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LAW AND CULTURE

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ABSTRACT

In its founding decades, the anthropology of law, largely centered in Britain, paid little explicit attention to culture, although it often did so implicitly by addressing vernacular ideas and beliefs involved in legal processes. Explicit focus on the cultural foundations of law came, in the USA, with a turn to cultural hermeneutics and the ‘legal sensibilities’ involved in the management of conflict; that turn resonated with a shift, in the broader field of Law and Society, from the study of law *and* culture to the study of law *as* culture. Most recently, the anthropology of law-as-culture has expanded to take in new foci. These include the role of language and linguistic ideologies in legal processes and the devolution of culture across much of the world into intellectual property. This entry traces the broad trajectory from the early generations of the anthropology of law to its major contemporary concerns.

KEYWORDS: Law, Culture, Hermeneutics, Language, Intellectual Property, Identity, ‘Law as . . .’

In 1999, Paul Kahn, a law professor at Yale University, published what claimed to be ‘the first full examination of what it means to conduct a modern intellectual inquiry into the culture of law . . . [c]harting the way for the development of a new intellectual discipline’ (Kahn [1999]).¹ As it would turn out, this ‘new intellectual discipline’ never took root in the legal academy. What was notable about it, however, was its resonance with ‘a model of inquiry long familiar to cultural anthropologists’ (Dolgin [2000] at 965).

To be sure, legal anthropology has paid considerable attention to the relationship between law and culture, albeit in many different ways. In so doing, it has provoked a foundational question about that relationship, about the *and* linking the two terms. Why?

Because, for some critical perspectives, law is, *ab initio*, an intrinsically cultural construct and a fundamentally cultural practice (e.g. Rosen [2008]), if an historically

labile, exquisitely complex, and highly variable one. There is an echo to this in the broader field of Law and Society. It questions the long taken for granted study of 'Law and . . .' (Economics, History, Psychology, Anthropology, Religion, Language, Literature), replacing it with 'Law as . . .' (Tomlins and Comaroff [2011]; Fisk and Gordon [2011]). As Naomi Mezey ([2001] at 46) puts it, perhaps 'we should not speak of the "relationship" between law and culture at all, as this tends to reinforce the distinction between [them]'. From this perspective, as Durkheim might have put it, the law is the *conscience collective* in its active, if often disputatious, voice (Clarke [1976] at 246).

Early Moments

For many anthropologists, the anthropology of law owes its origins to *Crime and Custom in Savage Society* (Malinowski [1926]; see Goodale [2017] at 12-14), a study rich in its address of the cultural bases of Trobriand law – but under other terms, among them, custom and belief. British structural functionalism, the *locus classicus* of legal anthropology in its founding generations, was uncomfortable with the concept of culture – unlike its American counterpart – except as a loose synonym for society. Social institutions were its primary objects of analysis – although Max Gluckman's magisterial studies of the legal system of the Barotse of Zambia (then Northern Rhodesia) addressed indigenous cultural concepts and practices under the rubric of *Ideas in Barotse Jurisprudence* (Gluckman [1965]). Most notable among these was a culturally nuanced (albeit lexically unmarked) concept of the Reasonable Man, socially inflected by contrast to the similarly named, but universalistic and individually-centered European legal construct (Gluckman [1967] at chapter 3).

Gluckman's work was famously criticized by Paul Bohannan, an American anthropologist, allegedly for misrepresenting Barotse concepts and practices by translating them into the language of Western law rather than analyzing them in their own terms (Bohannan [1957]); it was an allegation that Gluckman contested vigorously. By contrast, Bohannan's own account of legal processes among the Tiv of Nigera made repeated reference to indigenous usages which, he claimed, constituted a discrete folk system. The Gluckman-Bohannan debate that followed is well-known. In essence, it

was an argument over the im/possibilities of cultural translation in the study of “other” legal orders – and, more broadly, over the epistemic foundations of the anthropology of law (Bohannan [1957], [1969] at 401-418; Gluckman [1967] at chapter 9). Strikingly, however, while it hinged on the analysis of the cultural practices of two African peoples, it was conducted without any attention to the concept of culture itself.

There was one exception to the lack of explicit engagement with culture in the early and middle generations of British legal anthropology: *Rules and Processes: The Cultural Logic of Dispute in an African Context* (Comaroff and Roberts [1981]). This ethnography of the Tswana of southern Africa locates their legal processes deep in the socio-cultural order out of which conflict arises. The authors argue that it is the social and semiotic construction of the indigenous world – and the ontological contradictions on which it is founded – that give material meaning to the intentions, relations, actions and aspirations that determine the form and content of Tswana law in action; law in action, in other words, arises out of a dialectical relationship between socio-cultural structures and individual experience, social context and human practice. And it, in turn, shapes and reshapes the lineaments of the lived-in social universe. This dialectical relationship also underlies the contradictory manner in which Tswana perceive their lived-in world: as rule-governed yet open to the constant (re)negotiation of relations, rank and status, orderly yet fluid. This excursion into the cultural epistemology of the law of an African people was to resonate with the emergence, of a hermeneutic moment in American legal anthropology.

The Hermeneutic Turn

The impetus in anthropology for treating law as an artifact of culture is usually associated with Clifford Geertz ([1985] at chapter 8). Law everywhere, Geertz argued, may have to do with the application of *facts* – defined as ‘closely edited diagrams of reality’ – to received *rules*. But both facts and rules, in any given context, depend on a culturally distinctive ‘legal sensibility’, itself rooted in ‘local knowledge’. The workings of the law, and especially the management of conflict, follows from that legal sensibility. To illustrate this, Geertz offered an elaborate comparison of three legal worlds, each

founded on its own 'cultural hermeneutics, a semantics of action', each founded on a particular 'manner of imagining the real',² each embodied in a core concept: *haqq* in the Islamic, *dharma* in the Indic, and *adat* in the Malaysian. Each, Geertz showed, entails a distinctive understanding of the nature of truth, fact, and evidence – and the ways in which they relate to prevailing notions of rules. In so doing, each gives meaning to the world and the ways in which it is lived. And, when necessary, contested in law.

Geertz's approach to law was echoed and exemplified in a flow of comparative works (e.g. Rosen [2008]) and theoretically-informed ethnographies. Two such ethnographies stand out. In the first, a study of 'hermeneutics and world construction' among the Maranao peoples in the Philippines, Carter Bentley ([1984]) argues that their indigenous life-world is configured through the processes of engagement to which conflict gives rise. Dispute, here, is a 'theater of the real' in which relations and rank, indeed the lineaments of the social world, are constantly reconstructed; this as social actors caught up in a litigious, labile and often violent social context, struggle to impose their versions of truth on each other. Bentley relies on Paul Ricoeur's approach to the textual analysis of meaningful action to make sense of the hermeneutic logic of facticity and the invocation of rules as Maranao argue with one another. In so doing, he erases entirely the distinction between culture and law, evoking Pierre Bourdieu's often cited statement ([1987] at 839) that '[i]t would not be excessive to say that [the law] creates the social world, but only if we remember that it is this world which first creates the law'.

An equally vivid account of the cultural ontology of the law comes from Indonesia, from the Dou Donggo. In their world, Peter Just ([1986]) shows, vernacular moral imperatives, distilled in customary rules, determine the construction and representation of facts in any given case, whatever may actually have happened. What actually *did* happen, even if it is known by all concerned – which it usually is -- is construed not by virtue of an empirical or forensic truth. Evidence is configured and narrated in such a way as to 'fit the crime'; that is, to establish a sociologically and ethically appropriate, collectively sanctioned finding of guilt or innocence. The *conscience collective*, in the socially active voice, at work again.

The hermeneutic moment signaled an increasing engagement with different cultural sensibilities in the constitutive practices of the law, broadly conceived – extending, as well, to the Islamic world (e.g. Rosen [1989]; Messick [1996]; Agrama

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[2012]). Nor has this engagement been confined to anthropology or even to the broader field of Law and Society. It has also found its way into professional legal practice (e.g. Adams [2012]) and legal education (e.g. Gibbs [1981]).

Law and/as Culture in the Continuing the Present

The anthropology of law and/as culture has proliferated widely in recent decades. This is best exemplified, perhaps, in two bodies of work. One concerns law and language; the other, law, culture and intellectual property.

Language, self-evidently, is critical to the question of law and/as culture. For Marianne Constable ([2014a], [2014b]), law *is* a language. More often than not, however, anthropologists of law have interrogated the spoken word for the manner in which it is deployed in legal contexts as a means to produce ends: for purposes of meaning-making in ways sometimes creative, theatrical, parodic, strategic; sometimes for purposes of domination, sometimes for purposes of subversion, typically to render inchoate acts into justiceable facts (Goodale [2017] at 39-50). This – the linguistic joining of means and ends – has been framed by a number of linguistically oriented scholars as an expression of ‘language (or linguistic) ideology’. The term is variously defined, but is usually taken to refer to a ‘set of beliefs about language’ or a ‘cultural system of ideas about social and linguistic relationships,’ or a ‘shared bod[y] of commonsense notions about the nature of language’ (Woolard and Schieffelin [1994] at 57). Or ‘cultural conceptions about language . . . and about the place of communicative behavior in social life’ (Gal [2006] at 171). But ideas, beliefs, cultural conceptions and commonsense notions about language and communication do not exhaust the broader cultural context in which any linguistic ideology is rooted. That broader context, *its* constitutive social, material, moral, and political dimensions, are less often taken into account in analyses of the role of language in legal contexts.

It is critical that they *are* taken into account, argue Piszcz and Sierocka ([2020] at 537), citing Alessandro Duranti ([1997] at 277): ‘if we want to understand what people mean with, through and sometimes despite their words, one must look beyond linguistic

means . . . [which are] located not only in language but in social values, beliefs, social relations . . . and the social organization of [a] community'. Or, as was shown in *Rules and Processes*, mentioned earlier, in a historically situated sociocultural order, its

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constitutive forms of signifying practice.

The other focus of the anthropology of law and/as culture arises from the devolution of the latter, of culture, into intellectual property (IP). Among the earliest anthropologists to address this topic, Rosemary Coombe ([1998]) explores the role that IP law has played in transforming the ordinary artifacts, practices, knowledges and symbolic forms of contemporary cultures into legally protected, often marketable property, a topic subsequently explored further by, among others, Haidy Geismar ([2013]). This transformation has been encouraged by UNESCO and the World Intellectual Property Organization, especially with a view to safeguarding the traditional knowledge of indigenous peoples, their right to culture (Comaroff and Comaroff [2009] at 160, n.11). Its complexities and contradictions – sharpened by the commodification and financialization of so much of everyday life, its artifacts and mentefacts – have also spawned lively anthropological interest in copyright (e.g. Geismar [2005]), patents (e.g. Strathern [2001]) and branding (e.g. Nakassis [2013]). And it has sparked vexed debates over 'who owns native culture' (Brown [2003]), debates between those who believe that cultural knowledge and practices constitute an inalienable commons and should be kept apart from the market; those who argue that individual cultural producers should have material rights in their creations; and those who hold that a culture belongs to all who can establish their belonging to the people who made and remake it – and therefore are entitled to profit from its commodification. As this suggests, the transformation of culture into more or less commodified, more or less legally protected, more or less branded property has played heavily into the politics and economics of identity. It has also led to innumerable lawsuits as individuals and communities have sought to protect and profit from their presumptive patrimony.

Conclusion

It has been argued that, in recent times, law has become ever more important to the conduct of everyday affairs, that a 'culture of legality' has come to dominate social, economic, and political life (Comaroff [2009]) – all the more so since the language of human rights has become a global vernacular through which people make claims on

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the world. What is more, the way that we 'think' law is heavily shaped by contemporary ideological shifts in economy and society. For example, it is no coincidence that the influential rise of law and economics – now a theoretical orthodoxy in legal scholarship – has accompanied the emergence of market fundamentalism as the dominant cultural ethos of the neoliberal era. It is an era, after all, in which individuals are encouraged to conceptualize and conduct their lives according to a cost-benefit calculus, to treat themselves as human capital, and to take responsibility for the management of risk and the accumulation of value. Law, in sum, appears to have become an increasingly universal cultural currency by means of which ever more people imagine the world and their lives within it.

1. The quoted passage is taken from the publisher's announcement of the book; <https://press.uchicago.edu/ucp/books/book/chicago/C/bo3640543.html>.

2. All the cited phrases here are taken from Geertz ([1985] at 173).

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