Commentary:

The Morals of Liability: Some Thoughts on "Humanitarians in Court"

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This commentary proposes that anthropology should delve deeper into the phenomenon of the increasing juridification of moral norms. The many struggles that attempt to turn perceived moral obligations into legally binding obligations provide insights into how our very basic notions of immediate and mediate causation are renegotiated to accord to understandings of justice that reflect the power asymmetries in enabling situations of harm in a globally interconnected world.

Keywords: juridification; morality; responsibility; obligation.

One of the central questions that emerges from the discussion of Steven Patrick Dennis vs. the Norwegian Refugee Council by Kristin Bergtora Sandvik is that about the relation between law and morality in our current world. More precisely, to me this article raises the question how, in a world in which the perception of our inextricable entanglement increases, the juridification of claims to mutual care and concern arising from moral notions of obligation impacts on the relation between law and morals.

It appears that we do, indeed, have a time in which we find liability, and causal responsibility contested more intensely than before. I am thinking of the many social movements that struggle for a world that is more just, be it in terms of climate justice, corporate responsibility, fairer trade relations, and so on. It seems that in both tort and in criminal law claimants as well as cause lawyers are stretching into new directions, drawing different points of causal and moral connections between events, actions, suffering and remedies. They attempt to draw into the net of causal responsibility more actors that are connected to an event, and they try to distribute the burdens of liability anew.

When they employ legal norms in their struggles, they engage in processes that negotiate law's meanings and possibly shape legal norms to accord with expectations and aspirations that arise from moral claims. What is discussed by Kristin Bergtora Sandvik in relation to the humanitarian sector, is therefore also highly pertinent more generally. What I have elsewhere called the juridification of protest (Eckert et al. 2012) is also a juridification of moral indignation, and an attempt to re-align law and morals as they are perceived by those making legal claims. These legal struggles concern the moral claims that we can make on each other because of our our intricate entanglements in world society.

It has been said that the moralisation of global social relations often substitutes for more binding obligations, moving responsibility into the direction of mercy. This is what Didier Fassin (2012) has identified as one effect of the rising significance of affect in politics in the era of humanitarian reason. An affect-based moralisation, Fassin (2012) and others have stressed, often covers over the structural causes of suffering and in doing so, turns our expressions of mutual obligation into charitable gestures. Central to processes of juridification, however, are the attempts to establish new binding obligations that arise from moral notions of 'connection'. These struggles firstly re-moralise our factual entanglements, and then attempt to make binding the moral obligations we have towards each other.

What possibly unites these attempts to turn new perceptions of moral obligation into legal obligations is that they renegotiate mediate responsibility: actions and ommissions which enable (rather than directly cause) situations of damage and hurt move more to the centre of our attention. The perception of causal links reaching far in space and time, and into actions and omissions often overlooked in the analysis of the causes of suffering, are ever more explicitly pronounced. However, many of the

institutions of legal responsibility and liability attempting to reflect our current interrelations have been criticized as individualising cause, reducing analysis to immediate causation, as reducing narratives of conflict by the simple dichotomisation of perpetrators and victims (e.g. Clarke 2010; Wilson 2009), and "cutting" (Strathern 1996) short socially, temporally and spatially the relations that generate phenomena, situations, "persons and things" (Pottage/Mundy 2004). This is partly due to the fact that, when the entanglements of world society are reflected in terms of legal responsibility, this happens within the parameters of conventional law with its persistent jurisdictional "methodological nationalism", as well as its specific limits of culpability and spatio-temporal restrictions of liability. Marilyn Strathern pointed to that when she relativized Latour's assumption about the prolongation of actor-networks in modernity. She held that, while the chains of interaction may become ever longer in modernity, modern institutions of law cut these chains at particularly short intervals. While she looked at the example of intellectual property rights and the idea of the "invention", the same also holds for the relatively short temporal and socio-spatial conceptions of liability (see Kirsch 2001).

This raises the question whether the relations in which we live jar with the current categories of legal responsibility, legal liability and the different legal conceptualisations of participating in, enabling or failing to prevent suffering. Does the perception of interconnectedness in our current world, and the moral claims that arise from this, exceed contemporary legal possibilities and norms of liability? If attributing liability and fault is (perceived as) increasingly unjust: reductionist, individualizing and inadequate to the complexities of distributed agency in our current world, are there less reductionist methods of attributing liability?

The apparent response, visible in the reaction of the "humanitarian community" and their stance that Steven Patrick Dennis vs. the Norwegian Refugee Council should never have gone to court in order not to set a precedent, is the tendency to increasingly rely on 'out of court settlements', on making deals, mediation, and ADR (Alternative Dispute Relation; see e.g. Nader 1999). Many current drafts for corporate criminal law entail extensive suggestions about delaying trial and replacing them with compliance measures (Hilf 2018). Arguments are often brought forth that such alternative dispute resolution actually benefits all parties to a dispute more than punishment would. This might be the case because it lessens the costs of procedures, it makes restitutive measures more accessible for the victims, and it might actually remedy the structural causes of doing wrong. No matter whether we approve of such measures normatively, we need to ask what their implications are. I would venture the thesis that it affects power relations in legal conflicts; that it privileges "the Haves" (Galanter 1974) because often in a compromise, a deal, the weak lose out. Kristin Bergtora Sandvik also interprets the legal victory of Dennis as a case in which the 'Haves' did not win – which they would have, had they settled out of court: their denial of binding obligations of their duty of care would have been affirmed, while Dennis's victory transformed the duty of care into a more binding obligation.

Those engaged in processes of the juridification of their moral claims onto others operate with the assumption that chains of causation reach far and wide, but that the differently positioned participants in these chains of distributed agency can actually be identified rather precisely in all their complexity. Thus, they oppose the tendencies of the dissolution or fragmentation of responsibility generated by the complexity of distributed agency; nor do they grade all forms of participation equally. Rather, they insist that many more forms of partaking in circumstances entails "causation" or

enabling, and therefore also contain more responsibility (see also Shklar 1990) than is currently admitted. They reflect that it is diverse deeds that make suffering occur, that those who could have but did not prevent the case as when they negate on their duty of care should also be held legally liable. Thus, capacity to prevent, to aid and abet, to help or to remedy, gain a new significance in attributing responsibility. It seems to me that this also means putting power relations entailed in a situation of harm or damage at the centre of negotiations of liability.

In these processes of juridification, moral obligations turn into legally binding obligations, transgressing the existing limits of liability and culpability; they thereby shape legal institutions to accord more clearly with the perceptions of connection, causation and obligation in an entangled world. However, such drives to expand our socio-temporal conceptions of responsibility and liability do not go uncontested: while conceptions of complicity, aiding and abetting might be expanded in some fields of law (especially security related ones), the efforts of widening our attention to those who enable situations of harm to develop often meet with countermoves that advocate for restrictive notions of liability, or altogether softer notions of obligation, as mentioned above. In order to understand the patterns of changes in relating liability to causal and moral relations in different legal fields, legal ethnographic studies, which and draw on the conceptual debates within and across legal anthropology, legal sociology and the anthropology of the state and reconnect their methodological legacies, are well suited. They are particularly equipped to explore the complex effects, which legitimacy, visibility, economic power, and alliances have on the dynamics of changes in the understanding of ‘connection’ in current conceptualisations of liability and legal responsibility.

References

Clarke, Kamari. 2010. “Rethinking Africa Through its Exclusions. The Politics of Naming Criminal Responsibility.” *Anthropological Quarterly* 38 (3): 625–651.

Eckert, Julia and Brian Donahoe, Christian Strümpell, and Zerrin-Özlem Biner. 2012. “Introduction: Laws Travels and Transformations” In *Law against the State: Ethnographic Forays into Laws Transformations*, edited by Julia Eckert, Brian Donahoe, Christian Strümpell, Zerrin-Özlem Biner, 1-22, Cambridge: Cambridge University Press.

Fassin, Didier. 2012. *Humanitarian Reason. A Moral History of the Present*. Berkeley: University of California Press.

Galanter, Marc. 1974. “Why the “haves” come out ahead: speculations on the limits of legal change.” *Law & Society Review* 9 (1): 95-160.

Hilf, Marianne. 2018. “Too big to Jail?” Paper presented at the Berner Forum für Kriminalwissenschaften, Bern, November 13.

Kirsch, Stuart. 2001. *Property Effects: Social Networks and Compensation Claims in Melanesia*. *Social Anthropology* 9 (2): 147-163.

Nader, Laura. 1999. “The Globalization of Law: ADR as "Soft" Technology.” In *Proceedings of the Annual Meeting (American Society of International Law)* Vol. 93, 304-311.

Pottage, Alain and Martha Mundy, eds. 2004: *Law, Anthropology and the Constitution of the Social; Making Persons and Things*. Cambridge: Cambridge University Press.

Shklar, Judith. 1990. *Faces of Injustice*. New Haven: Yale University Press.

Strathern, Marilyn. 1996. “Cutting the Network.” *Journal of the Royal Anthropological Institute* 2 (3): 517–535.

Wilson, Richard. 2009. “Representing Human Rights Violatons: Social Contexts and Subjectivties.” In *Human Rights: An Anthropological Reader*, edited by Mark Goodale, 209–228. Blackwell: London.