

# THE ANTHROPOLOGY OF LAW IN FRANCE: AN ANTHROPOLOGICAL VIEW

A review essay on *ANTHROPOLOGIE JURIDIQUE* by  
Norbert Rouland. Paris: PUF (1988)\*

Heleen F.P. Ietswaart

A book review ought to provide the following information for the reader. First, what is the contents of the book? Second, does it achieve what it proposes to do? Third, is it worth buying? Fourth, is it worth reading, and if so for whom? I shall try to be as specific as possible about all four questions.

Professor Rouland has written what is meant to be an introduction to legal anthropology for law students. He presumes, rightly so given the structure of higher education in France, that most of those will have no knowledge whatsoever of anthropology (p. 16). He says nothing about their presumed knowledge of law. He states specifically that he does not pretend to give an exhaustive treatment of the material.

## Form and organization.

The book contains about 500 pages which are divided in 10 chapters. These chapters are grouped together in three parts. Part I deals with general epistemological issues (what is real and can I see it?), the evolution of the themes of interest to anthropologists of law, the problem of the definition of law, various quarrels with other disciplines, notably the history of law, comparative legal theory and

---

\* *Anthropologie Juridique* has been favorably reviewed in various French journals. See, e.g., *Droits* 1989 (10), p. 164; *Revue historique de droit Français et étranger* 67 (2), juin 1989, p. 324; *Revue trimestrielle de droit civil* 88 (2), juin 1989, p. 423.

© Copyright 1989 - Heleen Ietswaart

even the sociology of law. A brief chapter is dedicated to field research methods.

Part II deals with diversity in legal systems and treats certain aspects of legal anthropology in Africa (family relations, relations to land, contractual relations and, in particular, conflict handling). It starts out with a chapter entitled "the (sic) traditional legal system", which I had to force myself to read since I have trouble digesting discourse about "African law" or "the African way of thinking about the world and society" (p. 183),<sup>1</sup> especially if the author first indicates that in Africa there exist about 4000 legal systems (p. 181). The last chapter of Part II deals with issues of legal borrowing and the imposition of law in colonial situations.

In the third Part, Prof. Rouland proposes to apply the methods, knowledge and theory of legal anthropology to the positive law of Western countries, France in particular. Within positive law, two themes are selected: the family and dispute handling.

Each chapter is followed by a mostly large number of pages in very small print, full of additional comments, interpretations, elaborations and bibliographical notes. As a consequence, the main text contains hardly any references; even most direct citations indicate no source. This is quite annoying for the reader who is used to precise references in the text and an alphabetical list of sources cited in the back of the book. There is no such list, all source material being exclusively set out in the small print at the end of the chapter.<sup>2</sup>

---

1. "The African way of thinking is therefore neither idealist nor materialist, but realistic, in so far as the visible and the invisible, subject and object, nature and culture form together reality" (p. 184).

2. For example, at p. 69/70, The author states, "Conflict is not a pathological state, on the contrary, it is a process of adaptation which is not only normal but, according to Bohannan, inevitable and positive; conflict is one of the conditions of the evolution of individuals and mankind; there is no point in trying to regulate or eliminate it". (no reference). The small print at p. 101 indicates under the heading, "The study of conflict", *Law and Warfare* but nothing more specific. At pp. 58/59 we read: "... the earlier theories of L. Lévy-Bruhl (which he rejected at the end of his life, under the influence of Bergson) still show the persistence of evolutionary thinking: after the "pre-logical way of thinking" (*mentalité prélogique*) of traditional societies, characterized by the incapacity to reason in an abstract manner, (...) comes the civilized way of

The book has a curious author index in which a selected happy few of all those mentioned in the text are listed: Abel is there but Arnaud is not; Griffiths is there but Gilissen is not. A good number of this elite has written little or nothing about legal anthropology. One wonders about the meaning of such practices<sup>3</sup>.

There is also no decent subject index. The index on page 483 contains all of 47 items, including roman law, marriage, racism, incest and hunters and gatherers. This is not practical for those who would like to know what further readings the author recommends on any given subject: that person must somehow find the subject in the text, go to the end of the chapter, find the appropriate section there and note the literature mentioned.

### The contents of the book.

The book has two recurrent themes: (1) legal pluralism is the definitive theory of legal anthropology, and (2) lawyers (*les juristes*) are the major enemy of the anthropology of law. The author traces the history of ideas in anthropology of law, and in particular its contemporary history in France. In the beginning there was evolutionism, but this theory is now considered wrong. Then Malinowski came along and introduced functionalism (p. 55, 68 ff.). Within the functionalist tradition there are those who put emphasis on rules and those who study processes, i.e., conflict handling (NB.: "process" refers to conflicts only; see p. 69). The synthesis of what is worthwhile in these latter approaches is legal pluralism. Griffiths gets a lot of credit for his "hyper critical theory" (pp. 83, 88 ff.). Belley (1977) is also frequently cited.

Prof. Rouland states that the main development in the organizing ideas of legal anthropology has taken place outside France. Indeed, up to the present day, legal anthropology in France is remarkably underdeveloped: according to the author, there are about ten professionals and about 15 hangers-on (graduate students, assistants)

---

thinking, characterized by superior performances." (no-reference) "C. Lévi-Strauss has clearly shown the fallacious nature of the distinction ..." (no reference).

3. Strijbosch figures in the book in various guises. On one page (p. 110) we find A. Strijbosch, F. Strijbosch and A.K.J.M. Strijbosch. Who outside the Netherlands would guess they are all the same person?

(p. 117). Thus, Rouland has looked abroad and has integrated a good part of the literature in English and German. This effort, helped by a stay of considerable length in Canada to study the Inuit, is remarkable and courageous, in the French intellectual context, where normally not much credit is given for such an outreach. Disturbing gaps remain, however. It cannot but strike the reader that Galanter is never mentioned, nor are the eminent anthropologists at and around Amherst such as Yngvesson, Mather and Merry, to name only a few. Surprisingly enough, Geertz is absent.

In discussing the evolution of ideas, Rouland presents the work of Maine, Bachofen, Morgan, Marx and Engels, d'Aguamme, Mazzarella. Weber is only briefly mentioned in the small print (6 lines at p. 106). With a certain reluctance Durkheim and Mauss are mentioned. Although the author admits that Durkheim combined functionalism and evolutionism and had some other brilliant, original ideas in his day (p. 61), this founding father of sociology, generally treated with great respect by sociologists and anthropologists of law alike, is mostly ignored by Rouland. A close reading of the small print at the end of the chapter provides the explanation: according to Rouland, Durkheim remained much too close to legal doctrine and his students played into the hands of lawyers.<sup>4</sup>

This brings us directly to the second theme of the book: Rouland's quarrel with lawyers, in particular law professors. The miserable state of anthropology of law in France is their fault: "Legal anthropology, above all in France, has developed in hiding. The responsibility for this is mainly to be attributed to lawyers and their habits. First of all, they never arrive at a definition of their discipline. Kant said already: 'lawyers are still busy defining their concept of law' [no reference]. This is still the case." ( p. 13). This discourse goes on for

---

4. See p. 100. The author deals first with Mauss and recommends the reading of his *Essai sur le don* (1923/4) for being a classic. Rouland then goes on: "Other disciples of Durkheim remained quite faithful to his teachings and presented themselves as fully fledged lawyers. In general, they published in *l'Année Sociologique*. Among them, we mention Huvelin (...), Fauconnet (...). However, others like Lucien and Henry Lévy-Bruhl, Granet and Gurvitch, have taken more distance from the concepts elaborated in the 19th century. At the methodological level, the disciples of Durkheim were the last armchair anthropologists..." In fact, all this history may be ignored: the anthropology of law in France "was really born with Henry Lévy-Bruhl" (p. 111).

a while. It appears that the problem is not that definitions of law are lacking (the opposite would seem to be the case) but that Prof. Rouland does not like them. They lead to (note the direction of the causality) legal ethnocentrism in the Western world, because of the identification of law with the State (p. 13; see also p. 75).<sup>5</sup> Lawyers are conservative (p. 14), they cherish ivory tower ideals which reduce legal practice to a technical skill (p. 15). It is clear to Prof. Rouland that "les juristes" have kept down the anthropology of law in France. For the reader the issue is less clear. Why should the anthropology of law be thriving in Holland, Germany and the US, for example (as Rouland jealously notes), and not in France? Are law professors so different in those countries, have legal theory and doctrine been more tolerant there? No evidence of that is brought to the fore. It is true that lawyers tend to be on the side of the established order, but there are so many important exceptions (even in France) that it is unjustified to generalize. In any case, the underdevelopment of anthropology of law in France cannot be explained by reference to law professors or legal doctrine. It may have more to do with the splendid isolation of France in the social sciences than with the attitudes of French law professors. Nevertheless, Prof. Rouland applies the worldview of the Yoruba: at birth, each child must have an enemy, if not it will not grow strong. His enemy is lawyers and the state which claims a monopoly over law.

#### The discourse of social science.

So far so good. Let us turn to the second question. Is this book helpful for French law students taking a course in anthropology of law? It probably is. They must among other things learn the type of discourse that is expected from French intellectuals, who would rather say something about 'French society' or about 'African law' than about dispute treatment among the Arusha. They must also learn that, in the field of law as within the social sciences, one must choose a lineage. Rouland situates himself within the lineage of Henri

---

5. The idea that definitions of law could cause certain attitudes and practices goes with the belief that images, notions, values and other mental constructs determine behaviour. This is indeed the structure of the theory of Alliot with which Rouland fully agrees (see below, pp. 166 ff.). At page 400, Rouland calls Alliot's theory "neo-culturalist". He explains: "For culturalists, human behavior varies essentially as a function of cultural models in different societies."

Lévy-Bruhl, Alliot and Poirier.<sup>6</sup> He has no quarrel with Lévy-Strauss, and also keeps the door open for Bourdieu.<sup>7</sup> Sociologists of law are ignored, thus for the naive reader of his book the two disciplines have nothing to do with each other, which is not an incorrect description of the French situation.

Prof. Rouland's discourse is wholly within the French tradition in the social sciences, and in particular within the struggle over *who* may make legitimate statements about law in society. In a chapter ironically entitled "legal anthropology and the sharing of knowledge of law" (pp. 151 ff.), he argues that only anthropologists of law can do this, because their unique knowledge of the diversity in the organization of different societies makes them the only really competent analysts of social organization. Lawyers cannot do it because they are ethnocentric and know nothing but the state law of their own country. Legal historians are disqualified because they continue to stick to the theory of legal evolution, which is wrong. They still believe that "there is progress in the history of state institutions, and that the process of legal uniformization is beneficial for society" (p. 152). In fact, legal history "has been used to 'prove'

---

6. See p. 111. Henry Lévy-Bruhl (1884-1964) was a romanist who got interested in the work of Durkheim and in the anthropology of law. He believed that the study of 'primitive' societies could shed light upon modern societies. This idea was not favorably received in French law faculties. Through his students, such as Alliot and Poirier, legal anthropology in France has survived. After WW II, H. Lévy-Bruhl became the Director of the *Salle d'Ethnologie Juridique*, at the Paris law faculty, and set up some courses in legal anthropology there (1955). In 1964, Alliot established a department of African law and economics. A year later, he set up the *Laboratoire d'Anthropologie Juridique* (a research center, now affiliated with the CNRS). Verdier was there at the beginning but later created his own center at Nanterre. He is the editor of the only French journal in the discipline, *Droit et Cultures*.

7. Bourdieu is cited favorably at p. 97 (in the main text). The coded language of this sociologist who has recently begun to claim rights in "the field of law" (*le champ juridique*) is to be found in some of the headings of Rouland's book, such as: "les champs de l'anthropologie juridique", "le champ du droit", "les savoirs juridiques". In the text there are expressions like "le champ du contrôle sociale juridique" and "le champ juridique". All those who use terms like "*champs*", "*savoirs*", "*le droit savant*" and "*enjeux professionnels*" want to be taken seriously by Bourdieu.

the legitimacy of law and the republican form of government" (ibid.). Comparative law is equally disqualified because its conceptual framework is too narrow: the classification of legal systems which comparatists continue to apply are simplistic and concentrated upon the Western world (p. 154).

Sociologists of law cannot do the job because sociological thinking limits itself to Western industrial societies. Prof. Rouland states that, while anthropologists of law have extended their analyses from traditional to Western societies, sociologists have failed to do the reverse (p. 156). The latter are thus more limited in their approach and cannot bring the specific anthropological knowledge of diversity to bear on the analysis of Western societies. On the basis of this argument Rouland claims for himself, as an anthropologist of law, a high degree of legitimacy to speak authoritatively about law in all societies. The historical dimension is dealt with by himself, through numerous references to Roman law.<sup>8</sup>

This sort of discourse and its objective - the exclusion of all those who do not belong to the author's school of thought from participating in the discussion about law in society - is no longer shocking to me, having worked in France for several years and thereby been thoroughly exposed to it. But I would not recommend reading it. The notions of exclusive truth (I have it and you don't) and of exclusive property of intellectual domains (this is mine, don't touch it) are contrary to my conception of social science. The latter should be seen as a cooperative effort in which many different scholars may have an input. Anthropologists of law (I am using this label here, but see below) have a particular contribution to make to the understanding of law in society, as have others. In the international community of law and society scholars the value of these contributions is to be judged by their contents, according to the current criteria for valid discourse in the area.<sup>9</sup> Prof. Rouland, like anybody else, has the right to ignore part of the input in the area, but he has no right to say that certain authors whom *he* labels as "lawyers" or "sociologists of law" have no right to make legitimate statements. It is true that lawyers in France say the same thing (e.g., socio-

---

8. Like H. Lévy-Bruhl, Rouland was a romanist before becoming an anthropologist of law.

9. Some of the current criteria are, e.g., that findings and insights must contribute something to our understanding of law in society; that methods must be sound and adequate for the analysis proposed; that relevant existing literature must be taken into account.

logists of law have no right to talk about law because they know nothing about law), but that is no excuse: it is equally wrong.

Indeed, Rouland is found to resort to undefendable labeling. What would distinguish a 'sociologist of law' from an 'anthropologist of law'? The fact of having done fieldwork in Africa? The fact of analyzing or frequently citing literature on non-Western societies? And what of the relation to law? Some well-known and respected scholars in law and society earn a living as law professors; some have never done any fieldwork outside the Western world but do extend their analysis to what has been written about non-Western societies.<sup>10</sup> Griffiths (1986: 46-7) is right in encouraging everybody to drop the distinction for being intellectually unfounded.

### French theories of legal anthropology.

By now I have dealt with the first two questions a review ought to address: the contents of the book and the degree to which its objective had been achieved. It will be useful for French law students and I would say even graduate students in anthropology of law. But what is there in it for other categories of readers? For those who are looking for bibliographies in French on certain subjects there is some value. It should however be kept in mind that the literature recommended for "further reading" is quite selective. It concerns only those authors with whom Rouland has affinities, i.e., on the one hand the group around Alliot and on the other the group around Verdier (cf. note 6). The work of Assier-Andrieu, for example, is only briefly and negatively referred to (p. 159, in small print) because he is not in the lineage.<sup>11</sup> As a consequence of the exclusion of sociologists of law from the field, there are hardly any references to the work of sociologists of law.

For those who would not normally aspire to reading an introduction to legal anthropology in French rather than in another language, the most useful feature of the book is the brief account of the theories of Alliot and of Verdier. Rouland is in overall agreement with Verdier (although with some reservations), but chooses his base in the ideas

---

10 Abel would be an example of the first category, Black of the second.

11 Assier-Andrieu is what Rouland calls a legal positivist, closer to philosophers like Troper. This does not prevent him from doing very interesting research. See, e.g., Assier-Andrieu 1983.



of Alliot. In the following I shall present Rouland's summary of those theories.

Alliot states "that law is a universal phenomenon and that it is legitimate to look for those elements that distinguish it from other forms of social control" (p. 147). Special attention should be given to the process of legalization. "Law is not so much a particular type of social relations as a specific label that each society chooses to put on certain social relations, which determines the variations in legalness" (ibid.; the clumsy formulation is from the French text, not a problem of translation). The different elements of these statements are elaborated as follows (pp. 147-150); (1) law is not only what Western societies say it is; (2) law is not a set of norms but an internormatif process; this means that norms go back and forth between the areas of morals, religion and law; (3) law shows great variation among societies; (4) there are three levels of observation of legal phenomena: discourse, practice and imagery. Alliot situates himself in the functionalist tradition: law must help regulate what a society considers essential for its survival.

How helpful is this? It sounds very much like Black's unholy definition of law as "governmental social control" (1976). The idea that norms may be legal as well as moral is not new either: cf. Bohannan's (1965) notion of 'double institutionalization of law'. The "variations in legalness" cannot but remind us of Griffiths' (1984) effort to save Black's theory by cutting the heart out of it, an effort which has not been wholly successful.<sup>12</sup> If every behavior expressing disapproval is to be considered 'social control' the concept loses all meaning. And if the nature, or variation, of social control (more or less legal) can only be defined by reference to law (the terms 'legal' and 'legalness' are, after all, derived from 'law') then we have not done much better than those who have tried to give a comprehensive definition of law. Whatever be the merits of both positions, we have been through this. It does not seem to me that Rouland (or Alliot, for that matter) has a special contribution to make.

Now let us see how this theory works out for the analysis of Western law. According to Alliot, all societies function on the basis of "mythologies which have for an objective the construction of consensus on, first, the state of law at a certain point in time and, second, the desired course of its evolution. (...) Each individual society creates its own specific image of the visible and the invisible

---

<sup>12</sup> See Van den Bergh's (1985) critique of both Black and Griffiths.

worlds, and this image determines the limits of the legal, the domain (*champ*) of which touches everywhere that which a society considers vital for its cohesion and reproduction" (p. 400). The variety thus observable in the world is organized around three archetypes which impose their own specific social logic. These archetypes are: identification, exemplified by ancient China; differentiation, exemplified by Africa; and submission, typical of the Islamic and the Christian worldviews, according to which God existed before the Creation, and therefore man considers himself bound by forces outside himself to which he cannot but submit. In the Christian world, God had been replaced by the State (it is as simple as that). According to Alliot, this worldview of Western societies "sets them radically apart from the rest of the world. The archetype of submission gives birth to a social logic in which society frees itself from all responsibilities, by handing them over to an exterior entity, i.e., the State, while the other two archetypes lead to forms of social logic in which society takes responsibility for itself" (p. 405). Whoever can take more of this may read the rest of the chapter. To my mind this is a form of idealization of non-Western societies. The Western nation state is evil, traditional societies are wonderful. The latter apply equity and notions of good faith, not impersonal rules that come from the outside (pp. 149, 195), they rely on conciliation, not adjudication, etc.<sup>13</sup> However, it would seem to me that it is only in Western countries that the State takes some responsibilities for the unfortunate, the poor and the aged. And why would we think of "the State" as such an exterior entity in "society" to begin with? That is surely not a fair description of the relation between the two in Western Europe.

Verdier's ideas are characterized by an attractive simplicity, and I can be brief about them. Everything legal may be captured under the concept "exchange". "Law is a system of communication and exchange of values creating symbolic relations among the members of a political entity, or between the different units of a larger political group" (p. 144). Not only contract is exchange, status is, too; vengeance is exchange, punishment is, too. Vengeance has been the centerpiece of the research done by Verdier and his team. Here again we find the glorification of traditional systems, characterized by some

---

13 Prof. Rouland has clearly not read the article by Sally Merry in Abel (ed.) 1982, in which she points out that in the conflict handling literature it is frequently forgotten that, however interesting it may be, conflict handling is the exception in traditional societies, the rule being selfhelp and violence.

form of vengeance, which is contrasted with the Western state in which vengeance has been replaced by official (public) punishment. "Punishment and vengeance are thus essentially different, namely in that the former separates the individual from society, while the latter shows the internal solidarity of vindictive groups" (p. 329).

### The anthropology of positive law.

In the last two chapters, Prof. Rouland presents a number of rather incoherent remarks about a few aspects of law in France and in the US. The first question that arises logically is why an apparent admirer of Belley and Griffiths, who embraces legal pluralism without reservations would want to study "positive law". The very objective of legal pluralists is precisely to demonstrate that there is nothing special about what the State calls "law", that law is everywhere in society and that we should study all sorts of law. The author does not seem to be aware of any contradiction.

The theoretical framework proposed by Prof. Rouland for the study of "positive law" is the following: law is a form of religion based on mythical thinking. Positive law in Western countries is based on a number of myths: (1) the myth of the individual and liberal totemism (p. 411); (2) the myth of the State (pp. 412/16); (3) the myth of statutes and laws; e.g., the great Napoleonic codes, in particular the Civil Code, which "embodies the appearance of stability borrowed from traditional myths which need to show why the future must look like the present" (p. 416). The Codes take the typical form of "Sacred Texts". The concepts of God, Reason and the public interest are one and the same, but at different points in time (p. 413). All this is tied to the myth of Progress (p. 411).

Rouland then proceeds to an analysis of the family. In this domain, he states, law serves the myth of the State: the nuclear family is the "normal" state of affairs and the State assumes all the responsibilities formerly attributed to the extended family. Follows a demonstration of the "complexity" of the issue of the relation between the extended and the nuclear family (what else is new?). Strikingly absent is any mention of the considerable body of research that has been done on law and the family by sociologists and demographers (e.g. Roussel, de Singly, Commaille, Festy, Bolgeol, Bastard and Cardia-Vonèche).

The other theme in Part III on "positive law" is conflict handling. The latter is analyzed in terms of "imposed" vs. "negotiated" order.

## ANTHROPOLOGY OF LAW IN FRANCE

Heleen Ietswaart

---

Naturally, the "imposed" order comes from the judge (and is evil), while the "negotiated" order is brought about by mediation (and is good). Judicial order is imposed through judicial ritual. Summarizing: both the State and law are myths and the State imposes law through ritual. Prof. Rouland's remarkable aversion of the State and law puts him in a poor position to study law in society.

It is a pity that the French community of law and society scholars is so divided. Anthropologists fight sociologists, sociologists fight criminologists, and all of them have an increasingly hard time against conventional law professors who want to retain exclusive rights over the domain of law. One of the reasons why the latter are relatively successful is that most sociologists of law (in the large sense of the word) know very little about law, while those who have legal training go out of their way to hide it, as if it would be shameful to have been 'one of them'. One of the important themes of discussion in France is still the difference between 'sociology in law' and 'sociology about law'. Sociologists emphasize that 'sociology in law' is applied sociology, research at the service of the legal system, in particular the legislature, while 'sociology about law' is the study of law from the outside, by someone who has not been contaminated. Lawyers assert that 'sociology about law' is normally based on too little knowledge of law and therefore wrong, while informed 'sociology in law' may be a good thing. The contents of what is said about law is always of secondary importance. It is unfortunate that Rouland has not been able to go much beyond the preliminary discussion about who may make legitimate statements about law in society.

### REFERENCES

ABEL, R. L.

1982 *The Politics of Informal Justice* (2 vols). New York: Academic Press.

ASSIER-ANDRIEU, L.

1983 'Représentations juridiques et conséquences sociologiques du modèle domestique dans les pyrénées.' *Droit et Cultures* 5: 17-32.

BELLEY, J.G.

1977 *Conflit Social et Pluralisme Juridique en Sociologie du Droit* (unpublished dissertation Univ. Paris II).

- BERGH, G.C.J.J. van den  
1985 Review of Donald Black (ed) *Toward a General Theory of Social Control* (2 vols). *Journal of Legal Pluralism* 23: 209-219.
- BLACK, D.  
1984 'The General Theory of Social Control.' In Donald Black (ed) *Toward a General Theory of Social Control* (2 vols). New York: Academic Press.
- BOHANNAN, P.  
1965 'The differing realms of law.' In Paul Bohannan (ed) *Law and Warfare*. New York: The Natural History Press.
- GRIFFITHS, J.  
1984 'The division of labor in social control.' In Donald Black (ed) *Toward a General Theory of Social Control* (2 vols). New York: Academic Press.  
1986 'Recent anthropology of law in the Netherlands and its historical background.' In Von Benda and Strijbosch (ed) *Anthropology of law in the Netherlands*. Dordrecht: Foris Publications.
- MERRY, S.E.  
1982 'The social organization of mediation in nonindustrial societies.' In Richard Abel (ed) *The Politics of Informal Justice* (2 vols), Vol.2, Comparative Studies.