ONE

The imagined order

The ethnography of the unknowable

Anthropology bases its distinctiveness as a discipline on a method of long-term social interaction, getting to know a community intimately through face-to-face dialogue, together with sustained close attention to the details of everyday life. Knowing this, I am nevertheless setting out here to break with this source of anthropologists' disciplinary identity by discussing social actors who are intangible, abstract, notoriously unpredictable and largely unknowable. In a certain sense, they are figments of the imagination, though they act together in ways that largely determine our cultural, political and legal landscapes. Together, the members of this society are popularly known as *the public* – though there is of course more than one vaguely identifiable public with more than a single repertoire of preferences, and it is usually more appropriate to use the plural term "publics."

It might reasonably be argued that looking at publics is not the business of an anthropologist, that this is the domain of political scientists, sociologists, social psychologists and others who have painstakingly developed methods for probing the dominant trends of opinion, most publicly (and sordidly) in the course of political campaigns. My answer to this is that publics, however intangible, have also become part of the social worlds of those whom it is possible to know intimately. To take

this point further, the processes by which people define who they are, above all the ways they articulate and defend their collective rights and shape and represent their distinct cultures, are now often negotiated and mediated in collaboration with distant publics. I am interested in publics because they have become an important part of the social imaginations and dynamics of identity of those with claims of culture.

This is an issue for legal anthropology insofar as the values and tastes of publics have increasingly become points of reference for the rights claims of distinct peoples and communities. Simply because there is primarily a psychical rather than a physical compulsion behind laws that lack judicial enforcement, we should not entirely discount the likelihood that, in Weber's terms, "there is a probability that an order will be upheld by a specific staff of men … with the intention of obtaining conformity with the order, or of inflicting sanctions for the infringement of it."[1] The question to which we are led by the burgeoning corpus of human rights law concerns the ultimate source of compulsion or power in the realization of collective will. Most analysts of human rights and other bodies of "soft law," lacking enforcement mechanisms through judicial sanctions, would probably agree that popular opinion and activism can and do influence the behavior of the powerful, usually in the direction of conformity with law, and that this can be somehow understood with reference to "popular will," acting in ways that are quite different from judicial decision-making. A basic difference can therefore be drawn between those laws that have built into them a formal mechanism of enforcement, that are supported by the possibility of (ideally) behavior-modifying, judicially applied sanctions, and those that rely more exclusively on popular opinion, compassion, the "politics of shame" or, as I will later discuss, the cultivation of popular "indignation."

[1] M. Weber, *From Max Weber: Essays in Sociology*, ed. H. Gerth and C. Wright Mills (London: Routledge & Kegan Paul, 1948) 180.

Flux and boundary

The central subject matter of this book – that obtuse entity sometimes referred to as "the public" – is situated somewhere in the point of impact of two seemingly incompatible certainties. The dominant paradigm of cultural studies in recent decades has emphasized the invented nature of tradition, the porousness of cultural boundaries, the malleability and often manipulability of the ideological and affective foundations of social membership. Heritage is selected and cultures are constructed. The boundaries of inclusion and exclusion are artificial products of political ambition and/or bureaucratic necessity, often with roots in colonial governance. There is no authentic connection to a primordial past, no inner essence of a people that is not a product of human creativity, no ethnic divisions that are not constructed and, in practice, plastic, overlapping and opaque.

Often ideas of cultural impermanence and invention are connected to hopeful conceptions of cosmopolitan belonging, the idea of people brought together in a mobile, boundaryless condition of peaceable, ecumenical individualism. Since nations are no longer the central reference point for political identity, we are not speaking of the social consequences of trans*national* networks, but of something that might be described as trans-human. In this new world order, social identity is a moral choice. Youth is faced with the burden of this choice, of deciding upon their allegiances and values. The individual is more than ever before freed from the constraints of determined social belonging; and it becomes a task for individuals to navigate the possibilities of self-creation, to choose from their repertoires of identity, to take an active part in determining their personhood. And if culture is ultimately a chosen process, the time has come for divisions between people to be overcome, for people to combine their heritages and social attachments in new ways, on a scale that encompasses all of humanity. This, at any rate, is a central, at times utopian, theme in thought about an emerging global social order.

Another certainty seems on the surface to be starkly contrary to such culture-as-process, cosmopolitan ecumenicalism. During the past several decades we have witnessed the growing importance of reinvigorated identity as a source of group membership. Conceptions (or descriptions) of cultural permeability and change are uncomfortable for or unacceptable to those whose greatest hopes are oriented toward the recognition of their primary source of belonging as an identifiable, secure community. Distinct peoples, through spokespeople and sympathizers, are often publicly represented as bounded entities with discrete histories, encouraging national and international legal systems to accommodate cultural claims in legal proceedings and processes of legal reform.

It is through the inherent mutability of cultural remembrances, identities, and attachments – often mediated and guided by legal formulation of rights-bearing social entities and public affirmation of cultural representation (the subject matter of Chapters 2 and 3) – that distinct societies are bringing their collective self-images into sharper focus. Paradoxically, bonds seen by community members as inherent, timeless and indissoluble have only recently been reformulated, publicly performed and given new political standing.

This means that the unstable conception of culture that pervades the social sciences is in stark contradiction with legal approaches to culture. Transnational organizations and institutions of global governance are primary sources of ideas about cultural coherence and collective virtue, treating heritage as a clearly definable body of beliefs, values and practices rooted in the past, integral to local and distinct ways of life.

At the same time, the institutions of global governance are built upon ideas of effecting change among non-compliant peoples in the interest of furthering cosmopolitan values of peace and development. As I intend to show, there is a tension between promoting the autonomy and identity of distinct peoples and acting on the universalizing ideals of peaceable civilization, human rights and global civic order. Sally Engle Merry is among those who point to a growing tendency in international human

rights circles in which activists (and sometimes international institutions and nation states) are prone to engage in sweeping condemnation of "traditional culture" as inconsistent with human rights standards (thus unwittingly invoking nineteenth-century style imperialist arguments that situate cultures on a scale of human progress); while at other times culture is invoked as a source of vital heritage, something to be protected, nurtured and treasured.[2] In both cases, "human rights relies on an essentialized model of culture [that] does not take advantage of the potential of local cultural practices for change."[3] The adaptability of cultural ideals in the context of political contests within communities in transition is all too often overlooked in favor of mistaken attributions of intellectual and political coherence, permanence and undiluted traditional virtues.

Legal anthropology has become a mediator of this tension between flux and boundary. In the study of culture among distinct social strata such as ethnic minorities and indigenous peoples, there is a central intellectual challenge in which social conditions of transnationalism or "delocalization" are causing anthropologists to question the culture concept by emphasizing the shifting, intangible nature of collective identity while, at the same time, distinct peoples, through spokespeople and sympathizers, are publicly represented as bounded entities with distinct histories, encouraging national and international legal systems to accommodate cultural claims in legal proceedings and processes of legal reform. In response to this tension, critical analysis of such concepts as "social justice," "identity," and less familiar terms like "juridification" and "convergence" (discussed in Chapter 7) along with other conceptual tools of legal anthropology, cannot help but lead toward analysis of major social transformations that are currently unfolding and provide an opportunity to appraise efforts to come to grips with them.

[2] S.E. Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press, 2006) Ch. 1.
[3] Merry, *Human Rights and Gender Violence*, 11.

Law is of course not content to merely describe or comment on the world; it seeks to make itself felt, to act on the world, to be a source of betterment. And this introduces the problem of efficacy: how does the passive orientation of human rights law – its reliance on the "soft power" of public persuasion – translate into immediate, tangible effects in the conditions of peoples' lives? There is another direction from which to approach the same problem: what conditions might have changed the ways that people are influenced by legal thought that allow or encourage a turn toward the reformulation of categories of belonging?

Starting this question is a bit like starting a stone rolling: as it gathers momentum it runs into others and sets them too in motion. It also becomes important to know how ideas about rights that originate in meetings of experts in European and North American centers of power are finding their way to the political, legal and developmental aspirations of peoples (now legally identified as such) and communities on the margins of states. This is a process sometimes referred to as *international norm diffusion*, which in essence challenges us to find the linkages between ideas developed in closed meetings among bureaucrats and experts in capital cities and those among rights-claimants in marginalized communities, and then (and this is the really hard part) to determine, whether, how, and the extent to which the resulting ideas and strategies find legitimacy and support in local constituencies.[4]

Soft power and publics

Human rights ideology, Lori Allen reminds us, "is a cornerstone of global civil society and a key idiom through which stateless groups

[4] See, for example, G. Sarfaty, "International Norm Diffusion in the Pimicikamak Cree Nation: A Model of Legal Mediation," *Harvard International Law Journal*, 2007b, 48 (2): 441–82.

and the disadvantaged seek redress across the globe."[5] This is mostly because of the wide recognition in the aftermath of World War II that the alternative to the minimum standards of human rights consensus is moral chaos in an increasingly integrated world. The result of this moral consensus – the current global regime of human rights – is the most widely legitimate source of guidance for the ethical standards of collective behavior. It has more adherents than any one faith, mainly because it does not overtly compete with faith, by virtue of the fact that it does not require of its adherents exclusive membership or loyalty.

Part of the explanation of the near-universal legitimacy of human rights follows from the importance of public appeal as a mechanism of rights compliance. And this, in turn, has created a revolution in the origins and pathways of collective identity construction. A thorough treatment of this topic would have to go well beyond any connection with legal anthropology by outlining the already well-known history of the politics of public persuasion, including the central place of state-sponsored propaganda in the ideological underpinnings of the major wars of the twentieth century. For the purposes of this introduction, it must suffice to briefly outline the origins of the politics of indignation. We can look first to Enlightenment ideas of the capacity of the "public spirit" to unerringly exercise political judgment, elaborated first in England and France and subsequently exported to Germany, and to point to the stark contrast between this "sense of the people" with more contemporary ideas that stress the malleability and manipulability of opinion, emphasizing hegemony as an extension of power.

Jürgen Habermas, in *The Structural Transformation of the Public Sphere*, provides a masterful overview of the intellectual history of public opinion, situated in the tumultuous political transformations of Europe

[5] L. Allen, "Martyr Bodies in the Media: Human Rights, Aesthetics, and the Politics of Immediation in the Palestinian Intifada," *American Ethnologist*, 2009, 36 (1): 163.

in the eighteenth and nineteenth centuries. He gives the conservative British parliamentarian Henry Bolingbroke a central place in the early development of the idea of public opinion as a political mechanism, starting with his *Craftsman* articles of 1730 which situated the "Spirit of Liberty" of the people against the corruption of those in power, producing, in Habermas' words, a "direct, undistorted sense for what was right and just and the articulation of 'opinion' into 'judgment' through the public clash of arguments."[6] This was an early expression of the durable idea of public opinion as an essential component of democracy, not only in the electoral process, but also more subtly, with popular will acting as an almost invisible or (depending on one's perspective) insidious source of guidance in judicial decision-making, a kind of hegemony of mass empowerment or, from a minority point of view, of popular tyranny.

As with many turning points in modern history, a formative condition for the politics of indignation can be found in the populism of the French Revolution. The Revolution seems to have put into practice a romantic, demagogic conception of public opinion, reflecting Rousseau's ideal of a public acting according to its natural inclinations, through a consensus of hearts – which ultimately makes superfluous the need for debate. The *volonté générale* was to reveal itself through a plebiscite in permanence, based perhaps on the Greek *polis* or the stirring image of those natural consensual assemblies that must have once taken place beneath the spreading branches of a tree, in which people gathered more for acclamation than the rational-critical processes of public debate.[7]

Keith Baker, in his essay "Public Opinion as Political Invention," demonstrates that in the course of the French Revolution the most widespread conceptualization of opinion changed in a fundamental

[6] J. Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge, MA: The MIT Press, 1991 [1962]) 94.
[7] See Habermas, *The Structural Transformation of the Public Sphere*, 98–100 for a discussion of Rousseau's conception of public opinion.

way, from a philosophical concept describing a dubious, error-laden form of belief that contrasts starkly with the certainty and purity of rational thought, to a political concept referring to an equalizing moral force, the ultimate source of judicial and political guidance, shaping the behavior of citizens and government alike. Public opinion, Baker points out, "suddenly emerged as a central rhetorical figure in a new kind of politics. Suddenly it designated a new source of authority, the supreme tribunal to which the absolute monarchy, no less than its critics, was compelled to appeal."[8] Whether conceived as a source of pre-existing mores, the spirit of a people, that under a just constitution would naturally be expressed in law or imagined as an outcome of a public entrusted with the tools of rational-critical debate that acts as a watchdog and censor of government, a common assumption was that public opinion acted independently, perhaps even infallibly, in a condition of autonomy from the state.

Despite these origins in the Enlightenment ideals that accompanied the emergence of modern states, the influence of popular opinion was slow to emerge as a significant aspect of compliance in international law. The absence of publics was especially significant in the earliest international efforts to regulate the behavior of states toward their own unwanted citizens. The Treaty of Saint-Germain and the Treaty of Versailles (outcomes of the Paris Peace Conference of 1919), intended to establish a new, peaceful order in the aftermath of World War I, were sweeping in their scope, essentially redrawing the map of Europe so that the frontiers of states would, to the fullest extent possible, follow the lines of nationality, and counteracting the behavior of states in their persecution of minorities; but enforcement relied upon agreement and leverage from the Great Powers, the main victor-states of the Great War.

[8] K. Baker, *Inventing the French Revolution* (Cambridge University Press, 1990) 168.

There were no appeals to the will of the people to pressure states in the direction of fulfillment of their obligations, no grassroots lobbying to the fledgling League of Nations, even though the issues involved – especially the resettlement and protection of minorities – were hugely significant, with immigrants numbering in the millions pouring across the redrawn boundaries of Europe and many thousands of new refugees, designated as *apatride* or *heimatlos*, suddenly finding themselves without membership in a state.[9] The League, having put things in motion, had to be content to make itself small, avoid political backlash (especially from the Powers to which it was beholden) and leave it to the states to manage their affairs. To the extent that public involvement was possible in these circumstances, it was indirect and at a remove from the enforcement of law, taking place in a minimal way through the private charitable organizations mobilized to do the things neglected by states in the cataclysms of displacement caused by their actions, things like feeding starving masses and sheltering orphans.

The post-World War II regime of human rights left much more room for public involvement and persuasion – this much almost everyone agrees, despite the influence of new Great Powers in the form of the Security Council and the troika of powerful global financial institutions, the International Monetary Fund (IMF), the World Bank and the World Trade Organization (WTO). And almost everyone agrees that public opinion matters in bringing about human rights compliance (to the lamentably limited extent that states do comply with human rights). But how does this happen? How does popular will modify illegal behavior in the absence of formal mechanisms of enforcement?

First, let us consider the question of public opinion as a source of leverage in rights compliance. Will Kymlicka touches on this when he casually

[9] M. Marrus, *The Unwanted: European Refugees from the First World War Through the Cold War* (Philadelphia: Temple University Press, 2002) 69–70.