

Anthropology and Law in Latin America

Towards Transformative Collaborations?

Rachel Sieder

As a researcher working within the field of collaborative or ‘engaged’ legal and political anthropology in Latin America, law does very much shape my research agenda and that of most of my colleagues.¹ I would also contend that anthropology does impact law throughout the region, although to a much lesser extent. This is most evident in the legalisation, judicialisation and juridification of indigenous peoples’ collective rights to autonomy and territory in recent decades. Yet, the influence of anthropology on legal adjudication in the region is not only limited to issues pertaining to indigenous peoples: engaged applied ethnographic research is playing an increasingly important role in revealing to legal practitioners and courts the effects of human rights violations in specific contexts, and victims’ perceptions of the continuums of violence to which they are subjected.²

Judicialising Indigenous Autonomy Claims: Anthropologists in the Courts

The multicultural and pluri-national constitutional reforms implemented in Latin America throughout the 1990s and 2000s formally defined state law as comprised of plural legal orders. The process of constitutional transformation occurred in what had previously been resolutely monocultural legal systems informed by a positivist, norm-driven view of law, and what Julieta Lemaitre (2019) has described as a civilising (or colonial) impulse. In the modern history of Latin American states, the prevailing discourse is that the modernisation of barbarism requires law – whether that be taking civil codes to the rural areas in the nineteenth century, or criminal law to marginal urban neighbourhoods in the twenty-first century. Law has traditionally been a means



to dominate and discipline the unruly 'other'. Regional histories of state formation fetishize the state and the law, and lawyers have long played a central role in dominant configurations of power. The recognition of legal pluralism in Latin America's new constitutional orders initially seemed to herald a paradigm shift, but in both normative and practical terms, it has proved ambiguous, limited and begrudging. Yet, it has meant that lawyers engaged in defending indigenous peoples' collective rights to autonomy, land and territory and judges adjudicating these cases have had to engage with alternative cultural conceptions and representations of what 'law' itself is. Anthropological expertise has played an important role in mediating and facilitating these conversations between the dominant legal culture and the move towards more plural legal orders.

Many of us are called upon to elaborate special anthropological witness reports in defence of the social movements and organisations we work with to support indigenous peoples' autonomy and justice claims (see Hernández Castillo 2016; Kirsch 2018; Sánchez Botero 2010). We engage in these activities with both pragmatic and strategic objectives: pragmatic because the immediate concern is often to keep indigenous leaders facing criminal charges for their exercise of autonomy rights out of jail, or to secure convictions against state officials for gross violations of human rights perpetrated against indigenous people. And despite the acknowledged dangers of 'speaking for others' and reproducing colonised forms of power through such engagements, our longer-term strategic focus is driven by the region-wide epistemic community of which we are a part, which advocates for a transformation in the nature of law and politics more broadly.

Yet, perhaps unsurprisingly, the dominant logics of the law and the legal field still prevail: even amongst those lawyers who are our allies in these struggles, motivations for engaging with such ethnographic forms of knowledge remain largely instrumental. Although the space for presenting different cultural readings of given phenomena within court settings has expanded beyond the traditional 'cultural defence' (Escalante 2015), anthropologists engaged in legal battles find it difficult to escape these logics, at least within the processes of litigation. Outside the strict confines of litigation, however, our work as legal anthropologists is important in advancing alternative understandings of the nature, norms, sources and practices of 'law'. We argue of course that indigenous law *is* law, that indigenous peoples' everyday forms of being should be understood as sources of law, as should ethnohistory and what some would call foundational myths or origin stories. Against

the positivist legal traditions that dominate throughout the region, we make the case through our ethnographic research that lived social practice is a source of law, is due process and is legal theory. In this sense, at least, I agree with Kari Telle and Jeremy Kingsley's contention that conceptualising law is the central part of the puzzle.

Incorporating Anthropological Knowledge in the Law

Telle and Kingsley argue that greater openness on the part of lawyers to more ethnographic understandings of law and an appreciation of legal pluralism would 'allow ideas to develop that incorporate local constructions of law and governance'. Yet, experience to date in Latin America indicates that although certain elements of 'indigenous justice' have been incorporated into state judicial systems in recent years, including conciliation, mediation and the creation in some countries of 'indigenous courts', indigenous law has essentially been viewed as a form of alternative dispute resolution to be incorporated within dominant logics of legality and power, rather than accepted as equally valid as state law (Aragón 2016). As Boaventura de Sousa Santos (2006) reminded us more than a decade ago, 'hybrid legalities' are riven by power inequalities: the colonial and colonising impulse of dominant legal logics should not be underestimated, and greater openness to 'ethnographic sensibilities' by itself will not resolve this.

Nonetheless, while different perspectives exist on the emancipatory potentials of Latin America's multicultural/pluri-national legal turn, these legal reforms have opened new possibilities for subaltern actors to name, claim and blame, and perhaps even occasionally to win. One example is the ways in which indigenous women have used the 'constitutionalising moment' that ostensibly recognises local forms of law in order to challenge patriarchal forms of custom in community legal systems (Barrera 2015; Sieder 2017). Another is the results of strategic litigation using special anthropological testimony before the Inter-American Court of Human Rights. The testimony of my colleagues Rosalva Aída Hernández Castillo (2016) and Héctor Ortiz in the case of Inés Fernández, a Me'phaa campesina raped by members of the armed forces in Guerrero state, Mexico, contributed to the court's ruling against the Mexican state and its acceptance of the argument that the effects of the rape were not just individual but also collective, affecting the entire community, and that reparations should also have a collective dimension.

Legal Training: Possibilities and Limits

Telle and Kingsley note the sparse offerings of law and anthropology courses in law departments. Across Latin America, it is an uphill struggle to secure spaces for course options on legal pluralism and indigenous peoples' rights as part of lawyers' training. Powerful individuals and law firms representing multinational companies have brought pressure behind the scenes to ensure that lawyers defending indigenous territorial claims do not find space in law faculties. And even if such courses are included, the contextual readings and ambiguities that are the departure point for anthropological enquiry are antithetical to the ethos of most law schools, which remain highly formalist or at least maintain a core conception of law centred on its normative dimensions. Although legal training may slowly move away from an exclusively doctrinal, positivist focus, for example incorporating more empirical studies of courts and how they function, lawyers will probably never engage in the kind of deconstruction and critical interrogation of law that is routine practice for anthropologists.

Legal training in a few key elite schools in Latin America has focused on human rights, which traditional conservative legal scholars tend to view as external to domestic constitutional orders. Forward-thinking law schools are training future lawyers in human rights and in strategic litigation at national and regional levels. But this does not mean that they are necessarily open to anthropological understandings of the law, much less different ontologies of law. Indeed, the 'evangelism of human rights' combined with ingrained colonial, racialised frameworks and hierarchies mean that indigenous forms of justice may be rejected out of hand as 'barbaric' or 'patriarchal' by human rights lawyers, even when those same individuals may endorse the notion of multicultural constitutionalism in the abstract. Last year, I completed a special anthropological witness report for a case involving the indigenous authorities I work with in Santa Cruz del Quiché, Guatemala. The public prosecutor's office had initiated criminal proceedings against the first Indigenous mayor, Juan Zapeta, for the correction of a minor for robbery according to Maya K'iche' law. Part of the due process in the correction involves ritual beatings or purification with branches of a quince tree – although this is just one aspect of law in this locality.³ While the Mayan defence lawyer in the case fully endorses legal pluralism and K'iche' world views, some of my most vocal critics have been friends who are human rights lawyers, who reject the practice as equivalent to torture. The difficulty of reading the practices of Mayan

law outside their own cultural lens seems particularly challenging, especially when those practices do not correspond to the ideal projection of what law (liberal human rights law) should be.

Towards Mutual Learning?

So far, it seems that anthropologists have learned more from lawyers than lawyers from anthropologists, but there are some signs that this may be changing. Working in support of indigenous communities, we have learned how to cite the relevant jurisprudence, elucidate the 'due process' of indigenous law for non-indigenous judges and present cultural difference in the language of rights. We have also learned how to emphasise the importance of different subjectivities for the understanding of grievances and appropriate reparations, deploying concepts such as continuums and intersectionalities of violence, collective trauma and intergenerational justice claims (Sieder 2017). While critically interrogating the processes of rights construction and claiming, we engage in acts of translation, employing dialogic, collaborative and reflexive forms of ethnographic research to try and deconstruct the racialised, class and gendered power dynamics these translations inevitably involve.

Obviously, not all lawyers will engage positively with claims for indigenous peoples' autonomy rights. And few human rights lawyers, especially those fighting for difficult causes, will readily cede the privileges and indeed the world view of the juridical field. Yet, across Latin America, anthropological special witness reports have played a vital role in historicising and contextualising racialised, gendered form of violence in key cases of gross violations of human rights: for example, the Sepur Zarco judgement in Guatemala in 2016 was the first time that military officers were found guilty in a domestic court of perpetrating sexual slavery during armed conflict. The reports of the anthropologists Rita Segato, Irma Alicia Velásquez and Marta Elena Casaús made important contributions to such legal precedent setting and indeed are cited extensively in the court's historic judgement. Such victories mean that future generations of legal practitioners and scholars will study and, hopefully, engage with more complex, anthropologically engaged understandings of personhood, harm and reparation, sovereignty and legal pluralities, perhaps even transforming the law in the process.



Rachel Sieder is Senior Research Professor at the Center for Research and Advanced Studies in Social Anthropology (CIESAS) in Mexico City, and Associate Senior Researcher at the Chr. Michelsen Institute in Bergen. She has recently published in the *Journal of Latin American Studies*, *Journal of Latin American and Caribbean Anthropology* and the *New York University Journal of International Law and Politics*. Her most recent book is the edited collection *Demanding Justice and Security: Indigenous Women and Legal Pluralities in Latin America* (2017). Email: rachel.sieder@ciesas.edu.mx



Notes

1. On collaborative, activist and engaged anthropology, see Hale (2006); Hernández Castillo (2016); Kirsch (2018); Speed (2008).

2. For example, the first case of forced disappearance during Mexico's ongoing 'war on drugs' heard at the Inter-American Court of Human Rights in April 2018 includes an anthropological special expert report on the context and impacts of the disappearances (*Nitza Paola Alvarado Espinoza and Others v. Mexico*; see WOLA 2018); similarly, Mexican anthropologists have participated in an important report on the impacts of the forced disappearance of the forty-three students from Ayotzinapa, a case that will undoubtedly be judicialised in the future (Antillón Najlis 2017).

3. I have documented numerous similar cases over the past decade and together with the anthropologist Carlos Y. Flores have made two films, *K'ixb'al/Shame* (2011) and *Dos Justicias* (2012).

References

- Antillón Najlis, X. (ed.) (2017), *Yo solo quería que amaneciera: Informe de impactos psicosociales del Caso Ayotzinapa* (Mexico City: Fundar).
- Aragón, O. (2015), *De la 'vieja' a la 'nueva' justicia indígena: transformaciones y continuidades en las justicias indígenas de Michoacán* (Mexico City: Universidad Autónoma Metropolitana).
- Barrera, A. (2015), *Violence against Women in Legally Plural Settings: Lessons from the Andes* (New York: Routledge).
- Escalante, Y. (2015) *El racismo judicial en México: Análisis de sentencias y representaciones de la diversidad*. (Mexico City: Juan Pablos).
- Hale, C. A. (2006), 'Activist Research vs. Cultural Critique: Indigenous Land Rights and the Contradictions of Politically Engaged Anthropology', *Cultural Anthropology*, 21, no. 1: 96–120.
- Hernández Castillo, R. A. (2016), *Multiple Injustices: Indigenous Women, Law and Political Struggle* (Tucson: University of Arizona Press).
- Kirsch, S. (2018), *Engaged Anthropology: Politics beyond the Text* (Berkeley: University of California Press).
- Lemaitre, J. (2019), 'Law and Violence in Latin America', in R. Sieder, K. Ansolabehere and T. Alfonso Sierra (eds), *The Handbook of Law and Society in Latin America* (New York: Routledge).



- Sánchez Botero, E. (2010), *El peritaje antropológico: Justicia en clave cultural* (Bogotá: Gesellschaft für Technische Zusammenarbeit).
- Sieder, R. (ed.) (2017), *Demanding Justice and Security: Indigenous Women and Legal Pluralities in Latin America* (New Brunswick, NJ: Rutgers University Press).
- Sousa Santos, B. de (2006), 'The Heterogeneous State and Legal Pluralism in Mozambique', *Law and Society Review* 40, no. 1: 39–76.
- Speed, S. (2008), 'At the Crossroads of Human Rights and Anthropology: Toward a Critically Engaged Activist Research', *American Anthropologist* 108, no. 1: 66–76.
- WOLA (Washington Office on Latin America) (2018), 'OAS Court Hearing on Mexican Military's Role in Enforcing Disappearances Could Impact Controversial Internal Security Law', press release, 25 April, <https://www.wola.org/2018/04/interamerican-court-disappearances-mexican-military>.