Restating the Legal Anthropological Discipline

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This is the second volume to result from a series of conferences organised by the Max Planck Institute for Social Anthropology in Halle/Saale. Within a few years this institute has become one of the leading centres in legal anthropology and has managed to attract most leading scholars in the field to its conferences and seminars. It is only to be hoped that it will continue to be so successful after the imminent retirement of two of the editors of the present volume, Franz and Keebet Von Benda-Beckmann.

The title of this particular book is almost synonymous with what legal anthropology has become in recent years and what it is likely to remain for some time to come. Relating the global and the local, with increasing attention to the national, and exploring the relation between power and law in such transnational constellations has become its core focus, certainly now that most legal anthropologists have enthusiastically embraced the ‘cultural turn’ in the social sciences.¹ This is reflected in the first chapter, which reads as a restatement of the basic tenets of the discipline, reconfirming the centrality of legal pluralism, addressing the issue of transnationalism and discussing the role of power in transnational legal relations. While it is a useful introduction to the ‘uninitiated’, it does not contain important new insights to those already familiar with the field.

Unfortunately, that also applies to some of the first chapters of this book. Notably the contributions from Greenhouse, Nader and Baxi – all of them renowned scholars with impressive track records – I found disappointing. Their main objective seems to be to restate, using the contemporary jargon of legal anthropology, what the well-informed newspaper reader with a background in the social sciences already knew. They deal respectively with the Military Order of 13 November 2001, which provided the legal basis for Bush’s War against Terror (Greenhouse), the way rule of law and democracy discourse are used to legitimise the occupation of Iraq (Nader), and ‘legal pluralism amidst the current ongoing global wars of, and on, ‘terror’ (Baxi). Looking at earlier writings of the main legal advisers of the Bush administration becomes ‘following discursive trails’ (Greenhouse); concluding that in the process of invading and occupying Iraq, law and politics are closely

¹ The ‘cultural turn’ refers to a major development in the social sciences during the 1990s, when under the influence of post-structuralist philosophy scholars increasingly looked for ‘the causal and socially constitutive role of cultural processes and systems of signification’ in understanding social reality (Steinmetz 1999, p. 1-2).
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connected becomes ‘exploring the frontiers of illegalities’ (Nader); and the use of extraordinary measures by the Bush and Blair administrations in the war on terror becomes an example of ‘foster[ing] globalising secular fatwa cultures’ (Baxi, p. 106). At the end of his chapter Baxi does come with an interesting plea for legal anthropologists to re-engage with the work of John Rawls, which is a normative position that is not usually taken in this field. However, the way to get there was not particularly straightforward. ‘Jargon’ and theory can be eminently useful, but if they do not help to provide new insights into already familiar materials, they only obscure the evident.

Two other chapters in the first part do provide new insights. One is Jane Cowan’s illuminating historical comparison of supranational bodies in Europe concerned with problems of ethnic minorities. Her first case concerns the Minorities Section of the League of Nations’ struggle with discrimination against newly ‘formed’ minorities after the breakdown of the Austro-Hungarian empire; the second looks at how the EU has struggled with the same issues in its accession policy after the demise of the Soviet Union and the break-up of Yugoslavia. Cowan not only manages to bring out the surprising continuities in these cases; she also relates her findings in a meaningful way to the audit and accountability processes in the EU more generally. Her theoretical discussion further demonstrates how these cases can be better understood in terms of what she calls ‘the new internationality’, instead of in the more common framework of ‘empire’. Although the chapter does not fully develop this framework, the idea is worth exploring. Likewise, the author presents useful suggestions for new empirical research to take this agenda further.

The other illuminating chapter is by Franz Von Benda-Beckmann, who takes a critical look at how human rights have been represented in anthropological debates and how this feeds into political discourse. Von Benda-Beckmann’s central concern is the tension between the ‘demanded and asserted universality’ of human rights and the culturally relativist position traditionally associated with anthropology. He provides a clear and concise review of this debate. The first issue he addresses is the presentation of human rights as a principally ‘western’ notion, and hence ‘the gift of the west’ to the rest of the world, which, he argues, has led to a misguided approach that looks for moral notions in non-western countries that support the universality of human rights. His line of reasoning is pursued along the neo-Kantian line that empirical data can never support a moral (or legal) position. This is important for legal anthropologists because they deal with several types of ‘existences’ at the same time: human rights may exist in state law, but also in knowledge of locals, programmes of NGOs, etc. However, none of these ‘existences’ can prove human rights’ universal validity from a social science perspective. Therefore, socio-legal scholars who critically examine human rights but still support them as an ideal need not worry as long as they continue to draw the distinction between an empirical and a normative approach. This is a sensible position which I think can be of much practical use to socio-legal scholars working on this issue.

The next part of the book is called ‘At the Intersection of Legalities’ and contains three chapters about completely different topics: fisheries management, a devel-
opment project aimed at improving the position of women in Burundi, and Scottish children's hearings. They are tied together to a degree by the fact that they all deal with the question of how bureaucracies respond to legal influences, which is more of a *Leitmotiv* than the part's title suggests since in legal anthropology the intersection of legalities is to be found everywhere nowadays.

The chapter by Melanie Wiber and John Kearney addresses the development of fisheries management on a Canadian island over almost four decades, providing a nice combination of ethnographic description with theoretical debate, as well as showing how one can take a normative position without abandoning the distance required for a balanced evaluation. The authors describe how the introduction of the fish dragger, with government support, led to the decline of fish stocks. In response, the government introduced a quota system, which managed to reduce the dragger fleet and concentrated the remaining vessels into the hands of a few companies. However, traditional hook-and-line fishers resisted the quota system and managed to avert its imposition by introducing a self-regulatory body. Wiber and Kearney then engage with the literature on community-based natural resource management (CBNRM). Their main argument is that a state-centric approach to CBNRM is fatal to the required flexibility and innovation needed for it to become a success. The fish-stock-based approach, combined with governmental ‘silosim’ and dealing with quotas as property rights, inevitably promotes local disputes and accumulation of capital in the hands of a few. Nonetheless, within the very narrow margins available to them, community management boards like the one found on the island have managed to contain such disputes by effectively involving all kinds of stakeholders in decision making, even extending beyond the Canada-US border. Such vertical and horizontal linkages are essential for building ‘learning communities’, which differ substantially from the stakeholder approach generally adopted by the government. Unfortunately, the confines of a single chapter have not allowed the authors to discuss the central issue of how the ‘legal landscape’ affects the formation of such ‘learning communities’; no doubt this will follow at some later stage.

Likewise, the chapter by Weilenmann is both empirically and theoretically interesting. The author’s main argument is that it makes sense to conceptualise the rules that guide the planning and conceptualisation of development projects as well as the rules formed by the personnel during implementation as ‘project law’. In the end, I found this conceptualisation in itself not particularly informative, but the way the author addresses how such norms influence the various phases of project development and implementation from a case in Burundi is fascinating. Looking at a ‘gender’ development programme within a larger programme of ‘crisis prevention’, Weilenmann conceives of the planning process as a series of translations from the top level all the way down. He shows the different factors at play at various levels and how general notions at the top – such as ‘feminisation of poverty’ – gradually acquire the form of a ‘common ideology’ at the lower levels, with gender and ethnic scapegoating as a result. Moreover, the infatuation with gender and a lack of local understanding has led to an ethnicising of gender that had not hitherto occurred. Thus, western analytical categories ultimately do lead to a new reality on the ground, but not the one intended at the outset.
One critical remark on this chapter is that it would have benefited from looking at the literature of development administration. This is a more general point about the part of legal anthropology that looks at the type of issues which have for decades been the domain of development administration, but without paying much attention to the discoveries already reported in this discipline. A similar suggestion applies to the next chapter by Griffiths and Kandel, but then for ‘western’ public administration. This concerns an excellent case study, showing what insights a really good ethnography of organisations can yield. The article examines the Scottish Children’s Hearings system, which has been established to decide whether compulsory supervision measures must be applied in the best interest of the child. The central issue is the tension between the power of the hearing panel to impose such measures and the need for an ‘open’ exchange of information between the panel and the children and their families. This situation is exacerbated by the class differences between the panel members and those being heard. Various other government instances involved in supervision (reporters, social workers, and guardians) have their own stakes in the process and their own balance to maintain – hence they pursue strategies to obtain and optimum outcome of such hearings from their own perspective. An additional complication is the influence of the ECHR’s Articles 6 and 8, which demand a fair hearing and respect for private and family life. As a result the procedure becomes loaded with contradictory interests which result in different interpretational strategies by the panel members in order to obtain the information they wish without compromising the legal prescriptions.

The authors analyse these strategies and their results with great subtlety and an eye to meaningful detail. I only wonder why the authors have decided to frame this theoretically as a case of inter-legality. Such a notion suggests that, in the absence of an influence from international law, there would be a case of ‘straightforward’ legality, implying less tension and a more automatic outcome. One may wonder whether such a view does justice to ‘national law’. Law always requires interpretation and may yield different outcomes. The question, then, is whether inter-legality is not simply another word for law. Nonetheless, this should not detract from the excellent analysis contained in this account, as well as the fact that it mainly deals with legal interpretation and power in a government organisation – which turns it, not into a typical legal anthropological venture, but a meaningful contribution to public administration.

The final part of the book is called ‘Religion as a Resource in Legal Pluralism’ and, in spite of the somewhat puzzling title, it fortunately continues the presentation of new empirical material. The first chapter, by Richard Whitecross, discusses ‘the Buddhicisation of Bhutanese Law’ and deals with the struggle fought in many developing countries to modernise the legal system without squandering its legitimacy. It describes how the architects of a new district court have introduced religious references into their building in order to reinforce its stature, but also – and more importantly – how such Buddhist cultural symbolism is playing an increasing role in legal process as well, smoothing the transition from the traditional legal system to a modern one predicated on foreign codes and procedures. This includes the translation of foreign legal terms into concepts drawn from
Buddhist writings, which involved such sensitive issues as replacing the traditional word for judge with one carrying connotations of impartiality and justice. Altogether, however, the changes are drastic and according to the author are moving towards delivering ‘efficiency, form and process’ rather than justice. Whether that is really the case cannot be judged from this chapter, however, as this would require more extensive fieldwork into court practice. Moreover, it also implies that in the old system justice was indeed done, and the chapter does not carry any evidence for such a conclusion. As a matter of fact, I myself am still attracted by the notion that impartiality may lead to better justice than concentrating legal power in the executive. So, while the account is revealing in some ways, the conclusion amounts to speculation.

The next chapter, by Keebet Von Benda-Beckmann, excels in its clarity and brevity. It takes up the challenge posed by John Bowen’s work on inheritance disputes among the Gayo in the Acehnese highlands (Indonesia) to see if the expansion of Islamic courts’ jurisdiction over such disputes does indeed lead to an increasing number of litigants turning away from the general courts elsewhere. The author looks at the West Coast of Sumatra, the Minangkabau region, which is known for its Islamic piety, but still adheres to a matrilineal inheritance system and compares it to Bowen’s Gayo highlands. In both areas law is a constellation of state law, religious law and customary law. These cases are presented within the framework of a decentralisation process that started in 1999 and has reinforced notions of identity and altered the political landscape in the two regions in different ways. The outcome of the comparison is straightforward: unlike in Gayo, the large majority of Minangkabau litigants prefer the general court over their Islamic counterpart. This in itself is a remarkable finding, but the true value of the chapter lies in its analysis of what accounts for these different outcomes. The author addresses an amazing variety of factors, local and national, political and cultural, and moreover frames them in a historical perspective. The conclusion reveals that the explanation does indeed consist of very diverse reasons, which can only be understood if one looks at these cases in a longer perspective. Key issues are the different relations between \textit{adat} and Islam in the regions – both in their relations with the central government as well as in social (family) structures – and the different position of Islamic judges in society. But in both cases the judges mediate between Islamic and \textit{adat} law, no matter whether they sit in the Islamic or the general court. While not spelled out, the theoretical framework used in this work extends beyond this particular case and Indonesia, and will be of great use to anyone doing research into disputes involving constellations of state, customary and religious law.

The final chapter is by Fernanda Pirie; it compares how Tibetan villages in India vs China have responded to the extension of central state authority over their affairs. The author takes issue with the models of domination and resistance developed by Scott and Escobar, and demonstrates how ecological factors have played an important role in determining the nature of the response to attempts at domination – an issue not often explored, but sometimes quite important. In the village in India, high up in the mountains and difficult to reach, the influence of the state moved from raising taxes and enlisting soldiers in the days of the
Ladakhi kings to the provision of goods and welfare today. Nevertheless, the villagers have maintained a high degree of autonomy and resolve their disputes without any involvement from central state institutions, and religious authorities do not impinge on this autonomy either. The ecological conditions here have been enabling, but the emphasis on autonomy, the author suggests, may also have to do with the extractive nature of earlier regimes and the resistance against it.

The situation in the ‘village’ in China is quite different ecologically as it concerns nomads roaming on the Tibetan plateau. Here monastic and aristocratic influence was greater, until the Chinese annexed Tibet and collectivised the herds. Since the 1980s much has reverted back to the old system, however, but the stratified nature of the tribes concerned seems to have lost importance. Theft and violence within encampments occur quite often and retaliation is seen as a legitimate response. However, if matters threaten to get out of hand, they will be settled by the headman. Feuds between different encampments are mostly resolved by lamas from monasteries in the area, which have been permitted to reopen. Just as in the ‘Indian’ case, autonomy is thus considerable.

The Chinese state, however, is viewed by the locals in a far more negative light than the Indian one, even if it has brought considerable material benefit. It is likely that the enforced collectivisation has not been forgotten and at present the enclosure of pasture poses a threat to the nomadic lifestyle. It is therefore somewhat paradoxical, according to Pirie, that in case of more serious conflicts the state is actually called upon to intervene. In fact, however, this is in line with general theories of dispute resolution and Henley has earlier explored the role of ecological factors in explaining the call for outside intervention – in his case in Northern Sulawesi the Dutch VOC, which was not a typically benevolent power either.2 In any case, the chapter is quite informative and thought provoking.

Judging the book as a whole one cannot escape the conclusion that it is the result of a successful conference, but not one that was greatly coherent. The editors have done their best to order these chapters logically, but this is no easy task when participants presented what they happened to be working on at the time. If one wants to bring them under a common denominator the only thing would probably be ‘legal anthropology’ – or indeed ‘the power of law in a transnational world’, a notion which is just as broad. But this critical note should certainly not deter anyone from reading the volume since most chapters combine excellent empirical data with sound theoretical approaches and insights.

References


2 Shapiro 1981, Henley 2002