

LEGAL PLURALISM AND CULTURAL DIFFERENCE WHAT IS THE DIFFERENCE? A RESPONSE TO PROFESSOR WOODMAN

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Introduction

Professor Woodman's review of recent conceptual debates in the field of legal pluralism advances the subject by making a case for viewing legal pluralism as an ethnographic field that includes state law. In so doing, he poses a fundamental challenge to the tenacious intellectual tradition shared by academic law and classic social anthropology that divides custom from law, making legal pluralists and legal centralists into contending parties. He confronts the recent genealogy of that tradition branch by branch, and concludes that if legal pluralism has anything in store for social scientists, it is not up that particular taxonomic tree.

I agree with Woodman, but for reasons arising from another frame of reference. He concentrates on the classic literature on legal pluralism and customary law, particularly in Africa. My own views are shaped more directly by current dynamics of law and society in the United States - my own ethnographic field - where the contemporary climate of contention (and the terms of contest) over the horizon between federal and state law compels urgent reassessment of classic positions on legal pluralism. Further, Woodman's discussion is addressed primarily to the longstanding dialogue between anthropologists and lawyers from a lawyer's point of view; mine broaches that same dialogue from my standpoint as an anthropologist concerned with current anthropology's epistemological and comparative debates over ethnography itself, and how these might be related to real world conditions. Thus, my response is in the spirit of the on-going conversation between our respective fields, as is Woodman's essay.

Anyone who has followed recent U.S. public debates over the role of law is already

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familiar with the highly charged controversies over civil liberties, social welfare, access to law, public education, and more. Virtually every area of social life in the U.S. these days yields questions over the proper limits of law generally, as well as the lines between federal, state and local powers. These debates about 'devolution' (the current slogan) and deregulation are now so intense and pervasive that any line around state law must inevitably be viewed as an unstable one. Indeed, the forces that drive this instability - xenophobia, racism, unemployment, a pervasive sense of economic and political crisis, the perceived failures of liberalism (as viewed from the right and the left) - compel attention in their own right, as dimensions of any ethnographic question regarding 'legal pluralism'.

Without claiming that the present situation in the United States is more than one case, it is one case that is integral to a more general state of affairs. The practical exigencies that relate legal pluralism to what Americans call 'multiculturalism' raise more general theoretical questions regarding the relevance of cultural analysis in relation to understanding state law. I want to argue strongly for including contests over rights, access to resources, and recognition *within* the ethnographic frame surrounding questions of legal pluralism. Otherwise, the law's claims to legitimacy and the contest over those claims are 'settled' in theory in a way they can never be in practice.

To put the U.S. example in more general terms, I want to suggest that an interesting problem for scholars and practitioners interested in legal pluralism is the contested nature of states' claims regarding the legitimacy of official law and the selective official recognition of those contexts - particularly in relation to the pressures of ethnonationalist and other social movements within and across legal orders. This problem is relevant well beyond the U.S., since the pressures and counterpressures that drive identity politics (including new forms of racism and class tension), globalization and national, even local, retrenchments are themselves global in nature.¹

¹ See, for example, Appadurai 1990 and Hannerz 1992 on globalization. On racism, identity politics and the tensions between 'the local' and 'the global', see (for example) Balibar and Wallerstein 1991, Centre for Contemporary Cultural Studies 1982, Gilroy 1993, Gooding-Williams 1993, Lomnitz 1994, Nash 1994, Rieff 1991, Robertson 1992 and Smith 1992. On the connections between these developments and official law, including the political appeal of 'law and order', see Fitzpatrick (1991, 1995), Gilroy 1982 and Lawrence (1982a and b). On the current demography and geography of urban centers (especially in the United States) in term of world migration and the global mobility of capital and labor, see Harvey (1988, 1989), Lamphere 1992, Sanjek 1990 and Sassen (1988, 1991).

In theoretical terms, Woodman broaches such situations of vulnerability and change in his paper, but - being primarily concerned with other lines of argument - leaves these instabilities largely to implication. I read his paper as pointing to three main areas of implication, each a call for rethinking: (1) the relationship between legal difference (or legal pluralism) and cultural difference, (2) the relationship between legal jurisdiction and ethnographic conventions of scale and locality, and (3) the relationship between legal pluralism and anthropological problems of comparison. Of these, I will comment only on the first since it is logically prior to the others. I will leave the others, with the observation that issues of legal pluralism involve potentially high stakes for anthropologists - and not just 'legal anthropologists'. Among the stakes for any anthropologist interested in legal pluralism are the many aspects of ethnographic practice that are conceptually tied to the key symbol of 'society' as a 'legal entity'.²

Overall, Woodman's paper amounts to questioning what, indeed, is theorizable - if anything - about legal pluralism from an ethnographic point of view. His answer seems to be that the central theoretical questions in the field of legal pluralism arise from the cultural reality of state law. To this, I will add the suggestion that what is theorizable about legal pluralism is neither law nor pluralism *per se*, but the ways the conceptual and practical boundaries of legal recognition and legal jurisdictions draw on and contribute to repertoires of signs by which cultural identity is recognized and contested in the broader social landscape within and beyond the law.³

Legal Difference and Cultural Difference

While 'legal pluralism' (for anthropologists) still tends to connote the modern legacy of customary and traditional law, legal anthropology is also attentive to the role of

² These range from discussions of literacy and orality on the one hand to the limits of cultural relativism on the other. Similarly, the conceptual debates among scholars interested in legal pluralism are theoretically and practically tied to western - and specifically anthropological - ideas about culture.

³ These themes evoke the work of the late Johan Pauwels, whose writings chart points of contact between civil law and the everyday realities of life, local knowledge, and personal affiliation. For example, Pauwels 1973.

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state law in the broader dynamics of cultural production and personal experience.⁴ However, as Woodman also notes, the law/custom distinction might no longer be an object of theorizing in legal anthropology, but, in submerged form, it remains central to debates on legal pluralism.⁵ Those debates have been contentious ones. 'Legal centralists' (as Griffiths calls them) identify the core issues of legal pluralism in state law, either as delegations of state authority or via less formal practices of recognition. For legal pluralists, state law is only one modality of legal pluralism. For them, a reference to legal pluralism in contrast to law is thus an acknowledgement (in theory) of multiple modalities of order both 'inside' and 'outside' of official law. In the articulations of normative systems across social fields, questions of jurisdictions, their constitution and maintenance tend to be absorbed into the more diffuse notion of 'social field'.⁶

For Griffiths (1986: 4), legal pluralism is "an empirical state of affairs in society". Drawing on Moore's view that complex societies consist of multiple, intersecting social bodies capable of generating and enforcing norms, Griffiths (1986: 38) concludes that legal pluralism and 'social pluralism' are congruent. In a related vein, Merry (1988, 1992) notes the widespread division of opinion as to what constitutes the appropriate field of inquiry (is it official law or normative orders?) and recommends that legal pluralism be taken more or less as a synonym for cultural pluralism.

⁴ For example, recently, legal anthropologists have been concerned with the role of state law in the cultural construction of identities and as institutional sites of resistance. On law use as contestation, see Lazarus-Black 1994 and Lazarus-Black and Hirsch 1994. For reviews of the anthropology of law and its internal critiques, see Cain and Kulscar 1981, Collier 1975, Comaroff and Roberts 1981, Just 1992, Moore 1969 and 1986: 320-329, Nader 1965, Snyder 1981 and Starr and Collier 1989. The most recent overview of the field, concentrating on legal pluralism, is Fuller's (1994). The question of whether legal anthropology defines some central *theorizing* project remains in doubt.

⁵ My discussion refers especially to the most recent article length assessments of the field, by Griffiths (1986) and Merry (1988). Geertz (1983) addresses comparative and interpretive aspects of legal differentiation, but he does not refer to his subject as legal pluralism.

⁶ Griffiths 1986: 29-37. Moore herself offers the concept of the semi-autonomous social field not as a theory of legal pluralism but as a methodology for the study of complex societies (Moore 1978).

On one level, such propositions are intuitively compelling; however, on another level, the conceptual equation of legal pluralism and social/cultural pluralism is highly problematic. One difficulty is that such an equation makes law *a priori* and preeminently a sign of cultural identity, as if law's production could be separated from the social processes by which people self-identify or are identified by others as belonging together in a 'cultural group'. Indeed, anthropological discussions on legal pluralism *have* tended to take as axiomatic a corollary relationship between the organization of *legal orders* and an on-the-ground schema of *cultural identity* - as if cultural identity has some axiomatic corollary in territory and legality. This axiom hampers us unnecessarily. Its origins are not within anthropology, but within the cultural organization of the modern nation-state - and, as I have tried to suggest, its theological precursors. The idea that law and cultural identity are each other's corollary is fundamental to the cultural self-legitimations of the nation-state. Herzfeld has suggested that nationalist ideologies conflate geography (locale) and absolute moral categories, constituting the nation in a taxonomic assemblage of 'cultural types' (also see Gellner 1983). In western nationalist rhetorics, this moral geography is territorialized as jurisdiction, temporalized as 'traditions', and characterized as 'culture' - as if a condition of modernity were a braiding of separate strands of local tradition in the present (when, in fact, it is as likely to be the reverse or something more chaotic; see Hobsbawm and Ranger 1983).

It would seem that the recurring debate between rules and processes is not quite over, but kept alive by the conceptual uncertainty surrounding a connection between law and culture at the level of the social field. That debate hinged on the question of whether a comparative ethnography of law should focus on substantive rules or the processes by which rules (and other outcomes) are achieved. Even now, as Woodman makes clear, there is still no consensus on the question of whether 'law' can be used metaphorically to refer to all social orders and their criteria of difference - or, indeed, whether such usages *are* metaphorical (see von Benda-Beckmann 1988). Until *that* question is resolved, any distinction between legal centralism or pluralism is moot from an ethnographic point of view since *both* involve repertoires of cultural practice constitutive of both 'law' and 'difference'. These cultural practices - what goes on 'between legal pluralism', as it were - merit investigation in their own right.⁷ Without some understanding of these, the

⁷ In taking this position, I differ in part with Fuller (1994), who addresses the question of why legal pluralism is not currently a major anthropological question in Great Britain. He suggests that legal pluralism has been 'taken over', as it were, by lawyers, and that it must now be reclaimed by anthropologists. I am suggesting that there is little to be gained from a theoretical standpoint in taking it back, unless anthropologists are prepared to include official law within their critical ethnographic frame. The central obstacle in the anthropological tradition in this regard is the

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definitional debates over legal pluralism can only conserve old primordialisms and old definitional debates over law itself (see Roberts 1978 for a discussion of these). This is paradoxical, since anthropological attention to legal pluralism is a critical response to these very positions (see, for example, Malinowski 1982 [1926] and Comaroff and Roberts 1981).

What is the Difference?

No matter how energetically scholars search for the nuances of the law's power in everyday life, or the impact of culture on the law, legal pluralism as a field of anthropological inquiry inevitably remains committed to legal centralism and the basic premises of state nationalism so long as comparative problems are organized around the assumption that official and unofficial law follow the same map that differentiates social fields and/or cultural solidarities. An alternative approach would be to focus on the processes by which law comes to be a sign of cultural identity, as well as the aspects of cultural solidarity that are *not* recognized in the sign systems the law commands. Law is controlling without ordinarily being determinative, variant but not necessarily in ways that are homologous with *cultural* variation. These are compelling conceptual possibilities for ethnographers, and they correspond to vexing political realities for contemporary politicians, judges, advocates, activists and voting publics. There is no overstating the relationship between these two frames of reference. Yet the emphasis anthropologists have tended to give to relations of power within social fields tends to understate the play of power *between* them, creating the illusion that the metaphorical term 'social field' refers primarily to normative venues that are also sites of cultural solidarity.

An alternative would be to attend directly to the ways law, power, and solidarities cross-cut each other, and to consider the circulation and materializations of power in the local constitution of authority, epistemologies, identities, causes, norms, and strategies. Though she does not advocate the idea in precisely these terms, Moore's approach to social fields as semi-autonomous normative communities does emphasize their vertical linkage within hierarchies over time (Moore 1978, 1986). I read her essay as a call for lending ethnographic attention to the political and normative connections among social fields, not (as others would seem to have it) as

tendency to conflate cultural difference and legal jurisdiction, as noted in the text. The more interesting theoretical question is that of how signs of identity and difference circulate in (and against) legal orders (so-called) as materializations of different forms of power and authority.

a charter for equating normative systems and cultural difference. Social fields, after all, can also be constituted at the intersections of cultural solidarities and as sites of resistance - as recent ethnography of nationalism and state bureaucracies has shown, as well as recent historical reassessments of ethnogenesis and resistance in the context of colonial encounters over time.⁸

Any congruence between legal pluralism and cultural pluralism only makes more urgent the problem of understanding how any social process comes to be normatively organized around categories of difference in the first place - overdetermined by particular signs of identity. Thus, one project for anthropologists interested in legal pluralism would seem to be the examination of when and where the fault lines among normative communities encode potential or thwarted liberations and sovereignties. Another line of investigation might explore ways in which state legal systems manage the indeterminacies and outright contradictions among the ideological charters of constituent populations. Gender, class, race, language, ethnicity, 'culture' - these are not all differences of the same kind, and they are by no means categories of difference that map the world from everyone's perspective, since the cultural meanings of difference are themselves contingent at least to some degree on the ways populations have been caught up in, consolidated, divided by, or expelled from specific modes of participation in state institutional regimes, as well as other modes of local and translocal social participation.

Conclusion

Casting the debate on legal pluralism in terms of a polarity of official law and plural social fields within states, overestimates the extent to which even official law serves as a stable vantage point in terms of which to conceptualize difference - yet, at least in the U.S., this is precisely the polarity that is central to the self-legitimations of the law 'itself'. Even law in the strictest sense of the term is a dynamic order in its own right, also improvising, selecting, appropriating, denying, and contesting normative ideas from a host of sources. As Assier-Andrieu has written: "In order to exist, the law must constantly reinvent itself".⁹

⁸ For example, Anderson 1991, Chock 1991, Greenhouse and Greenwood (forthcoming), Herzfeld 1992, and Moore 1993 on nationalism and state bureaucracies; on colonialism, see Chatterjee 1986, Comaroff 1985, Comaroff and Comaroff 1991, Lazarus-Black 1994 and Lazarus-Black and Hirsch 1994.

⁹ "[L]a loi pour exister doit être incessamment réinventée." (Assier-Andrieu 1987:

I see Woodman's paper as a call for rethinking canons, reengaging the ethnography of law, and bracing for new world circumstances. While this might lead ethnographers and lawyers towards divergent roads in the short term, it promises a revitalized dialogue between social science and law in the longer term. At the very least, we will be better prepared to reconsider the points where the humane aspirations behind our shared conceptual and comparative categories have perhaps prematurely and wishfully written into the anthropology of the future sovereignties and legalities that are - in today's realities - by no means certain.

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