Durkheim in World Society: Roger Cotterrell's Concept of Transnational Law.

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Introduction

I want to take up two issues from Roger Cotterrell's book that have been of central concern in my own attempts to grapple with law's social transformations (Eckert et al 2012). One is his discussion of the relation between moral norms and legal norms, and more specifically his reading of Durkheim. Cotterrell takes up Durkheim in order to explore "law's moral meaning, not in a philosophical sense, but in terms of the empirically identifiable conditions of co-existence of individuals and groups in a certain time and place; that is, in the circumstances of a particular kind of society at a particular point in its historical development," (2018, 174). At a historical moment when many struggles that concern fundamentally moral obligations are fought via the law, it is very timely to explore law's moral meaning anew.

The second aspect is Cotterell's concept of transnational law. He insists in particular on the "need to think about law in radically new ways: Emphasising the creation of norms and authorities in 'bottom up' processes of negotiation and consensus formation" (ibid., 110) and the "revision of the whole idea of 'legal' expertise" (ibid., 117). This appears superbly promising for empirical socio-legal research in our current world, as does his approach to law's moral meaning. I want to bring these two aspects of Cotterrell's thought together – because there seems to be a problem with Durkheim in world society.

Law's moral meaning

The connection made by countless people between morality and law – i.e. the claim that a) law should be moral and adhere to moral norms, and that b) law is a means of furthering particular moral concerns – cannot be ignored, as we do in our research when we posit either a

fundamental difference or a pragmatically and ethically necessary distance between law and morality. What I have elsewhere called the juridification of protest (Eckert et al. 2012) is also a juridification of moral indignation, of moral claims, and an attempt to re-align law and morals as they are perceived by those protesting. 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. Fundamentally, all of them concern the moral claims that we can make on each other because of our deep entanglements and our intricate relations in world society. Thus, they endeavor to re-moralise the global economy, to struggle not merely against the loss of certain entitlements that inhered in an older moral economy, but for a new moral economy, in which our (economic) relations are matched by obligations of care and liability. Many attempt to employ legal norms in their struggles, thereby engaging in processes that negotiate law's meanings to possibly shape or even produce transnational legal norms.

At times the moralisation of global social relations can substitute for legal obligations, moving responsibility from obligation in the direction of mercy. This is what Didier Fassin (2012) has identified as the rising significance of affect in politics in the era of humanitarian reason. An affect-based moralisation, such as Fassin (2012), Bornstein and Redfield (2012) and others have stressed, often covers over the structural causes of suffering, and in doing so, turns our expressions of mutual obligation into matters of charitable gesture. Central to struggles over a juster world society is the attempt to bindingly regulate societal fields that have seemingly been de-regulated in the course of the liberalisation of the world economy, but which are better described as being shaped by regulations which limit mutual obligations to very narrow spheres of social relations, disconnecting them from the factual interdependence that entangles us in world society not only economically. The struggles that employ (also) legal means aim at establishing binding obligations that reflect these wider relations of interdependence. They claim that our factual entanglements give rise to moral obligations that we have towards each other, and they attempt to make these binding thereby establishing an intricate relation between morality and law.

Hence, in these (moral) contestations around emergent institutions of legal responsibility in international law - be it in international criminal law, environmental law, or institutions of liability and tort as in all struggles for corporate legal liability – the question arises as to how the social perception of global interdependence and entanglement and possible resulting claims to responsibility transform existing legal concepts. In contestations where legal norms are both a means and an end, moral and legal norms inform each other. They are often synthesised in the process, blurring seemingly fixed boundaries between different normative orders and

creating processes of what Santos (1995, 473) called interlegality. Interlegality is not what comes out of solving conflicts of law; rather it is triggered in normatively plural situations. Interlegality means the effects alternative norms and normative orders have on each other by mutually informing interpretation and meaning. Roger Cotterrell hints at that when he writes that "transnational regulation does not operate […] in terms of bounded regimes" and that we should rather think of "a complex normative web of indefinite and changing shape." (2018, 126-7) Here, norms inform each other either by being posited as comparable equivalents or as invalid others. Each norm is thereby related to the others. They are relational not solely in terms of the positioning of normative orders, they are also relational in terms of their very meaning. Such processes of mutual information propel normative processes, and novel meanings emerge. Thus, if we ignore the moral meaning that law has in these (only partly) legal struggles, I suggest that we also lose possibilities to refine our theories of legal change and the emergence of norms. Not only would it be empirically thin, it would be theoretically unproductive to dispense with the question of the relation between moral and legal norms.

The transnational law of communal networks

But can we explore law's moral meaning in struggles over our entanglements in the way Durkheim conceptualised the relation between law and morals? Cotterrell writes that, for Durkheim, "morality is not just what people think in a given time and place. Sociologists can also point out what is morally (and legally) appropriate for societies of *a certain type* and this depends on a sociological understanding of what is needed to ensure their integration or cohesiveness" (2018, 173). Now, if it is hard to imagine how one would identify, for transnational law, "the value system that, *for sociological reasons*, Durkheim argues must be a foundation of all law in modern complex societies" (ibid.), it is even harder to see how sociologists would identify the appropriate morality that would ensure integration and cohesion in world society. Are particular moral norms necessary for an integrated cohesive world society? What legal norms would ensue and which morality would support them? It appears to me that Durkheim's approach fundamentally depends on his conception of society, in which the sum is necessarily something other than its parts, and conflicts between parts cannot be perceived as productive. Durkheim's disregard of the structures of difference beyond the organic solidarity of the division of labour seems to make it impossible to transfer this conceptualisation of society into world society.

Cotterrell introduces the notion of "negotiation" as central to his concept of transnational law, which seems productive for exploring the relation between moral norms and legal norms in

processes of normative change. Yet, any notion of negotiation necessitates a concept of conflict, since what is negotiated are diverging positions, goals or procedures; negotiation is one way of dealing with conflicts, and arguably a productive one for changing societal institutions. Cotterrell's attention to negotiation as productive of new norms stands in tension to Durkheim's functionalist focus on systemic integration and stability, in which this potentiality of conflicts for generating institutions is not explored, and seems more akin to conflict theoretical positions, with which we can explore conflicts for their productive and transformative potential. It is precisely this norm generating quality of negotiations that interests Cotterrell: If transnational norms, or norms more generally are produced in negotiations, conflicts are central to normative development.

In order to go beyond a Durkheimian concept of society, Cotterrell introduces the notion of communal network. Communal networks, he stresses, "need to be seen as much more varied, flexible, fluid, and changeable than is envisaged in most appeals to 'community'" (ibid., 113); they can be based on instrumental association, belief, affect or common tradition (ibid., 113).[1] „All relations of community are based on a degree of *mutual interpersonal trust* among their members" and "all have regulatory needs (for 'justice' or 'order' […] that may or may not give rise to law [...]" (ibid.).

The role of such communal networks in the emergence of legal norms is reminiscent of what Robert Cover has called jurisgenesis. Cover theorised law as a social construct that takes place through interaction and develops within a normative universe. This normative world 'is held together by the force of interpretive commitments – some small and private, others immense and public. These commitments – of officials and of others – do determine what law means and what law shall be' (Cover 1992, 99). In Cover's words, the production of 'legal meaning, jurisgenesis, takes place always through an essentially cultural medium. […] [T]he creative process is collective or social.' (ibid., 103). Cotterrell considers in a more empirical way the actual norm-generating activities that arise from specific regulatory needs in varieties of communal networks. Therefore, his concept seems extremely useful for coming to an empirical understanding of how transnational law is made. Community conceptualised in this way certainly promises a solution to Durkheim's problematic concept of society insofar as it

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[1] What is missing here, it seems to me, is place – a central ground for a community, like a city. Such places of *shared concerns* have been extremely important in re-defining community and membership criteria from commonality to coexistence. It is mentioned by Roger Cotterrell under 'shared tradition' as locality, but localities – especially heterogeneous ones such as cities - are not necessarily made by shared traditions alone, but are also, and possibly primarily made by shared conflict and problem solving.

theorises different grounds of "integration" and does not presuppose a bounded society, as Durkheim does.

However, concepts of 'community' and even "communal networks" thought of in this way raise two new problems that might impinge on a full understanding of the processes of making transnational law in bottom up negotiations amongst communal networks. One is the empirical question of how fully we can understand the processes of emergence of transnational norms if we do not explore in our analysis the conditions and effects of power differentials, even in terms of the question of 'charisma' in a global public. The second is the normative question about representation and democratic voice, namely, in forming a communal network to shape these norms: how can transnational norms take into account the concerns of those who, for whatever reasons, cannot voice their concerns themselves?

Who is a communal network?

First, is it enough to explore transnational norms "within" communities, or even within communal networks? Is transnational law not shaped also by the confluence of concerns of different, even antagonistic communities linked (or entangled) by shared but unequally distributed effects of global chains of interaction? And does not reflecting on precisely the relation between moral norms and legal ones force us to consider regulation that might be developed *within* a communal network, as well as its relation to, and impact upon the passive agents to whom it applies, but who did not participate in its development? The specific regulation of an issue within a communal network of concern potentially impacts many others. For example, any regulatory 'compound' will also regulate relations with the "outside", with those who are not part of the communal network (where internal needs for regulation are met). In order to solve this problem, Cotterrell (2018, 138) calls us to examine "processes of negotiation and conflict-resolution between communal networks," which he deems necessary to the creation of institutional frameworks for managing the coexistence of transnational regulatory regimes. Apart from questions of who is to create a meta-framework to manage conflicts between communal networks, and how would a meta-framework arising from such negotiations reflect asymmetrical power relations among the individual networks, their different alliances etc., a legal anthropology perspective demands that we also account for the fact that *not all of those concerned, or "affected", can be usefully conceptualised as communal network*. Some groups might lack the potential or capacity to form a network, *to organise* in a more old-fashioned way, or even to react to the norms emerging from a communal network organised around a specific issue. Several questions remain even for groups with no formal

membership and no border policing, as described in Calliess and Zumbansen and (2010), for example, which Cotterrell refers to: What conditions are necessary for forming a communal network? What conditions are necessary for access and participation? If not membership or expertise, what are the prerequisites for participation or voice?

Charisma

Cotterrell's chapter on transnational legal authority explains vividly how the authority of law today is based on charisma (Cotterrell 2018, 130), rather than on legal rationality (alone), and how charisma derives from expertise (ibid.). But what counts as expertise, and who can attribute charisma to an expert (seeing that charismatic authority, if we go along with Weber, is in the eye of the beholder)? Cotterrell is well aware of these questions: "Also often unclear is what counts as 'expert' in standard setting." It "may depend on how far these bodies enjoy respect for their (not necessarily legal) expertise or on the basis that they adequately represent the participants in the networks of community they purport to regulate." (ibid., 117) Since the legitimacy of expertise is based less and less on (state)-sanctioned certification, we move towards "respect" and "representation" to signify charisma. So the question is: Does charismatic authority arise from expertise, or is charisma attributed – today – mostly to what is also attributed expertise? But by whom?

Maybe it is helpful to return to Max Weber, for whom the prototype of charismatic authority was the prophet. The prophet breached the teachings of the priests – the experts, so to say, who held not necessarily mere traditional, but also rational-legal authority. Therefore, it seems productive to complicate the relation between expertise and the notion of charismatic authority: If heterodoxy is the hallmark of charismatic authority, for forms of expertise to attain charisma, they need to project heterodox visions; moreover, heterodox normative suggestions that do not hold the attributes of expertise might also gain charisma.

The increased relevance of charisma in processes that "make" transnational law obliges us to consider the conditions under which charisma (as the perception of expertise) and authority become possible. While one might argue that legal authority is based on what Weber termed legal-rational legitimacy, in fact, it is based as often on traditional legitimacy. The observation that legal innovations need to rely on the perception of their charismatic authority, or increasingly do so, is convincing, particularly in fields where existing regulation is inadequate for the current challenges of interaction, as in the examples that Cotterrell discusses. Since transnational law emerges not only in fields hitherto seemingly un(der)-regulated, but arises also from attempts to re-regulate fields perceived to be regulated in an manner that does not

accord with moral expectations, a more urgent question is which normative innovations are attributed charisma – and which fail to attain charismatic legitimacy, and why. This, I would venture, might be less a matter of substantive content or functionality, than of `connection capability` or connectivity. Such connectivity is probably strengthened by the reference to existing norms and procedures and by the existence of pre-established networks that have already agreed upon a shared language. Thus, connectivity has a cumulative or self-reinforcing effect.

What conditions enhance the possibilities of expertise, of voice and visibility in "global public opinion", and through what processes are these attributes distributed? In question are the possibilities of "reverse translations", which Harri Englund (2012) and Stuart Kirsch (2012; 2018) have explored, in which normative projects and heterodox institutions establish themselves as "debatable" in a communal network or beyond, in a public. Let us go back to the social movements mentioned above, which struggle in myriad ways and often employ legal means to further their visions of a just world. One example, the notion of *buen vivir* (good living), is particularly striking. *Buen vivir* advocates a holistic and harmonious relationship between mankind and nature, and appears in various political agendas such as interculturality, sustainable development and climate responsibility. While the concept is normally considered to have originated in indigenous worldviews in South America, in current public debates its main representatives come from very different social, regional and professional backgrounds, including indigenous activists, environmental or development agencies, as well as (left-wing) academics and politicians. It has been included in the Ecuadorian constitution (Affolter n.d.), and adopted by environmental movements across the globe.

Why did the notion of *buen vivir* successfully inspire radical alternative suggestions for the global regulation of human-non-human relations, whereas other moral norms remained tangential to this debate? How did this notion gain such charisma, and travel in such diverse contexts? Is it that local environmental perceptions attract considerable international attention if articulated in terms of (postcolonial) indigeneity (as they are in Latin American contexts), but less so if articulated in agrarian−animistic terms (e.g., Africa)? This might be because the term indigeneity is already formalised in international law (in the form of the ILO convention 169), and has been widely used in diverse fields for diverse purposes; it is a container concept with greater connectivity than diffuse agrarian-animistic terminologies and cosmologies.

This points at the complex processes of attributing charisma, 'charismatisation' so to say, in which novel norms or interpretations gain authority and are "translated", in the language of

Latour (1986), and propelled to significance by numerous and diverse translations. Therefore, it is crucial to study these translations and the selection processes amongst specific communal networks, particularly political arenas and policy forums, where some normative suggestions gain traction and others disappear from the debate. Such negotiations between differently positioned networks, such as "local people" and social movements (formed communal networks), among different social movements, and between these groups and international bodies are central sites of normative change. They have an amplifying effect, because existing models are adopted to connect new concerns to a dominant language of legitimate obligation.

Transnational law may be conceptualised and demonstrated as emerging from bottom up processes of negotiation and consensus formation, but it is not a domination-free discourse (Habermas 1984/87) within or between communal networks, as Cotterrell (2018, 111-2) points out. It is structured by existing norms of how to relate to others, by capacities to connect, and by the sometimes volatile possibilities of visibility and charisma. For a thick theory of the emergence of transnational law from bottom up negotiations, we need to take into account how specific networks are empowered, how they form alliances that give them a privileged position to project relevant expertise and assert authority, that is, how they attain charisma.

Organising

This analysis of the cumulative effect of the attribution of charisma in negotiations of transnational norms, i.e. the relations of power within and among communal networks, points to another, even more fundamental issue: as indicated above, we need to ask, who can actually form a community and what might hinder their association. In his treatise on power, Heinrich Popitz (2017) has shown very clearly how specific positions can enable or disable association or collective action. This depends upon whether ingroup solidarity among many disempowered people can be sustained once they obtain a position of power, where the many must themselves compete for a few privileged positions (ibid.). Tania Murray Li discusses in a different vein how mobilisation is disabled, how potential "connections are not forged; and individuals do not organise with others who share their fate." (Li 2019, 30). She shows how some are silenced when forces that disempower or impoverish them are embedded in deeply entrenched common sense understandings of the necessity of particular social relations. As I mentioned above when discussing the lack of global charismatic potential of agrarian-animistic discourses, dis-articulation – in the double sense of the word – might also hinder association, i.e. lack of connection capacity stems from previous failures to form communal networks and develop a

shared language of obligation, or even a common conceptual vocabulary. In short: Most social theories attempt to explain why it is difficult for the disempowered to organise, and why forming a communal network is not 'automatic', and actually unlikely, especially when mobilisation does not concern one's own regulatory needs but tries to mitigate regulations that arise from the needs of others.

If we conceptualise transnational law as emerging from processes of negotiation and consensus making in and among communal networks – a good description of the empirical processes we observe – the capacity of people not only to access a network and participate in it, but also to form a new network, engage in negotiating and consensus making with others, and actually shape new norms, seems of central concern. The self-reinforcing effect of charismatic authority in transnational law possibly encumbers the articulation of those who do not form communal networks despite suffering adverse impacts from new regulative endeavours. If we limit our exploration to processes within and between such networks, we truncate the processes of negotiation from which transnational law emerges. From an anthropological point of view, a full understanding of the emergence of transnational norms using the communal network concept must also examine processes in which communal networks form to see who can achieve workable networks and why some developing associations remain disjointed and ineffectual.

Crime

This conceptualisation of transnational law brings particular problems to the field of criminal law, and Roger Cotterrell addresses this directly. At first 'crime' is "what the state (or some international agency authorised by states) declare it to be through law" (Cotterrell 2018, 141). Therefore bottom up or "popular" (ibid.) negotiations about how to regulate or even define crime have a different character than the examples from private law that he refers to in conceptualising transnational law. The problem Cotterrell poses is that there is an "increasingly felt need to apply ideas of crime coherently across and irrespective of national boundaries. […] Cultural authority (the authority of popular ideas arising in everyday social life) to shape the concept of crime may have new significance as the political authority to shape it becomes less clear" (ibid., 142). Returning to Durkheim, Cotterrell posits that "as ideas of crime become transnational, cultural authority must be found for them if they are to be coherent and meaningful" (ibid.). But the problem is not normative pluralism, where some communities do not adhere to Human Rights, or the fact that few notions of crime span the globe. The issue is, rather, that "no meaningful concept of crime could encompass all kinds of popularly recognised

harms, injustices, or infringements of rights" (ibid., 150). This is so. Even though Cotterrell (ibid., 148) states that "some ideas of human rights and human dignity are acquiring relatively stable meanings and can thus inform criminalisation," the problem is not lack of adherence to Human Rights norms, but what can be considered under Human Rights as a violation of an individual life.

There are forms of suffering that today cannot be thought of, or addressed legally as a crime. As Cotterrell himself says, violation of an individual life might be considered to encompass "poverty, racism, sexism, imperialism, colonialism, and exploitation" (ibid., 150). But he quotes Jeffrey Reiman to say that individual responsibility is basic to most contemporary ideas of crime (ibid.); therefore, diffuse types of wrongs or harms of 'non-point sources' are not addressed in criminal law. Indeed, this is so and there are good reasons for it, reasons related to the specific rules of modern criminal law and its focus on punishment.

So the question becomes, which harms and injustices in a transnational arena are perceived as crimes from a `popular authority` perspective, and how do they gain charisma and authority?

Here the problems addressed above become acutely visible, namely, the differential possibilities for participation in norm-generating communal networks, and the differential possibilities for speaking out in such a network or to a global public. All attempts to present violations of individual lives that somehow exceed, escape or jar with current criminal law and its punitive possibilities are difficult to articulate, harder to make pointed, and seem to lack connectivity. A Durkheimian perspective positing that "it is because a wrong is viewed as sufficiently serious to threaten the order or security of the entire communal network" (ibid.), cannot plausibly or thoroughly explain why only some forms of "serious social harm or injury […], or the creation of danger, significant risk, or insecurity to individuals or society" (ibid., 149-50) are criminalised, while producing and selling weapons, building coal or atomic power plants or novel technologies with high risks to health and the environment, or simply speculating on agricultural products, housing or land, etc., are mostly legal despite the danger, significant risk, or insecurity they pose to individuals or society – and are identified by many as creating serious social harms.

A Durkheimian perspective, focussing on what is `popularly perceived` as producing serious social harm or injury, danger, significant risk, or insecurity because it is "a threat to the way that social life […] must be organised", cannot question processes (of negotiations of communal networks) in which such perceptions first arise, and why criminalisation follows some of these perceptions, but not others. By positing a necessary connection between popular perception of

crime and social organisation, it cannot address the negotiations that lead to a specific selection of acts and result in their criminalisation.

Empirically we observe that many people do identify individuals' choices as causing – sometimes cumulatively – wrongs that are relegated to the seemingly unchangeable realms of structure, or to specific groups that cause harm. People do identify individuals as causally or ethically responsible for "diffuse" wrongs that are clearly and entirely manmade. There is no necessity to exclude poverty, racism, sexism, imperialism, colonialism and exploitation from questions of responsibility. In fact, the entanglements of world society challenge us to reconsider the distinction between "responsibility" and "root causes" that Susan Marks (2011) once addressed. Current legal conceptualisations of individual responsibility seem to jar with contemporary entanglements in world society. Hence, rather than simply positing a distinction between responsibility [2] and root causes, we need to understand, where the line between responsibility and structural explanation is drawn and by whom, that is, by what communal network(s), and how lines of distinction might shift.

Conclusion

Contemporary struggles over law and morality place these questions at the forefront of the analysis of transnational law and its moral meaning(s). The question of which moral norms can or cannot be mobilised and "connect" with others to gain visibility (and possibly authority), which "communities" can or cannot participate in negotiations, or which positions can or cannot be articulated in a communal network seems essential if we want to explore the development and formation of transnational law as a bottom up process, *too*. Not all conflicts about norms are necessarily resolved. Resolutions can take very different forms, as asymmetry in the potential for participation will necessarily shape negotiations. Therefore, we need to consider not only inter- or cross-community 'negotiations', but also the asymmetrical positions from which better or more poorly integrated communal networks participate in such negotiations.

From a perspective of legal anthropology, a theory of the emergence of transnational law needs to take into account a) the processes of emergence of communal networks, and b) less "integrated" efforts to engage with emergent regulation: The silencing of poorly integrated, less vociferous, less charismatic and therefore less authoritative contestations is in itself one of the

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[2] I am not arguing that we should replace notions of individual responsibility with those of collective responsibility. Rather, I think we need to address our narrow notion of individual responsibility that has its rationale in punitive criminal law (because punitive criminal law narrowly conceptualises individual responsibility in order to make possible the safe-clauses in criminal law necessitated by punitivity).

aspects that interests us about the normative negotiations from which transnational law emerges. Thus, we need to analyse the structures and patterns of the possibilities of forming a communal network and participating in these conflictive negotiations, in which new moral economies are struggled over. This entails establishing the parameters of the different grounds of domination, those founded in existing legal structures, but also the effects of epistemic power for the possibilities of heterodoxy. Then we will get a "thicker description" of the processes shaping regulatory regimes in a thoroughly entangled world society.

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