Anthropological perspectives on law and religion

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Introduction

Distinct anthropological perspectives on the tangled relations between law and religion only fully developed in the wake of the resurgence of religion in the public space of modern nation states after the end of the Cold War. Prior to this period of intense global socio-political and economic transformation, anthropologists had hardly engaged in both of the two anthropological sub-disciplines, i.e., the anthropology of law and the anthropology of religion.

The trans-regional ramifications of “9/11” and the increasing normative clashes between Islam and secular national law in European countries have furthermore prompted some anthropologists to turn their attention also, but not exclusively, to the West in order to study the normative clashes between migrant religious communities and their host cultures as well as their local and transnational dynamics, reasons and consequences. The analyses of these anthropologists have directly or indirectly lent support to postcolonial studies scholars in demonstrating the “provincialization of Europe” (Chakrabarty 2000: 3). They have done so in a twofold manner: (1) by eschewing a Weberian emphasis on the specialness of Europe and putting European countries and the European Union in comparison with other multi-religious, multi-ethnic, and multi-cultural states, like the US, India, and Indonesia; and (2) by showing that Western law does not constitute universal law, not even in Western societies.

In order to understand the disciplinary developments I just described, I will first discuss salient anthropological perspectives on “law” and “religion.” Subsequently, I will turn to the paradigmatic shift within post-Cold War anthropology from the study of either law or religion to the study of the interlinkage between the two in the contemporary world. In the final two paragraphs, I will zoom in on two major thematic areas in which this interlinkage is at issue, namely the rights claims of indigenous peoples and their legal accommodation in so-called settler countries on the one hand, and migration and the legal accommodation of “foreign” religions in Europe on the other.

“Religion” and “law” in an anthropological perspective

In his article, Shifting Aims, Moving Targets: On the anthropology of religion, from 2005, the late Clifford Geertz, who has been widely acknowledged as the most influential post-World War II
anthropologist both within and beyond the discipline (Apter 2007), looked back to the beginnings of his long career. With some justification, he pointed out that already in the 1960s, he and a couple of fellow anthropologists, such as Mary Douglas and Victor Turner, had eschewed a reductive understanding of Max Weber’s concept of rationalization, according to which “the rationalization of modern life was pushing religion out of the public square, shrinking it to the dimensions of the private, the inward, the personal, and the hidden” (Geertz 2005: 10). Geertz’s research on the varieties of Islam in Java as well as local attempts at religious reform in Bali from the 1950s to the 1970s had indeed attested to an increasing prominence of religion in the Indonesian public space. Strangely, though, he had paid no attention whatsoever to the possible impact of Indonesian state law on the religious developments in Java and Bali.

In the mid-1960s, Geertz turned to the study of Moroccan Islam with the objective of comparing and contrasting what he called the styles of traditional and modern Islam in Morocco with those in Indonesia (Geertz 1968). In an effort to trace the local patterns of religious change, he observed that secularism and scripturalism had undermined the hegemony of the traditional religious styles in both countries, which in turn had spurred a polyvocality of dissenting religious persuasions (ibid.: 60). Again, at no point in his, at times rather anecdotal, account did Geertz make any mention of how law might have featured in the respective trajectories of religious change.

In an extensive essay, Local Knowledge: Fact and law in comparative perspective, in his seminal book, Local Knowledge, from 1983, Geertz finally spelled out his reservations toward anthropologists’ concern with law in what is called “legal anthropology.” Viewing this field of study as an encounter between anthropology and jurisprudence, he averred that both disciplines would indeed be alike in deducing abstract principles from “parochial facts” (Geertz 1983: 167). In his opinion, though, anthropologists and lawyers were divided by their respective professional styles of categorization. Interaction between the two “practice-minded professions” would have so far yielded little in the way of mutual accommodation but much in the way of ambivalence and hesitation, not to say irritation (ibid.: 168–9). The latter was prompted, according to Geertz, by a major difference in epistemology: whereas anthropologists would be concerned with interpreting what they observe in the field, by taking into account layers of contexts that in the anthropological writing process then coagulate into a “thick description,” lawyers would not read the facts of social phenomena but create them in the mirror of their categories and procedures in order to render them judiciable (ibid.: 173, 182).

Geertz did consider the study of local laws as a legitimate task of anthropology. In the process, however, anthropologists would need to relativize the Western legal categories projected onto non-Western contexts (Geertz 1983: 181). In order to highlight the inadequacy of Western legal categories in capturing non-Western institutions and procedures that share a certain family resemblance, so to say, with Western law, Geertz referred to three different sets of concepts that would reflect what he called Islamic, Indic, and Malayo-Polynesian “legal sensibilities.” Suffice it to just present here a couple of Islamic examples provided by Geertz. The first of the two is haqq. As Al-Haqq, the category is part of the names of Allah and thus always implies a connection with God. Besides, haqq connotes “truth,” “reality,” “validity,” and at the same time “duty,” “right,” “just,” “fair,” and “proper.” The second category is figh, which implies “knowledge” and “comprehension” of Islamic norms, and so forth (ibid.: 183, 185, 188–9).

Geertz’s approach to law and local laws built onto the argument by the Oxford-trained US anthropologist Paul Bohannan against the South African lawyer-cum-anthropologist Max Gluckman, founder of the now famous Department of Social Anthropology at the University of Manchester in 1947, in what has come to be known as the Gluckman–Bohannan debate.
commencing in the 1950s. Today, the theoretical positions advanced in this debate have lost nothing of their actuality for legal anthropological research.

Gluckman was in fact the first anthropologist systematically studying actual African dispute processes. Hitherto, African law had generally been viewed as a set of customary rules colonial officers had elicited in interviews from local chiefs and other traditional authorities. These collections of customary rules still served as guidelines in the colonial courts, while in reality they were rather distorted versions of local practices. Instead of abstracting indigenous legal nomenclature from interviews with local authorities, Gluckman witnessed concrete disputes and decision-making processes and particularly focused on the relationship between rules and reasoning. He also examined how a dispute found its way into the colonial court and tried to record the experiences of the disputing parties both before and after the court decision. He thereby established the foundation of modern legal anthropological practice, the so-called “extended case-method” (Gluckman 1955: 3, 32–4; Falk Moore 2001: 98; Donovan 2008:102, 109).

Departing from Bronislaw Malinowski’s contention that law is a cultural universal, Gluckman was preoccupied with demonstrating that indigenous African legal norms, institutions and practices were as rational, in the Weberian sense, as Western ones. He acknowledged that the conceptual frameworks of these institutions and practices were different, as their social milieus were different. The legal norms, institutions, and practices of the Lozi Gluckman had studied were of course special to their society. Yet Lozi juridical reasoning would rely on logical principles that are found not only in Western legal cultures but all systems of law. Foremost among these universal principles, so Gluckman, was the principle of “the reasonable person,” which was indeed central to his plea for an equal treatment of African law vis-à-vis Western laws (Goodhart 1955: xv–xvii; Gluckman 1955: 22–9, 82–162; Falk Moore 2001: 98–9; Donovan 2008: 104–5).

One of the major criticisms leveled against Gluckman’s claim of the universality of legal reasoning was Paul Bohannan’s counter-contention that local legal concepts are unique. Translating local norms, institutions, and practices into English legal terms would amount to distorting them. What was at stake in Bohannan’s argument against Gluckman was whether Gluckman’s use of English legal categories had biased him in perceiving Lozi norms, institutions and practices as similar to those of Western law. Bohannan’s emphasis on the fundamental non-translatability of indigenous concepts, institutions, and practices, which was reiterated by Geertz, left anthropology with the grave dilemma of how to compare. Bohannan himself tried to solve the problem of comparison, by distinguishing between so-called “folk” categories and “analytical” ones. The anthropological project would be to describe the former in and on their own terms and only then to translate them into the latter. In Bohannan’s understanding, English legal concepts were folk categories, just like the corresponding Tiv or Lozi terms, and thus could not serve as analytical ones (Bohannan 1957: 5–6; Bohannan 1967; Roberts 1998: 103; Falk Moore 2001: 99; Donovan 2008: 107, 113–14, 119).

When arguing for the anthropological study of “local laws” instead of “law,” Geertz in point of fact followed Bohannan’s dictum that “The Tiv have ‘laws’ but do not have ‘law’”

1 Bronislaw Malinowski (1884–1942) was the father of modern, fieldwork-based social anthropology. In his book, Crime and Custom in Savage Society, Malinowski defined “the rules of law” as “the obligations of one person and the rightful claims of another.” Infringements are sanctioned “by a definite social machinery of binding force based … upon mutual dependence, and realized in the equivalent arrangement of reciprocal services, as well as in the combination of such claims into strands of multiple relationships” (Malinowski 1926: 55). Malinowski’s concept of law thus assaulted the automatic linkage of law with centralised political authority (Roberts 1998: 96).
Talal Asad is the son of a famous protagonist of what Martin Kramer called “The Jewish Discovery of Islam,” the Jewish-Austrian convert to Islam, journalist, diplomat for Pakistan, and scholar of the Al Quran, the late Leopold Weiss alias Muhammad Asad (Asad 2004: 48–9), author of the book, Road to Mecca, first published with Simon and Schuster (New York) in 1954 (see also Kramer 1999). Since I use the Kindle edition of Asad’s book, my references are to the respective positions in that very edition rather than the respective pages in the book, which are not listed in the Kindle edition.

As to the issue of conflicting temporalities in our world today refer to Benda-Beckmann 2014.
the fact that all concepts are developed and promoted in complex power relations, Asad furthermore ascertained that the secular nation-state does not guarantee toleration of “religion.” Rather, it subjects its citizenry to the “necessities of law” that leave little room for negotiation where the law’s core principles are concerned. Law thus obstructs, argued Asad, different ways of life by force (ibid.: pos. 139–43, 175, 4070–4). This mechanism has become inarguable in the case of the non-representation of the Muslim citizens of secular European states in the narrative, not to say governance, of Europe, and by the non-representation of their Muslim citizens as Muslims by European states (ibid.: pos. 2505–860).

Because of secularism’s interlinkage with the international Human Rights regime, Asad also traced the Judaeo-Christian roots and the Western history of the concept of Human Rights, homing in on the consequences of neo-liberal Human Rights regimes for people on the ground (see, e.g., Asad 2003: pos. 2258–330). In so doing, he exposed a major contradiction between Article 25 of The Universal Declaration of Human Rights stipulating that, “Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control,” and the fact that the responsibility of putting the necessary socio-economic preconditions into place is given solely to sovereign states (ibid.: pos. 2001–4, 2012, 2120, 2138–142). This contradiction, which in verity assigns Human Rights only to citizens of nation states and not to homo sacer (Agamben 1998; see also Asad 2003: pos. 2250–5), the mere human being, is not lost on the destitute of today’s world. It casts serious doubts on whether secularism can help establish much needed local as well as supra-regional social security networks, like organized religion evidently can.

Where Asad’s comparison of embedded concepts leaves us with a juxtaposition of largely incommensurable categories, institutions, and practices, the late French anthropologist-cum-sociologist Pierre Bourdieu offered an analytical instrument that does allow for comparison between societies with a similar degree of social differentiation and division of labor. I am referring here to Bourdieu’s concept of field and the associated categories of habitus and capital. Bourdieu’s notion of field is incidentally a modification of Max Weber’s adaptation of field theory that has its roots in the physical sciences (Dianteill 2003: 530; Martin 2003: 3, 20; Keyes 2002: 233, 239; see also Bourdieu 1987: 809, 833, 842).

Bourdieu generally conceived of social fields as effects of historically contingent processes of social differentiation. As such, they are patterned fields of embodied practices that foster different kinds of capital. While they are, according Bourdieu, connected to a common substratum, that is to say, “culture at large,” Bourdieu treated them as analytically distinct, because each of them would have a coherence, structure or logic of its own that brings about a certain set of dispositions that structure the habitus and thus the perception of actors participating in the respective field (Bourdieu 1987: 805–6, 815; Martin 2003: 23, 41; Friedland 2009: 887–9, 900).

In his reflections on “The Force of Law: Toward a Sociology of the Juridical Field,” Bourdieu concerned himself with a particular social field of modern nation states. The social arrangements that constitute this field are geared, he wrote, toward the generation of certain symbolic capital and structure the habitus of the professional actors, i.e., the different categories of lawyers, judges, and other legal practitioners. It is indeed necessary to understand the process of habitus formation in the juridical field in order to assess how the juridical habitus participates in the world-making power of law (Bourdieu 1987: 807, 811, 818–21, 839, 842). The external politics of the professional actors in the juridical field would generally aim, with varying success, at establishing and maintaining professional control over the definition and interpretation of law in society (ibid.: 817–18, 822, 828–34, 836, 838). Yet despite a certain degree of homogeneity of
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habitus shared by all legal practitioners, they are internally divided by intense competition and diverging interests (ibid.: 806–8, 823, 850–1). It is important to note that Bourdieu did not consider the juridical field as independent from other social fields, contrary to the normalization strategies of legal professionals who tend to declare “law” as autonomous (ibid.: 808, 829, 834, 839). In this, his concept of the juridical field is reminiscent of Sally Falk Moore’s proposition of law as a semi-autonomous social field.

In her understanding of semi-autonomous social fields Moore, like Bourdieu, drew on Max Weber (Moore 1973: 721). Similar to Bourdieu’s emphasis on the internal rule-generating capacity of social fields, she stressed that semi-autonomous social fields on the one hand spawn rules and regimens with the power to obtain compliance, while on the other they are sensitive to decisions and regulations generated in other social fields. With respect to the field of the legal she wrote that when state law is articulated together with rules and regimens generated in non-legal fields, the latter often directly impinge on or influence the modes of compliance and non-compliance with the norms and regulations enacted by the state (ibid.: 720–2, 744).

Numerous non-legal rules of mutual obligation informed, for instance, the conduct of the different actors, i.e., designers, contractors, and retailers, involved in the production of expensive ready-made women’s dresses in the New York City of the 1970s. These rules required the giving of gifts and the doing of favors to an extent not at all “reasonable” when judged in the light of the legal contracts that officially regulated the business transactions between these different actors. However, the scarceness of the resources necessary to be successful in this business made the aforementioned non-contractual obligations, which some may consider “bribery,” a matter of economic survival. This case shows that the semi-autonomous field of law, articulated here in the form of the respective business contracts, may be rendered insufficient or even inoperative because actors are able to mobilize norms from other social fields in their negotiations with each other (Moore 1973: 723–9, 743). This fact has largely been underestimated or neglected by the legal profession.

The value of Moore’s and also Bourdieu’s concept of social fields lies in its inherent distinction between state law and non-state normativities (see also Roberts 1998: 98). Neither Moore’s concept nor that of Bourdieu is static or euro-centric, as both versions in principle accommodate issues of historically contingent social change and non-Western processes of social differentiation (Martin 2003: 24). Unfortunately, and unlike Moore, Bourdieu did not follow up on his theoretical reflections concerning the juridical field, by providing us with an exemplary empirical analysis. This, I am tempted to say, was partly made good by Bruno Latour in his ethnography of the Conseil d’État, a study that does provides us with glimpses of the particular habitus formation of French administrative law judges in the Palais-Royal in Paris, although it centers on the construction of legal arguments (Latour 2009).

Like Geertz, Bourdieu also provided us with a characterization of what he called the “religious field.” Very much like his concept of the “juridical field,” his concept of the “religious field” applies only to sufficiently segmented societies, whose degree of social differentiation and division of labor allows for the emergence of a relatively autonomous, both structured and structuring semi-autonomous field of the religious (Bourdieu 1971: 295–96, 300–1, 320, 325; Dianteill 2003: 530) – Geertz’s “religion” as both “model of” and “model for” life or reality.

5 This was recently skilfully reiterated by the German sociologist, Daniel Witte, at an international conference on “The Normative Complex: Legal Cultures, Validity Cultures and Normativities,” organised by Werner Gephart at the Käte Hamburger Centre of Advanced Studies “Law and Culture”, Bonn University, April 9–10, 2014.
The religious professionals who are the actors in this field display a strong disposition to control the production and reproduction of a body of secret teachings (Bourdieu 1971: 304–5, 308, 313–14, 318–19). Similar to Moore, Bourdieu viewed the religious field as depending on the patterns, rules and limitations generated in other social fields, like law, politics or economics, in that it for instance transforms the restrictions of the law through its “sanctifying precepts for atonement,” or in that it symbolically manipulates individual aspirations in the face of political and economic limitations. The boundaries of the religious field, in short, are porous (Bourdieu 1971: 310, 318–19; Dianteill 2003: 530–1, 538).

**Anthropological perspectives on “law and religion”**

Prior to “9/11,” there was, as already mentioned, hardly any anthropologist paying attention to the relationship between law and religion. Nevertheless, the resurgence of religion- and ethnicity-based identity politics after the end of the Cold War not only in post-socialist transitional states but also in countries like India, Indonesia, Malaysia, South Africa and the US was beginning to raise anthropological interest already in the mid-1990s (see, e.g., Veer 1994; Comaroff and Comaroff 1997; Hann 1998). “9/11” finally rendered unarguable the fact that “religion” had become a major political force after the collapse of the Soviet Union ten years previously and thus rendered factuality to the continuing separate existence of religion and law as semi-autonomous fields in modern nation states. It furthermore seemed to vindicate Samuel Huntington’s thesis of an emerging clash of civilizations he had first proposed in 1993 in an article in the *Foreign Affairs* magazine.

According to Huntington, the following civilizational identities have been “shaping the patterns of cohesion, disintegration, and conflict in the post–Cold War world” (Huntington 1998: 20): Western, Latin American, African, Islamic, Sinic, Hindu, Orthodox, Buddhist, and Japanese (ibid.: 26–9, 38–9). Huntington furthermore called upon the Western societies to accept “their civilization as unique and not universal” and to jointly “renew and preserve it against challenges from non-Western societies” (ibid.: 20–1). The Western civilization is inter alia marked, so Huntington, by a pervasive cultural influence of Catholicism and Protestantism, the separation of spiritual and temporal authority, the rule of law, social pluralism and individualism (ibid.: 70–1). While Christianity and Islam would both have the potential to do well in modernizing societies, Christianity would only spread by conversion, whereas Islam by conversion as well as reproduction (ibid.: 65). In other words, a major challenge for the West would come from the Islamic Resurgence in countries with a Muslim majority (ibid.: 109–1, 146–9, 175–9, 183, 214–18, 254–91).

Salient criticism of his thesis, such as that Huntington did not consider the work of a single non-Western scholar that might have mitigated his strongly Western-centric perspective, notwithstanding, Huntington’s book has by now become required reading not only for scholars but also civil servants and military leadership (Swan 2010). Anthropologists have responded both to the aforementioned world-changing events and to the wider societal debates spawned by Huntington’s book, by massively focusing their attention on the role of religion in contemporary societies. Most, however, have done so by employing a cultural or political perspective. Comparatively few have approached religion from a legal anthropological angle. The publications of those who have done so generally fall into three categories: (1) studies of Islam as a legalistic religion, in which the juridical and the religious field, if you will, collapse onto each other; (2) studies of plural normative constellations in which religion and law are positioned at opposite ends; and (3) studies that discuss the tangled relation between law and religion in contemporary societies from a perspective transcending the conceptual
secular-religious divide. While most of these anthropological studies still focus on issues and situations in non-Western societies, some are also concerned, as already mentioned, with developments in Western countries.

An exemplary case of mainly the first category is Lawrence Rosen’s book, *The Justice of Islam*, a collection of articles, some of which were already previously published. The first edition of the book appeared in 2000 and was immediately followed by a second one when the omnipresent specter of Al-Qaeda spurred a widespread need to understand Islam. This book in particular, proves the benefits of combining an anthropological perspective with that of a legal specialist, as Rosen was trained both as an anthropologist and as a lawyer.

In *The Justice of Islam*, he fruitfully applied a Geertzian interpretative approach to Islamic law as practiced in postcolonial Morocco, Tunisia, and Malaysia, as well as a Gluckmanian comparative law perspective to Islamic law in general (Rosen 2002: xi). Due to the selective adoption of Western legal codes and institutional structures, the role of the *qadi* in the local juridical systems has greatly changed. Rosen nevertheless identified a common quest for an authentic Islamic way of life that has prompted a renewed interest in classic Islamic jurisprudence in these countries, which would justify, he argued, to call their law Islamic (ibid.: 3). Elucidating the internal logic of the legal procedures employed in the Islamic courts, Rosen first of all described how, in Morocco, cases are filed, pleas made and evidence collected. According to Rosen, a sense of mutual ingratitude and indebtedness lies at the root of Moroccan society, which is expressed in the local concept of law as *haqq* denoting, like Geertz had already expounded, “duty,” “obligation,” “truth,” and “reality” (ibid.: 6). Hence, when a person’s actions infringe upon *haqq*, the *qadi* would consider his or her actions above all as indications of a shift in his or her relationship with the respective others. This shift would necessitate that the terms of these relations be negotiated anew. Adjudication would thus not be geared toward the enforcement of rights but to the creation of conditions under which such renegotiations can be conducted without violence (ibid.: 13, 28, 36–7). Since even today people are never seen in isolation from each other but as members of particular social networks imbued with certain rights and obligations, it makes sense that oral, that is, personal testimonies still count as the most reliable evidence, even though written documents have meanwhile come to be regarded as sufficient in most of the cases (ibid.: 5, 99–110).

In the comparative part of his book, Rosen pointed to surprising similarities between Islamic law and the Western common law traditions (Rosen 2002: 38–54). Both would hover over society, “legitimizing not centrality through its own certitude but, ironically, its opposite – the dispersion of power to local practice” (ibid.: 58). Despite these similarities, US courts have accommodated Islamic norms guiding the life of six to eight million US Muslims only to a minimal degree. Cultural defense pleas, for instance, advanced in cases of so-called honor killings have evidently never been heeded by judges or juries (Rosen 2002: 200–5). US courts also have not accommodated the ritual needs of US Muslim prison inmates beyond those of inmates with Christian or Jewish backgrounds (ibid.: 206–8). Employment discrimination suits filed by US Muslims seem to have likewise fallen through due to difficulties of providing the necessary evidence, such as proving intent, etc. (ibid.: 212–13).

Rosen attributed this attitude by US courts to Islam less to a strict separation of law and religion in the US Constitution than to a prevailing Christian–Jewish bias of US judges and juries (Rosen 2002: 213). In another study of the jurisprudence of the US Supreme Court, he drew our attention to the slow infiltration of “religiously inflected notions,” in the form of a direct or indirect use of “the language and precepts of ‘natural law,’” into the juridical field of the United States (Rosen 2013: 183), which anyway belies a strict separation between law and religion. With respect to this development, he attributed some importance to the fact that there
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are currently six Catholics – four of them known to be highly conservative – on the Supreme Court (ibid.: 184, 187–8). Commonly understood as referring to “those principles God is said to have fixed in the world that can be discerned by human reason” (ibid.: 184), natural law has recently been revived, according to Rosen, by an alliance of Catholics and Evangelicals that has formed around issues, such as anti-abortion, public accommodation of religion, preservation of the traditional family, limitation of sexual expression (ibid.: 185).

Rosen’s analysis of the meltdown of the boundaries between “law” and “religion” in the jurisprudence of the US Supreme Court, due to the revival of natural law engineered by Christian conservatives, falls into the third category of legal anthropological studies of religion in the wake of the global Islamic Resurgence. Another excellent example is John R. Bowen’s study of the ways in which Indonesians – villagers, social activists, judges, barristers, religious leaders, and so forth – deliberated over “value-pluralism” (Bowen 2003: 3) at a time, when Indonesia was transitioning from a highly centralist quasi-dictatorship to a democracy with a broadly decentralized governance system, and Islam was increasingly accommodated on various levels of Indonesian state law (Ramstedt 2012). The Indonesian debates about value-pluralism were informed by competing claims about how people should live, and about the future identity of Indonesian society. These claims reflected current ideas about local customary law (adat), international Human Rights, long-standing national principles (pancasila), as well as parochial religious (i.e., predominantly Muslim but in some measure also Christian, Hindu, Buddhist, and since 2006 also Confucian) ideas.

Bowen’s research was based on “long-term intimacy with people in particular places” (Bowen 2003: 8), and constituted an innovative application of Geertz’s interpretive anthropology to the study of the tangled relations between law and religion in Indonesia (see also Bowen 1995: 1049). Departing from instances in which norms collided, Bowen distinguished between different repertoires of public reasoning about norms concerning marriage, divorce, and inheritance, namely interpretations, justifications, and argumentations (Bowen 2003: 5, 25–43, 70–83, 91–9, 106–11, 119–42, 204–28). Geared toward investigating the possibilities of, as well as obstacles to, reaching an agreement, his study showed that the values of compromise, gender equality and “harmonious reconciliation” continuously informed judges’ repertoires of reasoning despite shifting positions as to content and an ongoing search for moral certainties (Bowen 2003: 6, 19, 253–8, 268).

In Bowen’s account of legal reasoning in present-day Indonesia, we can observe how actors were able to draw “upon different normative registers that reveal illuminating overlaps and semantic shifts” (Benda-Beckmann et al. 2013: viii). Anthropologists working on the intersection of religion and politics have observed a similar sort of tangled relation between the juridical and the religious field in modern Burma, since 1989 called Myanmar.

Right after independence U Nu, Burma’s first Prime Minister from 1948 to 1962, took on the role of the old Burmese kings in safeguarding the continuation of Buddha’s dispensation (sasana), by granting state support to the Buddhist lay meditation movement initiated by the renowned Burmese monk, Mahasi Sayadaw, at the end of the colonial period. U Nu, who was himself a student of Mahasi Sayadaw, saw Theravada Buddhism as the ethical foundation for the national identity and national unity of independent Burma (Schober 2006: 86–7; Jordt 2007: 19, 21–3, 26–31, 51–5, 175–7, 198, 218). Hence, Art. 21 of the Constitution of the Union of Burma from 1948 stipulated that, “The State recognizes the special position of Buddhism as the faith professed by the great majority of the citizens of the Union.” Again like the Burmese kings of old, U Nu’s government also instigated monastic reforms that involved new interpretations of the vinaya, i.e., Buddhist monastic law ensuring the purity of the sangha. The sangha in Burma has comprised different monastic transmission lineages of the Buddha’s teachings.
In 1962, U Nu was deposed by Ne Win’s military regime, which ushered in the Burmese Way to Socialism reflected in the new Constitution of the Socialist Republic of the Union of Burma from 1974. Despite the lack of any reference to Buddhism in this constitution and the fact that, during the first two decades of its rule, the regime concentrated on the centralization of the economy and the establishment of socialist workers collectives, Ne Win began to initiate far-reaching religious reforms in the early 1980s with the help of the Ministry of Religious Affairs. Eventually the organization of the sangha was brought under state control to a degree hitherto unknown. As a result of these reforms, workers collectives, ministers and generals started to perform merit-making rituals on public occasions. Also Ne Win’s successor regimes, the State Law and Order Restoration Council (SLORC) and the State Peace and Development Council (SPDC), like U Nu, made increasing use of Buddhism as a source of legitimation (Schober 1997; Schober 2006: 88–91). The SLORC regime furthermore established the Department for the Propagation and Promotion of Buddhism within the Ministry of Religious Affairs. Designed to foster “national integration,” the Department has extended its Buddhismization efforts into the territories of non-Buddhist ethnic minorities as a way to bring them into the national fold (Schober 1997: 237–8).

The pro-democracy resistance against the regime has equally drawn on the moral capital of Buddhism, particularly of Socially Engaged Buddhism. The major protagonist of this resistance, Nobel Price winner Aung San Suu Kyi, was another prominent student of Mahasi Sayadaw until the monk’s death in 1982. In her Letters from Burma (1997) as well as in other public statements, she referred to the benefits of a personal discipline of meditation for political action and social change (Schober 2006: 92–5; Jordt 2007: 9–10).

Whereas in modern Burma/Myanmar, state regulation seems to have taken over religion, it is law that has receded in favor of religious normativity in modernizing Thailand, so the argument of the US jurist and ethnographer of Thai legal culture, David M. Engel. Analyzing the establishment of a modern, secular tort law in early twentieth-century northern Thailand (Lanna), Engel found out that legal modernity for local injury victims “took an unexpected turn. For them, as they considered whether and how to seek a remedy, law did not become autonomous and secular; it simply ‘went away’” (Engel 2013: 216). In the traditional belief of people in Lanna, it was angry guardian spirits or other agents of supernatural intervention who caused all cases of injuries, because the victims voluntarily or involuntarily had offended them. In order to remedy injuries, purification ceremonies had to be performed to placate the spirits (Engel and Engel 2010: 24–6, 66–72). However, the introduction of the modern Civil and Commercial Code in 1935, which went hand in hand with religious rationalization efforts on the part of the Thai government, embodied in the Sangha Act of 1902 entailing the purification of local Buddhism from spirit worship (Engel 2013: 219–24), foreclosed any recourse to traditional remedies. Since the new tort law viewed injury in economic terms, such as financial loss, loss of financial support, inability to work, and cost of medical treatment instead of in ritual terms, such as the necessity to perform purification rituals, victims sought remedy in customary law, which still provided the traditional framework for injury disputes. As a result, litigation rates in state courts were low (Engel and Engel 2010: 15–16, 24, 28, 82–7, 102–8; Engel 2013: 225). This situation only changed in the 1990s, when the customary law of injuries had finally disappeared. Surprisingly however, litigation in tort cases has actually declined ever since, because victims have shown a propensity to forgive the perpetrators, with the intent to increase their good karma for the future rather than to seek redress in court, and, likely to be at least equally important, because they tend to think that the law is not on their side, or because they could reach an agreement outside the court (Engel and Engel 2010: 2–3, 90–1, 129–38; Engel 2013: 226).
Rights claims of indigenous peoples and their legal accommodation

Another strand of contemporary anthropological research on the nexus between law and religion has been directed to the accommodation or rejection of the rights claims of indigenous people by state courts in the so-called settler countries (Canada, the United States, Australia, and New Zealand). In a study on the application of the religious freedom law in the Euro-American Human Rights tradition to Native American sacred sites protection claims, the Austrian legal anthropologist René Kuppe argued that modern religious freedom law in the Western human rights tradition has developed chiefly in response to challenges raised by adherents of Christian denominations. Jews and Muslims have had an impact on the shaping of modern religious freedom law to a much lesser extent. There has been no impact whatsoever, though, by followers of other religions (Kuppe 2009: 49), particularly those that often do not count as such, that is, so-called “indigenous” or “ethnic religions.” Yet, according to the Universal Declaration of Human Rights from 1948, Article 18, every individual should have the right to freedom of thought, conscience and religion, which includes the right to manifest, in private and in public, her religion or belief in teaching, practice, worship and observance.

The First Amendment of the American Constitution in principle heeds this individual right, by interdicting Congress to make a law that either favors the establishment of a certain religion (establishment clause) or prohibits the free exercise of religion (free exercise clause). For a case of claimed infringement of the free exercise of religion to be adjudicated at all, claimants first have to prove that the state has put a burden on the exercise of religion. A burden put on the exercise of religion by the state is seen as justified only if a necessary state interest outweighs impaired exercise of religion (Kuppe 2009: 48, 50).

In the wake of their massive defeat in the American Indian Wars, Native Americans have lost many, if not most, of their sacred sites to either private owners or the state. That means, these sites are now either privately owned or are public lands managed by non-indigenous people. In many cases, the new owners have been involved in land development projects Native Americans deem destructive for the sacredness of these sites. This does not apply to all development projects, though. According to Native American beliefs, a serious threat to sacred sites exists only when they are opened to the public (Kuppe 2009: 52). Public access is believed to undermine their sacred character and spiritual power. In some cases, dam building projects have flooded sacred sites, which have of course prevented believers accessing them. Kuppe’s review of some of the US case law illustrates that a large part of the predominant failure of Native Americans to win sacred-site cases is rooted in the fact that the courts have not fully grasped the nature of Native American religiosity, which they have often judged to be “culture” – and thus as an invalid foundation for the respective claim – rather than “religion,” due to their Judaeo-Christian bias as to what counts as such (ibid.: 51, 53–6, 60–3).

Yet, anthropological research has also shown that even when cosmological concepts of indigenous or ethnic religions have been accommodated by modern states, there has been a significant transformation of these concepts in the process that has often turned out to be detrimental to the interests of the very indigenous people(s) from whom these concepts had been adopted. Varun Gauri, for instance, pointed out that the juridification of indigenous cosmological concepts has invariably rigidified the social arrangements originally established on their basis (Gauri 2012: 224). Pressed into the complex legal systems of modern states espousing clear and fixed definitions and distinction as well as rigorously standardized procedures, their original range of interpretative possibilities has been considerably narrowed.

A case in point is the normative recognition of the Maori concept of kaitiakitangata in New Zealand’s state law, such as the 1991 Resource Management Act and the 1996 Fisheries Act.
Kaitiakitanga refers to the guardianship of natural resources based on descent and the sense of responsibility toward one’s whole environment that one has inherited from one’s lineage (Turvey 2009: 543–4). Kaitiakitanga not only lacks an adequate English translation, which by itself has already made it difficult for New Zealand’s judges to do justice to the concept, moreover judges have not been compelled to pay attention to the indigenous interpretations and procedures in which the concept was originally embedded. Having been incorporated into the ontology and operations of a Western legal-cum-economic regime, and thereby subjected to alien procedures of interpretation and implementation, the concept has become more and more disconnected from its original purpose and range of connotations; so much so that it sometimes seems to have helped subverting Maori culture rather than protecting it (Turvey 2009: 531, 541–3, 546, 549).

This is why the Australian Aborigine lawyer and activist Christine F. Black drew our attention to the actual workings of “Australia’s ancient Indigenous jurisprudence,” transmitted through myths, genealogies, and “law stories” (Black 2011: 11, 89–97). Her argument forcefully underscores the fact that mere normative recognition of indigenous religious principles without due recognition of their institutional and performative contexts is at best a void exercise.

My research on the progressive juridification of Balinese sacred customary law in post-Suharto Indonesia, on the other hand, has shown that the normative and institutional recognition (Woodman 2012: 137) of indigenous or ethnic concepts and institutions might not only aggravate existing intra- and inter-communal conflicts but generate new ones. In response to the increasing Islamization of the public space as well as Indonesian state law, a Bali-wide alliance of political and religious leaders, businessmen, administrators, and lawyers took advantage of the legislative latitude provided by Indonesia’s new national laws on regional autonomy, by granting a significant degree of legislative, administrative, economic, and adjudicative autonomy to the customary law communities on the island. The new village jurisdictions with their modified customary law institutions have articulated new fault lines of local citizenship, which in turn have generated new conflicts over the interpretation of local customary law norms and the status of non-Hindu Balinese residents from other Indonesian islands, while at the same time exacerbating seething disputes over territorial boundaries between villages, caste conflicts, and obligatory participation in communal rituals (Ramstedt 2013).

Migration and the legal accommodation of “foreign” religions

Anthropologists working on the interlinkage between law and religion have increasingly turned to the West, often but not always, and not necessarily exclusively, to their home countries. I have already mentioned Lawrence Rosen’s work on how US courts have dealt with claims to the normative recognition of Islam and on the revival of natural religion in the jurisprudence of the US Supreme Court. John R. Bowen’s work on the intersection of the global religious field of Islam not only with the Indonesian but also the French and British national legal fields deserves special mention here. In his investigation of “why the French don’t like headscarves,” he endeavored to trace the cultural sensitivities of the French majority society that, in his opinion, had led up to the issuance, in 2004, of a law prohibiting pupils, along with their teachers, to wear objects, like headscarves, that would express their religious beliefs. One of his findings was that due to specific mechanisms of promotion and reviewing in France, only those scholarly and journalistic texts would influence public opinion that would reinforce the cultural sensitivities that had given rise of the law (Bowen 2006: 1–4). French laïcité, which configures secular law in strong opposition to religion, has moreover prompted, according to Bowen, the emergence of a “French Islam” connoting piety “without the antiquated trappings of Islamic law, and with less emphasis on the practices of prayer and sacrifice” (Bowen 2004: 44).
Some young Muslim women in France, on the other hand, would wear the headscarf in order to break with the “insufficiently Islamic traditions” of their country of origin, or that of their parents or grandparents for that matter. Striving to develop a “universal” Muslim identity in opposition to the “parochial” Muslim identity of their parents or grandparents, they would generally experience donning the veil as personal growth, in the process of which they rebel against or even break with the “insufficiently Islamic” social norms of their families (Bowen 2004: 46–7).

Whereas France recognizes Muslims as citizens only when they “make an effort to leave behind their foreign attachments and to resemble other citizens in matters deemed critical to defining ‘France’” (Bowen 2004: 53), the UK goes to great lengths in accommodating the norms and institutions of the Muslims among its citizenry, particularly when it comes to out of court arbitration of conflicts. In his study of different Muslim arbitration bodies in Britain, Bowen observed that disputants in family matters like divorce or inheritance, etc., can easily access a diverse range of shari’a councils in cities like London, Birmingham, Bradford, Manchester, and so forth (Bowen 2013: 129, 137–44). Other councils, such as the Muslim Arbitration Tribunal (MAT) at the Hijaz College north of London, specialize on commercial disputes among members of Britain’s Muslim community. MAT’s arbitration cases have apparently been so successful that also members of non-Muslim communities have started to avail themselves of MAT’s services (Bowen 2013: 129, 131–2).

Apart from the different constitutional frameworks Muslim migrants in France and Britain have found themselves in, the different organizational structures developed by them can be attributed, so Bowen, to their different migration trajectories. Muslim migrant laborers from different North African countries, including Mali, who came to France in the 1960s and 1970s, usually lived together in large public housing units. The fact that they share the Arabic language has helped them to forge some degree of cooperation (Bowen 2014: 209), which is comparatively low, though, when compared with the associations formed by British Muslims. According to Bowen, about half of the latter have come from a certain region, Mirpur, in Pakistan, followed by Bangladeshis who usually hail from Sylhet, and finally Muslims from India (ibid.: 206–7). Philip Lewis’s study of Bradford’s Muslim community showed that migrants from the same country or even district settled together, and local Muslim organizations were formed along ethnic lines (Lewis 2002: 56, 74).

Conclusion and outlook

This brief overview of anthropological studies on the relationship between religion and law has shown that anthropologists have started both to decenter stereotypical notions by Western jurists of the different religious normativities of non-Western people and to render “foreign” religious law comprehensible within new frameworks of legal comparison. Anthropologists have achieved the former by unpacking, in a Bohannian and Geertzian vein, the logics of non-Western normative systems against the backdrop of the larger socio-political histories of the respective groups, communities, and societies. As to the development of new frameworks of legal comparison, the paradigmatic endeavor by Rosen to reconceptualize the categories of comparative law on the basis of his deep familiarity with Islamic law begs for a follow-up. Bowen’s comparative framework is more traditionally anthropological in its integration of Sally Falk Moore’s concept of the semi-autonomous social field and Bourdieu’s field theory. This framework allows him to investigate how the global religious field of Islam is influenced, impinged on, and modified by the norms generated in the semi-autonomous fields of the national laws of three different countries, i.e., Indonesia, France, and the UK. These project “Politics
of Religious Freedom: Contested Norms & Local Practices” (2011–2014), funded by the American Henry R. Luce Initiative on Religion and International Affairs, presents yet a third approach to comparison. Carried out by an interdisciplinary team involving anthropologist Saba Mahmood, political scientist Elizabeth Shakman Hurd, jurist Peter Danchin, and religious studies scholar Winnifred Fallers Sullivan, the project looks at how the legal category “religious freedom” is culturally translated, that is, “transformed through legal and political contestations in the United States, the Middle East, South Asia, and the European Union.”

While anthropological studies might most of the time not be immediately helpful to judges and juries precisely because they tend to destabilize Western legal categories, local activists often refer to them in an effort to explore and use alternative readings of law against an oppressive state regime (see, e.g., Eckert 2006). Of course, quite a few anthropologists have been called upon as expert witnesses in court cases. Anthony Good’s reflections on his work as an expert witness for South Asian asylum seekers in the UK deserve special mention here. However, to my mind, anthropological studies on religion and law should above all feed into endeavors to develop a “jurisprudence beyond borders” that is dedicated “to create or preserve spaces for productive interaction among multiple overlapping legal systems” (Schiff Berman 2012: back cover; see also Schiff Berman 2012: xi, 16–18, 21–2, 262–9, 286–7, 325–8). Interdisciplinary discussions on this topic have barely started, though.

Bibliography


6 See http://www.politics-of-religious-freedom.berkeley.edu

7 See, e.g., Anthony Godd’s project, “Anthropologists as Expert Witnesses: The Case of South Asian Asylum Seekers,” funded by the Economic and Social Research Council, http://www.esrc.ac.uk/my-esrc/grants/R0000223352/read
Anthropological perspectives


