Law is again

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The central contention in Fernanda Pirie's contribution to this Forum – that anthropologists should pay more attention to what law *is* – immediately brought to mind the many (legal) anthropological conferences I have attended over the years. Locations, themes and organizers changed: from the Commission on Legal Pluralism Conference in Chile, the meeting of the American Anthropological Association in Williamsburg, a session on legal anthropology in Cape Town and in Nigeria and the Law and Society Association gathering in Berlin to great meetings at the Max Planck Institute in Halle. Yet, in all these meetings, there was one red thread. Somewhere during the presentations, invariably, someone would stick up a finger to ask what I have, by now, come to consider the key question that legal anthropologists obsess with: 'What exactly, in the context of this paper/study/presentation, do you mean by law?'

The tenacity of this question, combined with the heated and open-ended discussion that it always engenders, form the main reason why I wholeheartedly disagree with Pirie's point of departure – that anthropologists do not pay enough attention to the essence of law – and shall offer some reasons for this first. Next, I will also take up issue with the second part of Pirie's argument; her assertion that anthropologists *should* pay more attention to the essence of the law. Here, I disagree not only because legal anthropologists have already put law at the heart of their scholarly endeavours for over a century, but also because, as I will set out, the essential contribution of anthropologists to the study of law lies elsewhere.

Before I turn to these two issues – *do* anthropologists pay enough attention to the essence of law and *should* they – a caveat is in place. Pirie's highly readable and engaging contribution to this Forum is essentially a summary of her key arguments in her book *The Anthropology of Law*, and the temptation of writing a review of this book loomed large.[1] This, however, is not the nature of this feature, which seeks to bring a particular socio-legal debate to the readers of *Recht der Werkelijkheid*. There is, also, one comprehensive review of the book out, and another on its way.[2] If I were to write a review of the book I would recommend it for its valuable contribution to the field of legal anthropology, the impressive range of examples it offers and its value as an introduction for students but, again, this is not the nature of discussions on these pages. Let me therefore turn to a critical discussion of Pirie's first contention, that anthropologists have rarely considered the 'nature of explicit law'.

1 Pirie 2013.
2 Halliday 2015; Woodman 2014.

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Law as an object of anthropological enquiry

Legal anthropology, as a field, only came about in the twentieth century. It was preceded, however, by many works driven by the same type of interest of understanding the essence of law in its social and cultural context that would shape academic endeavors later on. Montesquieu's interest in the way in which laws and customs from Rome to China and Japan related to culture and tradition is one prime example.[3] Similarly, Henry Maine's landmark work on 'Ancient Law', in which he sketches the development from status to contract might have been written in Maine's Oxford armchair, but was based upon his readings of the essence and nature of law in given contexts over time.[4]

The field of legal anthropology as we now know it started with Bronislaw Malinowski's work on Melanesia, which did not only introduce the method of longitudinal participant observation within a given community, but also a desire to understand the nature of laws, dispute and disputing processes within them.[5] It was Malinowski who first pointed out how the inhabitants of the Tobriand islands did not need formal laws to establish social control, but made use of insults and gossip instead, and how it was the anthropologist's call to study these laws. Subsequent founding works in legal anthropology, like Mead's *Coming of Age in Samoa* and Evans-Pritchard's ethnography of the Nuer explicitly engage with the absence of formal laws and the role of other mechanisms of social control.[6] It was in seeking to capture the essence of law, that Hoebel, for instance, developed his often-cited definition of it: 'A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting.'[7]

One of the main polemics in twentieth-century legal anthropology was the discussion as to whether it was possible to capture and compare the essence of law beyond a given social context. Whereas Max Gluckman described his observations amongst the Tswana in common law terminology, Bohannan advocated the need to stick to original terms stating that 'It is just as wrong and just as uncomprehending to cram Tiv cases into the categories of European folk distinctions as it would be to cram European cases into Tiv folk distinctions'.[8]

Ever since the 1980s, much of the anthropological interest in the nature of law has been discussed under the heading of legal pluralism. The central mission of legal pluralism can be characterized as two-fold. On the one hand, it is about setting out – as Pirie does in her book – that there are many different orders and systems that essentially perform the same function as law, and should thus also be studied and even recognized as such.[9] In addition, legal pluralism has also sought to point out the limits of state law, and how law in action very rarely cor-

3 Montesquieu 2002 (1748).
4 Maine 1861.
5 Malinowski 1984.
6 Evans-Pritchard 1969 (1923); Mead 2001 (1928).
7 Hoebel 1954 quoted in Donovan & Anderson 2005, p. 10.
8 Bohannan 1989 (1957).
9 Griffiths 2002; Merry 1988.

responds to law in the books.[10] Within legal pluralism, the search for an understanding and definition of the essence of law is a key debate.[11] Brian Tamanaha started the debate with a scathing critique on 'The folly of the "social-scientific" concept of legal pluralism'.[12] After a long series of debates the same author – to my personal full agreement –, however, proposed to stop searching for an essential understanding of law to instead focus upon that what people, in a given context, considered as law.[13]

Should anthropologists do more?

The core debates in legal anthropology over the past century, thus, show how Pirie's contention that anthropologists have rarely considered the nature of explicit law is a misconception. The second question thrown up, however, is still open to debate: should anthropologists do more in studying the essence of law? Again, I beg to differ. Of course, the essence of law, legal texts, courts and their unique position in a given society merit attention from those approaching law from a more positivist perspective and from the humanities and social sciences alike. Whether the denominator is law & economics, legal philosophy, the history of law, law & psychology or any other field, studying legal texts and legal institutions in context is of fundamental importance in understanding what law *is*. The way in which anthropologists can, and should contribute to this debate is, in my opinion, through their unique understanding of what law *does*. What role does law play in a given society and cultural context? How does it give meaning to social interactions and power relations, what disputes erupt and how are they solved? It is these questions that are the staple of legal anthropology, and that are relevant as ever. Whereas sociologists of law are generally concerned with the interrelationship between law and social processes at large, it is this situational, time-and-context specific understanding of the interaction between individuals, groups and the legal and the meanings allocated to it that legal anthropologists have to offer.

A very specific aspect of the anthropological contribution to discussions of the law concerns the anthropological method: the longitudinal, careful participant observation of people and processes in a given society.[14] Of course the object of study can (and should) be the markers of the legal that Pirie puts forward: the legal texts, courts and other institutions and disputes. But the anthropological focus should not be on an – in my opinion futile – attempt to capture what all these *are* but rather on what they *do*: what function to these texts, institutions, disputes perform in society, what meanings are ascribed to them, how and when do they surface in social processes, and when do they remain outside of the playing field? Holleman's classical study of both trouble cases and trouble-less cases

10 Pound 1910.
11 Woodman 1998.
12 Tamanaha 1993.
13 Tamanaha 2000; 2008, p. 396.
14 Starr & Goodale 2002.

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still serves as an example here.[15] Both Merry's classical work on 'Getting justice and getting even' and Hirsch' study of courts in Tanzania serve as examples of how anthropological study of the role that individuals ascribe to courts and court processes can contribute to an understanding of what these mean in a given context.[16] The argument here is thus not that there should not be more thoughtful, scholarly debate on what law is, but that the best anthropological contribution to that debate is via the detour of this disciplines unique perspective on what law does in a given context.

Many of the anthropological works cited above show that anthropologists do engage with what law is, but that their real contribution lies in understanding what law does. The value of this anthropological perspective might best be captured in W.H. Auden's classical poem on law as love, that I always cite in the first 'Law, Society and Justice' class of the year. In it, Auden captures how concentrating on how people view the law – the anthropological perspective – stands in the way of any essentialist understanding of it. The abbreviated version of the poem, with which I will conclude, runs as follows:

> Law, say the gardeners, is the sun,
> Law is the one
> All gardeners obey
> To-morrow, yesterday, to-day.
>
> Law is the wisdom of the old,
> The impotent grandfathers feebly scold;
> The grandchildren put out a treble tongue,
> Law is the senses of the young.
>
> Law, says the priest with a priestly look,
> Expounding to an unpriestly people,
> Law is the words in my priestly book,
> Law is my pulpit and my steeple.
>
> Law, says the judge as he looks down his nose,
> Speaking clearly and most severely,
> Law is as I've told you before,
> Law is as you know I suppose,
> Law is but let me explain it once more,
> Law is The Law.
>
> Yet law-abiding scholars write:
> Law is neither wrong nor right,
> Law is only crimes
> Punished by places and by times,
> Law is the clothes men wear

15 Holleman 1986.
16 An Na'im 2002; Hirsch 2002; Merry 1990.

Anytime, anywhere,
Law is Good morning and Good night.

Others say, Law is our Fate;
Others say, Law is our State;
Others say, others say
Law is no more,
Law has gone away.

And always the loud angry crowd,
Very angry and very loud,
Law is We,
And always the soft idiot softly Me.

If we, dear, know we know no more
Than they about the Law,
If I no more than you
Know what we should and should not do
Except that all agree
Gladly or miserably
That the Law is
And that all know this
If therefore thinking it absurd
To identify Law with some other word,
Unlike so many men
I cannot say Law is again

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