesser extent, are characterised by distinctive and often powerfully self-validating systems of thought whose analysis and interpretation ought to be central to legal anthropology.

This, more or less, is the perspective of Geertz (1983), who argues that we should look at law as a cultural system of meanings; his approach, incidentally, was anticipated by Barkun, who defined law as a 'system of manipulable symbols that functions as a representation, as a model, of social structure' (1968: 92). According to Geertz, legal reasoning is one of the most significant ways in which people try to make explicit sense of their world and it is itself partially constitutive of that world, notably through law's capacity to relate general concepts to particular cases. Law is 'part of a distinctive manner of imagining the real' (Geertz 1983: 184), a culturally variable system of ratiocination about the relationship between facts and norms, rights and duties, truth and justice. The main body of Geertz's essay is a comparison of three Indonesian systems of law - Islamic, Indic and 'Malaysian' 'customary' adat - pursued against the backdrop of Anglo-American law, but his conclusions are general ones. 'Law, with its power to place particular things that happen in a general frame in such a way that rules for the principled management of them seem to arise

naturally from the essentials of their character, is rather more than a reflection of received wisdom or a technology of dispute settlement' (ibid.: 230). Thus law is not simply a codification of explicit norms or a mechanism for social control; it is also a 'species of social imagination' (ibid.: 232) that lets people work out for themselves how they are going to live, how they can 'imagine principled lives they can practicably lead' (ibid.: 234).

Geertz's approach is open to familiar criticisms and it is also idealistic; after all, the law is about repression just as much as imagination. Moreover, other authors, drawing on much more detailed ethnographic data, have developed interpretative insights like his in greater depth. What Geertz successfully does, however, is to emphasise evocatively the extent to which law comprises an intellectual process of transforming the specific, or moral and relational, into the general, or legal and rule-governed, and then of reciprocally extrapolating from the latter to the former. This process is, in its own way, as imaginative - and despite its ostensible naturalness as exotic - as any more patently imaginative reasoning to be found in the domains of politics or kinship or religion.

A central strand in Roberts's objection to the law-centred approach in legal anthropology is its dependence on the premise that law is a system of rules that determine the outcome of cases. That premise is indeed demonstrably false, but in

insisting on this point Roberts almost throws the baby out with the bathwater, because analysis of the rules themselves - the backbone of legal reasoning - ceases to be central to the project of legal anthropology as he summarises it (1978: 7). Roberts thus turns away from much that is most fascinating about law, and anthropological expertise seems to be discarded where it has arguably been most fruitful: namely, in the interpretation of alternative modes of thought within their local social contexts.

Anthropologists certainly can contribute something valuable and different to a domain of scholarship increasingly dominated by academic lawyers investigating legal pluralism. By using their detailed ethnographic data about the local workings of non-state law or normative orders, anthropologists are able to illuminate the elusive ways in which 'legal thought is constitutive of social realities rather than merely reflective of them' (Geertz 1983: 232), as Comaroff and Roberts perspicaciously show in their ethnography of Tswana law (1981). Indeed, much that is valuable in that study derives from its authors' pursuit of an approach that Roberts had apparently dismissed in his RAIN article.

Legal anthropology today can no longer be a distinctive subdiscipline standing apart from the study of legal pluralism in its many dimensions (cf. Merry 1992). Yet law is too important to be left entirely to academic lawyers and it cannot be neglected by anthropologists, who still pretend to study all the exotically ordinary ways in which human beings organise and

represent themselves and their relationships with each other.

The reader may object that I have failed to say how legal anthropology should substantively develop in the future, but that would be to miss the point. What is required above all, at least in Britain, is the subdiscipline's reintegration into the anthropological mainstream, so that legal anthropology can anew benefit from and vigorously contribute to the development of the subject as a whole.

Note

The author is a Reader in Anthropology at the London School of Economics.

Acknowledgements

I would like to thank John Comaroff, Simon Roberts and Dick Werbner for their critical comments on an earlier version of this article.

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