THE FUTURE OF THE ANTHROPOLOGY OF THE LAW / PoLAR Emergent conversations part 6

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My contribution to this debate on the future of legal anthropology takes up an old concern of the field, namely the relationship between the anthropology of law and social theory. Legal anthropology has turned into a strong sub-discipline intent of studying *the legal*. This has had many very positive effects, but it has also isolated the field from broader anthropology and social theory. I argue that, in order to remain relevant to anthropology and to society, scholars of anthropology and law should use their ethnographic insights to theorize beyond the field of legal anthropology. The following three questions lay out what I believe requires our attention: What are we actually (currently) studying? Do we really know enough about what law is and what it does in people's lives? If so, how can we better theorize its role in society?

What are we studying?

There is a disjunction in *what exactly* scholars of the anthropology of law study. Some are studying up (Nader 1972). They study the specialists and experts of law in their institutional contexts, interested in how regulatory frameworks emerge and are implemented by state and non-state actors and in their diffusion and adoption in different spheres and geographical areas. In short, they are interested in norm-making.

Other scholars study "down". They study those who have to deal with the norms made by legal experts; the others, the laypeople. Ethnographers who study down engage with community-grounded conceptions of the law in its different forms.

Both "up" and "down" scholars are sure that they study how the law is being *practiced*, but the two fields rarely engage with the other. Instead, they engage in a partition of labour depending on specific and differing conceptions of the law. In both perspectives, experts and specialists are somehow closer to the structure of the law (they *make* the law); and that those "below" *fill in* and have to deal with this structure; that is, they *practice* the law. My concern here is that we create artificial, conceptual boundaries between the makers and the consumers of the law. This might have something to do with the power of word-based discourse and the social status which grows from written expertise (also among academics).

I believe we should try harder to overcome the disjunction between these two fields of study, as they are part of one social field, to speak with Max Gluckman. Overcoming this disjunction is not easy. There are reasons for the disconnect between the fields and the disparities of knowledge (i.e. the experts and the rest). In other words, we also have to try hard to overcome them *as researchers* and undermine more self-evidently the separation between constructed types of knowledge.

What is law, and what does it do?

As an anthropologist who is not trained as a lawyer, the law remains ambivalent to me as an object of study. Do I need to know as much about the law as lawyers do in order to properly understand the role of the law in people's lives – or does it suffice to have some kind of lukewarm knowledge, similar to that of my lay interlocutors? While lack of expertise might be a problem, expertise can also be blinding because it is overemphasizing the role of the law in people's lives. Here there are parallels to other sub-fields in anthropology. Like the (ill) body in medical anthropology, the law is often treated as something exceptional and excluding instead of something we all know, do draw on and are shaped by. This means that we need to study law as part of a holistic perspective on being-in-the-world. We should ask how law-doing relates to politics, religion, and memory. What we need is not a law versus society conception but a *law in society* approach.

To illustrate what I mean, I give an example from my own research (Kesselring 2017). I went out to study the effects of the legal discourse on apartheid victims who turned to US courts in the hope to see their grievances addressed. In the specific case, South African victims sued multinational companies today for damages relating to past injuries. In many ways, victims are the prime example to demonstrate the power of the law; how the law subjects and re-produces victimization. It would be seducing to argue that the law keeps people in a social position where they were when turning to the courts, or even worse: how the law turns them into victims. Undertaking this study, I grew increasingly confused about the relevance and effects of the legal discourse. I realised that there were much more pressing questions for victims than the legal discourse, such as: does the law help them to emancipate from their victimhood, and from their bodily knowledge of violence? How can we understand the lingering effects of violence in people's lives – and the role of the law in it? To better understand how legal discourse works (or fails to work), I had to focus on the body and bodily memory of harm. Anthropology of the body and anthropology of law usually do not

engage with each other, but I found it impossible to say anything meaningful in the one without taking into account the other. I was only able to say anything meaningful about the effects of law by moving beyond the anthropology of law. Isolating a legal perspective from its social context would not merely have produced a partial truth, but a half-truth.

More general questions follow from this: How is the law produced as a separate social field with its own logic? How far do the proponents of the separation (including legal anthropologists) succeed in transforming their vision into reality? In what situations are people avoiding or ignoring the law? How do legal and non-legal domains intersect in their lives? If we can better theorize the distinction between the two, and the overlaps and shifts from one to the other, I believe we make a contribution to social theory more generally. This leads me to my final point:

Theorization

The sub-field[1] of the anthropology of law should make its contribution – and relation – to social theory clearer. The 'turbulent years' (Moore 2001) have, I think, been over for too long. Maybe as a result of the institutionalization and proliferation of legal anthropology in academia (which is a success in itself, of course), we take the law's importance in people's lives for granted. This might have been crucial for the development of the fields, but it is now time to go back to social theories.

Back in 1978, Simon Roberts expressed his doubts about a "law-centred analytical framework" (1978, 6) as a convincing outlook on society. The question to me is not so much whether we should adopt "our own folk categories" (as opposed to "the legal" proper), as Roberts pondered, and where exactly to draw the line of what "legal" should mean in analytical terms. I am not doubting the value of "the law" as a category for analytical purposes – although I do see the challenges and problems (cf. Greenhouse 1982). My concern is that, if we separate the legal from the social, one of the many consequences is that we misconceive the law as discourse-as-words only. Looking at current scholarship on anthropology and law, I fear that focusing on the law (however defined) has indeed enticed us to primarily focus on the discursive level of human interaction as informed by Foucault (Goodale 2017, 35). This ignores that law, social order and conflict are human categories

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[1] Contrary to Mark Goodale, I believe that legal anthropology has reached sub-disciplinary status (Goodale 2005, 947)

which are lived, embodied, and enacted, and this cannot be captured in words, legal texts and judicial activities only. The legal field is nothing exceptional, nor is it necessarily relevant. To understand its place in people's lives, we must situate its working (and limits) in relation to other discursive formations.

Against this concern, I suggest a twist to Roberts' question of "what do we gain in insisting that a particular mode of action is 'legal', whereas another is not?" (Roberts 1978, 7) by asking: what do we *lose* if we insist on studying the law? For the future of the anthropology of law, this can mean a number of things. The sub-field might dissolve into a general anthropology. More likely, however, the anthropology of law will remain prominent. In order to remain *relevant*, though, we should always take clues from other sub-fields, and thereby develop anthropology, the social sciences and, ultimately, social theory further. Otherwise, we run the danger of doing a self-referential exercise and a limited social analysis, of leaving anthropology to others – and, worst of all, of losing touch with society.

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