CHAPTER ONE

COMPARABILITY ON SHIFTING GROUNDS: HOW LEGAL ETHNOGRAPHY DIFFERS FROM COMPARATIVE LAW

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Comparing Comparisons

Law is more than a set of rules or norms. Law does not just reside in courts, police offices, or law firms. Law, this is a lesson from post-modern legal anthropology and sociology, gains force *inter alia* through a number of social mechanisms that merge accounts, rules, and judgments. This chapter links up to the newer law-in-action concepts—and it does so not in theory but in light of research strategies that emerged in an ethnographic research project conducted in criminal courts and small law firms in the USA, England, and Germany.

Three ethnographers, including the author, followed around lawyers in their everyday work. Each researched the legal archive, the case files, and the court’s protocols for discursive regularities, here especially for careers of argumentative stories and for the development of winning cases. Each prepared temporal maps and data logs in order to keep track with the careers of what later became fully fletched witness statements, plea bargaining agreements, or reasoned judgements.

One point of departure of this concerted ethnography seemed rather conventional from a (German) sociology of law perspective, and rather odd from an ethnographic perspective. The lead researcher, the author, chose Luhmann’s sociology of law as an analytical frame; here especially his idea that law operates by procedure or procedural systems. Why Luhmann and why “legitimisation by procedure”? According to Luhmann, each procedure organises its case material in light of its ending, the unavoidable but still open judgement. Procedure

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1 The two others, Kati Hannken-Illjes and Alexander Kozin, are present in this volume as well, which allows the reader to gain a comprehensive picture on the overall project and its different takes on law-in-action.
renders cases determinable not just by collecting information about what happened, but by confronting any contribution by a party with its preceding contributions. Procedure urges the parties to practically confirm earlier contributions, while at the same time, recovering or improving ‘imperfect’ features in order to positively influence the outcome. Procedure, thus, produces a constant urge for the participants to provide more case materials and to engage with the legal matter. This is the point where the notion of “binding” and “being bound” played in. The procedural mechanisms make participants contribute and bind them to these contributions in due course. Binding makes each party commit itself to its case (against the adversarial case) or to its version (of the inquisitorial matter) throughout the ‘promising’ and ‘demanding’, that is, yet undecided procedure. What is more, procedure involves the conflicting parties while increasingly containing the conflict. The ‘outer world’, e.g. friends, neighbours, colleagues, is less able and willing to follow the increasingly detailed and self-serving contest. Procedure thus operates exclusionary. This effect lies at the heart of procedure and at the heart of law’s functioning in society. This system theoretical concept of “legitimisation by procedure,” however, seems a rather thin description of what law actually does to conflicts and their parties.

How can this functionalist version of the “force of law” gear a group of ethnographers towards thick comparison? How can “binding” elicit comparison that stays close to the mundane details of law-in-action? How can this mechanism inform a comparative perspective across various fields? This chapter sketches how a general concept (“binding”) affords comparability without betraying the ethnography’s demand for thickness. As a result, thick comparison could show how procedural regimes involve defendants, witnesses, and victims differently. The regimes engage different modes of participation. What is more, they articulate criminal cases largely differently. In essence, each procedure engages its own mix of binding and unbinding and involves insiders’ knowledges and tactics to actually cope with these mechanisms.

Our comparative ethnography of criminal legal procedure used “binding” as a methodical reduction, a kind of pressure point, in order to produce comparability. However, the relation called “binding” is not an operational concept yet. In order to pinpoint it, we focussed on the relation of what we called “a first defence” (the initial response to an accusation) and the “last defence” (the version at the final procedural stages). We compared the availability and usability of the first