

Hong Kong Institute for the Humanities and Social Sciences
The University of Hong Kong

IHSS6004 Selected Topics on Inter-Asian Connections
“Law, Norms and Social Order: Anthropological Perspectives”

Semester 2, 2017-18
Time: Wednesday 10:30am –12:30pm
Venue: Room 201, 2/F, May Hall, HKU

Course Teacher

Prof. Ellen Hertz

Office hours: by appointment
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Overview

This course examines the sources of order, predictability and justice in human societies, building on the rich tradition of anthropological study of law, broadly defined. In particular, it looks at the “double institutionalization” of certain norms and procedures that we call “law”, a process by which certain norms and ways of doing are made explicit, and treated as discreet bodies of customs or rules; in Durkheimian terms, they become more than simple “social facts”, taking on the formality or explicitness of the “legal”. The “double institutionalization” of norms and habits is at work in all societies, but with enormous differences in form and content. It can take the form of prospective rulemaking (as with law-making in the legislative branch or regulatory offices), or of the retrospective application of rules to disputes or acts classed as criminal.

Despite its technicalities and its aura of disciplinary specialization, the limits of “the law” are in no way stable. To the contrary, they can be rejected, challenged and modified by different social groups in different contexts, and are constantly evolving in relation to changing power dynamics within and between societies. Thus, at the most general level, the course will examine instances in which the boundaries of the law are expanding or contracting in contemporary global societies, and ask what is at stake in these transformations.

Learning objectives

This course has two principal objectives. First, students should gain mastery of a specific body of literature in anthropology and related social sciences that examines the nature, functions and effects of the law, both in non-Western and Western, “developed” and “developing” societies. Second, students should learn to relate these questions to contemporary issues in their own society, using the anthropological perspective to broaden and challenge the ways they perceive and evaluate conflict, crime, disputes, legal institutions, social justice, order and change.

Course Requirements, Assignments and Evaluation

These questions will be examined both through theoretical readings and with the help of selected empirical examples taken from both “classical” anthropological field sites such as African tribes and Turkish villages, and from the “modern” legal fields that proliferate in contemporary industrial societies. Students will be asked to do a fair amount of reading, both before coming to class and for written assignments. In all of this reading, students are encouraged to make links with issues they read in news media or encounter in their everyday lives, and ask what an anthropological perspective adds to their understanding of these issues.

Specifically, in addition to active presence and participation in class, students will be required to:

1. come to the first day of class and complete a brief written assignment in class;
2. read two book-length ethnographies and furnish a short report (1-2 pp.) on each, in relation to the questions discussed in class;
3. in order to give students a hands-on experience with the difficulties of identifying a “legal situation” and of going about studying it from an anthropological point of view, students will be requested to conduct a brief “field study”, in a location of their choice, and to write up their field notes as a report (3 pp.);
4. complete a take-home examination (5 pp.)

The deadlines for these assignments are indicated below. Detailed instructions will be distributed and discussed in class, and placed on the on-line course platform.

Evaluation will be based on the following criteria: clarity and structure of written work, mastery of the assigned literature, timeliness, care in writing and originality/relevance of positions expressed. Each book report is worth 20% of the final grade, as is the field report and take-home examination. The remaining 20% of the final grade will be based on class participation.

Plagiarism

If you copy other people’s work without proper acknowledgement, you will fail this course. Plagiarism includes, but is not limited to: copying / summarizing / extracting information and ideas from books, journals, newspapers, websites (incl. Wikipedia), and other printed and electronic sources without acknowledging the source of information. Papers must be uploaded to Turnitin.com by the due date.

Class ID: 16284513

Enrollment key: IHSS6004

Class Schedule

- 17 January** Obey! Unpacking commonplace associations with “the law”
- Assignment* There will be no readings, only an assignment to do in the classroom and hand in on the spot. (N.B. If you cannot be present during the first day of class, please contact me directly by email to make up this exercise.)
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- 24 January** Anthropologists discover “primitive law”
- During this week’s class, we will explore the concept of “primitive law” as it was used during the first decades of the discipline. We will examine some of the classical field sites where “primitive law” was discovered and analyzed, and start unpacking the reasons why we put “primitive law” in quotation marks.
- Readings* COLSON, Elizabeth, 1974, *Tradition and Contract: The Problem of Order*. Chicago: Aldine Publishing Co (excerpts pp. 35-59).
- MALINOWSKI, Bronislaw, 1926, *Crime and Custom in Savage Society*. London: Routledge & Kegan Paul (excerpts pp. 71-129).
- POSPISIL, Leopold, 1973, “E. Adamson Hoebel and the Anthropology of Law”, *Law & Society Review*, vol. 7, n° 4, pp. 537-560.
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- 31 January** Debating the limits of law in non-Western societies
- As early as there was a sub-discipline called “legal anthropology” there were debates about its mission, content and limits. In this week’s readings and discussion, we will review some of these debates. None of the issues raised by these debates can be said to be resolved today, although the terms of the debate may have evolved, either because of changes in the “real world” or because of changing disciplinary orientations.
- Readings* MOORE, Sally Falk, 1973, “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study”, *Law & Society Review*, vol. 7, n° 4, pp. 719-746.
- NADER, Laura, 1965, “The Anthropological Study of Law”, *American Anthropologist*, vol. 67, n° 6, pp. 3-32.
- SIMS, Michael M., 1995, “Old Roads and New Directions: Anthropology and the Law”, *Dialectical Anthropology*, vol. 20, n° 3/4, pp. 341-360.
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- 7 February** Everyday law in industrialized societies; preparing your field excursion
- At first sight, the hop from “primitive” legal institutions to contemporary “modern” legal settings in industrialized societies seems large. However,

the functions associated with primitive law are universal and can pose the same problems of resolution in state-based industrialized societies as they do in “simple”, “primitive”, or non-state societies. During the first half of this week’s class, we begin our examination of these questions – which will occupy the rest of the semester – by focusing on two classic functions of the law: resolving disputes and punishing crimes. We examine how the social sciences have conceived of these functions (including important theoretical debates around the concept of “function” and functionalism itself) and look at how conceptions and uses of law can vary in relation to social position, religious ideals, and economic status within a single society.

Assignment In the second half of the class, we will discuss your field assignments. I will outline what I expect of you and where you might begin, but students should come to class with some ideas of their own about appropriate places to conduct observation and/or interviewing in law-related settings in Hong Kong.

Readings FELSTINER, William, Richard ABEL & Austin SARAT, 1980/81, “The Emergence and Transformation of Disputes: Naming, Blaming, Claiming”, *Law & Society Review*, vol. 15, pp. 630-649.

GREENHOUSE, Carol, 1986, *Praying for Justice: Faith, Order and Community in an American Town*. Ithaca: Cornell University Press (excerpts, pp. 23-42).

SCHNEIDER, Jane & Peter SCHNEIDER, 2008, “The Anthropology of Crime and Criminalization”, *Annual Review of Anthropology*, vol. 37, pp. 351-373.

14 February No class

Assignments Students should use the following month to locate their field sites and to conduct their observations and/or interviewing for their field report. They should also use it to complete their first book report. Both reports are due on **Wednesday March 14**, to be brought in paper format to class.

21 February No class (class suspension period for the Lunar New Year)

28 February No class

7 March No class

14 March Legal fictions in Western societies

With this week's classes, we delve deeper into the world of law in state-based, industrialized societies. We begin by examining one of the central mechanisms of the legal system, the notion of the "legal fiction". It is through legal fictions that the law produces its "framing" effects on reality, by circumscribing and defining who can be the subjects of the law, who counts as a victim, and what it means to have a right. These are not empirical findings but normative decisions; the extent to which a legal subject can exercise its rights is determined by its ability to "fit" within the normative framework defined by the law. This is the first great "gap" between law and social reality that we will examine in this class, and that give law its special status as a permanent promise of justice despite daily demonstrations of its inadequacy.

- Readings* GHACHEM, Malick W., 2003, "The Slave's Two Bodies: The Life of an American Legal Fiction", *The William and Mary Quarterly*, vol. 60, n° 4, pp. 809-842.
- GREEN, Edward, 1968, "The Reasonable Man: Legal Fiction or Psychosocial Reality?", *Law and Society Review*, vol. 2, n° 2, pp. 241-258.
- IWAI, Katsuhito, 1999, "Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance", *The American Journal of Comparative Law*, vol. 47, n° 4, pp. 583-632.

21 March Law as an instrument for resistance

Law is frequently mobilized as a tool for advancing the interests of less powerful groups in society, or for resisting domination by the state or by superordinate classes. This is especially true in regimes where equality is considered to be a fundamental social value. In these cases, the law seems to hold out the promise of counteracting the prevailing forces of power and wealth, and promoting social justice. In this week's class, we will examine the premises underlying this understanding of the law, and test law's promise against empirical examples of resistance at work. In the process, we will open up the question of law's continual evolution and its constitutive instability.

- Readings* MERRY, Sally Engle, 1995, "Resistance and the Cultural Power of Law", *Law & Society Review*, vol. 29, n° 1, pp. 11-26.
- O'BRIEN, Kevin J., 1996, "Rightful Resistance", *World Politics*, vol. 49, n° 1, pp. 31-55.
- SPEED, Shannon & Alvaro REYES, 2005, "Rights, Resistance, and Radical Alternatives: The Red de Defensores Comunitarios and Zapatismo in Chiapas", *Humboldt Journal of Social Relations*, vol. 29, n° 1, pp. 47-82.

28 March Law as an instrument for hegemony

With the concept of hegemony, we move into the dialects of law and power, social justice and domination. “Hegemony” in a Gramscian perspective implies the powers of dominant classes in society to impose on all members of society a set of values and practices that benefit them and perpetuate their dominance. In classical Marxist analysis, law – as part of what Marx labeled the “superstructure” – was one of the central forces for creating hegemony, maintaining the illusion of justice in a system in which the infrastructural rules of possession and the extraction of value were created by the ruling classes. However, the law’s historical role in the social justice movements against colonization, racial discrimination and sex inequality that marked the 20th century have challenged the simple Marxist scheme, making an examination of the subtle workings of hegemony through and against the law indispensable.

Readings GREENHOUSE, Carol J., 2005, “Hegemony and Hidden Transcripts: The Discursive Arts of Neoliberal Legitimation”, *American Anthropologist*, vol. 107, n° 3, pp. 356-368.

HUI, Elaine Sio-ieng, 2017, “The Neglected Side of the Coin: Legal Hegemony, Class Consciousness, and Labour Politics in China”, in (I. Franceschini, K. Lin, N. Loubere, eds.), *Disturbances in Heaven*, pp. 80-83. (available on-line at <http://www.jstor.org/stable/j.ctt1q1crrk.17>).

NADER, Laura, 1999, “The Globalization of Law: ADR as ‘Soft’ Technology”, *Proceedings of the Annual Meeting (American Society of International Law)*, vol. 93, pp. 304-311.

4 April “Global” law: hegemony and counter-hegemony?

With the coming of so-called “globalization”, scholars of the law have increasingly turned their attention to the international, transnational and “global” dynamics of legal spread, evolution and transformation. While much of this literature documents the use of law as a tool for American, and more broadly Western, incursions into new marketplaces, including the increased legal scramble for the control of the world’s natural resources, not all of the newly globalized forms of law can be seen as hegemonic in this sense. This week’s class will examine the confusing and often contradictory changes that the world has witnessed in the last four decades, asking what forms, if any, of generalization can be ventured.

Readings MERRY, Sally Engle, 2006, “Anthropology and International Law”, *Annual Review of Anthropology*, vol. 35, pp. 99-116.

SAWYER, Suzana, 2006, "Disabling Corporate Sovereignty in a Transnational Lawsuit", *PoLAR: Political and Legal Anthropology Review*, vol. 29, n° 1, pp. 23-43.

WEILENMANN, Markus, 2009, "Project Law – A Legal Intermediary between Local and Global Communities: A Case Study from Senegal", *Anthropologica*, vol. 51, n° 1, pp. 39-51.

11 April New forms of "sympathetic" law: "soft law", corporate social responsibility and sustainability as alternative normative constructs

As we saw in class two weeks ago, the rise and proliferation of law and legal instruments worldwide has been accompanied by movements working against legalization, from all sides of the political spectrum. These movements argue that state-based law is incapable of tackling the major problems threatening world peace and prosperity, and that law must therefore be complemented – or replaced – by "soft law", corporate social responsibility and other forms of alternative rule-making. Like the global spread of law, the global spread of "soft law" is a complex and contradictory process that has been seized on by corporations and communities alike. In this week's class, we examine some of these dynamics, placing them in contemporary context and subjecting them to critical review.

Assignment Second book report, on a contemporary ethnography of law, **due today**. Please bring paper copy to class.

Readings NADER, Laura & Elisabetta GRANDE, 2002, "Current Illusions and Delusions about Conflict Management – in Africa and Elsewhere", *Law & Social Inquiry* vol. 27, n° 3, pp. 573-594.

SHAMIR, Ronen. 2005. "Corporate social responsibility: a case of hegemony and counter-hegemony", in: Boaventura de Sousa Santos (ed.) *Law and globalization from below: towards a cosmopolitan legality*, pp. 92-117. Cambridge: Cambridge University Press.

WILSON, Richard A., 2006, "Afterword to 'Anthropology and Human Rights in a new Key': The Social Life of Human Rights", *American Anthropologist* vol. 108, n° 1, pp. 77-83.

18 April The changing status of law in China

Law in China is a contested topic and has been for more than two thousand years. As encapsulated by the famous opposition between a "Confucian" and a "legalist" approach to state governance, law in China had an ambivalent status, if in fact we can speak of "law" (法) without entering the complex questions of translation that this supposes. In this class, we will briefly review these historical debates and then concentrate our attention on

post-Cultural Revolution approaches to the law on the mainland. Noting the ambiguities surrounding the Chinese 以法治國, we will explore how law «cuts both ways» in contemporary China, as both a tool of increased access to justice and legal regularity, and an instrument of increased state power and capitalist penetration.

- Readings* BRANDTSTÄDTER, Susanne, 2011, “The Law Cuts Both Ways: Rural Legal Activism and Citizenship Struggle in Neosocialist China”, *Economy and Society* vol. 40, n° 2, pp. 266-288.
- CHEN, Jianfu, 2007, “Role/Rule of Law in China Reconsidered”, in (C. Antons & V. Gessner, eds), *Globalisation and Resistance: Law Reform in Asia since the Crisis*, pp. 179-207. Oxford/Portland, OR: Hart Publishing.
- HERTZ Ellen & Marylène LIEBER, 2017, “Marginalizing the law: Corporate social responsibility, worker hotlines and the shifting grounds of rights consciousness in contemporary China”, in (S. Brandtstädter & H. Steinmüller, eds.) *Justice, Publics, Popular Politics and the Chinese State*, pp. 52-73. London: Routledge.
- LORA-WAINWRIGHT, Anna, Yiyun ZHANG, Yumei WU & Benjamin VAN ROOIJ, 2012, “Learning to Live with Pollution: The Making of Environmental Subjects in Chinese Industrial Village”, *The China Journal*, vol. 68, pp. 106, 124.

25 April Conclusions and discussion of final exam.

In this class, we review the rich and varied material we have examined over the course of the semester and ask whether it is wise to conclude.

- Assignment* The final exam is a take-home exam, based on class material and the three written assignments already submitted. In it, you will review what you had written on the first day of class and discuss in a short paper (5 pages maximum) how your thinking about these issues has changed over the course of the semester. You should make reference to class materials and readings whenever relevant but you should not review the entire class. The exam is centered on your learning process and your personal synthesis of what you have learned or now view differently. It can include challenges to or critiques of course material and/or the course itself, but these must be justified with reference to other material from the course, and not simply reflect your personal opinion. The final exam should be send to: ellen.hertz@unine.ch on **April 30, 2018**, and should arrive neither early nor late.

List of classical ethnographies in legal anthropology – chose one

- BOHANNAN, Paul, 1957, *Justice and Judgment among the Tiv*. International African Institute. London: Oxford University Press.
- CHANOCK, Martin, 1985, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia*. Cambridge: Cambridge University Press.
- CODERE, Helen, 1950, *Fighting with Property: A Study of Kwakiutl Potlatching and Warfare, 1792-1930*. American Ethnologists Society Monograph no. 18.
- COLLIER, Jane, 1973, *Law and Social Change in the Zinacantan*. Stanford: Stanford University Press.
- FALLERS, Lloyd F., 1969, *Law without Precedent: Legal Ideas in Action in Courts of Colonial Busoga*. Chicago: University of Chicago Press.
- FORTUNE, Reo, 1932, *Sorcerers of Dobu: The Social Anthropology of the Dobu Islanders of the Western Pacific*. London: Routledge & Kegan Paul.
- GLUCKMAN, Max, 1954, *The Judicial Process Among the Barotse of Northern Rhodesia*. Manchester: Manchester University Press.
- GLUCKMAN, Max, 1965, *The Ideas in Barotse Jurisprudence*. New Haven: Yale University Press.
- KOCH, Klaus F., 1974, *War and Peace in Jalemo: The Management of Conflict in Highland New Guinea*. Cambridge, MA: Harvard University Press.
- LEACH, Edmund, 1961, *Pul Eliya, a Village in Ceylon: A Study of Land Tenure and Kinship*. New York: Cambridge University Press.
- LLEWELLYN, Karl & E. Adamson HOEBEL, 1941, *The Cheyenne Way : Conflict and Case Law in Primitive Jurisprudence*. Norman : University of Oklahoma Press.
- MOORE, Sally Falk, 1981, *Social Fact and Fabrication: "Customary" Law on Kilimanjaro, 1880-1980*. Cambridge: Cambridge University Press.
- ROSEN, Lawrence, 1988, *Bargaining for Reality*. Chicago: University of Chicago Press.
- STARR, June, 1978, *Dispute and Settlement in Rural Turkey: An Ethnography of Law*. Leiden: E.J. Brill.

List of contemporary ethnographies in legal anthropology – chose one

- BEAR, Laura, 2015, *Navigating Austerity: Currents of Debt Along a South Asian River*. Stanford, CA: Stanford University Press.
- BILLAUD, Julie, 2015, *Kabul Carnival: Gender Politics in 'Postwar' Afghanistan*. Philadelphia: University of Pennsylvania Press.
- BOURGOIS, Philippe, 1996, *In Search of Respect: Selling Crack in El Barrio*. Cambridge & New York: Cambridge University Press.
- CHECKER, Melissa, 2005, *Polluted Promises: Environmental Racism and the Search for Justice in a Southern Town*. New York: New York University Press.

- COMAROFF, Jean & John L. COMAROFF, 2006, *Law and Disorder in the Postcolony*. Chicago: Chicago University Press.
- COOMBE, Rosemary J., 1998, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law*. Durham, NC: Duke University Press.
- EULE, Tobias G., 2014, *Inside Immigration Law. Migration Management and Policy Application in Germany*. London & New York: Routledge.
- GOLUB, Alex, 2014, *Leviathans at the Gold Mine: Creating Indigenous and Corporate Actors in Papua New Guinea*. Durham, NC: Duke University Press.
- HO, Karen, 2009, *Liquidated: An Ethnography of Wall Street*. Durham, NC: Duke University Press.
- KELLY, Tobias, 2011, *This Side of Silence: Human Rights, Torture and the Recognition of Cruelty*. Philadelphia: University of Pennsylvania Press.
- KESSELRING, Rita, 2016, *Bodies of truth: law, memory, and emancipation in post-apartheid South Africa*. Stanford, CA: Stanford University Press.
- MALLARD, Grégoire, 2014, *Fallout: Nuclear Diplomacy in an Age of Global Fracture*. Chicago: University of Chicago Press.
- NADER, Laura, 1991, *Harmony Ideology. Justice and Control in a Zapotec Mountain Village*. Stanford, CA: Stanford University Press.
- NGUYEN, Vinh-Kim, 2010, *The Republic of Therapy: Triage and Sovereignty in West Africa's Time of AIDS*. Durham, NC: Duke University Press.