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Introduction: Legal Pluralism in a Globalized World

Janine Ubink*

This issue of the *UC Irvine Law Review* results from a symposium on legal pluralism, co-organized by the Commission on Legal Pluralism and the University of California, Irvine School of Law in August 2016. The Commission on Legal Pluralism was established in 1978 by the International Union of Anthropological and Ethnological Sciences (IUAES) and is affiliated with the International Association of Legal Science (IALS). The Commission aims to further knowledge and understanding of legal pluralism, with a focus upon theoretical and practical problems resulting from the interaction of different types of law, such as state law, international and transnational law, religious law, and customary law. Among its main activities are the organization of international symposia; the initiation and encouragement of Regional Working Groups in different parts of the world; and the organization and delivery of courses and summer schools on legal pluralism.¹

Legal pluralism is generally defined as the presence of more than one legal order in a social field.² It was a response to legal centralist ideology that law is and should be the law of the state and that other normative orderings are hierarchically subordinate to state law.³ The concept also reacted to the trend in classical legal anthropology until the 1950s or '60s to “edit out the state” in their studies that usually focused on small, isolated, untouched societies.⁴ Researchers approached the customary legal systems of these societies as autonomous legal systems, largely disregarding the colonial government and its actors; they were thus unconcerned with any interaction between state and local normative systems and the resulting

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1. See *Citizenship, Legal Pluralism and Governance in the Age of Globalization*, COMMISSION ON LEGAL PLURALISM, <http://commission-on-legal-pluralism.com/nl/home> [https://perma.cc/6JLK-6GVL] (last visited Mar. 21, 2018).

2. John Griffiths, *What is Legal Pluralism?*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 1 (1986).

3. Franz von Benda-Beckmann, *Who's Afraid of Legal Pluralism?*, 47 J. LEGAL PLURALISM & UNOFFICIAL L. 37, 37 (2002).

4. Keebet von Benda-Beckmann, *Noot 24: Rechtspluralisme*, in DE SOCIALE WERKING VAN RECHT: EEN KENNISMAKING MET DE RECHTSOCIOLOGIE EN RECHTSANTROPOLOGIE 740 (J. Griffiths ed., 1996).

complex normative structures.⁵ When legal anthropologists became more interested in the role of the state, their focus on disputes and disputing⁶ led them to overestimate the role of the state. They regarded customary law as an invention by the state, ignoring the fact that much law formation and application takes place outside of disputing and that customary law outside of the courts was much less influenced by the state.⁷ Today there is a much stronger realization of the different versions of customary law, including official versions such as judicial customary law and in some countries codified customary law, and the gap between these versions and the local lived or living customary law.⁸

In the decades following the introduction of the concept of legal pluralism, *étatists*⁹ continued to reject it on the premise that only normative orders emanating from the state could be considered law.¹⁰ Legal pluralists countered that for many people, in many places, state law is not the dominant normative order, and that people choose when to use which normative system and related fora.¹¹ As such, legal centralism is a construction or, as Griffiths says, “a myth, an ideal, a claim, an illusion,”¹² while legal pluralism is the empirical reality. They also argued that normative orders differ in degrees of institutionalization, specialization and sanctioning mechanisms, and that customary justice systems did not differ so fundamentally from other forms of normative ordering that any comparison between state and non-state normative ordering would be *prima facie* faulty.¹³ They thus argued that legal pluralism should be understood as a comparative-analytical concept and not as a juristic one.

The term legal pluralism was coined to put the issue of competing legal orders center stage. Originally, studies of legal pluralism focused on the relationship between state law and customary law in former colonies.¹⁴ Over time, there was a realization that legal pluralism is a characteristic of virtually every society. Studies of

5. *Id.*

6. MAX GLUCKMAN, *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA* (1955); *LAW IN CULTURE AND SOCIETY* (Laura Nader ed., 1969); LEOPOLD POSPISIL, *KAPAUKU PAPUANS AND THEIR LAW* (Human Relations Area Files Press 1964) (1958); Martin Chanock, *Neither Customary nor Legal: African Customary Law in an Era of Family Law Reform*, 3 INT'L. J.L. & FAM. 72 (1989); P.H. Gulliver, *Social Control in an African Society: A Study of the Arusha: Agricultural Masai of Northern Tanganyika*, in INTERNATIONAL LIBRARY OF SOCIOLOGY AND SOCIAL RECONSTRUCTION (W.J.H. Spott ed., 1963).

7. Keebet von Benda-Beckmann & Bertram Turner, *Anthropological Roots of (Global) Legal Pluralism 2–3* (June 21, 2017) (unpublished manuscript) (on file with author).

8. See OLAF ZENKER & MARKUS VIRGIL HOEHNE, *THE STATE AND THE PARADOX OF CUSTOMARY LAW IN AFRICA* (2018) (finding the difficulty this gap creates for state bureaucrats in various African countries).

9. *Étatism* is defined as control of the state over individual citizens. *Étatists* thus adhere to the legal centralist ideology that law is and should be the law of the state.

10. See von Benda-Beckmann, *supra* note 4, at 743.

11. *Id.* at 744.

12. Griffiths, *supra* note 2, at 4.

13. See Brian Z. Tamanaha, *The Folly of the ‘Social Scientific’ Concept of Legal Pluralism*, 20 J.L. & SOC’Y 192 (1993); von Benda-Beckmann, *supra* note 4, at 743–44.

14. See Sally E. Merry, *Legal Pluralism*, 22 L. & SOC’Y REV. 869 (1988).

legal pluralism now include such diverse fields as the New York garment industry,¹⁵ farmers and cattle ranchers,¹⁶ religious courts,¹⁷ sumo wrestlers,¹⁸ stand-up comedians,¹⁹ and slum dwellers.²⁰ Legal pluralism studies reject dualistic distinctions between state law and non-state forms of ordering in favor of dialectic analysis of their interrelations.²¹ It is individual behavior and processes of interaction, struggle, and negotiation within and between various social fields that determine what the law effectively is at a particular time and location.²² Terms such as semi-autonomous social fields,²³ interlegality,²⁴ vernacularization,²⁵ and hybridity²⁶ have been introduced to describe these interrelations.

General acceptance of the concept among lawyers and social scientists only happened at the end of the twentieth century, when the expansion of globalization and the proliferation of international and transnational law started to take on dimensions that clearly refuted the argument that nation-states are the only legitimate source of lawmaking.²⁷ As a corollary, opposition against the notion of legal pluralism within national legal systems and at sub-national levels also dissolved.²⁸

The symposium on “Legal Pluralism” brought together ten researchers based in North America who are working on legal pluralism from various disciplines, including law, anthropology, history, and political science. Five of the symposium’s articles appear in this issue. In the first, Pran *Justice: Social Order, Dispute Processing,*

15. See generally Griffiths, *supra* note 2; Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 L. & SOC’Y REV. 719 (1973).

16. See generally ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991); David M. Engel, *Legal Pluralism in an American Community: Perspectives on a Civil Trial Court*, 1980 AM. B. FOUND. RES. J. 425.

17. See generally Daphne Hacker, *Religious Tribunals in Democratic States: Lessons from the Israeli Rabbinical Courts*, 27 J. L. & RELIGION 59 (2011).

18. See generally Mark D. West, *Legal Rules and Social Norms in Japan’s Secret World of Sumo*, 26 J. LEGAL STUD. 165 (1997).

19. See generally Dotan Oliar & Christopher Sprigman, *There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787 (2008).

20. See generally Manuel A. Gómez, *The Tower of David: Social Order in a Vertical Community*, 10 FIU L. REV. 215 (2014).

21. See Merry, *supra* note 13, at 880.

22. Griffiths, *supra* note 2, at 36.

23. See generally Moore, *supra* note 14.

24. See generally BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION* 437 (2d ed. 2002); Andre Hoekema, *Rechtspluralisme en Interlegaliteit* (Jan. 2004) (lecture presented at Inaugural Lecture of University of Amsterdam) (on file with author).

25. See generally SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* (2006).

26. See generally HYBRIDITY: LAW, CULTURE AND DEVELOPMENT (Nicolas Lemay-Hébert & Rosa Freedman eds., 2017).

27. von Benda-Beckmann & Turner, *supra* note 7, at 4.

28. See Peggy Levitt & Sally Merry, *Vernacularization on the Ground: Local Uses of Global Women’s Rights in Peru, China, India and the United States*, 9 GLOBAL NETWORKS 441 (2009); von Benda-Beckmann & Turner, *supra* note 7. See also the other contributions in this special issue.

and Adjudication in the Venezuelan Prison Subculture, Manuel Gómez describes the internal ordering of social life by inmates inside a Venezuelan prison. The prisons of Venezuela are in a deep crisis. The perception is that the government has lost its grip on them and that this has turned them into highly dangerous places for inmates. The almost total absence of government oversight and the institutional disarray has enabled certain groups of inmates to expand the reach of their criminal networks to prison, and to establish powerful internal social and political hierarchies that rely on the pervasive use of violence as a mechanism of social control. Self-created norms, called the Code of the Inmate, govern all aspects of individual behavior and group interactions. These norms not only regulate the substance, but also the procedural vehicles to make rights and duties effective. While the prison culture emerges and operates in an environment that glorifies violence, discrimination, and other values that run against the official legal system, Gómez highlights that the inmates are interested in regulating their social dynamics, not because they want to resist or challenge the official legal system, but because they need to regulate their life behind bars and create certainty. The inmates' informal justice system mimics a highly bureaucratic order where concerns for due process, legitimacy, and community order are paramount. In fact, the inmates seem to have a higher regard for the due process safeguards in their own system than the ones offered by the formal legal system. While there is an absolute divorce between the official law and the Code of the Inmate, this shows that not all aspects of the Venezuelan prison sub-culture are negative, as the internal ordering by inmates regulates and safeguards the provision of goods and services as well as the maintenance of social order in prison. Counterintuitively, and contrary to generalized belief, criminal groups may thus reduce anarchy and create certainty among their members. Their main value is, however, to their members, not to society at large.

The second article, *FARC Justice: Rebel Rule of Law*, by René Provost, brings us to the neighboring country of Colombia. In this country, rebel group Revolutionary Armed Forces of Columbia (FARC) was a dominant presence in more than half of the country over long periods of time. In these areas, FARC has been involved in the provision of public goods, such as security, and the management of social issues, such as labor relations, commerce, family life, and taxation. One facet of this "rebel governance" has been the administration of justice. From a centralist perspective—seeing the state as the only authority to create legal standards—norms adopted by non-state armed groups cannot be labeled "law" and their dispute settlement institutions not "courts." While it is understandable that governments object to characterizations of rebel norms and dispute settlers in terms of law and courts—afraid that this may endow legitimacy on the rebel group—empirically, it is inadequate to regard state law as the sole or even as the dominant normative order in FARC dominated areas. Provost then turns to legal pluralism and its critique on centralism and extends this to the exclusive association of the concept of the rule of law with the state. He explores the malleability of the concept, with descriptions ranging from "thin" to "thick"

versions, and shows that the exclusive association of law and the state is recent and unjustified, “rooted neither in the concept of law nor in the idea of the state.”²⁹ Following legal pluralism’s stance that law is not, and never has been, a state monopoly, he argues that the concept of the rule of law can apply to state as well as non-state legal centers and processes, although its substance may vary with the context of the exercise of public authority to which it is applied. As such, rule of law applied to rebel governance would be substantially distinct from that applied to the state. He explores how international legal instruments in the field of international human rights law and international humanitarian law seem to underwrite this. Provost then defines four elements to a rebel rule of law: the administration of governance must be part of a broader system of governance; the application of rules must be stable and predictable; it must include some minimum elements of procedural fairness; and the administration of governance must be related to objectives of social justice. In defining the substance of rebel rule of law Provost does not aim to legitimize the cause of armed groups, but rather to have a yardstick by which to measure and criticize the practices of non-state armed groups and a tool with which to engage in dialogue with these groups to encourage them to alter their behavior.

In the third article, *Individual Choice of Law for Indigenous People in Canada: Reconciling Legal Pluralism with Human Rights?*, Ghislain Otis focuses on the choice people in pluri-legal societies have between different normative systems and their dispute settlement institutions. He distinguishes between the choice of personal status—where individuals from a certain ethno-cultural or religious community fully abandon their legally recognized status as a member of that group—and choice of personal law—where an individual can opt out of some specific community norms under certain circumstances. The article focuses on the latter and first shows that historically, there was no formal system of coordination between state law and indigenous law, due to the state’s indifference and hostility towards indigenous law. This changed with the 1982 constitutional recognition of aboriginal and treaty rights of the indigenous people of Canada and subsequent self-government agreements and treaties between the government and indigenous nations. These new instruments all offer individuals, explicitly or more implicitly, a choice of law. The purpose of choice of law is to ensure that indigenous persons will not be denied access to rights, programs, and benefits made available by the state to all Canadian citizens. During the colonial era, European colonial powers saw choice of law as an instrument to encourage colonized people to submit to the law of the colonizer, as “a vector for a gradual transition from a plurality of legal systems native to the territory to legal and political unity within the state system.”³⁰ Thus, choice of law was asymmetrical—people could move from indigenous law to the state law, but not the other way around—and was supposed to cause non-state law and

29. René Provost, *FARC Justice: Rebel Rule of Law*, 8 U.C. IRVINE L. REV. 227 (2018).

30. Ghislain Otis, *Individual Choice of Law for Indigenous People in Canada: Reconciling Legal Pluralism with Human Rights?*, 8 U.C. IRVINE L. REV. 207 (2018).

institutions to atrophy. According to Otis, this rationale for individual choice of law has lost much of its authority now that cultural and legal diversity are increasingly seen as worthy of protection. A new rationale for individual choice is found in the protection of human rights in indigenous societies. The human rights implications of choice of law have not, however, been rigorously examined. Otis examines how the choice of law is framed and what this means in practice in Canada. On the basis of that analysis, he concludes that the protection of human rights does not require choice of law in the case of Canada, because that protection is safeguarded in other ways, such as the fact that the treaties make indigenous governments and law-making authorities subject to the provisions of the Canadian Charter of Rights and Freedoms and that gender equality is provided for in the statute that gives recognition to aboriginal and treaty rights. As a result, legal remedies are already available to a person who feels his or her rights or freedoms have been infringed by indigenous authorities in the exercise of their powers under the treaty. Otis concludes that making indigenous law exclusive—not allowing individuals to opt out and choose state law—will strengthen the legal systems of the new indigenous authorities and further self-government of indigenous peoples. Individual choice of law is not necessary to safeguard human rights of indigenous individuals, although perhaps indigenous communities value access to state law for other reasons.

In the fourth article, *Global Legal Pluralism as a Normative Project*, Paul Schiff Berman urges legal pluralists to defend core post-World War II values by going from a descriptive enterprise to a more normative one, prescribing law, policies and governmental institutional designs that foster interaction and dialogue among multiple norm-generating communities. Berman first describes the birth of global legal pluralism from the insight that in the current, highly globalized world, not only the state, but also international and non-state entities, have law-making capacities. An emphasis on pluralism in the international sphere is useful to analyze hybrid legal spaces created by a set of overlapping jurisdictions. Additionally, it makes redundant the debate whether international law is really law given its limited direct enforcement power, through its focus on whether people perceive commands to be binding on them, and how these commands influence local power struggles and legal consciousness. It also recognizes the state as consisting of multiple actors and voices, with different and conflicting interests, beliefs, and ideas. Each of these actors can have recourse to the morality and power of international, transnational, and non-state norms in the contest for the development and implementation of certain state actions and policies. As a normative project, legal pluralism can focus on substantive or procedural questions, but Berman focusses mainly on procedural mechanisms, institutions, and discourse to manage pluralism. He aims to find a different road, one that does not need to kill off all competing interpretations of law by prescribing what the law looks like, and what it does not look like. This road lies in the middle between “sovereignist territorialism”—which renders outsiders and their normative orderings irrelevant—and the “universalist approach”—which requires people to be conceptualized as fundamentally identical to be brought within

one universal normative system. Berman then describes six institutional principles for evaluating the ways in which legal systems interact, which translate into six mechanisms for managing legal pluralism. He admits that global legal pluralism as a normative project may lose sight of the radical critique on the presumed power of official legal systems and may instead fall back on “liberal legality” in pursuing practical solutions. While this will entail limitations on the range of hybridity, the language used, and the sorts of arguments entertained, he posits that the end justifies the means. The protection of post-World War II values of tolerance and interrelation are at stake, and the introduction of some legal pluralism into the framework is better than none at all.

This volume concludes with Erin Stiles’ article, *How to Manage a Marital Dispute: Legal Pluralism from the Ground Up in Zanzibar*. Stiles draws on two years of fieldwork centered on marital disputes in Zanzibar, Tanzania. She builds on work that argues for the contribution of legal pluralism to studies of Islamic law and extends this beyond the confines of state-recognized institutions to other types of legal authority. She urges the study of legal pluralism from the ground up in order to assess how different legal actors—including lay people as well as institutional actors—perceive and approach the pluri-legal system and different forms of authority, and what they consider law and legally relevant in the handling of marital disputes. Stiles describes the role of three different authorities in the processing of marital disputes in Zanzibar, which are each associated with a different body of legally relevant knowledge and draw their authority and legitimacy from a different source. These include first the *wazee*, elders whose authority is sometimes seen as based on custom, sometimes as resulting from the religious requirement to respect the authority of elders, and sometimes simply as how things should be. Second, *sheha* are government-appointed community leaders, who are regarded as familiar with community norms, values, and standards. They do not have specific knowledge of religious law and try to help the parties to get to an agreement rather than impose a decision or solution themselves. They describe their own work not as specifically legal. The Islamic or *kadbi* courts form the third authority involved in marital disputes. These derive their authority from Islamic law but are also associated with the state, whose laws circumscribe their jurisdiction to family matters over Muslims, prohibiting them from applying Islamic law in its entirety. What is remarkable about the Zanzibari case study is that disputants do not engage in forum-shopping in the sense of choosing between the different normative registers and their institutional authorities. Instead, disputants engage the different authorities in a sequential procedure, from *wazee* to *sheha* to *kadbi*—all “regarded as tiered and compulsory steps in the widely agreed upon process of managing marital disputes.”³¹ Stiles posits that the flexible use of the term “sheria” in Zanzibar reflects the pluralism in the legal landscape. Although derived from the Arabic word

31. Erin E. Stiles, *How to Manage a Marital Dispute: Legal Pluralism from the Ground Up in Zanzibar*, 8 U.C. IRVINE L. REV. 275 (2018).

shari'a, in Zanzibar it is a more general word for law and does not necessarily mean religious or Islamic law. It is the suffixes—such as *sberia za kiislam* (Islamic law), *sberia za kanuni* (state law), and *sberia za mila* (customary law)—that determine the precise meaning of the word. The term *sberia* can thus be used to denote the rights and duties expected in marriage, whether resulting from Islamic legal ideas or from custom and community norms. Stiles describes several changes that have taken place in people's legal consciousness, including the weakening of elder authority. This weakening is connected to the loss of legitimacy of corporal punishment, which in turn is attributed to increasing Islamic education, and forms part of a larger shift in legal consciousness from a more customary means of handling marital problems towards one more inspired by Islamic legal norms. Despite the perceived change in their authority, elders still play a significant role in handling marital disputes, not as final authority, but rather because the *kadhi* courts respect their decisions and see their “contracts” as binding on the parties. This shows that while legal pluralism continues to define the legal reality of Zanzibari citizens, its specific constellation constantly shifts in form.

Taken together, these articles showcase the broad scope of the current field of legal pluralism studies. They range from discussion of legal pluralism at the sub-state level to the global level; transverse the normative registries emanating from states, international and transnational law, custom, religion, and other non-state orderings that are more (prisoners law) or less (rebel governance) “private”; and see a role for descriptive as well as normative approaches to legal pluralism. As such, this issue of the *UC Irvine Law Review* clearly displays that the field of legal pluralism has expanded and matured. From a field of study relevant exclusively to post-colonial societies regarding the interaction between state and non-state mainly customary, legal orders, legal pluralism has become more widely relevant, built on the recognition that “virtually every society is legally plural,”³² whether that society is defined at the national, sub-national or supranational level.

32. Merry, *supra* note 13.