

Legal Anthropology



An Introduction

James M. Donovan



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Preface

Goals of the Book

Legal anthropology looks at “law” from a cross-cultural, comparative perspective. The goal of the enterprise is to identify general principles that characterize this slice of sociocultural life so as to understand this aspect of what can be termed the normative regulation of society: those social forces generally working to create and maintain the ties of cohesion that hold society together against the tidal pull of individual interests. At best, these principles will be nontrivial claims that are uniquely true of law (as that term is usefully understood). Specific questions would include relating law to other normative control systems, identifying how society and its representatives use law to heal divisions and resolve disputes, and following the individual as he or she negotiates among available choices in order to obtain justice in whatever form he or she conceives it, analyzing in the process the normative values that influence those choices.

This text aspires to guide the student through some of the fundamental history, concepts, and theories that have emerged from the works of the field’s most prominent and influential authorities. Missing from its pages is a catalog of legal exotica from remote cultures around the globe. This omission is utterly pragmatic. Space does not permit the thrilling recounting of the varied and creative ways that the world’s peoples have found to resolve their disputes and do the other work expected of law. The second justification is more philosophical: the ethnographic detail that can so enchant the reader already shapes the data that support the theoretical propositions I describe. Ethnography is represented herein more by the results it has generated than by the process by which it helped to arrive at them. In its stead, the text uses recurring examples from Western legal systems. At one level this should require no apology: our own legal system is as needful of anthropological scrutiny as any other. But the broader purpose of these local illustrations is that they help the

reader to better understand his or her own background assumptions about just what law is like. Controlling those assumptions is a prerequisite to thoughtful analysis of more unfamiliar systems. Highlighting some of the surprising idiosyncrasies of the reader's legal system is a first step toward achieving the necessary control to reflect on the experiences of others.

Legal Anthropology: An Introduction was conceived as a brief, affordable overview of the specialty, to be used in the classroom in conjunction with the instructor's choice of more detailed case study materials. The hope is that this text will allow the student to put the case studies into theoretical perspective, without "tracking up the snow" of their rich local detail that draws so many to anthropology in the first place. My own classes, for example, incorporate the materials on the Canela of Amazonian Brazil. The available materials—a wonderfully digestible overview of the society (William H. Crocker and Jean G. Crocker, *The Canela: Kinship, Ritual, and Sex in an Amazonian Tribe* [2004]) as well as an accompanying video (*Mending Ways: The Canela Indians of Brazil* [2003])—provide the right balance between what is said and unsaid about the relevant issues, leaving the students able to "do" the legal anthropology on their own.

The book's intention to be included within the classroom in no way precludes its reading in less structured environments. Although there is no substitute for the challenging confrontation with the primary material, *Legal Anthropology's* arguments are self-contained and presume access to no supplemental elaboration. I confess a hope that the nonspecialist reader will at its end feel both comfortable and interested in that deeper immersion. As one of its leading figures, Paul Bohannan, has observed, legal anthropology is "a small field in which the general quality of the work is extraordinarily high," one that can promise lasting rewards to everyone who ventures into its pages.

In part because the intended audience of *Legal Anthropology* extends beyond the classroom, its contents are also somewhat atypical for what might be expected in a "textbook."

By no means is this book a bloodless review of the established "truths" of legal anthropology. Far from a recitation of facts and history, the chapters are designed to tell a story on several levels and to offer a few suggestions of their own.

Much of law concerns just this telling of stories. Whether the need is to convince an opponent that he is wrong or persuade a judge that she should favor your argument or even instill the standards of living in relative peace, the mode of discourse often turns to framing the argument within a compelling narrative. This book, not least because it is about law, also tells stories.

Two themes run through the following pages. The first seeks to introduce "law" in terms that will allow the reader to distinguish it from its nor-

native cousins. As in any good story, the character of the focus can be conveyed through recounting the things that it has done, and so too shall law be sketched in terms of its actions. The goal shall be to learn to refine the categories of thinking about law so that anthropologists can reach better conclusions about it.

A second story line involves recounting the historical development that has culminated in a curious situation. Ask anyone on the street what law "does" or is "about," and one is likely to elicit a laundry list of tasks the speaker assumes are the special concern of lawmakers, if not law. Ask the same question of traditional legal anthropologists, however, and the response is likely to be much shorter. In fact, the answer might get no further than identifying dispute resolution as what law is about. At least that seems to be their position given the literature generated by the specialty. How that limited interest in the scope of law's action has come to be the standard of practice in legal anthropology shall be the second of this book's narrative themes.

There are more stories than these within the field of legal anthropology, so why tell these? A useful application of the insights of the first story will be to understand which social problems are best addressed through legal solutions and which are best left to other means of social regulation. Not only may a wrong choice exacerbate the original problem, but the resulting abuse could undermine the effectiveness of law even within its own domain. The second—showing how the reduction of legal anthropology to dispute resolution was historically motivated, not theoretically required—frees the student to expand inquiry beyond the traditional topics without apology. In its tersest formulation, legal anthropology is about law, not simply dispute resolution.

The narrative structure of the text has impacted its pages in yet another way. I have not littered the pages with innumerable citations or quotations from countless scholars beyond the bare minimum. Annotations are ordinarily collected into general footnotes to guide interested readers toward further source materials. Where available, I have deliberately selected references and quotations from the same small core of legal anthropologists in hopes that this will heighten the reader's familiarity with the speaker through repeated appearances in the text. Iterative exposure to a few key personalities, goes the hope, will increase the student's ability to contextualize the quotation. If one of the themes of the book's construction is to tell a story of the discipline, like any tale it will benefit from recurring appearances by a short list of known characters.

Narrative necessarily reflects the perspective of the narrator. While intending to be as objective as possible, this book does not pretend that it communicates only orthodox conclusions of the field. Another writer could easily have selected different emphases and underscored other conclusions than those found in the following pages. Accordingly, it is only fair to the

reader to forthrightly identify my own intellectual biases. Two underlying premises strike me as being particularly influential on the arguments that follow, one utterly pragmatic, the other more abstract.

First, the view of law that one takes perhaps varies according to one's ordinary relationship to it. Some like myself, who work with law at a practical level on a daily basis guiding law students through the techniques of legal scholarship and listening to the stories of pro se litigants hoping to find some understanding and control of their circumstances, may not look at law in the same way as someone who deals with law from a distance, as the object of intellectual scrutiny that must be left when other obligations demand priority. We probably have very different stories to tell about what law means to real people and how it is usefully approached.

Second, throughout this text is an embedded assumption about human nature, which it is the special task of anthropology to elucidate. In addition to advocating for the holistic study of human nature, I also assume that the most productive method in that project will be systematic, at times even rising to the level of the scientific. Systematicity implies that there is a "truth of the matter" to be understood and that new research can be evaluated as to whether it carries us further toward that goal. What questions have been answered, what problem identified and perhaps even resolved? This posture heavily informs my reading of the history of the theory of legal anthropology and differs from that held by scholars adhering to a different paradigm—one that I perhaps unfairly gloss as "postmodern," thereby lumping together a disparate assortment of theoretical stances—that would lead them to tell a very different story from that which follows.

Because of this pluralism of ideas about what anthropology should look like, the student is challenged not to accept every analysis as though it were a settled wisdom but to think where I might have erred in my reasoning. Has a particular assertion been adequately defended? Do the implications of that assertion follow as logical entailments or only as suggestive possibilities? Where alternative lines of argument are equally reasonable, have I justified my choice to the student's satisfaction? Or have I stacked the deck in favor of my own favored theses? Does the overall picture of legal anthropology that the text constructs "hang together," or does it, in the end, come off as a disjointed recitation of prior monographs and unrelated bracketed arguments?

Anthropology—and perhaps especially legal anthropology—is something one "does" and not something one passively imbibes. It would be no accident should the reader gain more from challenging my text than from uncritically absorbing it. Like all teachers, I adamantly encourage the former over the latter and wish *Legal Anthropology* to be more provocative than canonical. As I present my own view on the subject, the student should be stimulated to produce his or her countervision.

Structure of the Book

Part I grounds the discussion in fundamental concepts of the specialty. To study law presupposes an ability to identify law, and this immensely complicated question is initially addressed in chapter 1. Further methodological considerations are reviewed in chapter 2. Together, these chapters might be considered the "philosophical" discussions of the text, as they address matters that can be argued only one way or the other and are immune to the usual challenges from the scientific method. A definition of law cannot be true or false but only more or less useful or informative. The significant works pre-dating the appearance of a formal discipline of legal anthropology are briefly considered in part II, chapters 3 and 4, which cover the natural law theorists and the sociologists of law, respectively.

The first half of part III (chapters 5 to 10) reviews the major ethnographic foundations of legal anthropology, covering the classic period from the 1926 appearance of Malinowski's short yet influential *Crime and Custom in Savage Society* through Pospisil's ethnographic treatment of the Kapauku in 1958. Although focus will be on their most important monographs, an attempt will be made to consider the influence of each field-worker over the course of his professional career. Each chapter contemplates an especially important theoretical issue addressed by the featured thinker. Two exemplars of postclassic ethnographic work are offered in chapters 11 and 12 as illustrations of some of the significant scholarship being performed by today's legal anthropologists.

The challenge of part IV, spanning chapters 13 to 15, is to attempt to place the disparate ethnographic data into comparative perspective. The discussion on dispute resolution will show both the strength and the weakness of the current direction of legal anthropology and features the only truly comparative work in the discipline. That this need not have been the case will be shown by addressing other topics given greater emphasis in non-American legal anthropology traditions, such as legal pluralism.

Applying the comparative method to arrive at general principles that are both meaningful and valid cross-culturally would be no mean accomplishment. However, most anthropologists today are rarely satisfied to accrue such knowledge for its own sake, hoping instead to be able to use these insights to improve the life conditions of the original ethnographic informants, if not all persons and cultures. Some possible venues for this exercise are suggested in part V. The discussions in chapters 16 to 19 underscore the insights legal anthropology can bring to the task of articulating the contents of a cross-culturally valid category of human rights as well as how its lessons can inform a fairer approach to intellectual property problems. This project to interrelate the local and global legal norms receives special study through the question of whether criminal courts should recognize the "culture defense,"

a claim that a defendant who observes the dictates of his or her own cultural norms should sometimes be treated leniently when the associated acts violate the local law of another society. Finally, legal anthropologists have a role to play in reducing concerns over international terrorism, not least by bringing clarity to the concept and pointing out how local laws interact in broader international forums.

Finally, part VI, chapters 20 and 21, offers my own perspective on the future direction of legal anthropology. From an emphasis on the study of disputing, I argue that the specialty would be better served by analyzing perceptions of fairness. Fairness studies subsume the primary questions of dispute resolution but also bring to the anthropologist's attention problems normally associated with "law" that have been recently overlooked.

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I could never have mustered the confidence to attempt such a wide survey of the field if not for the support of the Thursday night Globes colleagues, especially Bram Tucker, John Turci-Escobar, and Leigh Willis. Between rounds of drinks and chips, they offered an opportunity to verbalize previously inchoate thoughts and challenged me to think in even broader terms.

My colleagues at the University of Georgia School of Law Library gracefully tolerated my distracted mind as I puzzled through the issues of whatever section I was working on. The students in my legal anthropology classes have been exceptionally motivated and challenging, for which I thank them. John Miller and Edgar Miller carefully read most chapters, sparing me much embarrassment and the reader great confusion. Any remaining errors are due either to my own blindness or to my stubborn refusal to take their good advice.

Finally, I dedicate this book to the late Jorge Vasconez, as one last public declaration. I shall never know your like again.

INTRODUCTION

Why Study Legal Anthropology?

LEGAL ANTHROPOLOGY emerged as a distinct intellectual specialty in the 1920s with the publication of Bronislaw Malinowski's *Crime and Custom in Savage Society*. Scholars of various pedigrees had, of course, earlier attempted to isolate universal principles of law. They were limited, however, by the lack of solid ethnographic data on which to build their theoretical systems. The sea change represented by Malinowski for anthropology generally and not only legal anthropology was his long fieldwork among the Trobriand Islanders, conducted in the native language, for primarily scientific purposes. The systematic and meticulous record of his research was qualitatively superior to the travelogues and missionary reports that to that point had provided most of the information available to theorists working from their overstuffed armchairs and raised to new levels the earlier efforts of anthropological fieldwork, such as that of the Torres Strait Expedition of 1898.

One might wonder why yet another specialty of anthropology was needed either then or now. Two broad answers offer themselves. In the first, the attention to law is merely one piece in the broader picture of sociocultural life that ethnography strives to depict. Here, accounts of law are necessary for completeness but otherwise not particularly exciting or intrinsically interesting.

Alternatively, an anthropology of law collects not just more but also different data on a people. This kind of incompleteness differs in that insights into the legal consciousness of a society do not just fill gaps in the story but potentially change the plot. Law is not a detail, to be addressed time and