

The Law and Economics of Anthropology: A Review
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by

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abstract: I briefly review the classics of legal anthropology and discuss the economic analysis relevant to it .

keywords: law, economics, anthropology, property, social norms.

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“Just look along the road, and tell me if you can see either of [the messengers].”

“I see nobody on the road,” said Alice.

“I only wish *I* had such eyes,” the King remarked in a fretful tone. “To be able to see Nobody! And at that distance too! Why, it’s as much as *I* can do to see real people, by this light!”

--Lewis Carroll’s Through the Looking-Glass, Chapter 7.

As a rule of thumb, an academic subject exists when someone teaches it regularly at a major university. By this standard, the subject of law, economics, and anthropology does not exist. A review essay requires eyes that the King attributed to Alice. In contrast, legal anthropology exists and so does the economic analysis of law. I will offer some remarks on how these two subjects relate to each other.

Legal Anthropology

Legal anthropology is a small subject that is taught in a few universities, especially in America (Kuppe and Potz 1994). I recently asked teachers of law and anthropology at major American universities to send me the reading lists for their classes. The readings were “all over the map” both literally and figuratively. The struggle in anthropology over the subject’s identity has infected law and anthropology. Some strands in modern anthropology, such as symbolic anthropology (Geertz 1983), have no apparent relationship to the economic analysis of law. Others, such as economic anthropology (Dalton 1967) (Plattner 1989) and anthropological materialism (Harris 1968), have a modest relationship to the economic analysis of law. In general, the analytical techniques

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used in the economic analysis of law are not understood or appreciated by anthropologists.

Reviewing the different strands of anthropological thought is a difficult task (Ortner 1984) and relating them to the economic analysis of law in a brief article is impossible. I will attempt something more limited and modest. My main aim is to describe for law and economics scholars their subject's frontier with anthropology. Legal anthropology has a small, classical literature, which I will describe briefly. Then I will review in more detail the aspects of the economic analysis of law that relate to classical concerns of anthropology.

Legal anthropology developed its classical literature (Conley and O'Barr 1993) in the 20th century when anthropology books and monographs devoted to law first appeared. (Malinowski 1926), who first conducted systematic field research on tribal law, debunked the myth that tribal law consists of strict prohibitions and harsh punishments resembling criminal law. Instead, he observed an elaborate system of compensation in Polynesia for harm done to others, resembling the modern law of property and torts, but without anything similar to formal courts. He commented on the usefulness of such a system and tried to explain how it worked .

(Llewellyn and Hoebel 1941) interviewed Cheyenne Indians in the 1920s and reconstructed their legal order as it existed in the 1860s before conquest and subjugation. This study applied the "case method" of the common law to tribal law, thus minimizing the distinctiveness of techniques required in legal anthropology. The "cases" consist of memories, stories, and myths about law and government. As practiced by Llewellyn and Hoebel, the "case method" explores the purposes and uses of political practice and law, which makes legal realism resemble functionalism.

(Bohannon 1957) observed disputes in the customary courts ("moots") of the Tiv in colonial Nigeria. Like Llewellyn and Hobel, he analyzed cases, but in greater detail

and subtlety, revealing the cultural obstacles to understanding exotic legal systems. Bohannan's concern over objectivity and neutrality in comparing cultures anticipates recent methodological discussion in anthropology. (Gluckman 1965) provided the same kind of in-depth study of the legal culture of another African group, the Barotse. (Pospisil) extended this tradition by attempting something resembling a codification of the customary law of a group in New Guinea who lived in the 1950s under limited Dutch legal control.

The small, classical literature aimed at describing aspects of tribal law that the modern state had not changed or distorted. More recent studies in this tradition explicitly concern the way custom responds to state and market (Collier 1973) (Moore 1986) (Sierra 1995), including the attempts of subordinate peoples to secure themselves against exploitation (Nader) (Comaroff and Roberts 1981). Whereas the classical literature concerned tribes, modern studies in legal anthropology often concern formal, non-western legal systems, such as Islamic or Buddhist law (Fikentscher 1995), thus effacing the distinction between legal anthropology and comparative law. Contemporary anthropologists have also developed an interest in the way contemporary customs interact with modern law in countries like the US (Greenhouse 1986).

Economic Analysis

I now turn to the smattering of articles on anthropology that fit within the modern law and economics movement. In an earlier review (Brenner 1983), stresses population growth as the destabilizing influence that causes innovation and economic development in tribes. Only a few papers in law and economics concern law among tribal people. Perhaps the most discussed is the paper Demsetz which proposes a simple theory of the origins of property (Demsetz 1967). Demsetz reasoned that private property emerges from a prior rule of open-access to resources, and this event should occur at the point in history when the benefits of the change exceed the costs. He observed that when

everyone has open access to a resource, over-exploitation produces a dead-weight loss, as with over-fishing on the high seas. In contrast, private ownership can eliminate this dead-weight loss, but, unlike open-access, private property requires costly definition and enforcement of ownership rights. So Demsetz predicts that privatization will occur when the dead-weight loss of open access exceeds the transaction costs of exclusion by private property rights.

For evidence in favor of this theory, Demsetz relies upon secondary sources, notably concerning the fur trade among North American Indian tribes. More careful examination proves that Demsetz got some important facts wrong. Tribal people live among kin with extensive, complicated obligations to each other, including obligations about using land. These obligations create a very different legal regime from open access. So the characteristic movement in tribal property law is not from open access to private ownership. Rather, new customary rights in property continually evolve from old customary rights in property (Cooter 1991). Tradition persists by continually inventing new things.

Economists often contrast individual and group ownership, but these labels are too imprecise to fit customary law. Research on property rights has revealed variety and detail in the political arrangements by which small groups manage their assets (Eggertsson 1992) (McCloskey 1975b) (McCloskey 1975a), (Ostrom 1990), (Ellickson 1993). Even without individual ownership, small groups of people living intimate lives seldom suffer the political paralysis that causes deadweight losses like the infamous tragedy of the commons.

Note that the Demsetz paper reveals a characteristic weakness of anthropological work among law and economics scholars: they lack intuition because they have never done field research. For an early exception in property law, see (Trebilcock 1981.)

In another paper with high ambition, Richard Posner interprets the behavior of tribes as a response to missing insurance markets (Posner 1980). The combination of the hazards of primitive life and the absence of insurance, according to this view, causes people to form long-run relationships and redistribute wealth. Like Demsetz, this paper contributes to anthropology by raising the level of generality in formulating familiar trade-offs.

Risk-reduction is important to cases where customary law allows relatively open access to a resource, such as summer grazing land in Mongolia. Variations in weather impose risks on people living off the land. A customary rule of open access enables people to relocate quickly from one micro-climate to another, thus reducing climatic risk (Nugent and Sanchez 1993) (McCloskey 1976) (Cooter 1995). Open-access, however, discourages investments to improve the land. So the trade-off is between dead-weight loss and risk-spreading, not the trade-off between dead-weight loss and transaction costs of exclusion as proposed by Demsetz.

Social Norms

As explained, legal anthropology especially concerns customary law. Proponents of legal decentralization typically admire custom because it arises spontaneously, outside the state (Hayek 1976) (Leoni 1991). The informality of social norms obscures their operation and causes observers to under-estimate their importance relative to formal law. Modern business is often conducted in rational ignorance of the law (Macaulay 1963). Informal law plays an especially important role in basic markets where state enforcement of contracts fails, as in capital markets in developing countries (Winn 1994). Over-zealous regulation forces informal law to operate in opposition to formal law, which impairs economics development (de Soto 1989)

In recent years, economic theories have corrected the tradition of underestimating informal norms. The analysis of social norms has become central to the law and

economics agenda, especially after Ellickson's research on liability for straying cattle framed legal decentralization in terms of the Coase Theorem (Ellickson 1991). Two bodies of theory are joined in the economic analysis of social norms. First, game theory has been adapted to the specific circumstances in which social norms direct behavior (Ullmann-Margalit 1977) (Sugden 1984) (Taylor 1987). Second, competition among social norms resembles competition in evolutionary biology, so the application of game theory to evolutionary biology provides models for understanding social norms. (Hirshleifer 1987) (Gruter 1991) (Frank 1988; Gruter and Masters 1992).

The economic analysis of social norms, such as the customary law of property or customary obligations of redistribution, draw upon a fundamental result in game theory: One-shot games with inefficient solutions, such as prisoner's dilemma, often have efficient solutions when repeated between the same players (Fudenberg and Maskin 1986). This generalization grounds the utilitarianism of small groups, by which I mean the tendency to create efficient rules for cooperation within small groups. Kinship provides a framework for repeated interaction among the same people. Consequently, game theory predicts that kin groups such as tribes can solve problems of internal cooperation without relying upon state law. Landa has used this result to study groups of Chinese traders (Landa 1981).

Kinship, however, is not the only basis for dense social networks in intimate societies. Much like kinship, trade organizations can provide a framework for repeated interaction (Cooter and Landa 1984). Historical institutions such as the medieval law merchant can be understood in this light (Milgrom, North, and Weingast 1990) (Greif 1993). Bernstein has demonstrated this fact in careful, detailed studies of modern diamond exchanges (Bernstein 1992) and commodity trading associations (Bernstein 1996). Social groups, in which people have repeated transactions with each other, must be distinguished from social categories by which people are classified. Unlike social

groups, people who fall in the same social category might not have ties to each other, so they may have inefficient interactions (Posner 1995).

I have reviewed various economic studies of social norms. The economic analysis of social norms requires a comprehensive vision, but none has emerged as yet. According to one approach, law should ideally correct failures in the “market for social norms,” rather like regulations should ideally correct failures in the market for commodities (Cooter 1994). This approach requires an analysis of the incentive structures in society which cause the evolution of efficient social norms, and, conversely, the incentive structures that cause social norms to fail. The application of game theory to customary forms of discrimination suggests an important kind of failure (Akerlof 1980; Akerlof 1985) (McAdams 1995). A thorough development of a theory of the evolution of social norms would provide the foundation for a theory of adjudication, especially in the area of common law (Posner 1996).

Conclusion

I organized my description of the law and economics of anthropology in terms of these underlying ideas: property, long run relationships, and social norms. Now I need to mention some loose ends that do not fit my categories. First, some law and economics scholars have examined issues concerning American Indians (McChesney 1990) (Anderson and McChesney 1994) (Cornell and Kalt 1993). Second, some studies in comparative law and economics have an anthropological flavor (Kuran 1995). Finally, a few brave scholars have attempted to cross the deep divide between meaning and behavior in social science by using the tools of law and economics to interpret stories and parables from the Bible (Levmore 1995) (Miller 1996) (Miller 1994) (Miller 1995), or by trying to adapt the rigorous individualism of economics to encompass a theory of culture (Audain 1995). These papers parallel the strong turn towards interpretivism in anthropology in general (Geertz 1983) and in legal anthropology in particular, which

stresses the distortion of the *meaning* of law as a consequence of political domination (Comaroff 1992) (Williams 1994).

Finally, I want to conclude by remarking on the interaction between anthropology and economics. In anthropology as in politics, the confidence of colonialism dissipated into the self-doubt of post-colonialism. Economics, in contrast, retains its brash self-confidence. Given these facts, some anthropologists associate economics imperialism with the mentality of political colonialism. Abandoning such ideological conceptions would create a better atmosphere for anthropology and economics to learn from each other. The economic analysis of legal anthropology remains more aspiration than reality. Economists believe correctly that they can bring more systematic analysis to a range of topics in anthropology. Adapting economic theory to new institutions and cultures, however, requires careful field research. Without a commitment to field research, economic theory remains too remote from its object of study to convince anthropologists immersed in other cultures.

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