CONCLUSION: THE MICRO-FOUNDATIONS OF ADVERSARIALISM

This legal ethnography was a journey to the heartland of adversarialism: to the land of, in Kagan’s categories, “formal legal contestation,” “litigant activism,” and “substantive uncertainty” (1994:3 sq.), where a “weak centre” and “two competing and fact-finding parties” provide the grounds for the “democratic deliberation of the decision” (Kagan 2003:3). However, the destination was not what legal or political scholars would expect it to be. The journey did not lead the socio-legal ethnographer to all “policy arenas and administrative systems” of a country and its legal culture. I did not travel every area of decision-making, covering “policy-making, policy implementation, and dispute resolution by means of lawyer-dominated litigation” (Ibid.).

I approached the heartland of adversarialism by staying in Northwestern England. I visited one region, one law firm, one Barrister’s Chamber, and two Crown Court centres. How could I then elaborate on adversarialism? Different to Kagan and his followers and critiques, I approached the very details of law-in-action, of casework and its procedure. This movement to the micro-foundation resembles a methodological manoeuvre that produces peculiar objects of study. Instead of quoting from ‘major’ statutes or programs, the author analysed ‘minor’ cases, file notes, protocol excerpts, jottings, and field observations. By turning to the micro-level, to case-making and its materials, I circumvented certain presumptions: for instance, that one pattern is at work throughout all aspects of legal culture, no matter whether criminal or civil law, legislation or administration, low court or high court.1 By turning to the micro-level, I encountered a confusing nexus of moments, techniques, and tactics – all dedicated to case-making at its procedural stage (not to law or legal norms as such). From within, something like the English legal system or the adversarial culture looks like being differentiated in procedural regimes, each procedure

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1 The big picture forces Kagan to elide differences within the ‘more or less’ homogenous legal culture: “Adversarial legalism is not uniformly distributed throughout the American legal order. Some policy arenas and administrative systems are rather free of litigation and the threat of it. Some communities, subcultures, and industries disparage and eschew legal contestation” (1994:5).
demanding different moves. In this view, what appeared as a demarcated legal culture or system seems no longer separated from other ‘patchworks’, meaning from other cultures or systems.  

This ethnography is small in scope. I restricted my interrogation of adversarial case-making to one procedural regime: the English Crown Court. I reconstructed procedural (discourse) practices from one position: here, putting together a case for the defence (see chapter III for the only exception). These specifications did not, as one might expect, lead to a clear-cut picture of the workings of adversarialism, its rationale, its efficacy. The opposite is true: the narrowed view allowed the local ‘jumble’ back in. The narrow focus allowed for a ‘thick description’ of what is going on where and when in the procedural course and certain cases.

I allowed myself another twist that may take aback socio-legal scholars for whom law-in-action is synonymous with evaluation or interpretation. I did not examine whether the law is applied precisely; I did not restrict the status of law to a situated interpretative task. The study of case-making diverts from these paradigmatic versions of law-in-action in that it focuses on the activities, methods and resources that are necessary to contribute to and participate in this procedure. This ‘tight’ context allowed my research to move closer to the actual circumstances and to grasp nuances, such as the defendant’s hesitation to contribute, the emotional work of the solicitor, or early ideas and their failing. This book demonstrates how case-making involves events and processes, how its interim results turn into circumstances for subsequent events, and how this historicity creates awkward speech positions, especially, but not exclusively, in court.

The empirical cases – the alibi-case (chapter I), the “I was not ready yet”-case (chapter V), the sleep-walking-case (chapter III), the unregretful murderer-case (chapter VII) – together with the conceptual sites – event/process relations (chapter II), file-work (chapter IV), resources (chapter VI), case-signs (chapter VIII) – revealed, I conclude, different mechanisms of case-making. The participants serve, operate, and utilize the mechanisms to their best knowledge(s). Knowing how to control the mechanisms and knowing where and when control is infeasible, distinguishes lawyers from laypeople, experienced from inexperienced participants.

2 The legal comparativist, David Nelken, criticized “Kagan’s insistence on putting U.S. law into a class of its own” (2001:813) and his denial of any differences in degree.