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Pluralismo giuridico

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Pluralismo giuridico

a cura di Mariano Croce,

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Concetti, contesti, conflitti

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Il pluralismo giuridico è tema vecchio e nuovo a un tempo. Un tema vecchio, perché la natura plurale dell'esperienza giuridica sembra riemergere a ogni nuova crisi dello Stato, al punto che non sarebbe una forzatura né storica né concettuale sostenere che lo Stato moderno e tardo-moderno non è comprensibile se non come momento di una complessa dialettica che lo vede opporsi all'istintivo pluralismo del sociale: una dialettica per cui lo Stato tenta di ridurre e inglobare entro la propria (presunta) unità l'innata tendenza alla proliferazione delle pratiche sociali, per poi lasciarsi erodere dall'interno da quella irriducibile molteplicità, sempre troppo riottosa ai tentativi di uniformazione. Se lo Stato nasce infatti come superamento del particolarismo della modernità pre-rivoluzionaria, l'uniformità del suo diritto tardo-settecentesco e delle sue trasformazioni successive si è sempre nutrita di spinte idealizzanti, a dispetto delle grandi narrazioni, come ad esempio il nazionalismo, che pur hanno saputo produrre notevoli effetti sul tessuto sociale degli Stati europei. Di ciò è viva testimonianza la forza attrattiva dei grandi autori del pluralismo giuridico del primo novecento, oggi troppo spesso dimenticati, come Eugen Ehrlich, Santi Romano, Cornelis van Vollenhoven: proprio allorché la personalità dello Stato e la sua capacità di farsi garante di una sostanza etica comune sembravano profilarsi come la condizione di possibilità del sociale, costoro ne mostravano la natura eterogenea, precaria, storica, e facevano luce su una realtà sottostante che avrebbe nel tempo riscattato la propria autonomia.

Il pluralismo giuridico, tuttavia, è anche tema nuovo, perché nuove sono le sembianze che esso assume nel panorama storico e giuridico-politico dei nostri giorni. Il presente fascicolo intende mappare le dinamiche e vagliare i contenuti di

[1] La cura del fascicolo di *Jura Gentium* è frutto del lavoro comune dei tre autori. Annamaria Vassalle e Valeria Venditti sono le autrici della presente introduzione.

un dibattito che negli ultimi anni ha ricevuto un impulso decisivo dalle trasformazioni politiche, sociali e culturali dell'età globale. Nelle sue differenti possibili varianti, il pluralismo giuridico si presenta infatti come una possibile risposta alle sfide politiche e sociali del nostro tempo: dalla crisi dello Stato nazione all'emersione di nuove identità, dalle rivendicazioni delle minoranze etniche e religiose ai problemi connessi con l'integrazione. La proliferazione di studi sul pluralismo giuridico segnala evidentemente una tendenza in atto, negli studi politici, sociologici e filosofici, a riconoscere nel giuridico un terreno ineludibile sul quale misurare e risolvere i deficit delle democrazie occidentali e, al contempo, ridiscutere i paradigmi concettuali con cui l'Occidente ha pensato se stesso. Si tratta tuttavia di un complesso arcipelago di posizioni, di cui valutare punti di forza e criticità.

Fin dalle sue prime elaborazioni o anticipazioni nel secolo scorso, l'idea del pluralismo giuridico ha mobilitato le energie di intellettuali e studiosi afferenti a settori disciplinari molto diversi: dall'antropologia alla sociologia, dal campo giuridico alla scienza politica, dalla filosofia del diritto alla filosofia politica e sociale. Questo carattere multidisciplinare non può che costituire un'occasione preziosa di incontro e di comunicazione fra prospettive e metodologie diverse, per chi voglia affrontare le sfide della contemporaneità senza trincerarsi nei confini angusti della propria disciplina. Un'apertura, questa, che la complessità dei processi e delle trasformazioni in atto rende certamente necessaria.

D'altra parte, nonostante la multidisciplinarietà dell'approccio al tema, è senz'altro possibile individuare alcune nervature problematiche e concettuali che attraversano tutti i settori e le posizioni ascrivibili al composito paradigma del pluralismo giuridico. Comune è anzitutto la denuncia dei deficit costitutivi del centralismo giuridico, fondato sull'idea dello Stato come produttore unico del diritto e dell'ordine sociale e dunque, sul piano teorico, il riconoscimento dell'obsolescenza del paradigma statalista che ha dominato la riflessione giuridica e filosofico-politica degli ultimi due secoli. Alla monopolizzazione e alla centralizzazione della produzione giuridica, che ha costruito la narrazione sulla quale lo Stato ha legittimato il proprio potere dalla modernità politica fino ad

oggi, i teorici del pluralismo giuridico oppongono l'idea – descrittiva e prescrittiva insieme e variamente declinata – della moltiplicazione o pluralizzazione dei centri di emanazione del diritto.

La messa in discussione del monopolio dello Stato nella produzione del diritto apre la strada, inoltre, a una battaglia teorica circa i confini del *giuridico* e al suo rapporto con il *normativo*. Si tratta a ben vedere di una strada tutta in salita, che gli studiosi percorrono non senza forzature e aporie, e che sembra destinata ad essere risolta non tanto da definizioni univoche, quanto piuttosto da soluzioni contestuali. In generale, al pluralismo giuridico si deve non soltanto il riconoscimento della rilevanza politica e sociale dei sistemi normativi altri dal diritto statuale, ma anche la ricostruzione delle modalità con cui il *contesto* socio-culturale nel quale tali sistemi sono elaborati influisce sulla delimitazione e legittimazione di questi, condizionando la possibilità e/o la disponibilità dei singoli ad adeguarsi o meno ad un certo set di norme e a partecipare alla loro rielaborazione e trasformazione.

La problematizzazione del rapporto fra potere statale e diritto implica, su un piano più generale, un radicale ripensamento della relazione fra politica e società. Insieme all'idea di un diritto unico quale emanazione dello Stato, il pluralismo giuridico mette in discussione anche la concezione del politico come latore e impositore verticale di un ordine prestabilito sul sociale. Aprendo ad una concezione del diritto quale prodotto delle istanze e delle richieste che attraversano le realtà sociali, infatti, il pluralismo giuridico contribuisce a riorientare (in senso orizzontale) il rapporto fra politico e sociale. Da questo punto di vista, esso si inserisce a pieno titolo nel dibattito in corso sull'ampiezza delle prerogative dello Stato e sul suo rapporto con gli attori sociali, e in tale dibattito può giocare un ruolo cruciale.

Analizzare il pluralismo giuridico in ambito infra-statale, d'altra parte, consente di dare conto di una situazione radicalmente differente rispetto a quella che caratterizza il pluralismo a livello sovranazionale. Nel più circoscritto contesto nazionale, la riflessione pluralista è chiamata a evidenziare la superficialità di una comprensione del diritto come univoco (imposto dall'alto

verso il basso) e unigenito (procedente da un'unica autorità). Inoltre, una simile prospettiva localista guarda al medium legislativo nella sua funzione di raccordo tra azioni e norme di condotta, lasciando in secondo piano la funzione coercitiva che invece risulta centrale nell'esame della giurisprudenza sovrastatale.

I molteplici centri di produzione del diritto interni allo stesso Stato nazione, così come le plurime istanze che ne compongono il tessuto sociale, rimandano un'immagine dinamica della legge quale processo di negoziazione che culmina nella promulgazione statale, ma non si riduce a questa. L'attenzione viene rivolta, dunque, sia al ruolo ricettivo del diritto, sia all'insieme di norme in uso nel territorio che il diritto statale si propone di governare nella sua interezza, ma sul quale coesistono innumerevoli centri di normazione "informali".

Se, da un lato, il diritto torna ad essere considerato punto di convergenza delle istanze e delle richieste che attraversano il campo politico, ovvero il luogo in cui si cristallizzano pratiche e fattispecie primariamente sociali; dall'altro, gli ordinamenti sommersi che si affiancano (talvolta sostituendosi) al diritto nazionale vengono portati alla luce: guardare al di là dell'istituzione giuridico-statale significa infatti dare conto della realtà instabile e mutevole presente entro i confini statal-nazionali. Tale realtà appare composta anche anzitutto da gruppi esogeni, che, stabilitisi in un dato territorio, tendono a rifiutare la via dell'integrazione e a mantenere pratiche culturali proprie. In tal modo, prendono forma vere e proprie *enclaves* legislative, ovvero sotto-sistemi con pretese di validità giuridica a cui gli afferenti a una data comunità di fatto si rivolgono e che vengono percepiti come fonte ultima di standard comportamentali vincolanti.

Se la dimensione sovrastatale è contrassegnata dall'elevato distacco tra singoli attori e pratiche governative, nel caso dei sistemi infra-nazionali si verifica l'esatto opposto. L'istanza pluralista nel contesto statale viene favorita da minoranze etniche e/o religiose che, nel cercare riconoscimento, avanzano pretese di autoregolazione, nonché richieste di tutela e valorizzazione della propria autonomia. Tali rivendicazioni identitarie in alcuni stati a tendenza multiculturale

si concretizzano in speciali deroghe e/o concessioni[2]. In ogni caso, simili aperture non sono sufficienti per superare l'inadeguatezza della concezione monista del diritto, le cui soluzioni si riducono al dispiegamento di strategie assimilazioniste o escludenti. Solo in apparenza opposte, tali strategie compongono le facce di una stessa medaglia, e rappresentano il necessario prodotto di un complesso unitario, coerente e unidirezionale di leggi, calate sul sociale a dispetto delle forme policrome di questo.

Alla luce di ciò, il compito dei teorici del diritto e della politica non si riduce più alla disamina di meccanismi sociali volta alla descrizione del pluralismo come mero fatto pragmatico, oppure alla produzione di mappe antropologico-politiche capaci di dare conto di quali dinamiche abbiano luogo nel sociale e quali siano i rapporti di questo con l'ordinamento giuridico "legittimo". Gli studiosi sono piuttosto chiamati a ripensare la natura stessa del diritto, agendo sull'intero apparato epistemologico sotteso alla teoria giuridica e politica nel suo complesso. Per operare un cambio di prospettiva e gettare le basi di un discorso pluralista non superficiale, bisognerà evidenziare quelle componenti che fanno del diritto un sistema intrinsecamente monistico. In questo senso, andrà superata quella comprensione del diritto occidentale che lo vuole sorgente neutra di norme, capace di accogliere istanze molteplici. Non dare conto dell'intrinseca univocità di tale struttura equivale a non concedere alcuno spazio al pluralismo: la concezione liberale di un modello giuridico imparziale e coerente, che si rivolge a individui razionali e da questi viene prodotto sulla scorta di standard "oggettivi"[3] finisce – nel suo essere espressione di una cultura specifica – per perdere qualsiasi margine di riflessività e proporsi (senza potersi imporre veramente) come centro unico di autorità. In una simile struttura si trova spazio per un riconoscimento dei

[2] È questo il caso della popolosa comunità Sikh in Gran Bretagna che ha ottenuto deroghe alle norme di sicurezza riguardanti, ad esempio, il diritto di non indossare il casco sul posto di lavoro o su motoveicoli, in quanto in conflitto con il turbante. Una simile richiesta da parte delle donne musulmane è stata recentemente respinta dal governo francese che ha varato il divieto di indossare veli integrali proprio in virtù di una politica per la sicurezza. Su questo si vedano alcuni interessanti articoli sul blog di Davina Cooper (http://davinascooper.wordpress.com, in particolare http://davinascooper.wordpress.com/2013/10/20/against-school-uniform/ ultimo accesso: 25/03/2014).

[3] M. Davies, "The Ethos of Pluralism", *Sydney Law Review*, 27 (2005), pp. 88-112, p. 92.

valori culturali "altri" rispetto a quelli che operano inizialmente nel sistema, ma, allo stesso tempo, rimane in piedi una concezione della legge come ente singolare, la cui distanza dal sociale si colma nell'imposizione di un ordine, cioè nella decisione sovrana di annettere delle fattispecie e di escluderne altre. Le pratiche polimorfe presenti nei gangli del sociale potranno dunque essere riconosciute e rispettate, ma allo stesso tempo verranno (nell'essere tradotte all'interno della struttura giuridica vigente, oppure nell'essere lasciate nel limbo della liceità) domate, rese compatibili con il sistema che le accoglie[4].

Il pluralismo giuridico veicola invece l'idea, sempre più diffusa in età globale, che il sociale non sia più concepibile come un ambito che il politico possa *plasmare* mediante la relazione verticale Stato-cittadino, ma debba piuttosto essere visto come un sistema complesso, irriducibile a un unico modello giuridico. Solo un discorso capace di tracciare i luoghi decentrati dell'autorità e di guardare alla varietà di forme in cui si danno modelli alternativi di guida delle condotte, così come di intercettare istituzioni sommerse e dare conto della sostanziale molteplicità della legge, può raccogliere la sfida di una contemporaneità non più decifrabile con gli strumenti concettuali delle teorie politico-giuridiche nate nell'alveo della statualità moderna.

Il fascicolo che qui proponiamo si apre con un bilancio sullo stato dell'arte degli studi sul pluralismo giuridico in Occidente. Nel suo articolo Werner Menski guarda alle sfide poste dalla riflessione sul pluralismo e rileva con franchezza debolezze e demeriti, ma anche possibilità e aspirazioni, di studiose e studiosi occidentali coinvolte/i in questo ricco dibattito. Il metodo di studio e le premesse che costituiscono le fondamenta delle indagini sul pluralismo, il pregiudizio eurocentrico/nordista, nonché una tendenza conservatrice ostile a quelle 'ibridazioni' che deriverebbero necessariamente dal riconoscimento dei nuovi assetti giuridici non consentono, secondo l'autore, di cogliere la grande problematicità del fenomeno pluralista, assecondando così valutazioni riduttive o

[4] Non possiamo qui dilungarci sulla questione di come la legge renda docili e muti le realtà sociali nel momento in cui decide di darne conto. Per chi volesse addentrarsi in un dibattito sempre più acceso si veda ad esempio R. McRuer, *Crip Theory. Cultural Signs of Queerness and Disability*, New York University Press, London and New York, 2006.

lacunose di questo. I modelli interpretativi che ne derivano restituiscono una lettura mutilata del funzionamento dei meccanismi giuridici, i quali vengono ritenuti prodotti primariamente nord-occidentali, legati a doppio filo con la forma Stato, nonché scevri da qualsiasi connotazione religiosa. Il fenomeno giuridico viene dunque descritto, anche quando plurale, sulla scorta di un modello che lo vuole emanazione omogenea e rigida, univocamente imposta sul sociale ma che al contempo ne risulta separata, distante. Simile lettura non riesce a dare conto di molte delle sfaccettature del diritto, in quanto nella avvenuta separazione tra "official law" e "living law" si perde di vista il carattere fluido della legge e l'estensione capillare di questa. Menski invita dunque a prendere atto della poliedricità del diritto il quale, tutt'altro che orizzonte piano, si dimostra coacervo di sistemi intersecantisi fra loro, la cui reciproca influenza dà luogo a modelli dinamici e instabili. In questo senso, una radiografia del sociale restituirebbe l'immagine di più centri di emanazione delle norme e darebbe conto di altrettanti movimenti e contaminazioni che fanno del diritto un prodotto sociale e politico, massimamente vivo e vissuto. Si parte da un bilancio, dunque, che non vuole essere presa d'atto conclusiva, ma piuttosto incoraggiamento a "lavorare duro per coltivare vedute più ampie e un più profondo rispetto per 'gli altri'".

All'appello di Menski i contributi che qui raccogliamo rispondono con soluzioni diverse, a partire da un confronto – ora più consentaneo, ora più critico – con gli indirizzi dominanti negli studi sul pluralismo giuridico. Insiste soprattutto sulle loro criticità il contributo di Virginio Marzocchi, che del pluralismo giuridico *mainstream* mette in questione alcuni dei presupposti metodologici e teorici fondamentali. *Punctum quaestionis*, la definizione e la delimitazione del campo del "giuridico". Partendo dalla prospettiva filosofico-sociale del discorsivismo di Jürgen Habermas e di Karl-Otto Apel, e facendola in parte interagire con il funzionalismo luhmanniano, Marzocchi propone una definizione del diritto come uno strumento e un processo di *problem solving*: come una risorsa discorsiva in grado di mediare le esigenze e le rivendicazioni degli attori (un tema, questo, che sarà centrale nel contributo di Spanò), rivelando un alto potenziale trasformativo rispetto alla realtà sociale. In questa prospettiva, il diritto non coincide *sic et*

simpliciter con un insieme di oggetti (norme), ma si configura piuttosto come un insieme di istituzioni, pratiche e giochi linguistici: come un campo, una sfera sociale, la cui esistenza consiste nel suo funzionamento e nella sua riproduzione intersoggettiva e interazionale. Su questa base, Marzocchi prova a compiere un'operazione se vogliamo più radicale rispetto ai teorici del pluralismo giuridico, che hanno insistito sulla pluralizzazione delle fonti del diritto: quella cioè di separare la validità delle regole e delle norme dalla loro fonte, spostando l'attenzione sulla coerenza interna e sui risultati delle interazioni resi possibili dalle regole. Questa operazione, nell'ottica dell'autore, non è funzionale soltanto a un approccio più pluralistico al diritto, ma anche a rendere la legge sempre discutibile e rivedibile a più livelli. Al contempo, essa invita a valorizzare il lavoro selettivo e elaborativo del diritto, come un modo per strutturare e trasformare azioni e interazioni.

A complicare il quadro contribuisce il lungo saggio di André Hoekema, che insiste sull'idea per cui una situazione autentica di pluralismo giuridico presuppone l'assenza di un arbitro imparziale che possa dirimere le controversie tra ordinamenti in conflitto. L'autore si sofferma sulle molteplici varietà di conflitti intra- e inter-normativi, esplorando il panorama ampio e frastagliato del pluralismo sub- e sopra-statale e porta alla luce i conflitti, le frizioni, le incompatibilità, ma anche le possibilità talora inattese che una situazione di complessità non comprimibile consente. Hoekema, da antropologo di professione, rivolge il proprio sguardo agli utenti del diritto, che si fanno carico per intero della portata conflittuale del pluralismo giuridico, e sono chiamati sia a pagarne il prezzo sia a sfruttarne le opportunità. In tal senso, egli insiste sul concetto di "interlegalità", elaborato qualche decennio fa da Boaventura de Sousa Santos, al fine di rimuovere una visione statica e bidimensionale del pluralismo giuridico e introdurre un fondamentale elemento di mobilità, per cui il pluralismo giuridico è spazio entro il quale attori di diversa natura mobilitano norme e risorse per costruire spazi normativi.

Lo sguardo sub- e sopra-statale del saggio di Hoekema indica al contempo le molteplici differenze tra questi livelli, laddove il sub- si rivela spazio micro di

attori esposti a continui rischi e continue possibilità, e quello sopra- teatro di azione di istituzioni e organizzazioni extra-governative, spesso saturato da interessi economici, spesso ostile e inadeguato ad accogliere istanze esterne al sistema transnazionale stesso, e quindi limitante rispetto agli spazi di partecipazione politica e alle conseguenti dinamiche conflittuali/generative che ne sorgerebbero. Ripristinare i margini di azione politica nella sfera transnazionale è l'obiettivo della riflessione global-pluralista, di cui Marco Goldoni offre un'acuta valutazione. Mediante l'esame delle teorie di tre prominenti studiosi (Paul Schiff Berman, Nico Krisch and Gunther Teubner), Goldoni evidenzia le ambiguità e le deludenti conseguenze delle proposte global-pluraliste. Nonostante queste mirino all'istituzione di piattaforme interazionali, capaci di mettere in contatto i differenti gruppi governativi e le disparate componenti non-istituzionali presenti sul campo, la struttura proposta si rivela incapace di favorire una genuina emancipazione. L'esercizio di essenziali funzioni politiche – quali la manifestazione del dissenso, la negoziazione di strategie e soluzioni, la gestione dell'autorità – è imbrigliata in griglie procedurali e iter controllati, così da venire, ancora una volta, dirottata, domesticata, sedata.

Alla valorizzazione del potenziale emancipativo delle pratiche e delle procedure della "globalizzazione giuridica" è invece dedicato il contributo di Michele Spanò, il quale associa al tema del pluralismo quello dei trapianti giuridici. Il pluralismo giuridico, infatti, è assunto dall'autore come la condizione stessa della globalizzazione giuridica, di cui i trapianti costituiscono gli effetti costanti e ripetuti. Presupposto e insieme conseguenza di questa associazione è la valorizzazione del ruolo degli *attori* sociali come agenti delle trasformazioni giuridiche – ciò che l'autore chiama "creatività degli attori". Si tratta tuttavia di una "creatività limitata", di un'"autonomia vincolata": il rapporto di speciale dipendenza fra globalizzazione giuridica (pluralismo e trapianti) e attori sociali, infatti, è inserito dall'autore nel quadro di un'interpretazione governamentale, che riconosce il carattere circolare o circuitale – per così dire – delle relazioni fra attori sociali e autorità istituzionali, e che individua nel diritto il medium fondamentale di questo circuito. Piuttosto che insistere sulla pluralizzazione dei

contenuti giuridici, Spanò privilegia un'interpretazione del pluralismo giuridico come pluralizzazione dei *mezzi* normativi: una prospettiva in cui a contare sono anzitutto le *performances* e le "competenze giuridiche" degli attori: quelle risorse cognitive limitate che l'attore può spendere in un'interazione – di tipo cooperativo o conflittuale – e che possono costituire un mezzo decisivo della trasformazione. Campo privilegiato in cui misurare l'efficacia e le potenzialità emancipative di questo dispositivo è la procedura: un "protocollo d'uso" che, grazie alle sollecitazioni degli attori sociali, "muta e si trasforma a sua volta nella misura in cui è usato", moltiplicando insieme i vincoli e le possibilità di trasformazione. Da qui l'immagine di BILLY – la nota libreria di IKEA – che l'autore elegge a metafora del pluralismo giuridico stesso, interpretato come *pluralismo procedurale*.

Se il pluralismo procedurale può rappresentare una risorsa preziosa per gli agenti, la sovrapposizione di ordinamenti giuridici, d'altra parte, non rende la vita facile ad eventuali legislatori. Salvatore Mancuso adotta nel suo articolo una prospettiva ravvicinata e descrive interazioni e cortocircuiti di più tradizioni giuridiche all'interno di un singolo stato: la Somalia. Nell'impianto giuridico somalo, diritto tradizionale, diritto islamico e diritto statale coesistono sin dall'epoca coloniale. La resistenza dei diversi ordinamenti alla riduzione e all'assimilazione reciproca dà luogo a un intreccio di norme sedimentate e regole imposte in cui ogni sistema normativo conserva il proprio ruolo e il controllo (non sempre assoluto) su specifiche pratiche. La radicale differenza che c'è tra ordinamenti d'impianto occidentale e sistemi di diritto indigeno ha fatto sì che l'innesto di modelli giuridici occidentali, ad opera dei colonizzatori, abbia dovuto conciliare le proprie ambizioni egemoniche con il riconoscimento di una realtà istituzionale frammentata e poliedrica la cui struttura differisce grandemente da quella da cui il sistema coloniale procede. L'articolo di Mancuso descrive lo scontro tra le strategie coloniali di inserimento, integrazione e tentata assimilazione e le necessarie negoziazioni con le pratiche locali, narrando gli sviluppi storici e gli approdi di una trasformazione giuridica non sempre facile e tutt'ora in atto.

Se Mancuso ci offre una presa diretta sui problemi che gli studi sul pluralismo giuridico si trovano ad affrontare attraverso un caso di studio, è con una riflessione sui loro risultati e sulle loro potenzialità *teoriche* che vogliamo concludere questo percorso. Il contributo di Mariano Croce si presenta come una storia ragionata del pluralismo giuridico, volta a ricostruire la relazione polemica e dialettica che esso intrattiene con la teoria giuridica tradizionale. Convinzione dell'autore è che il pluralismo giuridico – nelle sue molteplici correnti e accezioni – sia in grado di smascherare la parzialità dello strumentario concettuale della tradizione giuridica occidentale, decostruendo la narrazione su cui esso si è fondato. Ad essere in gioco, soprattutto, è l'idea dello Stato come fonte unica del diritto, con i suoi impliciti effetti esclusori; una messa in discussione cui si accompagna necessariamente un ripensamento dei confini del giuridico, dell'ontologia sociale e, soprattutto, dei rapporti fra queste due dimensioni. La discussione non riguarda semplicemente la maggiore o minore "ampiezza" dell'ambito del giuridico, sottratto all'identificazione con lo statale, quanto piuttosto l'individuazione dei fattori e delle variabili sociali – plurali e contingenti – che incidono sullo sviluppo, sul riconoscimento e sull'affermazione di un determinato ordinamento normativo o di determinate rivendicazioni. In questa ottica, è la concezione stessa del giuridico a cambiare: non più l'ambito in cui lo Stato si esprime attraverso proibizioni, giudizi e autorità, ma un campo in cui ha luogo una *battaglia simbolica* per il riconoscimento di istanze e di regolazioni del comportamento, che si sviluppano in un certo contesto geo-storico e sociale. Inquadrato in questa luce, *pluralismo* giuridico significa soprattutto pluralizzazione dei fattori e degli attori che intervengono in questa battaglia. Il percorso svolto e il suo peculiare angolo visuale portano Croce a concludere che il pluralismo giuridico non debba essere considerato come uno stato dei fatti (la mera coesistenza, conflittuale o non, fra più ordinamenti), bensì come la rivendicazione della necessità di un'analisi multifocale e multidisciplinare delle modalità in cui il diritto opera nella realtà sociale.

Non è compito di questo fascicolo offrire una mappatura dettagliata del pluralismo giuridico in ogni sua forma, concettuale, pragmatica, normativa,

proprio perché esso non lascia irregimentarsi in tipizzazioni o classificazioni. Gli autori che a esso hanno contribuito, tuttavia, hanno saputo mettere in evidenza contraddizioni e movimenti il cui effetto sulla natura stessa del diritto è reso evidente dal grado di incertezza che segna qualsiasi previsione sul futuro delle società contemporanee. Se le forme di pluralismo sono molte, come molte sono le entità che ne ampliano la portata, il venir meno di arbitri imparziali capaci di dirimere i conflitti tra repertori normativi rende lo scenario attuale ancor più precario. Non si può predire se prevarrà un pluralismo giuridico quale mobilitazione di risorse e pretese da parte di soggetti capaci di produrre regimi normativi legati alle loro esigenze e alle loro necessità o uno in cui gli attori più influenti saranno in grado di soffocare quelle risorse e quelle pretese in forza della iniqua distribuzione di potere simbolico e materiale. Ciononostante, nessuna di queste vie è preclusa.

The Liquidity of Law as a Challenge to Global Theorising

Werner Menski

Abstract This essay argues that the inherent liquidity of law as a global phenomenon is a troubling reality that scholars and especially judges have to learn to manage better in the never-ending search for the "right law" and, ultimately, for "justice". Providing an overview of the major strands of arguments in theorising legal pluralism, both for and against its recognition, the essay suggests that this challenge will never stop, mainly because there will always be competing perspectives and views of what is "intolerable" and what needs to be controlled or outlawed. The resulting struggles over different strategies of state involvement in legal management will continue. Hence the only safe advice that may be given is to be as prepared as possible to face law's liquidity in both theory and practice and to become as skilful as possible in navigating the internal pluralities of law.

Keywords equity, justice, legal pluralism, "new natural law", value pluralism

The Enormity of the Problem

This article provides at first a brief overview of the rather tedious and tortuous progress made so far in theorising legal pluralism, a progress still constantly interrupted and at times halted and reversed by irritated protests from several corners. Notably, objections are still raised that if anything goes, under the label of law, then we might as well stop theorising altogether. However, especially as there is no global agreement about the definition of law, it seems that legal scholars (or those that intervene in legal debates) need constant reminders not only about that resultant reflection of law's liquidity, they also need to take seriously that law and life are everywhere intricately connected in myriad ways. The article concludes, in due course, that the deep liquidity of law as a global and ubiquitous phenomenon challenges legal theorising today to show more respect for the practicalities of accepting the views of 'the other'.

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This means that comprehensive legal scholarship cannot merely ever be an elitist armchair occupation or a sophisticated enterprise that clearly pays much attention to corporate business and 'big money cases', but disregards the often far less clear-cut but equally important experiences of the so-called subaltern. That law in its various formal and informal manifestations is a critical part of the complexities of all people's lived experience, anywhere in the world, goes without saying. But we often forget this, apply middle class lenses or elitist perspectives, privileging certainty over flexibility and thus systematically ignore massive evidence of the multiple liquidities within and around the law, both in theory and in practice.

It has been claimed, repeatedly, that talking about legal pluralism risks becoming intellectually lazy, engaging in idle conversations with no point and wider relevance at all.[1] If everything is said to depend on situation-specificity, cherished notions about rules, established processes, and firm commitment to certain 'global' values, everything that supposedly counts in mainstream legal theorising, would appear to fly out of the window and that of course then endangers cherished core principles of certainty in the law. But where is the right balance between uniformity and diversity, between certainty and justice-focused possibilities for situation-specific exceptionality? These core questions for legal and moral philosophers also impact on daily legal lived practice. Such turbulences and tensions, as a constructive and immensely helpful new study on *Legal Pluralism and Development* richly confirms, have been causing major problems in the delivery of justice everywhere in the world.[2] This implies that theorists must take more avid note of such practice-focused findings, of "risks for authoritarian possibilities" – abuses of the law in the name of the law in clear text - which indeed constantly arise everywhere, and not just when legal pluralism is involved,

[1] A much-cited polemic text is B.Z. Tamanaha, "The folly of the 'social scientific' concept of legal pluralism", *Journal of Law and Society*, 20 (1993), 2, 192-217. Readers should note that Tamanaha has apologised for the tone of that article, while claiming that his views have not substantially changed. See B.Z. Tamanaha, "Understanding legal pluralism: Past to present, local to global", *Sydney Law Review*, 30 (2008), 375-411, p. 391, n. 47.

[2] See B.Z. Tamanaha, C. Sage and M. Woolcock (eds.) *Legal pluralism and development. Scholars and practitioners in dialogue*, Cambridge, CUP, 2012.

or 'religion' and/or 'culture'.[3] Since, as is now increasingly acknowledged, legal pluralism is everywhere a normal state of affairs,[4] logical conclusions have had to follow among legal theorists and practitioners. Both now realise that legal pluralism is at the same time part of the problem and of the solution.[5]

The partly nihilistic and often narcissistic responses to serious scholarly efforts to achieve greater clarity about the internally competitive aspects of law as a global phenomenon indicate that scholars may need a dose of "appropriate humility".[6] The enormity of the challenges ahead for anyone trying to write and speak about 'legal pluralism' or, if the reader prefers this choice of words, 'normative pluralism', remains simply mind-boggling. To make matters worse, the choice of words does not appear to make a real difference to the enormity of the problems faced. Any specific terminology to capture the liquidity of law simply emphasises concern over certain sub-issues of the deeper problem of drawing boundaries around something that seems constantly to slip away and evade complete control. Some clever commentators, Cesar Arjona among them in Barcelona and London,[7] suggest that a preferable term and more user-friendly nomenclature might be 'transnational law'.[8] This may risk taking a reduced myopic perspective that merely considers as vitally relevant those forms of legal conflict and competition observed between state-centric laws and the increasingly powerful fields of international law and human rights. In today's postmodern world, however, people's customs and values, including even remnants and recreations of old concepts of various culture-specific natural laws, have not simply vanished or been superseded by formal methods of law-making. Yet a huge number of lawyers and legal scholars, largely due to deficiencies and systematic failures of legal education, still struggle with such manifestations of legal liquidity and would like the world to be different. We see here powerful reflections of the

[3] Ivi, p. 158.

[4] Ivi., p. 1.

[5] Ivi, p. 14.

[6] Ivi, p. 15.

[7] Currently co-director of the Center for Transnational Legal Studies (CTLS) in London.

[8] See also Tamanaha, Sage and Woolcock, cit., p. 69.

familiar is/ought conundrum that afflicts any type of legal theorising, anywhere in the world. So it is actually unsurprising that we struggle with 'legal pluralism' and related concepts. The present article will not resolve this conundrum, but hopefully throws light on some bottlenecks of understanding the consequences of the inherent liquidity of law.

Justice consciousness in view of law as a 'plurality of pluralities'

While we may by now look back at significant progress, it seems necessary to criticise to some extent why European legal theorising remains so significantly deprived of sensitivity to pluralism. Current developments indicate, however, that there is an end in sight to this quite unsettling and partially reductionist politicking over the ways in which law in this interconnected world needs to be and is theorised. At a recent conference arranged by the new Centre for Law and Society in a Global Context (CLSGC) at Queen Mary, University of London on 'Relative Authority', there was finally widespread agreement that legal pluralism has gone mainstream. When one attends conferences on such themes in non-Western jurisdictions today, the intellectual climate is often remarkably different, basically far less hostile to 'other' types of law, maybe because more voices come from 'others'. There is also often more constructive debate about various possibilities of pluralist navigation, and it is probably no co-incidence that the most successful recent conferences on legal pluralism have been held in jurisdictions that are laboratories of pluralist navigation, such as South Africa. It will be fascinating to see what will happen in Mumbai, where the next Legal Pluralism Conference is to be held in December 2015.

In many non-Western discourse contexts there is often a notable intrinsic acceptance of the fact that law and morality are closely connected, so that no major statements need to be made about that fact, nor new books written. It appears to be part of non-Western people's ways of life to be deeply aware of such connectivities, while indeed this does not mean that one disarms or lacks all kinds of defences for human rights rationales. That this basic realisation of inevitable connectedness ('relative authority') may have huge implications on how state

structures and related laws are perceived outside Europe is evidently under-researched.

On the other hand, dominant Eurocentric positivisation has ignored at its peril, and for rather long, that rationality is never really value-neutral. Increasingly evident today, rejection of religious forms of belief is itself perceived and perceivable as a form of belief. Connected to this are ongoing fierce debates about secularism, peripheral to the present discussion, but deeply informed by it.[9]

It is also a rather significant realisation and experience that on the arduous journey towards increasing sensitivity to the internal pluralities of law, important help has been provided by cross-disciplinary orientations, often seen as quite peripheral to legal education, including sociology of law, legal philosophy and legal anthropology. It seems in hindsight that such assistance was crucial and quite necessary to dig the discipline of law out of a hole into which it had sunk over a prolonged period because of excessive reliance on certain Eurocentric models and reductionist patterns of thought. It is also necessary to report and acknowledge that quite important support for deeply plurality-conscious legal theorising has come from multiple inspirations provided by interdisciplinary activism as well as the interventions of non-Western scholars and voices over some time. This confirms what we know but are reluctant to admit, namely that in today's interconnected world there are important limitations to eurocentricity also when it comes to legal theorising. It is simply not possible to assume any longer 'law' is a Western category, or that Hindu law or Muslim law are just 'religious' entities, or that the Japanese do not have 'religion', while Western-centric assertions and discussions about the global phenomenon of 'law', which are of course themselves intensely plural, can serve as guidance for all legal development worldwide. The globally present phenomenon of law, as a deeply contested and constantly negotiated 'plurality of pluralities',[10] means that Eurocentric hubris

[9] Both of these issues were analysed in depth by the RELIGARE project in Leuven, www.religareproject.eu, in efforts to advise the European Commission about how to handle the challenges of religious pluralism.

[10] While this notion of what I now call 'POP' is causing irritation among doctrinal lawyers, and even some scholars of pluralism, liquidised or fuzzy plurality, and not just legal pluralism *simpliciter*, is a fact. In this, I do go further than John Griffiths in 1986 (see note 19 below).

now faces unsettling new challenges in an age of globalising trends that manifestly does not result in 'one law for all' at global level. Instead, we see that hybridisation processes constantly generate and re-configurate multiple forms of 'glocal' laws that we are struggling to accept, to understand, and most crucially, to manage and operate as devices to improve and fine-tune that elusive supposedly ultimate aim of all law and legal activity, justice.[11]

A global picture of the liquidity of law

In this highly volatile context, the perception of law as a liquid entity that takes different shapes and forms depending on its environment, as does water itself, another essential ingredient of human life, seems an apt guiding image for the present article. The time-space context within which all forms of life develop contains parallels and important lessons about how one may envisage the various manifestations and uses of law. There are clearly various methods to understand and manage legal diversity and pluri-legality. These different approaches are presentable as models or ideal types, which in every case yield an image of internal plurality, despite dominant first impressions of uniformity.[12]

Firstly, in the global north, we often presume to be governed by one law for all, assuming that this rule of law model has universal relevance when in fact it is quite culture-specific and depends very much on respective national contexts. In lived experience everywhere, this formal and potentially rigid model of legal uniformity seems to survive in practice because of its inherent capacity to allow the frequent exercise of discretion through making exceptions on the part of certain law-managing agents, in all kinds of specific legal scenarios. This observation actually matches Hart's well-known analysis of law and its emphasis

[11] Though himself not a lawyer, significantly, the contribution to this debate by Amartya Sen, *The idea of justice*, Cambridge, MA, Harvard University Press, 2009, follows similar reasoning as Jacques Derrida and others, to the effect that justice is always "in the making" and thus remains a constant challenge and a never completed task. The intrinsically dynamic nature of law is thus shown to be manifestly a reflection of this inherent tension between is and ought, certainty and flexibility, rule and exception, and so on.

[12] For graphic representations of the following sections see W. Menski, "Law as a kite: Managing legal pluralism in the context of Islamic finance", in V. Cattelan, (ed.) *Islamic finance*, Cheltenham, Edward Elgar, 2013, pp. 15-31.

on the multiple possibilities for the bureaucratic management of law, building on Weber and much else in earlier theorising. While the fiction of legal uniformity is formally maintained, the lived reality is thus totally different, often intensely plural, not only in terms of class and personnel, but also in relation to specific topics of deep concern to current legal practice and its stakeholders. This constantly generates new forms of legal regulation that confront and address issues of liquidity in supposedly uniform legal systems.[13]

A second major variation of the global picture of liquid law is marked by the strategy of making exceptions for specific groups of people, customarily the original inhabitants of specific national jurisdictions as found today. The USA, Canada, Australia and New Zealand are classic examples of this specific form of yielding to legal pluralism. However, much richer and still more complex evidence is found in jurisdictions like India with its various affirmative action programmes, or now South Africa, and many other countries. Aware of the fact that some people within their boundaries may have and do raise specific historical claims to special recognition of their statuses and certain law-related issues, the formal legal structures acknowledge that specific kind of difference.

The third type of legal structure and its plurality-conscious management is found in those many jurisdictions that operate a general law in many respects, such as a common Constitution, common contract and commercial laws and evidence rules, common civil and criminal procedure laws, and so on. Side by side with such laws, however, such jurisdictions also manage to handle the pluralist challenges of co-existing personal status law systems. Often heavily contested and deeply politicised, both internally and externally, they are a lived reality in many more jurisdictions of the world than their governments care to admit. It is actually, in terms of numbers, the most dominant pattern globally, and this has been so for millennia. Legal history, another neglected minority subject, teaches that this specific pattern of pluri-legality is not a fairly recent creation of

[13] Notably, the most recent issue of *Social & Legal Studies*, 22 (4) December 2013 contains an impressive array of articles problematising these kinds of limits of law. And if we turn to reported case law, the troubling background facts of *YLA v PM & MZ* [2013] EWHC 3622 (Fam) dramatically illustrate the agony of decision makers faced with cases in which legal liquidity appears as a core theme.

colonial interventions, but reflects ancient patterns of competitive co-existence of different communities and faith groups. Their respective power relationships would tend to change over time and thus give rise to many, often violent, contests and conflicts. These types of structures, today, prominently generate new tensions between local lived experience and supposedly global claims of certain authoritative patterns. In the age of human rights, such new conflicts over values and customs have risen high on comparative lawyers' agenda. This is most clearly manifested in Southern Africa's contested co-existence of 'official customary law' and 'living customary law'. Lawyers need to remember that this merely confirms the powerful notion of 'living law' theorised by Eugen Ehrlich at the start of the twentieth century. Today, this is indeed an integral part of the 'global Bukovina'.[14]

There is, however, much continuing resistance to the formal legal recognition of such forms of hybrid law, including specifically new liquidities that tend to arise in scenarios where Southern global migrants bring their cultural and legal luggage with them to new Northern homes.[15] Further below, it will be possible to identify why particularly such new conflicts are often so aggressively responded to, even giving rise to new forms of scholarly and street-level violence that we should remain alert to. For, as we shall see, on the road to understanding these kinds of conflicts, in terms of theory as well as practice, we need to absorb today the troublesome realisation that fights over 'the right law' today arise often over competing values rather than conflicts of rules or struggles over which legal processes to follow. This tells us something important about the liquidising impact of new human rights interventions that have clearly increased the heat in the cauldrons of legal pluralism debates.

[14] See M. Hertogh (ed.) *Living law. Reconsidering Eugen Ehrlich*, Oxford, Hart Publishing, 2009.

[15] P. Shah and W. Menski, "Introduction. Migration, diasporas and legal systems in Europe", in P. Shah and W. Menski (eds.) *Migration, diasporas and legal systems in Europe*, London, Routledge, 2006, pp. 1-12.

On the road to progress

This section does not seek to present a complete account of all the voices involved in the process of developing the various theories of legal pluralism to their current advanced state. That would be impossible today due to a number of reasons. However, some important signposts can be established.[16] Oddly enough, in view of the overarching argument about the liquidity of laws and the increasing realisation that global pluralist theorising remains a never-ending challenge, the main references here still remain to certain European voices in this debate and their contributions, even often to Anglophone voices. There are, many readers will know, rich strands of relevant literature in other European and also some non-European languages. Further articles and books on comparative law and global legal theory will need to be written, preferably by teams of authors from various jurisdictions, to highlight the richness of these often neglected voices engaged in the ongoing multi-layered discussion, clearly not restricted to Europe and North America. To trace how and to what extent progress may have been made in different jurisdictions and in different parts of the worlds would clearly require a much larger article than is envisaged here.

Within the context of mainly European debates on the subject,[17] in 1975 Barry Hooker pioneered further thinking and the nomenclature of legal pluralism in an important book.[18] We know now that this mainly highlighted what came to be called 'weak legal pluralism', the internal plurality of state-centric laws. Due to various hybridisation processes, such forms of state-centric legal pluralism appeared mainly in colonial contexts and in scenarios where a jurisdiction decided to use foreign transplants, whether by imposition or more or less voluntarily.

[16] Major texts from within European thought that trace this progress are S.E. Merry, "Legal pluralism", *Law and Society Review*, 22, 5, pp. 869-896 and Tamanaha, "Understanding". For non-Western perspectives, M. Chiba (ed.) *Asian indigenous law in interaction with received law*, London and New York, KPI, 1986 remains important and is excerpted in detail in W. Menski, *Comparative law in a global context. The legal systems of Asia and Africa*, Second edition, Cambridge, CUP, 2006.

[17] One could go back to St. Thomas Aquinas and his *lex humana*, on which see Menski, *Comparative law*, pp. 142-144.

[18] M.B. Hooker, *Legal pluralism: An introduction to colonial and neo-colonial laws*, Oxford, Clarendon Press, 1975.

Then, in 1986, an important year for legal pluralism studies globally, John Griffiths famously asserted that legal pluralism is a fact, and identified the co-existence of weak and strong forms of legal pluralism in various manifestations.[19] His arguments instantly convinced me, not the least because around the same time Masaji Chiba in Japan produced a path-breaking cross-cultural legal study. I found this immensely useful because Chiba identified the co-existence and multiple internal conflicts of 'official law', 'unofficial law' and what he called 'legal postulates'.[20] I then developed Chiba-sensei's theories further to construct my own models of legal pluralist methodology, suggesting at first a still somewhat static triangular structure of law.[21] My students were excited, but also persistently critical of my initial reluctance to incorporate human rights law and international law into this structure. Practice-focused work in courts and anthropological settings at the time prominently confirmed that legal pluralism studies cannot afford to ignore various situation-specific, bottom-up dimensions, nor the impacts of 'religion', 'ethics' and 'culture'. At the same time, reservations about top-down legal regulation remained strong and in fact grew.

Yet, as the increasing importance of supposedly uniformising and globalising trends was becoming overwhelming, more explicit recognition of human rights jurisprudence and methods of international law would be needed in yet more complex pluralist models of law. This swiftly led to graphic representations of legal pluralism into the form of a four-cornered kite, designed to express the dynamism of law and the interconnectedness of all its various competing and yet co-operating manifestations.[22]

However, this did not mean that the concept of legal pluralism itself or these particular approaches to pluri-legal analysis became more widely accepted. In fact, instant repudiation for daring to engage in such 'un-legal' theorising came

[19] J. Griffiths, "What is legal pluralism?", *Journal of Legal Pluralism and Unofficial Laws*, 24, 1986, pp. 1-56.

[20] Chiba, *Asian*, cit., pp. 1-12.

[21] At first W. Menski, *Comparative law*, first edition, London, Platinium, 2006, soon superseded by the second edition of Menski, 2006, and its triangular model of law at p. 612.

[22] On the kite model of law, see e.g. W. Menski, "Flying kites in a global sky: New models of jurisprudence", *Socio-Legal Review (Bangalore)*, 7 (2011), pp. 1-22.

from colleagues who had their own reasons, oddly at SOAS, for not wishing to listen to the voices of the 'global South'. Such excessive reliance on Eurocentric visions and related 'modern' human rights rationales remains a major problem for scholarly progress in pluralist theorising today. It often bluntly denies a voice to Asian and African 'others', expecting them simply to learn from us Europeans. Treating 'them' as virtual 'children', to be 'civilised' and socialised into 'our' ways of thinking and arguing about law, however, one fails to respect the axiom that law is everywhere culture-specific. This is a basic methodological error when faced with law's global liquidity. Such myopia is increasingly untenable and is deeply presumptuous. Today, there is indeed reluctant, but increasing acknowledgement that 'culture' and 'religion' are part of law's intense liquidity.

While meanwhile Sally Engle Merry had produced a detailed overview of what has come to be known as 'traditional' legal pluralism,[23] agonised debates continued over this messy and irritating phenomenon, over the next few decades, sometimes marked by exaggerated polemics which authors might later regret (see note 1). Notable in this ongoing debate is also that every major participant displays keenness to develop his or her own methodology and nomenclature. World class scholars were thus debating the same issues, but largely talking past each other – more evidence of myopia. All along, it remained easy to disregard other participants in the debates by simply claiming they belonged to a different sub-discipline. We see here the pernicious effects of extending the strategy to divide law from everything else by segregating all participants in the emerging global debate and putting them into separate 'black boxes', as Twining came to call this.[24]

This mental self-imprisonment seems to have delayed the realisation that the only way forward for legal pluralist theorising would be to connect the various dots rather than to segregate and separate them. It has thus become increasingly clear in the global discourse about legal pluralism that research efforts needed to be focused on what law may actually be or may become, and how widely it may

[23] See S.E. Merry, "Legal pluralism", cit.

[24] W. Twining, *Globalisation and legal theory*, London, Butterworths, 2000.

then extend, rather than to exclude certain phenomena, entities or influences. Atonement for the earlier focus on segregating law from other phenomena and entities is reflected in today's virtual though still somewhat reluctant global agreement that it may be unproductive to spend excessive energy on seeking to define what law is not.

Notably, that also meant a radical departure from dominant Eurocentric methods of theorising. At first sight, this appears to be the most painful issue of methodology which troubled many opponents of legal pluralism. Dominant euro-patterns of theorising privileged focus on one-dimensional state-centric analysis, or monist methodology, as I now call it. This would treat as offensive and basically 'intolerable' (more about that concept later) any attempts to provide holistic, more plural analyses of law. How this regression happened in relation to law cannot be examined here in depth, but the main culprits may well have been a combination of intellectual laziness and the strong tendency among lawyers to see the field of 'law' as a separate and superior entity dominated by states and nations and their authority claims. Also implicated is the rather prominent corresponding reaction of other social scientists to treat law as a separate field, hence often not to discuss it at all, working with reductionist stereotypical assumptions.[25]

Such critical observations focus on theorising law. A parallel and equally damaging process appears to have occurred in legal practice. Here, and not only in civil law systems,, which relied more strongly on codified rules of law anyway, the tendency to build up bodies of authoritative precedent through common law methodology privileged a situation which today is often challenged where different legal cultures meet formal legal systems. Most instructive examples come from the case law of India and from the rainbow nation of South Africa, both torn between East and West, or rather between the global South and the global North. The not so new but hugely instructive distinction or 'dichotomy', as Chiba would have called this, between 'official law and 'unofficial law', more specifically between 'official customary law' and 'living customary law', is a sign

[25] In this regard, though much of his writing concerns legal developments, see S. Vertovec, "Super-diversity and its implications", *Ethnic and Racial Studies*, 30, 6, pp. 1024-1054.

that the judiciary of South Africa, at any rate, has become super-conscious of the need to strengthen the links of the people of this young nation to its formal laws. One way to do so, hardly new at all, is for state law to just accept what the people are doing – but this is precisely where the shoe pinches, as giving in to 'tradition' is today widely perceived to contradict and be incompatible with the legitimate expectations of globally informal new rights consciousness. It is here that tensions between old and new laws and their attached value systems are played out in full force across the globe, and law's liquidity threatens to become explosive.

Liquid laws as a global theoretical and practical challenge

Some of the new ways experienced by legal systems today of being forced to reconcile and connect tradition and modernity through legal interventions, rather than dividing up the internally plural legal field into what is 'legal' and what is 'extra-legal' contains highly significant global lessons. I have written about this in various recent articles on the need for plurality-conscious navigation of the realities of pluri-legality. These comments contain hints not only about how to conduct pluralist analysis in the torture chambers of academics who sentenced themselves to hard labour by their choice of vocation, as Upendra Baxi calls this, but also in the courtrooms of judges.[26] While more and more jurisdictions have become alerted to such irritating challenges of pluralism, the superior Indian courts are a forum in which momentous challenges have been raising their head. Such dilemmas are by no means unique to India: Where is the boundary between legal formality and informal liquidities to be drawn? And what, then, does this mean for corresponding responsibilities of the state? Does one, to take one prominent example, insist on formal state-controlled registration of marriages to determine legal status, or is adherence to the norms of personal status systems within the contexts of 'culture' and family-based norms sufficient? All over

[26] See especially two forthcoming articles: W. Menski, "Remembering and applying legal pluralism: Law as kite flying", in L. Heckendorn Urscheler and S. Donlan (eds.), *Concepts of law: Comparative, jurisprudential, and social science perspectives*, Farnham, Ashgate 2014, and W. Menski, "Plurality-conscious re-balancing of family law regulation in Europe", in P. Shah, M.-C. Foblets and M. Rohe (eds.), *Family, religion, and law: Cultural encounters in Europe*, Farnham, Ashgate, 2014, pp. 29-48.

Europe today, as a result of massive migration of people from various parts of the global South to Europe, we find that judges are faced with tricky questions of this kind, often concerning new forms of conflicts of law that simply do not fit the supposedly well-established standard parameters of private international law.[27] Notions of law itself are facing significant liquidisation.

So what should judges do when they hear strong sensible evidence that people living in their jurisdiction do not fully follow the law of the land? How long can one ignore such evidence, and what should be the judicial response if the letter of the official law results in manifest injustice? We already have answers to such questions, good and solid answers,[28] though it may be necessary to go to several rounds of appeal to achieve such – in my view - correct legal outcomes. The notable recourse to equity in such scenarios is familiar to lawyers who studied their legal history well. However, it troubles those who either because of incomplete training or personal predilection tend to suffer from narrow vision and see only a restricted range of options. Such lawyers, and also a number of legal academics who discuss such cases, are unable or unwilling to admit in such scenarios that justice is, at the end of the day, more important than strict adherence to fixed rules or standard processes. Judicial activism means, then, that 'living law' can become part of the official law. It is not banished to the unofficial realm forever, provided the state law itself is able to remain supple and thus somewhat liquid itself.

A highly instructive more recent example of skilful judicial pluralist navigation is a case that involved a divorcing Jewish Canadian-British couple with two young children who after prolonged negotiations settled their disputes through the Beth Din in New York. Amazingly, they then succeeded in having that outcome formally accepted by the High Court in London.[29] Evidently such cases are the

[27] For the gravity of such conflicts see W. Menski, "Islamic law in British courts: Do we not know or do we not want to know?", in J. Mair and E. Örűcű (eds.), *The place of religion in family law: A comparative search*, Mortsel, Intersentia, 2011, pp. 15-36.

[28] See for example *Chief Adjudication Officer v. Kirpal Kaur Bath* [2000] 1 FLR 8 [CA] which applied a presumption of marriage to an unregistered Sikh marriage in the UK.

[29] See *AI v. MT* [2013] EWHC 100 (Fam), a case which incidentally endorses and cites with approval the much-pilloried views of the former Archbishop of Canterbury, Dr. Rowan Williams,

exception rather than the rule, and fortunately so. Otherwise the significant structural gaps between official law and unofficial law would be even wider and more troublesome to navigate, and liquidity would risk becoming a noxious 'free-for-all'. But it is evident that judges, these days, have a key function in such processes everywhere and are under enormous stress to fly those legal kites without causing crash scenarios.

Of course we are privileged in European jurisdictions, where normally legal guarantees mean what they say and fundamental rights guarantees are seen implemented, not just promised on paper. However, in stressful times of aggressive discourses about excessive immigration, we see presently that British immigration lawyers have again strong reasons to doubt such benevolent presumptions.[30] There are related doubts whether due process is followed in many areas of legal regulation, and even whether certain areas of life can be fully regulated by formal laws (see note 13 above). If that kind of stability cannot even be presumed in highly developed Western jurisdictions, then how much more dangerous would comparable scenarios be in India or South Africa? We may wish to close our eyes and ears and shut out such evidence, but a comprehensive global legal theory cannot ignore the pungent evidence of such legal liquidities and abuses of the law. Since solid global legal theorising cannot engage in fictitious strategies of make-belief, or simple assertions of power and authority, it has to face the challenge of constant serious fundamental rights violations, often on a massive scale. Such deprivations may demand quite drastic counter-active strategies, such as judicial activism and what is known as public interest litigation or social action litigation in South Asia, Southern Africa and elsewhere. But where does this realisation of the existence of many bottlenecks of justice leave global legal theorising? Has theory itself been infected with the virus of liquidity, total

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that the time has come for English law to recognise 'other' normative systems than purportedly secular state law.

[30] See the deeply troubling comments in the "Editorial" of *Immigration, Asylum and Nationality Law*, 27, November 2013, 4, pp. 284-285.

relativity, so that no yardsticks are possible anymore, and we drown in the politics of liquidity?

Avoiding the intolerable

We learn from such troubling and messy scenarios only that requirements and legitimate expectations to the effect that good law should be produced have to take account of multiple law-related aspects that impact on legal decision-making processes, whether in terms of policy making or appropriate decision-making in courts of law. Putting the problem this way indicates that we are basically going round in circles. Today we live in an age where state-centric reasoning suggests that the *dharma* of state law is to provide and secure justice. But we are also learning again, in this late modern or post-modern age, that when state-centric law faces limits in terms of justice delivery, it needs the help of the other types of law to secure real justice. This may mean that law and legal processes need the help of other disciplines and alternative techniques to traditional judicial decision making. It is in this context that important new research focuses on informal methods of dispute settlement and their promises to bring significant insights. However, how informal may such processes be if we want to avoid unaccountable 'palm tree justice'? As long as many scholars take a basically negative and often outright hostile stance to such methods and pre-judge them as efforts to bypass state-centric laws, we are always going to fall back into traps of state-centric reasoning. This is going to be unproductive, though ongoing debates are beginning to indicate a greater extent of acceptance of such methods and strategies. This is about time, but we must leave this specific matter there.

While in certain cases equitable remedies can be seen as viable, we learn, yet again, that official legal processes and high-level litigation are the exception rather than the rule. The *Bath* case in England (see note 28) is somewhat extreme, but one is aware of many such cases, and they arise with increasing frequency. Knowledge levels are low because such cases remain mostly unreported. Realising that law is much more than state-centric management of rules, processes and concepts, we must acknowledge that pluralist legal theorising is becoming an

important device to prevent legal systems from slipping into blind adherence to doctrinal assumptions about ‘rule of law’, sparking absolutist anarchy, deep dissatisfaction, and riots even on the streets of Western cities.

The opposite is often alleged, though, when pluralist navigation is dismissed as legal trickery or claiming unfair advantages. One simply blames the victims of legal myopia. Working from case to case rather than being bound by statute or case-based precedent is widely seen in euro-centric circles as inefficient and dangerous, as we remain wedded to notions that justice should be based on firm principles of equality and fairness. But applying axiomatic understandings of equality to people or scenarios that are manifestly not equal is deeply problematic, and we seem to encounter more and more cases where this is evident. As noted, all around the world except Europe, there is much higher awareness of such differentiations. In reality, though, the strategy to make exceptions in such scenarios is actually practised all the time, for example when cases are simply distinguished on the basis of their specific facts. Awareness of this is, it appears, constantly downplayed by a defective legal education system that uses shortcuts to make money from courses in the briefest possible time, at the cost of students who then have to pick up ‘best practice’ tools in the rough and tumble of courtroom battles.

That skilful lawyering demands nimble-footed plurality-consciousness rather than slavish adherence to basic formal principles such as precedent is dawning on more and more legal actors today, however. Whether they draw practical consequences from such realisations is quite a different matter. Much more could be said, therefore, about the need for better, more plurality-conscious legal education. Some experiments show that well-structured clinical legal education helps to empower legal practitioners to argue cases that seem, at first sight, to run into trouble because they violate basic principles of law. On closer inspection, such principles as part of a liquid superstructure may be negotiable with a view to achieving some higher public good, namely situation-specific justice.

When we take a global look at such issues, in a way which probably only lawyers who work on different jurisdictions can do comprehensively, we have to

acknowledge very fast that certain presumably firm principles, notions and rules are not globally valid and applicable at all. There is also no global law, while there are many lawyerly ambitions to construct normative uniformities out of liquid hybridities existing at various levels. An illustrative example is the presumption among Western lawyers and their non-Western acolytes that all marriages in the world are (or should be) legally valid only after formal registration by the state. Even this most basic element of legal regulation is deeply contested at global level, not to speak of polygamy, the appropriate ages for marriage, or matters of consent. It appears that for quite a few stakeholders in such global battles, failure to register a marriage becomes seen as an 'intolerable' violation of basic legal principles. But since there are so clearly different degrees and views of what is 'intolerable', the assessment of such criteria is itself subject to the conundrum of law's liquidity. Again, thus, we are going around in circles of competitive fussiness.

Given the increasing recognition of the need to accept a plurality of values today, I suggest here finally, therefore, that it will be productive to discuss in more depth the highly potent effects of the global shift to what I and others call 'new natural law'. It appears that the resulting conflicts over values, rather than rules and processes in legal discourses, which have been noted by many observers but not sufficiently theorised, offer a key to why we risk drowning in the law's liquidities. I found that a much-neglected study offers remarkable insights on where and how to draw lines.[31] However, I am discovering in discussions that this study has not been read by legal theorists and philosophers, and thus its powerful messages remain hidden.

Basically, a leading Western theorist, William Twining, engaged in prolonged conversations with four major Southern voices of human rights theorising. The aim was to challenge the parochialism of Western legal theory and to understand how far these Southern thinkers would go in accepting plurality. The findings are dramatic and troubling: Twining reports that these mature scholars all struggle in

[31] W. Twining (ed.), *Human rights, Southern voices. Francis Deng, Abdullahi An-Na'im, Yash Ghai and Upendra Baxi*, Cambridge, Cambridge University Press, 2009.

their own way to respect cultural diversity and value tolerance, but this involves no commitment to "tolerating the intolerable".[32] They all stress different techniques to handle this key challenge, but nobody can offer a key that solves all problems. The stark reality is, thus, that the liquidity of law, here of value pluralism in terms of ethics, morality, religious beliefs and so on, makes it simply impossible to establish firm and rigid boundaries.

So we face a double barrier against any efforts to find globally agreed criteria for legal decision making. First the meanwhile much more widely accepted situation that there is simply no global agreement on what we mean by law. Secondly, the need to preserve the individual's agency to determine for himself/herself what one finds 'tolerable'. In ongoing discussions and forthcoming conferences in 2014, this particular issue will generate important fresh debates: When certain individuals decide to find certain conditions of their life acceptable, though others may reel in horror, what should be the approach of 'the law' in making authoritative decisions? Or should the law, that is the respective state law that might be invoked, simply look the other way and leave such matters to self-regulation?

Not by coincidence, it has struck more scholars recently that what we are talking about here are methods to manage various forms of 'indirect rule', which were not merely a phenomenon of colonial times, but are an inevitable consequence of the inherent liquidities of law today. It is almost trite to say that most disputes never reach formal fora. So then, why do we insist that in many cases where people appear to be happy with unsatisfactory life arrangements and conditions, there needs to be the intervention of stakeholders that purport to protect the rights of what is now widely called 'vulnerable individuals'? Where, one may ask, is the boundary between being a vulnerable individual and simply being treated with less care and attention than other individuals in similar situations? Human rights approaches are today often the motor for interventions in such dilemmas. But excessive attention to human rights ideologies may cause its own problems.

[32] Ivi, p. 218.

Readers will be aware that there have been serious scholarly attempts to declare all brown women as vulnerable, and to rescue them from such predicaments. Or that all women and children of certain kinds (not only Muslims) are victimised by their 'culture' and thus need legal protection. The examples could be multiplied *ad nauseam*, but I shall not engage in polemics here. Rather, we need to realise that the subjectivity of human assessment is itself a core element of legal liquidity and that today, when it comes to 'ethnic minority legal issues', the heat of disputes increases. As indicated at the start of this article, we are left with grave challenges, as it is not possible to regulate all legal problems in the world, and any attempts to do so may cause serious new problems rather than offering meaningful remedies. This does not mean one sinks into nihilistic inactivity or gives up a commitment to human rights. Rather, the guidance needs to be to strengthen deeper analysis of situation-specific problematics, in all areas of life and law, aware of the fact that 'the right law' for one person is most probably not completely the right solution for the next person.

I acknowledge that general appeals to holistic, interconnected analysis do not solve anything, for solutions have to be case-specific, related to the time-space context. What this discussion has brought out, however, in stark clarity, is that today we appear to be back in an age where we are arguing over values rather than rules and processes. So in late modernity, we are thrown back into an age of natural law, not quite the pre-Westphalian type, but a post-Westphalian *avatar* of value pluralism that risks the outbreak of not so new wars over competing convictions. Certainly, as one can observe in abundance in academic conferences, too, there is much violence at lower levels. There is much evidence of fights over values rather than rules and processes, but these struggles are also reflections of power, in fact different kinds of law-related or legal power in competition with each other. Since each type is aligned to a specific type of law, each makes its own truth claims and offers its own promises of justice and a better future. No miracle that the debates remain convoluted and heated, for we often forget to respect the voice of the other.

Finale

By 2014, then, there is growing recognition of legal pluralism as a troublesome ubiquitous phenomenon as well as a powerful methodological approach for analysing and negotiating deeply contested scenarios all around the world. But at the same time, we are also learning more about the depressing fact that we will never completely stop fighting with others over different values. The reason for this is that we are all, whether as individuals, members of social groups, citizens, or global citizens, affected by the various liquidities of law existing all around us. This embroils us in an ocean of competing legal entities and perceptions that we just cannot extricate ourselves from until we die. In fact, then, we are infected by this legal liquidity, depending on the perspective we may take, burdened with the inevitable risk of subjectivity when it comes to making decisions about the various kinds of law that we are all involved with, whether we like it or not.

While misgivings continue over nomenclature, reflecting continued nervousness over extending the apparently coveted label of 'law' as a separate and powerful entity to entities that are clearly related in some form to state law, but have different roots, that is not the real problem at a philosophical level. Thus, in the views of many, these different types of normativity should be given different names, or we may choose compound names with different combinations of the word 'law', such as natural law, positive law, and so on.

However, we seem to know all that, so how do we move on? More important in todays' day and age is acknowledgement that much of what appears as state law is in fact not made by the state, but was accepted by state-centric systems as law, always connected, as Chiba-sensei taught us, to different competing values. Different methodologies thus exist for how to incorporate such normative orders into formal legal systems. Questions need to be asked whether in changed social, material and ideological conditions, further adaptations of state laws to prevailing social norms should be tolerated. However, that risks changing the entire nature of legal systems if one has, as many states in Europe now see, large numbers of 'foreign' citizens, who may be technically citizens, but follows different value systems.

Prominently, we can identify the earlier common law technique of turning local customs into reported official case law, or one could take a more radical civil law approach and pretend or claim that custom has been superseded completely by state law. Legal pluralities and liquidities will, however, continue to exist no matter what techniques of management we choose to adopt or privilege. Such discussions, then, are neither here nor there, for the deeper issue identified in this article is the troubling realisation that the real fights we have, even today, are about very personal convictions and assumptions of what is 'tolerable' and what is not. In many European contexts currently, there is a marked fear of 'the other' becoming too powerful also when it comes to formal legal regulation.

For ensuing debates about the risks of excessive liquidity in the law to be productive, what needs to be done? It is quite clear by now that arguing in favour of legal pluralism merely for the sake of argument is no justification for its existence at all. No form of law can be trusted to deliver justice on its own all the time, legal pluralism included. The key question then becomes whether adopting pluralist methodology can be more conducive to achieving better justice.

As 'good law' seems everywhere to be an amalgam of the various types of potential legal ingredients, in particular proportions, we find that we are neither able to trust legal pluralism *per se*, nor can we dismiss it out of hand. It always has to prove its worth, from case to case. On closer inspection, though, we have abundant proof that legal pluralism, both in procedural and normative terms, can be conducive to justice, but may still not be trusted. The most powerful examples are those where legal systems have systematically co-opted non-state law as law, and where the unspoken reality of pluralist navigation is not just daily practice but constitutes part of the foundation of entire legal systems. In other scenarios, naturally when more recent migrant groups are involved, this is less evident and more a matter of case-by case application in efforts to generate the right outcomes and thus produce 'good law'.

As indicated it remains problematic that much of eurocentric scholarship struggles with accepting the non-European 'other' when it comes to law and thus would voice grave opposition to the statements of the previous paragraph.

However, it is not a fact that only non-Western legal systems have adopted certain local and other cultures, this is a global phenomenon, everywhere, as the RELIGARE findings on the relationship of law and religion in various European states brought out in full force (see note 9). These are not matters of East v. West, therefore, they are globally shared problematic issues. Everywhere normative pluralism exists at multiple levels and legal liquidity becomes a virtual glue that binds – and arguably affects and infects - entire structures. This is simply a fact of life that we have to learn to manage as best we can.

In conclusion, then, the need to be alert to intense pluri-legality is unquestionable, and there are basically no clearly definable limits, as one person's sense of the tolerable is going to differ from the next person's perceptions. Finetuning will be needed of how we handle the vexing issues of adjudging what is 'intolerable', but this will forever remain contested.

What has not been raised here yet is what the remedy should be if something or someone is seen to be totally intolerable. Various unconvincing efforts have been made to establish or suggest agreed criteria or minimum standards. To take the simplest of examples, does one justify killing serial murderers, as otherwise there will be more deaths? Or does one incapacitate such individuals in other ways to prevent harm? What, at the end of the day, is 'harm'? I do not see much evidence of agreement among academics, while there is ample evidence that many judges face deeply troubling pressures to hand down their decisions.

Thus, the fact that law itself remains an un-agreed phenomenon will continue to be troublesome, and it will be matched by the equally disconcerting fact that value judgements over legal processes, rules and norms will also always remain deeply contested. As a result there will be no complete closure of these debates, good news for people claiming paid thinking time. There may be some sense of agreement or an understanding of commonality and shared values, but all of this remains partially liquid. The best that plurality-conscious legal education can do, then, is to provide young people everywhere, and not only in law schools, with the tools to manage the continuing competitions and to seek to find the right – or even just the best possible – solutions for specific situations and scenarios. There is no

fit for all, no ready remedy, and just as there is no realistic scope for constructing one law for the whole world, at lower levels of organisation sensitivity to the pluralities of specific scenarios will and should remain a key feature. This is, I think, not a depressing finding. Rather, it contains an appeal to work harder to cultivate open-mindedness and deeper respect for ‘the other’, at all levels of legal management.

What Can We Mean by Legal Pluralism?

A Socio-philosophical Perspective

Virginio Marzocchi

Abstract Sec. 1 delves into some of the main questions and claims raised by Legal Pluralists. Sec. 2 advances the suspicion that, in trying to oppose state legal centralism, Legal Pluralism has uncritically assumed most of the presuppositions of its opponent, i.e. of mainstream legal positivism, and thus has hampered its own original task to reverse them. From this perspective, which tries to encompass the claim- and project-use of law, sec. 3 contends that the question "What is law?" should be changed into the different question "Why have people invented and constantly transformed something that they have called/recognized as law?", so as to conceive law as a problem-solving process and a discursive resource. The subsequent sections provide a portrayal of law (or better, *iurisdictio*) as a social sphere, which allows the expansion/potentiation of society, and insist on the relevance of the why-question vis-à-vis ought-questions about law.

Keywords philosophy of law, legal pluralism, social philosophy, social differentiation, theory of action

1. Discussing "Legal Pluralism"[1] is a difficult but perhaps worthy enterprise.

Legal Pluralism is a neologism, which tries to encompass and generalise under the same label relatively recent phenomena and very old ones, already well known but often presented by legal historians (usually concentrated on the history of Western law) in different ways, that suggested a temporary and specific character of those phenomena: for instance under the label of "legal particularism" or "legal personalism". To the contrary "[l]egal pluralism, it turns out, is a common historical condition. The long dominant view that law is a unified and uniform system administered by the state has erased our consciousness of the extended

[1] Under the label "Legal Pluralism" (in capitals) I refer, in a general and broad way, to the studies of authors who have ascribed the label to themselves starting from the 1970s. For instance: anthropologists such as S.F. Moore, G.R. Woodman (mainly in the context either of colonisation and de-colonisation in Africa and Asia or of immigration to Western countries); sociologists such as G. Teubner (in the context of globalisation); legal theorists such as M. Galanter, J. Griffiths, B. de Sousa Santos, B.Z. Tamanaha, W. Twining; comparative lawyers as W. Menski, H.P. Glenn.

history of legal pluralism"[2]. Indeed "[l]egal pluralism was a normal condition during the medieval period; after law was consolidated within state structures, legal pluralism was reduced in Western Europe just as it was being increased elsewhere through colonisation; now legal pluralism is multiplying once again as certain powers held by states are devolving on to other entities or morphing into different political or legal configurations"[3]. From this point of view Legal Pluralism appears to be the awareness and assessment of a "fact", of "a social state of affairs"[4], which, though varying in degree and in forms, is claimed to exist "everywhere" in time and space: "in every social arena" by way of "multiple uncoordinated, coexisting or overlapping bodies of law"; in "many societies" through different and often coexisting "forms of law, like customary law, indigenous law, religious law, or law connected to distinct ethnic or cultural groups within a society"; and particularly today at a "transnational"[5] level, where "there are evident signs of a diminishment of the state's traditional legal functions"[6] and where "the growth of 'self-creating', 'private', or 'unofficial' legal orders"[7] have increased steadily.

We should note that some authors distinguish between "legal pluralism in the strong sense" and "legal pluralism in the weak sense"[8] or between "deep legal pluralism" and "state law pluralism"[9] (the latter, later recognised as possible even within legal orders different from state law, would be the case, for example, "when different rules, standards of proof or judges operate with respect to

[2] B.Z. Tamanaha, "Understanding Legal Pluralism: Past to Present, Local and Global", *Sydney Law Review*, 30 (2008), p. 376.

[3] Ivi, p. 410.

[4] See J. Griffiths, "What is Legal Pluralism?", *Journal of Legal Pluralism and Unofficial Law*, 24 (1986), pp. 4, 12.

[5] B.Z. Tamanaha, "Understanding Legal Pluralism: Past to Present, Local and Global", cit., p. 375.

[6] Ivi, p. 386.

[7] Ivi, p. 387.

[8] See J. Griffiths, "What is Legal Pluralism?", cit., *passim*.

[9] See G.R. Woodman, "Unification or continuing pluralism in family law in Anglophone Africa: past experience, present realities, and future possibilities", *Lesotho Law Journal*, 4 (1988), 2, pp. 33-79.

commercial issues from those with respect to other issues"[10]). Such distinction raises the question of the seminal and original locus of legal pluralism. Although deep/strong legal pluralism can be better ascribed to the relation between different types of legal orders, where the previous variety of norms is reduced through the levelling work of experts/officials, legal pluralism originally occurs conventionally and spontaneously in specified social groups or in self-regulating semi-autonomous social fields[11] or in sub-systems. Therefore society, in losing clear territorial borders and the unifying imprint of a diffuse and shared culture, should be seen not as a monistic unity but as a network of groups, fields or sub-systems. This view not only suggests a social ontology that differs from a great number of the most influent approaches in the social sciences (sociology and anthropology)[12]; but, at the same time, involves the identification of law with social norms, that "exist as such by virtue of being part of the social life of the group rather than through institutional recognition"[13]. I would say more generally: rather than through some sort of public elaboration/discussion/recognition by the group or by some of its members.

In my opinion this is the (empiricist) direction taken by some exponents of Legal Pluralism, which consists in avoiding the elaboration of a definition/concept of law (consequently also of Legal Pluralism) by the theorist/researcher and then in reducing the "legal" to a certain amount or *corpus* of rules/norms, identified as such (tacitly through compliance or explicitly through consent) by the (lay) people who are the subject of study.

G.R. Woodman for instance concludes a very interesting review of Legal Pluralism by assessing that "legal pluralism exists everywhere […] because unitary situations do not exist. But this is only to suggest that legal pluralism is a

[10] G.R. Woodman, "Ideological combat and social observation. Recent debate about legal pluralism", *Journal of Legal Pluralism*, 42 (1998), pp. 34, 23.

[11] See S.F. Moore, "Law and social change: The semi-autonomous social field as an appropriate subject of study", *Law and Society Review*, 7 (1973), pp. 719-746.

[12] See M. Mann, *The Sources of Social Power*, Cambridge, Cambridge University Press, 1986, Vol. 1, Chapter 1.

[13] G.R. Woodman, "Ideological combat and social observation. Recent debate about legal pluralism", cit., p. 42.

non-taxonomic conception, a continuous variable, just as, according to Griffiths' well-founded and helpful observation, 'law' is"[14]. The same author begins a more recent essay by proposing the following definition of customary law: "law which derives its existence and content from social acceptance", conceived as "a relatively widespread observance of the norms of customary law in a particular group of humans"[15] at a given moment (independently of its duration in time and of the motivation behind compliance). Woodman then classifies different types of customary law depending on the type of the social group, which in my opinion (but contrary to some examples proposed by the author) should be identifiable independently of the law: if law determines the group, then it would be impossible (or better, circular) to assume that we could obtain law (without presupposing it) by attesting to a diffuse compliance. He comes to a first conclusion: "[S]tate laws are in reality further instances of customary laws, the populations which observe them being the officials and others who operate the various institutions of the state"[16]; and then he draws the last one: "[I]t seems to be impossible to establish an empirical distinction between different types of social norms which can be used to give a narrower definition to customary law"[17], i.e. to "find some criterion for distinguishing those norms which were legal" [18] from the non-legal ones.

B.Z. Tamanaha firstly asserts: "The question 'what is law?' […] has never been resolved, despite innumerable efforts by legal theorists and social scientists"[19]. But then, in order to avoid the so called "Malinowski problem", consisting in considering law "every form of norm governed social interaction", "although common sense protests against it"[20], he affirms: "Law is a 'folk concept', that is,

[14] Ivi, p. 54.

[15] G.R. Woodman, "Diritto consuetudinario e diritti consuetudinari: una considerazione comparativa sulla loro natura e sulle relazioni tra tipi di diritto", *Politica & Società*, 2 (2009), p. 92.

[16] Ivi, p. 97.

[17] Ivi, p. 99.

[18] Ivi, p. 98.

[19] B.Z. Tamanaha, "Understanding Legal Pluralism: Past to Present, Local and Global", cit., p. 391.

[20] Ivi, p. 393.

law is what people within social groups have come to see and label as 'law'. It could not be formulated in terms of a single scientific category because over time and in different places people have seen law in different terms"[21]. Such general concept of law, claimed to be non-essentialist, involves that: "Legal pluralism exists whenever social actors identify more than one source of 'law' within a social arena"[22].

Regarding specifically the international and transnational realm, a similar non-essentialist concept of law has been invoked and defended by P.S. Berman: "[P]luralism frees scholars from needing an essentialist definition of law. […]. Indeed, the whole debate about law versus nonlaw is largely irrelevant in a pluralist context because the key questions involve the normative commitments of a community and the interactions among normative orders that give rise to such commitments, not their formal status. […] After all, if a statement of norms is ultimately internalized by a population, that statement will have important binding force, often even more so than a formal law backed by state sanctions"[23].

On the other hand, F. von Benda-Beckmann, in looking for "a concept of law that is not linked to the state by definition and that is broad enough to include 'legal pluralism'", defends the necessity of constructing an "analytic concept of law", "useful for looking at similarity and difference in cross-societal and diachronic comparison", as needed by "anthropologists", "legal historians" and "comparative legal scholars"; nevertheless, "others dealing with law [such as academic or practical lawyers, judges, religious or traditional authorities] may need a different concept of law for different purposes"[24]. "While the subject matter, law, law application etc. does not distinguish legal anthropology from legal science, the way in which legal anthropology conceives law as variable, the questions it asks about law, and the methodology on which research is based, do

[21] Ivi, p. 396. (See also Ivi, § 5).

[22] Ibid.

[23] S.B. Berman, "The New Legal Pluralism", *Annual Review of Law and Social Science*, 5 (2009), p. 237.

[24] F. von Benda-Beckmann, "Who's afraid of legal pluralism?", *Journal of Legal Pluralism*, 47 (2002), p. 40.

distinguish it from legal science, at least from the normative and dogmatic sciences of law, which elaborate correct interpretations of general legal abstractions with respect to concrete problematic situations and philosophical reflections on what and how law should be"[25]. Quoting L. Pospisil, the author makes clear that an analytical conceptualisation of law "is not a phenomenon – it does not exist in the outer world": "As analytical concepts, law and legal pluralism only point at the *theoretical possibility* that what we capture with the concept *may* exist empirically. […] They are only means to see whether they have such phenomena as specified by the concept"[26].

From the first perspective, which I have labelled above as empiricist, the question "what is law?" is referred to and presumed to be already decided (tacitly or explicitly) by the population (divided into different groups, conceived as the minimal unit of a society). I do not find such an answer convincing for many reasons, among which I would enumerate the following ones: it assumes that law consists of norms; it does not see that following a norm is not the same as being able to express or recognise it; it underestimates the role of experts (i.e. the formation of a separated group among the population) in the elaboration and transformation of a specific (technical/formulaic) and, at the same time, trans-sectional language[27].

To the contrary, from the second perspective, which I could label the conceptual-constructivist one, it seems that researchers/scholars could develop, for the sake of comparison, an analytical concept of law, which is constructed and verifiable independently of its recognition/use by the population as addressees or elaborators/authors of the legal rules. In my opinion, a concept that has to do with the socio-historical world does/must exist in some way (in a way that I will try to clarify in the following) in the outer world. In fact, the actors of the socio-historical world make use of this concept in order to regulate their actions and organize their interactions. Furthermore, the analytical concept, as proposed by F.

[25] Ivi, p. 41.

[26] Ivi, pp. 44-45.

[27] See M. Croce, *Self-sufficiency of Law. A Critical-institutional Theory of Social Order*, Dordrecht, Springer, 2012, Chapter 9.

von Benda-Beckmann for instance, is not a proper concept (i.e. a connection of characters) but an enumeration of traits that can vary independently of each other, to the extent that the presence of one or more of them implies neither the presence nor the variation of others.

2. My general impression is that most representatives of Legal Pluralism, in trying to oppose the identification of law with state law, i.e. the so-called ideology of legal centralism (summed up as follows by J. Griffith: "[L]aw is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions"[28]) assume uncritically most of the presuppositions of mainstream legal positivism[29] and limit their job in denying or better reversing them: law is not uniform, because it does not consider persons/individuals but different groups of persons; legislation and adjudication are not the exclusive resort of public officials, in that, even where the (contingent) distinction between officials and lay people exists, it is variable and traditionally drawn by the population. The main presupposition shared by both groups of scholars does not consist only in considering law as normative/prescriptive order/s (even if most Legal Pluralists are prone to wipe out the border between legal and social norms), which as such find/s its/their support in the sources/origins (either hierarchically ordered or not). Rather, such a presupposition consists also in the positivistic attitude and conviction, not exclusive of mainstream legal positivism, according to which "what is law?" is a right question, whose answer depends on what law has been till now and predetermines what all possible law can be. To such question we could find the right answer by extracting it from the socio-historical reality, where law exists: either as a unitary system, which assures certainty and efficacy in that it has been produced according to *l'ésprit general* of

[28] J. Griffith, "What is Legal Pluralism?", *Journal of Legal Pluralism*, 24 (1986), p. 3.

[29] For a clear and recent presentation of what I call "mainstream legal positivism", as developed both in the European-continental world under the title "allgemeine Theorie des Rechts" and in the Anglo-Saxon world under the title "general jurisprudence", see A. Marmor, *Philosophy of Law*, Princeton, Princeton University Press, 2011. For a more comprehensive presentation and discussion of the same stream see A. Schiavello, *Il positivismo giuridico dopo Herbert L.A. Hart*, Torino, Giappichelli, 2004. For a more recent and synthetic overview see G. Pino, A. Schiavello, V. Villa (eds.), *Filosofia del diritto*, Torino, Giappichelli, 2013, Chapter 3.

a people/nation (Montesqieu), a *Volksgeist* (Savigny), the only Sovereign (Hobbes, Austin), a *Grundnorm* (Kelsen), a series of superior (constitutional) norms (Hart); or as a plurality of normative orders, considered as such by a group or groups.

What the question "what is law?" misses is the full use of the word "law" and in so doing it overshadows another possible use of it. Lay people and scholars have used "law" not only in order to mark out a certain set of norms or practices, but also as a claim- or struggle-word and as a project-word. Let me mention for instance the theoretical starting point of legal positivism in terms of state centralism, represented by Hobbes's *Leviathan*. On the one hand, we can say that his centralist view did not correspond at all to the social reality of common law in England or to the situation of great legal localism in France at that time. Yet, on the other hand, I think that would be a mistake to regard Hobbes's proposal as pure ideology, as a distortion of the social reality of law, because it was largely and progressively realised at the time of codifications in continental Europe, starting from France and Austria. What I want to stress is that the discussion *about* law (among philosophers, lawyers, and social scientists) and the debate *inside* the law (in universities and courts) has been, at least in the Western world, an undeniable and intrinsic component of what law has been and is, i.e. not only in order to induce acceptance/obedience but also in order to construct/elaborate law and its contents. In my opinion, if we configure the question either as a pure is-question or as a pure ought-question, we end up obscuring and losing such internal relation between discursive reflection/debate about law and the law, and at the same time between law and its linguistic-cultural history.

I rather prefer such (heuristic) question: Why have people invented and constantly transformed something that they have called/recognised as law?

3. The main reason to put the question in this way is that it makes it possible to see law as a problem-solving process. On this account, on the one hand, law never

coincides with "what people consider as law"[30], in that (some of the) people can always object (but by showing it and convincing the others through the elaboration of feasible alternatives) that the given solution is not a good or the best one. On the other hand, the determination of law must take into consideration what people consider as a problem and as a right solution. My why-question is intended to open up a critical space in the subject of study that it makes understandable: why the discussion about law, even if it does not reach a definitive conclusion and perhaps exactly because of it, is relevant for formation and change (or better, in some cases, correction) of law; and why law remains a discursive resource[31], by which people do not only advance previous norms but articulate claims and needs in order for them to be recognised and satisfied. It tries to avoid the *prima facie* democratic, indeed traditionalistic/conservative idea of law, proposed by some Legal Pluralists: customary law (defended by Woodman[32]) or law as considered/named as such by people (as proposed by Tamanaha or Dupret) seems to satisfy at best the coincidence (without representation) between the authors and the addressees of law, but with the result that norms are reduced to normality[33], decided by a silent majority, which has not the duty/opportunity to listen to the voice or voices of the minority/minorities, at least at the moment of the elaboration/enactment of norms. More generally, I should note that norms, if reduced to normality, lose one of their essential traits, i.e. their project- or emancipatory character, whereby they can be thought to change or improve or reshape social reality/interactions, in case reality is experienced as unsatisfactory;

[30] B. Dupret, "Legal Pluralism, Plurality of Laws, and Legal Practices: Theories, Critiques, and Praxeological Re-specification", *European Journal of Legal Studies*, 1 (2007), p. 1.

[31] See M. Spanò, Azioni collettive. Soggettivazione, governamentalità, neoliberismo, Napoli, Editoriale Scientifica, 2013.

[32] I should note that custom/*consuetudo*, if deprived of the duration in time, as proposed by Woodman, loses its rationale: the conservation of the *consuetudo* or tradition, if we don't reduce it to a habit induced by simple repetition, can be considered as an evidence of the fact that the actors have judged it as repeatedly/constantly good/helpful and because of it (i.e. of the good results obtained) they maintain it. See for instance H. P. Glenn, *Tradizioni giuridiche nel mondo. La sostenibilità della differenza* (2010), Bologna, il Mulino, 2011, pp. 143-144; P. Grossi, *L'Europa del diritto*, Roma-Bari, Laterza, 2007, p. 15: la consuetudine "è un fatto ripetuto nel tempo in seno a una comunità piccola o grande, ripetuto perché si avverte in quel fatto una valenza positiva".

[33] For the dialectical relationship between norm and normality see A. Catania, *Metamorfosi del diritto. Decisione e norma nell'età globale*, Roma-Bari, Laterza, 2008, pp. 63-75.

and norms are limited to the request of imitation/conformity to previous standards of conduct, selected and marked out as models, to which all other people should conform, in that the majority (if there is any, or better, a clear and convinced one) already follows them[34].

My why-question is conceived as also different from an ought-question.

4. The ought-question can take a first form, usually/traditionally advanced by philosophers, who contend to be able (starting from a certain idea of human nature or of human faculties or of human society) to demonstrate how law ought to be and sometimes why (a so defined) law should be carried out, but largely regardless of whether this sort of law has ever existed. We could express the problematic aspect of such attitude as follows: the question lies in the relation between the term "law" as used/redefined by philosophers and the same term normally used by the rest of the population. In other words: do philosophers invent a new meaning by maintaining the same material sign or do they only transform/correct/precise a widespread/imprecise meaning, which partly validates their use of the same word? The problem does not dissolve, even if we decide to add the qualification "just" or "right" to the noun "law", in that the meaning of the noun must be in some way constant. From the point of view of social scientists, philosophers seem to be quite arrogant by imposing their ideal definition of law to all other people; on the other hand, philosophers could object that social scientists make use of an untested and arbitrary meaning in collecting the empirical material, which they unify under the same universal/common term "law", even if a natural language employs different signs (as for instance in Latin: *ius* and *lex*) and each natural language employs a sign or signs that are different from those used in all other languages. Against some philosophical positions, my why-question suggests that law is a socio-historical invention (as for instance writing or money), and therefore not a necessary request of reason or human nature/society. Against some Legal Pluralists, we cannot assume that law exists

[34] That is in my opinion the conclusion offered and finally endorsed by C. Schmitt. For a recent and acute reconstruction of his legal thought see M. Croce, A. Salvatore, *The Legal Theory of Carl Schmitt*, Abingdon Oxon, Routledge, 2013.

everywhere in space and time. Furthermore, an invention can be very casual in its emergence and then can be reused, selected and made stable for other at first unintended/unexpected purposes[35]. What the struggle between philosophers and social scientists sketched above (which goes on with regard to other words, e.g. "science" or "morality") reveals is that "law" cannot be reduced to a class of objects (often identified in norms), that already exist or should be brought into existence; indeed its referent is more similar to what Wittgenstein called a language game, whose existence consists in its intersubjective/interactional functioning/reproduction, and that I would call a social sphere.

As a *language game*, a social sphere consists not only of interlocutions (speech acts) but also of interactions: accepted speech acts make possible the interlocking of actions in interactions and successful/satisfying interactions make stable the meaning of signs, by which speakers/knowers/actors experience the world and construct/interweave their common socio-historical world: the use of signs in successful/satisfying practices, which reach the intended results, allows the speakers/knowers/actors to test, for the same speakers, the constancy of meanings through time and, for all the speakers of the practice, the identity of meanings, the rightness of the connection between meanings and signs, and the adequacy of the application of signs to objects/situations/actions/feelings. In this way, the meaning of (symbolic/conceptual) signs obtains an (intersubjective or social) objectivity not reducible to what one thinks or feels or considers-as and maintains a hypothetical/hermeneutical synthesis character, which makes the application/use of the sign testable, on the one hand, by each speaker/knower/actor but, on the other hand, on the basis of a social/shared meaning, whose distinctiveness/*intentio* is related to the capability of making successful interactions possible. Furthermore, if we conceive the interlocution as consisting of speech acts (with a performative/reflexive component and a propositional one, expansible through a propositional chain that can back and make acceptable the first one), than speakers/knowers/actors have the possibility of reshaping their shared meanings,

[35] See N. Luhmann, *Einführung in die Theorie der Gesellshaft*, Heidelberg, Carl-Auer Verlag, 2005, pp. 208-228.

even though resorting to previous untouched words/meanings[36]. As embedded in a language game, conceptual sign/meanings and action rules derivable from them have an interrelated cognitive and prescriptive character: they prescribe actions on the basis of the fact that, on the light of socially shared meanings, behaviours are conceived by the actor and understood by co-actors as the same type of action, which is requested in that it makes it possible to maintain the interaction, i.e. to be involved and remain involved in the game/practice[37] (what is condition of possibility of having a stable world, as linguistically/interactively stabilised/shaped, and to intervene on it through the improvement/potentiation of single's capabilities by the formation/organisation of a social/collective power).

But a *social sphere* (as e.g. economy or policy) is more than a language game in many respects. I will stress some of them. 1. Like *institutions*, a social sphere makes its inner roles fixed/rigid, i.e. largely independent of the individual traits/perspectives of the participants and independent of different positions assumed in other social contexts, with the consequence that we lose the interchangeable positions of speaker/hearer characterising language games, while participants have at their disposal different opportunities to mould language, e.g. to advance communication offers and to accept or refuse them. 2. A social sphere develops a proper/distinct language. On the one hand, this aspect enables relations/communications between already existing (local) language games and already stable institutions by the *inventio* of abstract/generalising categories, distant from the polyglot variety of every day language/experience (as e.g. in the case of the transformation/subsumption, accomplished by the Roman jurists, of diverse possessions into/under the one category "property" or of manifold exchanges/transactions into/under the category "contract")[38]. On the other hand, such a proper/distinct language finds its hold no longer directly in successful

[36] I make use of the transformation of the speech acts theory proposed by K.-O. Apel and J. Habermas, which I reconstructed and defended in V. Marzocchi, *Le ragioni dei diritti umani*, Napoli, Liguori, 2004, pp. 95-165.

[37] See M. Croce, "A Practice theory of Legal Pluralism: Hart's (inadvertent) defence of the indistinctiveness of law", *Canadian Journal of Law and Jurisprudence*, 1 (2014).

[38] See N. Luhmann, *Das Recht der Gesellschaft*, Frankfurt am Main, Suhrkamp, 1993, pp. 262-267.

everyday interactions, but (dwelling on the semantic-syntactic dimension of language) in the coherence/consistency of the new vocabulary and of the argumentative opportunities, opened by it, i.e. in a new science/knowledge/discourse. Nevertheless the new knowledge must be able to make successful interactions possible, as the moment where the (intersubjective or social) objectivity of even abstract/generalising signs/meanings finds its stabilisation and test, but now in bordered/demarked or *second order institutions* (as e.g. courts, universities or parliaments). The new knowledge/vocabulary does not have to be systematic, for it has to connect and reinforce different everyday language games/institutions, without dissolving them (as a necessary condition for the reproduction of the linguistic/intellectual and material resources needed by the new knowledge and the demarked institutions). Nor do the new demarked institutions have to be hierarchically ordered, in that they fulfil different functions regarding the law and can cover different fields. The idea of a law "uniform for all persons" and "administered by a single set of state institutions" could be largely (but not completely) realised only when the nation state, unlike the former jurisdictional one[39], has been able to homogenise society, i.e. the network of manifold local institutions/languages, by splitting it in equal/similar/self-determining/co-existing individuals, provided with equal rights, i.e. free spaces of initiative, that the law outlines and that the state (as a third impartial entity) guarantees through the monopole of force.

I would prefer to use for "law", conceived as a social sphere, the old term *iurisdictio*. It makes it clearer a few relevant aspects of law. First, law is seen as a result of *inventio* in terms of an elaborative/intelligent discovery of cognitive schemes/categories. Secondly, law is a public (societal) process which do not concern single/separate groups or pre-existing communities as such, but involves the emergence of roles/figures (as e.g. experts/jurists, judges, legislators/promulgators, lawyers, legal advisors, notaries) and distinct places/moments, different from every day interlocutions/interactions, that make

[39] See M. Fioravanti, "Stato e costituzione", in Id. (ed.), *Lo Stato moderno in Europa. Istituzioni e diritto* (2002), Roma-Bari, Laterza, 2005, pp. 3-36.

possible the interchange among more or less distant units, especially if we do not conceive them as sets of similar persons but as language games/practices and institutions, to which the same person can belong at the same time and which remain the same even if all members change. Thirdly, law does not properly reflect or reinforce a society but helps to build society, not by creating it (by transforming a *multitudo* in a people) but by inventing reflexively categories, roles, institutions able to increase collective power by integration/communication between (local, scattered) practices, by making them more predictable, and by repairing the functioning of practices in the case of quarrel/conflict among the interactors or in case of deviant actions.

I should admit that my reconstruction of law as a social sphere is largely dependent on the evolution and relevance experienced by law in the Western world and particularly in Western Europe. Though starting from the classical Greek unitary vision of the authentic human society/community (i.e. the *polis*) as a whole, where the basic structure of society (encompassing all aspects of life) could be deliberated by a more or less qualified number of its members (citizens), one of the main characteristics of this part of the world has been to open up, develop and maintain differentiated social spheres, not reducible to one another and provided with different logics and communication media for its functioning and reproducing. As far as I know, the first differentiated social sphere has been the law by way of the Roman *ius* and the second one has been religion by way of *christianitas*. I would make the claim that the building process of the national states system[40] can be seen as the attempt to deprive those two spheres of their relative autonomy, by reducing them to the binding decisions of the political sphere and at the same time by making them to coincide with the borders of the territory/population, while other social spheres have emerged, such as the technical-scientific one and the market economy, which in turn and in new forms were breaking control and borders of states.

[40] See C. Tilly, *Coercion, Capital and European States, AD 990-1990*, Cambridge Mass., Basil Blackwell, 1990.

What my last considerations concede to Legal Pluralism is one main tenet of this stream, i.e. that we cannot identify law with state law, more precisely with politics and the form that politics has taken in the national/constitutional states. But, on the other hand, they caution against finding law in every social context by assuming as law any sort of social regulation or normative order (either actually followed or recognised as such by people). In other words, they question that law is at work even in societies not characterised by differentiated social spheres, whose existence/functioning depends on the delimitation from other ones (and not chiefly on geographical borders or on group identification), on the interpenetration with other ones, and on the emergence/consolidation of specific discourses/languages and reflexive or second order institutions (where social claims, i.e. new practices and forms of relationship, related to emerging interactions, can be articulated even though by accepting that specific language or successfully reshaping/renewing it).

At the same time, if we see the referent of the word "law" as a differentiated social sphere, then we can transform the ought-question advanced by philosophers about law, in that we look at law from two different vantage points. On the one hand, law is taken to be as a self-maintaining historical (contingent) product/invention, not necessarily yielded by society. On the other hand, law appears as a powerful/ingenious device that makes possible the expansion/potentiation of society, in that it allows different/local practices to communicate and interlock, makes them predictable, and proves able to repair their functioning when dispute/conflict arise among the interactors or when deviant actions are performed.

5. The ought-question can take a second form, due to the assumption that "[t]he law is, by and large, a system of norms" and that "[l]aw's essential character is prescriptive", in that "it purports to guide action, alter modes of behaviour, constrain the practical deliberation of its subjects"[41].

[41] A. Marmor, *Philosophy of Law*, cit., p. 2.

This question is different from the first philosophical one, for it starts from a sort of empirically unquestionable assessment or assumption, which in my opinion is shared by a great number of Legal Pluralists, even though under the condition that we strike out the term "system" by retaining the term "norm" or better "normative orders" (in the plural).

What I tried to contest in the previous sections is that law consists essentially or exclusively of norms. Although norms are not the exclusive/principal moment, they play a relevant role. Mainstream legal positivism concentrate on them, especially on the "ought" which makes them binding/imperative/authoritative. Accordingly, positivists have tried to distinguish the legal "ought" from other sorts of "ought" (as e.g. the moral "ought") in two ways. First, they maintained that also the legal ought (even if supported by efficacy) is not reducible to an "is" or to facts (which can be social or individual as a feeling, an attitude or a belief). Secondly, they claimed that the conditions of validity of the legal "ought" "are detached from content"[42] of the legal norms. Even if we accept, as contended by Hart[43], that law cannot consist only of duty-imposing norms (in case of "primary" norms) but also comprises power-conferring norms (in case of "primary" and "secondary" norms), and even if, according to Legal Pluralism, we expand this contention in the direction of a plurality of forms of legal norms, the problem of the validity/justification of the "ought" or of a norm in its normative claim does not vanish: a norm is a norm in that it is valid even when it is not respected/observed, therefore it is correct/justified to criticise/condemn the infringing conduct; furthermore, only on the basis of a norm is it possible to discuss the rightness/incorrectness of a conduct, which otherwise could be only ascertained.

The question where/how to hang/fix/justify norms so that they remain stable and they can be used against conducts which do not abide by them is a serious one. At the same time, however, such a question radicalises the problem and suggests finding the solution in a place external/superior (i.e. to conducts), which

[42] Ivi, p. 5.

[43] H.L.A. Hart, *The Concept of Law* (1961), Oxford, Clarendon Press, 1994.

is seen as a legitimate source, even though such origin can be conceived in different and more or less pluralistic ways: as a sovereign, a basic norm, a series of secondary norms, the *consuetudo* or custom, a political or religious or traditional authority, the *communis opinio*. What radicalises the problem and imposes such external/superior solution especially in the case of legal norms, whose ought-validity must be independent from content, is the way of conceiving them: the legal norm is conceived as consisting in a description of a behaviour plus an "ought" or in a connection between behaviours through an "ought", as such not derivable from the described behaviour/behaviours, which therefore must be introduced/justified from outside. I would add that this way of conceiving legal norms makes a few issues difficult to understand. First, why people do not abide by norms as such, so that we have to reinforce the "ought" with some sort of coercion or with the need for conformity (detached from the advantages/disadvantages that the compliance with the norm implies). Secondly, how it is possible to discuss a norm, apart from questioning its legitimacy (i.e. its being produced according to the legitimate source) or correct application.

From the socio-philosophical and linguistic-pragmatic point of view I have introduced in the foregoing section, I would use the older term "rule" (*regula*, *Regel*) instead of the more recent term "norm", in that the former is more suitable to stress the regulative/organising function, while the latter emphasises the prescriptive/mandatory one. Further, I would claim that, in order to distinguish action (*Verhalten*) from behaviour (*Handlung*) and to interlock the former with actions of others in interactions coordinated by speech, we have to conceive an action as generated/structured/governed by a rule. Thus an action rule is not a way for conferring/attaching a positive/negative evaluation or an "ought" on a behaviour/conduct, which the actor could choose/want/realise and others (as observers or co-actors) could identify/describe outside the rule, but a synthesis-rule, which, by connecting the various moments/components (already linguistically shaped) of the action, organises/structures and makes the action as such (unlike the behaviour/conduct) conscious, voluntary, chosen, rational/intelligent for the actor and identifiable/understandable for others.

While there are reduced or defective rules, a *rule* in the proper/full sense is a synthesis (that can be made linguistically explicit) of components, already linguistically shaped/oriented, which I can indicate as follows: its aim/goal (*Zwecksetzung*); the means and the way of their implementation; its primary and secondary consequences; the conditions/situation of implementation; the correspondence to the personal identity and to the role of the actor/interactors. If the synthesis/connection of those different aspects turns out to be either congruent or more congruent than other actual alternatives, then we can consider the rule (practically) normative or normatively valid for actions/interactions. In the following senses: 1. Owing to its ideal character (and like conceptual sign-symbols with reference to things/events), the rule finds always only a partial/approximate fulfilment by any single action/interaction, which is nevertheless generated and governed by the rule. 2. Following an action rule requires a certain discipline by the actor, who must control/contain desires/urges/impulses/emotions and postpone other goals. 3. The rule is shaped (in its components and their connection) by a language, i.e. by a knowledge conveyed by a language socially/traditionally moulded, dependent on its usual acceptance by the other speakers/knowers/actors of the group, and on which some of them are in the position to exert more influence than others; in this sense an action rule is always social, but does not result from an aggregative convergence of individual beliefs/interests, and turns out to be testable/revisable/correctable in a public discourse.

If we detach the validity of rules/norms from their source/origin, which should make them legitimate/legal by generating/recognising/producing them, than we can not only support a more pluralistic approach to law, but at the same time, by moving the attention on the inner congruence and on the interactional results made possible by rules/norms, we make law disputable/revisable/tenable in many respects and at different levels. At the same time, we can see the selective/elaborative work of the law as a way of structuring/moulding actions/interactions, i.e. social roles (embedded in institutions) and forms of (collective) power, relationship, agency, and subjectivity.

Legal Pluralism: Conflicting Legal Commitments Without a Neutral Arbiter

André Hoekema

Abstract This essay suggests some promising fields for legal anthropological studies in matters of legal pluralism and discuss some key concepts related to the latter. My focus is on the crisscrossing of normative appeals issuing from state law, international and transnational rules and a great variety of non-state community based normative commitments, where there is no generally recognized, neutral arbiter to settle the conflicts between all these normative orders. My attention goes predominantly to what people belonging to distinct communities have to gain or lose from a situation of legal pluralism, both at the national and the international or transnational level. I then explore the mutual interpenetration of bodies of norms, or rather, the phenomenon of *interlegality*. Stress is laid on international but particularly transnational law beyond the state borders, and on the conflicts between these norms among themselves and with national and local law. In this framework, I raise the question of whether this situation deserves to be called "global legal pluralism" and what that means. Finally I deal with legal pluralism in policies of land tenure legalization as well as with the "state (law) legal pluralism", that is, legal pluralism within state law.

Keywords legal pluralism; interlegality/hybridization of laws; global legal pluralism; transnational law; internal conflict rules.

Introduction

Legal anthropologists[1] often deal with people who profit or suffer from conflicts between many bodies of values and norms that claim authority over them. For instance, people who identify themselves as belonging to an indigenous people colonised centuries ago have kept alive parts of their own worldviews and entertain their own norms for living a good life. Think of the specific regulation of

[1] To characterise the approach by social sciences in general, like legal sociology, legal anthropology, the political sciences, normative theory and others, I will use only one term "the *anthropological* view", and sometimes "the *empirical* view". This approach has to be contrasted carefully with the *legal* approach to legal pluralism. But recently the two different approaches seem to be converging to some extent, as I will explain below (sec. 4).

land rights on their territory: communal land tenure. This arrangement of norms regulates the use and transfer of rights to plots of land and embodies values like reciprocity, mutual support, keeping the land base intact, caring for Mother Earth and more. But the law of the state they live in often contradicts this, does not recognise these local rights, and imposes individual private property. And so do international donors and development consultants (or did until recently; more about this below in sec. 6). How is such a conflict between distinct sets of values and norms solved? Normally, it isn't. For the average lawyer and politician the answer is simple: there is no conflict, state law is supposed to take precedence when determining which norms apply primarily in such a conflict. But not only does this answer not show any respect for distinct ways of life; it is simply not realistic. In daily life, state law in varying degrees lacks power and sufficient popular loyalty as the exclusive, neutral, effective and widely recognised arbiter to solve the type of conflicts just described. This is the typical anthropologist's approach: going *outside* official law, calling the norms of various communities "law", even if the dominant legal theory does not accept this, and concentrating on the conflicts between many different, socially effective loyalties without the presence of a generally recognised, neutral arbiter.[2] This crisscrossing of normative appeals is called "legal pluralism". It is not true that the various normative bodies, e.g. indigenous law versus state law, always conflict with each other. But in case of conflict, a neutral and legitimate arbiter is missing. My thesis is that the absence of an arbiter is a characteristic feature of any instance of legal pluralism in the anthropological sense.

There are many overlapping and often conflicting values and norms in different communities to which people feel bound, like indigenous peoples but also professional networks, economic enterprises or whole branches, immigrant groups, religious communities, groups of rural smallholders, workplaces,

[2] Cotterrell calls this "an unstable overlapping of different regulatory systems (including those of state law) in the same social arena, competing for or negotiating their authority in relation to each other, as well as their chances of regulatory effectiveness". Implicitly, this author also points to the missing arbiter. See Roger Cotterrell, "Spectres of Transnationalism: Changing Terrains of Sociology of Law", Research paper 32/2009, Queen Mary University of London School of Law. Available at SSRN.com/abstract=1476954, page 4.

schools.[3] Yet, we should not forget to mention "the national society" as a norm-creating community and, beyond that, many transnational associations, global business groups, NGOs, global social movements, and the often permanent links between immigrants (and refugees) and their home country. In many of these social bodies, values and norms are nurtured that give meaning to the world, man, nature and community, tell people how things "naturally" are, and prescribe what behaviour is right. Some of these norms are officially legal (like state law), many of them are not legal *in that sense*, like religious lifestyle rules, the laws of an indigenous people, or the way an agrarian community runs its land. Legal anthropologists want to study the *de facto* normative commitments and *de facto* acceptance of authority, based on all kinds of cohesive communities and, as Berman[4] writes, do not accept the formal legal claim that state law is the only form of law.[5]

[3] My concept of community is a broad one, referring to all social entities, not only to small scale face to face communities. But linking pluralism to the interaction between community-based normative commitments means that norms produced by far more fluid and/or temporary networks, lifestyle categories, global Facebook communities etc., will not qualify under my view of legal pluralism.

[4] Paul Schiff Berman, "The New Legal Pluralism", *Annual Review of Law and Social Science*, 5 (2009), pp. 225-242, p. 237. Also available at SSRN.com/abstract=1505926.

[5] Nevertheless, not all these normative commitments can be called legal norms. It is wise to follow Woodman's reflections (G.R. Woodman, "Ideological combat and social observation. Recent debate about legal pluralism", *Journal of Legal Pluralism*, 42 (1998), pp. 21-59: 43) and approach "law" in the empirical sense as "a combination of social control of a certain degree of effectiveness […] and the use of certain forms of argument whereby appropriate, or 'sound' answers are found to particular issues". As this latter element may be satisfied also by a community *as such* stepping in to develop and enforce their norms and not only by the presence of specific authorities or controlling bodies, this anthropological concept of law is still very broad. Norms of the mafia and of the Colombian FARC qualify in this sense as law. But norms implicit in the way people interact on the street or relate to the bouncer regulating entry into a private club would not. But there is more. I personally think that we would do well also to include as a criterion whether or not the local norms are explicitly called "law" in a community because this symbolically shows that this community pretends to have the right to be recognized as a legitimate lawgiver alongside or against the official state lawgiver. Indigenous peoples often fight very fiercely against legal professionals and politicians who call their norms only "customs". They want their norms to be called "legal" as a sign that their societies and their institutions have to be recognized as different but also equal to national societies. The next question would be, does this criterion exclude norms of several functional associations from being called "legal"? Again referring to Woodman, I agree with the gist of his argument that legal anthropologists would do well to refrain from "essential" definitions of what is law in the social sense (and therefore also how to distinguish this "law" phenomenon from other social control mechanisms without the defined characteristics). But I still feel the need to exclude various controlling mechanisms from the qualification "law" like the examples I gave above (queuing, the bouncer and the club, etc.)

There are important differences among all these normative communities. One category is formed by ethno-cultural minorities, by indigenous peoples, by religious communities, by communes, by distinct smallholders groups and tribes, etc. These communities resemble societies in so far as they entertain values and norms defining and organizing many aspects of the good life. They are often engaged in a struggle for social, economic and cultural survival. Being loyal to a specific identity is at stake. Let me call this category *distinct communities*. Shared ultimate values and beliefs (and possibly also elements of tradition) are characteristic.[6] Many of the other communities are "instrumental" ones, oriented towards reaching more or less concrete goals or setting up concrete projects, like businesses, NGOs, professional groups of lawyers or medical doctors, public-private platforms of decentralised governance, etc. Henceforth, I call these *functional associations*. Obviously, in real life one meets communities that are mixed, as we will see in sec. 2 below. What people have to gain or lose from a situation of legal pluralism, and particularly how this affects their position within the national society and its state, also differs considerably among the two categories of communities. People in distinct communities are often fighting to survive, to end discrimination and dispossession, and to further a more respected and equal position in that society, backed up by a more pluralist kind of state legal order and authority. They deploy strategies for organizing a peaceful living together and fight for a genuine multinational state. People in functional associations have other problems. They know they have power, they usually challenge state norms and state policies, sometimes even quite successfully, and look for ways to share power with the state and forge common platforms for cooperation. They deploy strategies for organizing more "horizontal" forms of governance and doing away with purely state-based models.[7]

Although in both types of communities a "legal" order can be found, in empirical research projects I find it necessary to keep the two separate because the

[6] Terminology of Roger Cotterrell, "What is transnational law", *Research Paper Queen Mary University of London*, School of law, No. 103/2012, p. 19. Available also at SSRN.com/abstract=20211088.

[7] Berman, "The New Legal Pluralism", cit., p. 236.

content of the potentially conflicting norms and the underlying values is very different, and the positions of power and authority in the community and in the relations with another community are also different.

As already suggested, no scholar of legal pluralism can neglect the world beyond the national states any longer. People and communities today are affected by many legal norms produced *beyond the national state,* norms that moreover often break through state sovereignty and have an effect inside a state even if that state does not want it. Indigenous peoples, for instance, are affected by international conventions, some on an UN scale, others on a smaller scale like ILO convention 169, many on a regional scale (like the human rights systems, such as the Inter-American Commission as well as Court on Human rights, and human rights regimes in Africa, in Europe, etc.). Moreover, these people are sometimes helped out and sometimes overrun by NGOs and other development agencies, which nurture their own private but often influential project priorities, values and hobbies. Businesses and associations of professionals have to deal with internationally operating but privately made and enforced norms (like the Law Merchant, see below) and public-private or purely private agreements relating to sustainable environmental practices (like the FSC label), fair labour relations, etc. Many of these regimes are called *transnational* law, not international law in the classical sense, now that states and treaties between states are not the actual producers of such regulations. Others are purely non-state, private regimes. Any analysis of situations of legal pluralism has to take into account the presence of an amazing quantity of such transnational and non-state legal regimes originating and having an impact beyond the boundaries of a national state. The main point here is the missing arbiter again. Not always, but regularly, these transnational rules overlap and conflict with each other, while there is no overall body of highest norms that is generally accepted as a neutral arbiter in these conflicts. There seems to be a link to the situation described before in cases of “national” legal pluralism of indigenous law versus state law. I am not surprised that the term

global legal pluralism is used more and more in international law reflections,[8] although this usage often contradicts the anthropological view, as explained below (sec. 4).

In this essay I want to suggest some promising fields for legal-anthropological studies in matters of legal pluralism and discuss some interesting concepts. I confess that I will dedicate far more attention to distinct communities and how they are doing in legal-pluralist situations and less to functional associations. First of all, I offer a sketch of two recent studies of legal pluralism (sec. 2). The next step will be to illuminate and suggest the importance of the mutual interpenetration of bodies of norms: the phenomenon of *interlegality* (or hybridisation of legal orders) (sec. 3). Then, in sec. 4, I pay attention to transnational and non-state law beyond the state borders, and to the conflicts between these norms among themselves and with national and local law. Such conflicts impact heavily on the fate of many communities in the world. I also raise the question of whether this situation should called "global legal pluralism" and what that means. In sec. 5, I put forward the dynamics of the complicated and contested process of official recognition of distinct communities' non-state law and authority and the role of "internal conflict rules" that goes with it. Sec. 6 is dedicated to legal pluralism in policies of land tenure legalisation and as a source of inspiration for new forms of governance. Finally, in sec. 7, I deal with the often neglected topic of "state (law) legal pluralism", that is, legal pluralism within state law.

Two recent anthropological studies of legal pluralism.

Peru

Two recent anthropological PhD studies that I had the pleasure to supervise address legal pluralism. In a mountain valley in Peru, a local farmers' community has since time immemorial constructed, maintained and run a complex scheme of irrigation canals that feeds their mostly tiny plots of land. They take the water

[8] Also called "new" or "international" legal pluralism, like William W. Burke-White, "International legal pluralism", *Michigan Journal of International Law*, 12 (2004), pp. 963-979.

from a river called the Achamayo, an affluent of the Mantaro river that dominates a far larger and more important Andean highland valley. This is the study by Armando Guevara.[9] He describes how a local committee supervises the condition and use of the scheme, assigns turns for dispensing water to someone's plot, organises regular working parties to do repairs or improvements, collects a modest sum of money from each user, and tries to solve the many conflicts between the users, e.g. when they cheat the system and take more water than assigned to them. In drawn out and difficult meetings the committee develops and affirms specific norms that the users are supposed to follow and tries to persuade violators to stop such cheating or even occasionally sanctions such behaviour. Their authority depends on the cohesion of the community as such, its web of trust relations, partly based on the certainty that you need each other to continue this essential practice. Authority also comes from the charisma of some leaders, the wisdom that some committee members have. The committee is a "traditional" authority with a varying legitimacy and has no basis in official state law. On the contrary, a recent state law introduced a very elaborate and top-down system for the management of irrigation canals, also regulating the amount of water to be taken from the river, and collecting fees from the users. But this national Water Law is not implemented locally, while the communitarian rule continues its effective hold on the people. Nevertheless, at some point, the local leadership deemed it prudent to pay lip service to the state water authorities in the not too distant provincial capital. The official authority of these water authorities cannot be neglected completely, after all. The situation in this farmer's community is an instance of legal pluralism in the anthropological sense. In one and the same domain of activities – the upkeep and use of an irrigation scheme – at least two bodies of authority and norms address themselves to the same people with contradictory

[9] Jorge Armando Guevara Gil, *El derecho y la gestión local de agua en Santa Rosa de Ocopa, Junín, Perú*, Lima, Ara editors, 2011, Chap. 4.7, pp. 238-259. See also his paper for the conference of the global Commission on Legal Pluralism held in Cape Town (South Africa), September 2011, entitled "The legal and not so legal practices of a development project. The improvement of the main canal of the Santa Rosa de Ocopa Irrigators' Committee" (Junin, Peru).

claims.[10] For the state water authorities, perhaps there is nothing contradictory in the situation as it is clear that, formally speaking, the Water Law is the body of rules with the highest authority. The local committee does not exist in law, save for very minor tasks, and the body of local community rules does not qualify legally as "law". This official legal analysis does not answer the question of how things are done locally, however. In real daily life, local rules, or *local law* as these are usually called by anthropologists, are relatively legitimate and reasonably effective, notwithstanding all the fuss that often shakes the community. The Water Law officials try to make the most of the situation and partly accept the prominence of the locals and at times cooperate with the committee or even conclude official contracts with it and exchange other formal papers. One can see that there is no higher authority that effectively solves the many conflicts between local law and state law in generally accepted ways, for instance, by giving priority to state law. *As a matter of fact*, there are incompatible contradictions between the normative messages of the two bodies of norms. And there is no arbiter.

The case also contains an example of non-state global law, namely "project law", the priorities and goals NGOs bring to a region as a matter of fact when engaging in a development project. In the Achamayo river community, the international NGO Caritas was engaged to help out with a thorough improvement of the main irrigation canal. They sided with the locals, and these two partners very skilfully presented their project to the official water authority through a constant manipulation of all the official requirements, permits, declarations, etc. needed to do the job legally. Thus, state law requirements were symbolically respected and a show of legality staged. This seems to be a general pattern in the Andean countries practised by peasants and Indians to overcome the legal subordination that the state attempts to impose on them.[11] The local committee involved Caritas to use and condone the same strategy. The author therefore

[10] Particularly in cases of farmer-managed irrigation systems, there is abundant research to show how legally plural that situation usually is. See K. von Benda-Beckmann, "Transnational Dimensions of Legal Pluralism", in W. Fikentscher (ed.), *Begegnung Und Konflikt: Eine Kulturanthropologische Bestandsaufnahme*, München, C.H.Beck Verlag, 2001, pp. 33-48, p. 37.

[11] Guevara, El derecho y la gestión local de agua, cit., p. 8.

developed the concept of project law to include not just what an NGO imposes on the practices of local people but also what the local people (the "stakeholders") contribute to the definition and priorities of the project.[12] He describes this amalgam of normative elements from state law, NGO norms and local law as an instance of interlegality (see below, sec. 3).[13]

Mexico

Another situation of legal pluralism has been described by Israel Herrera[14] for the state of Quintana Roo, one of the states within the federal country of Mexico. It concerns the indigenous Maya. They have maintained some of their traditional way of living, their own authorities and body of norms, even after centuries of precarious living under colonial Spanish and post-colonial Mexican rule. Some elements of this local law formally contradict official law. For instance, a marriage ceremony conducted the Mayan way is normally not considered legally binding. Local judges administering justice in matters of family conflicts, aggression, theft and embezzlement are effectively solving these conflicts and restoring peace. But they do this in ways and following common norms and principles that have no standing in official law and at times could be construed as breaking that official law. This is the case in a great many countries in the world where indigenous peoples, original habitants, now live or rather survived within a wider society of a different nature. In all these situations, conflicts are encountered between local norms and official law without there being, as a matter

[12] Ivi, p. 11.

[13] The de facto priorities and values that a NGO wants to be accepted as conditions for the help and the money they are going to provide to a local group or a district authority in a developing country could be indicated as project law. Because of the power of money and expertise, these conditions normally cannot be rejected. Perhaps they are even specified in documents concluded between this NGO and regional or national authorities. Normally, the local community has no role in the negotiations. This kind of project law is rather top-down. In Guevara's study, however, project law is characterized differently. He stresses the role of the local committee and also the "interlegal" character of this law.

[14] José Israel Herrera, *Unveiling the face of diversity: Interlegality and legal pluralism in the Mayan area of the Yucatan peninsula*, 2011, Ph D Universiteit van Amsterdam, Universidad Autónoma de Yucatán 2015 (Spanish edition too).

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of fact, an arbiter with the generally accepted final word in such incompatible normative commitments. It is an instance of legal pluralism in the anthropological sense. Professional lawyers would hesitate to call Mayan norms and authority "law". Perhaps at best these norms are called "customs" and perceived as a complementary source of official law in some specific legal cases.

But the situation has changed. The state of Quintana Roo recently recognised some parts of Mayan customary law as valid law and accepted the Mayan way of administering justice as producing officially valid legal decisions of the same rank as the state justice decisions. This has come about because of the growing strength of indigenous movements, in Mexico and internationally, and also because transnational law like the ILO convention 169 puts pressure on the national state to recognise indigenous local law and justice. This recognition may bring with it an important change of the situation; I use "may" because one never knows how national judges will implement the new scheme (or not), or how local judges, local leaders as well as the ordinary local people will use or resist it. Moreover, as I will elaborate in sec. 5, the official recognition of Mayan law and authority contains many strict conditions and requirements, one of them being the nomination of a state official with the official power to supervise all the Mayan judges' decisions. Mayan legal competence, moreover, only extends to a few categories of cases. But Mayan marriages are now to be recognised as marriages under national law (provided some requirements are complied with). The same goes for divorces as well as baptisms. How will the situation of legal pluralism develop? This question requires a follow-up study to see how local institutions develop under the new conditions. Comparison with other situations of formal recognition of local law is necessary. But theoretically, I have to stress right away that this recognition does not change the situation being an instance of legal pluralism. Only if the Maya assimilate themselves completely into the dominant Mexican society, voluntarily or because of repression, would the situation of legal pluralism disappear. But this is highly unlikely. Why would the Maya suddenly let go of their culture, their *cosmovisión*, their own ways of life? Time and again conflicts will pop up between local law and state law, between different ways of

living the good life. Contrast between the more individualistic values underlying the state legal order and the more communal values of Mayan life will continue to cause trouble. It is to be expected that the rather modest official recognition of some Mayan legal elements for some forms of local conflicts or situations will be challenged and resented regularly. But some Mayan leaders may be inclined to perceive the new recognition and even the not very generous conditions – to be called internal conflict rules, see sec. 5 – as a step towards a more neutral and generally acceptable arbiter that they ultimately want, while others may not. And moreover, all Maya have to wait and see how the official dominant society and its authorities and professional lawyers will use and apply the coordination rules. After all, they are imposed and interpreted in a top-down fashion, which in itself causes resentment. Perhaps the official judges will try to sabotage the system. For many reasons the struggle will go on between the Maya and the state for a place for proper development according to their own wishes. The situation continues as one of legal pluralism, a conflict of normative commitments without the presence of a generally accepted arbiter.[15]

Functional associations versus distinct communities again

In these two cases we encounter the primary question of the character of the community from which local law derives. In both cases, as in any study of empirical legal pluralism, it is essential for the researcher to determine the social entity that produces the rules: a group, community, society, corporation, associations, or as Moore calls it, a "semi-autonomous social field".[16] Whatever the details, the social entity must be identified, a pattern of durable and cohesive

[15] It is an interesting question within constitutional law of how to reorganize a society in such a way that, in terms of the constitutional basis of this society, space is guaranteed for distinct communities to become fundamental parts of the sociopolitical set-up – and functioning!– of a society. This involves searching for other concepts of constitutionalism than the traditional concept of state and individual citizens, the model of much of present-day constitutionalism. J. Tully has become famous for trying to show this other concept, in his *Strange multiplicity: constitutionalism in an age of diversity*, Cambridge, Cambridge University Press, 1995. See also Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford, Oxford University Press, 2010.

[16] Sally F. Moore, "Law and social change: the semi-autonomous social field as an appropriate subject of study", *Law and Society Review*, 7 (1973), 4, pp. 719-746.

social relations within which local norms are formed and more or less enforced. The local community in the mountains of Peru is not an indigenous community like the Maya are, although the people appeal regularly to generations-old customs and practices and legitimise their position and their irrigation rules by referring to the works and efforts of their forefathers. To some extent this irrigation community resembles a kind of "instrumental community", that is, a functional association oriented towards concrete goals rather than the expression and preservation of a distinct identity, like the Mayan community, which qualifies as a *distinct community*. It is plausible that the irrigation association contains elements of both. But however one wants to qualify the two communities, any researcher should keep his/her eyes open for the possibility that these communities are not homogenous. There are blurred boundaries (who "is" Maya?), and inside these entities there are struggles, hierarchy, splits between the rich and the poor (relatively), followers fighting the chiefs, women struggling with men over public functions, etc. There may be a battle between several spokespersons who all claim to be the only one to represent the community before outsiders. Whether and how these internal oppositions cause local law to falter, local authority to be derailed, or even disintegration of the community, they are nasty questions that have to be posed and answered.

National society as a distinct community

It is even more difficult to uncover which cohesive community produces and enforces "state law" and renders it legitimate and effective (if it is perceived at all as legitimate). Often, legal pluralists do not see the problem. They compare non-state law with state law as if "state law" were a clear-cut category in social life. But this is not the case. Of course, everyone knows that in empirical research, state law cannot be analysed as legal theory would prefer by determining what rules are valid laws according to the standard legal test(s), and then determining the content and scope of these norms. This would be falling into the trap of taking this legal approach seriously as indicative or proof of factual patterns to be found in the daily life of legal professionals but particularly also in the lives of all other

citizens. Indeed, one has to deal with state law in the anthropological way, looking for the real presence of state law in daily life. Some laws do not have any effect, others produce unintended and sometimes adverse effects, and the majority of state law in reality supports other behaviour than the reading of the letter of the law or court judgments would suggest. In quite a few countries, particularly where a rule of law culture hardly exists, state law as a whole in the social sense is non-existent. And under such conditions it does not make sense to compare local indigenous law with the commands of state law. So, rule number one is: state law in these anthropological studies of legal pluralism has to be translated from a legal category into a social fact.[17]

After this proviso we have to go further. What "community" is behind this state law? It can only be something on a very wide scale and rather impossible to pinpoint clearly. It is "the national society" in which through a variety of institutions, including political ones, some kind of cohesion turns into a form of unity, produces its normative commitments, cloaking them sometimes in the form of "law" and to some extent finding support among the population at large. This analysis of the underlying community is often not done properly in studies of legal pluralism. But in my view, a study of legal pluralism in the average European state clearly differs from studies in weak states or tribally divided societies or generally in societies of a non-Western type without the dominant position of individualistic legal rights and rules. Perhaps I can summarise this point by saying that we have to look for the *de facto* ways, contents and nature of the self-regulation of this large social entity called or imagined to be a national society.

Interlegality

Each of the two studies mentioned above offers an example of a most interesting and rather novel focus in research on legal pluralism. Guevara describes the way the NGO Caritas, the local committee and the water authority together implicitly define and implement the improvement of the main canal as an interlegal venture.

[17] This formulation is taken from Woodman, *op cit.*, p. 35.

Herrera shows how Mayan judges adopt Western legal elements but also how Mayan elements make their way into official law. This is interlegality, a concept that captures the fact that the various normative bodies have some autonomy on the one hand and cannot be blown away and overruled simply, but on the other hand are exposed to and influenced by the other norm bodies like state law (in the social sense). The various normative bodies are but "*semi*-autonomous"[18]. This is also true of state law which normally depends strongly on local norms (at least as far as it has legitimacy and impact at all) and cannot be characterised as having a high degree of cohesion and overwhelming autonomy (see more in sec. 7 below). The normative orders involved interpenetrate each other, and people engaged in this negotiating contest produce a hybrid and therefore new type of legal order, only visible to the empirical scholar. This approach prepares the way for understanding that any legal order (in the broad sense of the anthropologist) is in constant contact and interaction with other ones and therefore changes all the time. A new and important element here is the imposition and relevance of transnational legal regimes that affect local people and communities in various ways and sometimes provide opportunities to improve their position against adverse policies from their national state.

This mixing of procedures, contents and principles of the two or more bodies of norms is often analysed on an abstract level, but I prefer to transfer the analysis to the concrete level of the people who do the mixing, like members of local communities but also professionals and officials of the dominant state law favouring (or resisting) the amalgamation[19]. I also want to suggest that in the process of mixing legal orders, people are combining two different social elements: interpretations of the world, man, nature and community on the one hand – like individualistic versus communal forms of land tenure – and more

[18] See Moore, "Law and social change", cit..

[19] This mixing of distinct legal orders is not only found in the competition between non-state law and state law, but in "negotiations" between all kinds of law, e.g. also between two or more non-state legal orders, for instance the way in which religious norms interfere with local customary law (like *adat*), or like in the Peruvian case, local community-based rules with NGO "project law".

concrete norms on the other. This is the level of *frames of meaning* versus the level of *norms*.

To get a clear idea of this mixing enterprise, let me use René Orellana's study of Bolivian Quechua-speaking highland communities, each made up of various villages, together comprising about 12,000 people[20]. He participated in many conflict-solving sessions where matters of cattle theft, aggression, land boundaries, succession, killings and marriage problems are regularly dealt with, but also what Westerners would call civil matters like debts and contractual problems, as well as matters of governance like contempt of leaders and disobedience by the rank-and-file members[21]. The character of the proceedings strongly resembled the elements of restorative and conciliatory justice[22], where disputes are settled by uncovering the underlying causes, by taking into account a far wider array of social relations than only those between the parties, where restoration of good relations is valued more than the finding of "the truth", and so on. The Bolivian Andean villages practise law and order in this spirit of harmony[23]. In the territory Raqaypampa[24] we hardly encounter written rules, proceedings are long and full of rhetoric, the public participates as well, and sometimes the leading official, the *secretario de justícias*, calls out for the public to vent opinions and suggestions, stress is laid on reconciliation, meetings go on indefinitely until reconciliation is reached. The decisions or rather the commitments parties have engaged in (either two parties in civil, land tenure, marriage matters or the accused in criminal cases) are written down and

[20] René Orellena Halkyer, *Interlegalidad y Campos Jurídicos. Discurso y derecho en la configuración de órdenes semiautónomous en comunidades quechaus de Bolivia*, PhD Universiteit van Amsterdam, 2004.

[21] This local administration of justice at that time (around 2003/4) in state legal terms was non-existent and illegal. The Bolivian situation has changed considerably in this respect.

[22] See Laura Nader, Harmony ideology: Justice and Control in a Zapotec Mountain Village, Stanford, Stanford University Press, 1990.

[23] More about the "harmony ideology" (Nader) in a review by Peter Just in the *Law and Society Review* 29 (1992), 2, pp. 373-412.

[24] One of the two territories studied. I use this case only and leave territory number two (Rinconada) out of the picture.

documented in simple but efficient statements. Often specific and sometimes heavy fines are stipulated if the parties do not live up to these commitments.

Now, to come to the interlegal point, I want to relate a specific case. Once, Orellana noted a most interesting move by the most prominent leader of one of the territories. He observed the processing of a very high-handed and vindictive person, accused of physical abuse and assault of a passer-by and of aggression against a leader, whom he even locked up for several hours. The case had got out of hand at the village level, where the local official was not able to withstand the format of the aggressor. Now the case was being tried on the highest level, under the presidency of the highest authority of this territory. The accused repeatedly displayed contempt of the court and challenged it by saying that he would go to the town, meaning the state justice. The authority in charge employed an amazing mixture of local and state law elements in his approach and suggestions. He more than once urged the court to follow the "correct procedure", viz. to hear witnesses, which is a rather novel adoption from state law, but dropped this later on. He also suggested that the accused had to be condemned, simply because his behaviour infringed a recently enacted rule, officially recorded and sent to all villages (*el acta*). However, the authority of this written rule was opposed by other, lower leaders.

This mixing of the new and the old is not exceptional. In similar research it is frequently observed that in conflict-solving assemblies on the village level, indigenous authorities decorate their speech with Western-style legal jargon and cling to new procedural rules and the extensive use of written registrations. This is not just an ornament or a fetish-like belief in the written form (although this has a role to play, too), these elements of writing and a more formalised and specifically "legal" way of proceeding are permeating slowly through the practice as a whole. I do not want to suggest that all local court sessions on every level in this Andean district are formalised and bureaucratised to a great degree. It is more a matter of assembling bits and pieces from the oral, relational and participatory style on the one hand, and mixing them with elements of the written, specifically case-

oriented and authoritative style on the other. People are struggling to combine rather contrasting values and different sets of rules. This is typical of interlegality.

The syncretism I depict here is not just the consequence of scattered and haphazard influences and tendencies. In this specific case it is deliberately sought after by those authorities who keep a close watch on the conditions for indigenous survival[25]. The authority we just introduced above made another interesting move. Rather harshly, he taught a lesson to the lower-ranking village official who had failed to deal with the case in a satisfactory way. *The way*, he said, *for us to dispense justice is to look both into state law and into local law and then come up with some form of combination. Just sticking to local norms could only lead into a trap*[26].

What trap could that be? One could interpret this as a realistic stance towards the future.[27] Nothing good is to be expected from stubbornly clinging to old forms which will only annoy the Bolivian political elite. Many sceptical outsiders point to the corporal punishments, to the sometimes very harsh treatment of witchcraft (even today sometimes death penalties are executed[28]) and other "barbaric" features, to discredit any scheme of recognition of indigenous justice. It is crucial for these people to manifest themselves as capable of learning, eager to pay heed to human rights, eager to follow some form of correct procedure, eager to show themselves fully civilised, shall we say? It is as I once read: To be taken seriously, First Nations have to show themselves as unique, distinct, in possession of

[25] The same self-conscious desire to maintain local autonomy vis-à-vis the state is encountered in the two case studies of sec. 2, the irrigation association and the Mayan community.

[26] Literally, he said to his village colleague (*el corregidor*): "What is the *corregidor* who knows the political structure well, doing, comrades, while administering justice? It is clear that in that task it cannot be a matter of just doing what comes to your mind, comrades. You have to analyse the legal (= state law, ajh) side of it, you have to analyse our own norms, and then you have to combine the two parts. If you don't pay attention to the national laws and completely go for our own ways, you are going to fall."

[27] Often, one might assume, this policy connects well with the more personal interest of authorities to consolidate their powerful position in their society.

[28] Once in the Andean region of Perú, I had a long conversation with a police officer who by a cunning rhetorical performance in a village assembly, had just saved a presumed witch from being condemned to death and executed. In stead she had to leave the village for some years but was allowed to come back.

"interesting" features and knowledge, but not so traditional as to require "development".[29]

But we need not interpret this as a *strategic* move only. It might be the sincere wish of many indigenous leaders to come up with systems of law and justice that borrow extensively from Western ones – like the stress on some concepts of individual human rights including procedural ones – while at the same time preserving core features of their own.

We see how cleverly and consciously this leader calls for a mixing of the old and the new, conducting and producing interlegality.[30] Perhaps this is the place to provide a general characteristic of interlegality: *actors involved in conflicts between legal orders adopt elements of a dominant legal order, national and/or international, and the frames of meaning inherent in these orders, into the practices of a local legal order, and/or the other way round.*

Another important case shows how the process of interlegality also works the other way round and transforms the dominant law and policy into another kind that is more open towards indigenous *cosmovision*, perception of the good life, and practical ways of life. Esther Sanchez analysed the Colombian situation, how national law, courts and public officials deal with and respect or frustrate the official self-governing autonomy the indigenous peoples of Colombia got in 1991.[31] Moreover, in transnational law these peoples have got the collective right to be respected in their culture. In the course of this research, she presented

[29] See Melanie Wiber's review of a book on "Nightwatch, the Politics of Protest in the Andes" (*Newsletter of the Commission*, Feb. 2002, 81 ff.). She quotes the phrase I cited from Anna Lowenhaupt Tsing, "Becoming a tribal elder and other green development fantasies", in Tania Murray Li (ed.), *Transforming the Indonesian Uplands*, Harwood Academic Publishers, 1999.

[30] A final aspect of this process of struggling for sociocultural survival as a distinct community is the stipulation of boundaries. Normally, communities are not homogenous, their "borders" are quite ragged. Local authorities don't like that. To prevent creeping assimilation, the leadership tries to define what they call the normal way of conduct in cases of conflict and to imbue the members, the *comuneros*, with the common sense of first passing through the village institutions, then to the central indigenous conflict-solving bodies, and only after having got permission, perhaps going to town, to national legal courts and police. Formally, at the time of doing this research, Bolivian Indian communities did not possess any official jurisdiction. But the local leaders tried to close the porous frontiers with the surrounding society.

[31] Esther Sánchez Botero, *Entre el Juez Salomón y el Dios Sira, Decisiones interculturales e interés superior del niño*, PhD Universidad de Amsterdam, UNICEF, ISBN 958-97658-8-2, Impresión Gente Nueva, 13 de Enero de 2006.

various cases in which different cultural views and practices were confronted with the individualistic meanings and norms inherent in the dominant type of Western law and public administration. One case is about twins born to a U'wa family. In that society there is a norm that such twins have to be excluded from the U'wa world, which used to mean abandoning the twins in the jungle. The official family and child protection agency[32] got hold of the case and strove for adoption, while the U'wa leadership wanted to hold U'wa nation-wide deliberations and rituals to find out if this practice could change and if a way could be found to accept the twins into their own society. This takes time, however. Misunderstandings multiplied, but eventually some of the public servants from that agency slowly came to understand the local meanings and norms and started to revise their initial qualifications of the "facts" and gain a mixed view in which local elements and Western elements were combined. Finally, they revised the policy and helped the U'wa authorities to find a solution. This difficult process is in fact a process of interlegality in reverse. The Western practice of the family protection board has changed slightly. They have taken aboard worthwhile elements of the two cultures involved and found a solution on that intercultural basis.

One should not underestimate how complicated it is to "mix" not only rather concrete norms but particularly the deeper values that drive the various orders involved. The Canadian state attorney Rupert Ross wrote *Dancing with a ghost*[33] to show the Canadians how deeply the world views, notions about man, society and nature differ between aboriginals and other Canadians and how very difficult it is to put yourself in the place of that other frame of meaning.

Finally, to prevent misunderstanding, I have to stress the fact that interlegality does not always imply such an active stance of people involved in the confrontation between legal orders. Often the mixing is far more implicit, fragmented, indeed chaotic and not part of someone's explicit and conscious doing.

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[32] The Instituto Colombiana de Bienestar Familial (ICBF).

[33] Subtitle: *Exploring aboriginal reality*, Toronto, Penguin Canada, 2006 (1st edition, Reed Books, Canada, 1992). A kind of follow-up book by the same author is: *Returning to the Teachings, exploring aboriginal justice*, Toronto, Penguin Canada, 2006 (1st edition 1996).

International, transnational and non-state norms in the global world

In view of the abundance of normative regimes that regulate relations beyond state borders and provide overlapping and often conflicting norms that affect people and communities, we have to tackle the transnational and non-state legal regimes that are encountered in the global world. The interaction, tensions and conflicts between all these relatively new regimes of norms in many places in the world have a concrete impact on the lives, opportunities, and rights of people and communities, including the state and the nation. I have already introduced several examples of the relevance of these legal regimes on a global scale in the cases discussed in sec. 2, while below in secs. 5 and 6 other examples will follow. These examples testify to how strongly these new transnational regimes have contributed in the last 20 years to creating an even more pluralistic ensemble of overlapping and sometimes conflicting norms that people meet in daily life. These regimes are no longer the exclusive product of states and conventions between states. Global legal regimes are now produced by all kinds of international and/or "transnational" law-making bodies and platforms, like the World Trade Organisation (WTO) and World Health Organisation (WHO), the network of global big companies that produce a kind of proper private legal regime among themselves (Law Merchant, Lex Mercatoria), non-state platforms producing private[34] regulation of internet domain names (Internet Corporation for Assigned Names and Numbers, ICANN) or rules for sustainable forest management (such as the one regulating the FSC label). Furthermore, NGOs are initiating projects everywhere in the world and often impose their own development priorities as part of the conditions for getting their money and help, which are often called "project law". They use concepts like transparency of governance, gender equality, human rights, sometimes private property as conditions for their "cooperation". This is often an offer that cannot be refused, at least not by the

[34] Mostly, this private regulation has the character of a public-private regulatory regime as the public authority often plays some role in it (see Christopher M. Bruner, "States, Markets and Gatekeepers: Public-Private Regulatory Regimes in an Era of Economic Globalization", *Michigan Journal of International Law*, 30 (2008), pp. 125-176).

locals. On a far broader scale, the World Bank, IMF, and international consultants do the same. Whether or not these regulations can all be called "law" from some formal point of view is not too important. Sometimes, the term "soft law" is used. The main point is that all these regulations and conditions possess effective authority over the businesses and people involved and have sufficient independence from state interference. Often states cannot just shut off their own domestic legal order and politics from the pressure exerted by these outside, globally produced norms. Not only has the state lost its position as the traditional centre of international law and independent taker of decisions (like whether or not it will accept international obligations), transnational law addresses more than just the states. In human rights conventions, for example, individuals are addressed as well and acquire the right to start procedures against their own state.

The point in enumerating all these regimes is not only that people and communities everywhere find their fate often deeply affected by all these global regulatory regimes, but in terms of legal pluralism there is an interesting parallel with the anthropological concept. For at least some international legal scholars,[35] it is characteristic of this global legal arena that there is often overlap and conflict but no neutral, uncontested and effective arbiter between all these legal regimes. There is "no common legal point of reference to appeal to for resolving disagreements; conflicts are solved through convergence, mutual accommodation or not at all," writes Krisch.[36] The Biosafety Protocol, for instance, negotiated in the framework of the Convention on Biodiversity (CBD), permits the parties, the states, to restrict or even completely prohibit the trade in products made on the basis of the genetically modified organisms (GMOs). At the same time, however, in its rulings the WTO define these trading restrictions under specific circumstances as unlawful, which may ultimately result in officially valid sanctions against the violating state. There is no body of conflict rules, some commentators say, that is widely accepted and effective in determining which

[35] Like Berman, "The New Legal Pluralism", cit., and Krisch, *Beyond Constitutionalim,* cit.

[36] *Beyond Constitutionalism*, cit., p. 69. These transnational regimes have overlapping and/or unclear jurisdictions while their relations are not and cannot be legally determined but rest indefinite, as Cotterrell formulates it (Cotterrell, "Spectres of Transnationalism", cit.).

body of norms takes priority in which kind of contradictory obligations, WTO rules or the Biosafety ones? The same problem is documented for the way trade rules affect the scope of multilateral environmental agreements. Some scholars do not view this situation as bleakly as I have sketched it, following Krisch who gives the GMO example.[37] These optimistic scholars recall the Vienna convention on the Law of Treaties and claim that this Treaty provides the means to draw a hierarchy between the various transnational legal regimes like WTO in relation to CBD. But scholars like Krisch uses the insights of political science to show that this Vienna system will not yield results in practice. The stakes involved, e.g. in the domain of GMOs and how to deal with them, are so high that in many countries significant parts of the population will resist the WTO-based striking down of import restrictions. Governments will not pay attention to suggested rules of collision drawn from the Vienna Treaty for internal reasons. He feels that the same will be true even if the countries prepare a special tribunal or other agency with the official competence to solve this kind of conflict. So for Krisch, an arbiter is not and will not be present. Hope that the world can still produce an effective and legitimate global web of "interface rules", "conflict rules", "collision rules" is vanishing. We have to qualify the situation as one of *legal pluralism in international law*.[38]

Like the traditional anthropological approach, the missing arbiter is again seen as the decisive element to define legal pluralism and distinguish it from just legal *diversity*, which is the very normal, even essential core of any legal order.

But although the *term* legal pluralism is the same in both anthropological and international legal studies, the respective *concepts* of legal pluralism are quite different. The missing arbiter is there in both approaches, but in international law

[37] Krisch, *Beyond Constitutionalim*, cit, pp. 194 ff. For the unresolved clash between environmental agreements and trade rules (WTO) see the briefing paper "Is the WTO the only way", by Friends of the Earth Europe, Adelphi Research and Greenpeace (2005).

[38] Later on we will see that even in *domestic* law, that is, national state law, some commentators talk about state law legal pluralism to indicate tendencies within state law that do away with the cherished notion of state law forming a neat and constantly reconfirmed unity of norms and principles, thanks to the work of legal theorists and particularly an elaborate collection of "neutral" and generally legitimate courts and other arbiters, like legal professionals doing doctrinal research. The suggestion that this is not the case is discussed further in sec. 7.

we are dealing with bodies of official law and formal authority, at least in the first place, and the lack of official accommodation and unity.[39] The anthropological scholars refer to a missing arbiter in the clash and negotiations between the many normative commitments of people in their daily lives. Even if these international scholars expand their concept of law and plead for realistic studies of overlap and conflict between these state and non-state as well as transnational regimes, they do this from a normative preoccupation. Berman, although mainly analysing as an anthropologist, asks about the good and the bad aspects of such a legal kind of pluralism in the global legal world, and discusses ideas of whether and how to regulate this pluralism in such a way that the international legal order is not completely fragmented and chaotic. This is the typical concern of any professional lawyer, either nationally or internationally oriented.[40] The anthropologist studying cases of legal pluralism is normally not eager to engage head on in a normative debate about e.g. whether or not the presence of some body of norms like indigenous law is good or bad in its conflict with state legal norms. Should one take sides in the emancipatory struggle or instead call for assimilative policies? In this blunt form no anthropologist can or will defend this way of taking sides as part of the scholarly commitment. Some, like myself, are indeed deeply inspired by what we see as an urgent need to reconstruct national societies and the states into real multinational, multicultural and in that sense equalitarian forms of society.

[39] Some international law scholars like Berman incorporate elements of the social sciences in their approach, expand considerably their concept of law, and eventually come to reason and argue as anthropologists. Like the anthropological scholars, he wants to study the *de facto* normative commitments and not their formal status, so he asks which statement of authority tends to be treated as binding in actual practice and by whom (Berman, "The New Legal Pluralism", cit., p. 237). Less successful however is his attempt to indicate the nature of these communities and how they can be delimitated and studied, particularly in transnational and non-state global law. Obviously, these communities are not like "national societies"(which is not a clear concept either). What "social community" is responsible for the trade rules formally produced by the WTO?

[40] Krisch, for instance, suggests that such pluralism is not as bad as the often used term "fragmentation of international law" suggests. Through all kinds of dialogue and communication efforts between states, variable collations and many rounds of contacts, we can expect forms of cooperation to come to solutions. He gives examples of such global streams of ongoing communications, a kind of worldwide negotiating or interactive governance. Pluralism in international law could be a blessing for the world. This kind of normative design is indeed demanded by legal doctrine. In my article, however, this is not a theme to be pursued further.

Some legal scholars not only reflect on the means to restore unity or at least forms of regular dialogue in the international – and for that matter also national – pluralist legal order, they also defend the view that taking the concept of legal pluralism seriously implies taking sides. According to Melissaris,[41] for instance, if a scholar feels justified using the concept of legal pluralism while analysing clashes of state law and non-state law, then he is committed to taking sides with the non-state law. In his concept of "law", he goes further than most scholars, even those like Berman who characterise "law" without reference to the core elements of Western state law. Melissaris is looking for the "right" concept of law. This should be done by participative research in a specific community to try to understand to what ways of life people feel committed as "law", and why. So far, I can agree with this approach. But Melissaris feels that grasping this "internal point of view" is not possible without taking sides, in other words concluding that this community has the right to be recognised as a law-giver of an equal rank to the nation-state or transnational law-givers. The competing views of what the law "is" should not be oppressed, reneged, or negated by state or transnational authorities. It is a jurisdictional claim as solid and justified as e.g. state law jurisdictional claims. I myself feel that this is going a step too far, at least for someone dedicated to anthropological scholarship. Take, for instance, the point that Melissaris does not even hesitate to call the discourse of a nightclub bouncer and the queue of people who want to get in as "legal" and calls the norms at stake "law". Is this a jurisdictional claim as good as a state law claim, or for that matter the claim from an indigenous community to have their law recognised?

Internal conflict rules and distinct communities

In the world of transnational law we encountered the missing arbiter. And the same problem, a lack of effective and neutral conflict rules, was met in the empirical studies of legally plural instances within the national society: state law more often than not cannot live up to its promises that it will determine priorities

[41] Emmanuel Melissaris, "The More the Merrier? A New Take on Legal Pluralism", *Social and Legal Studies,* 13 (2004), pp. 57-79.

between conflicting bodies of norms. Thus, state law is often not the conflict rule par excellence.[42] In this section I want to expand on this theme by analyzing a specific kind of conflict rule and the position of distinct communities. This section therefore does not deal with purely functional associations.

Sometimes conflicts between the law of distinct communities and state law and other official legal regimes are dealt with in specific ways to accommodate the one legal order with the other(s). Sometimes, then, legal pluralism is tackled head on. In the Mayan case a form of official recognition of legal pluralism is encountered, albeit a weak one. In other cases distinct communities obtain a collective right to their ancestral lands (and sometimes to some subsoil resources as well) partly because transnational regimes require the state to recognise such rights. In all such instances of recognition of local authority and law, either in a broad or a smaller range of domains, we encounter *internal conflict rules*.[43] They may be defined as follows: *legal rules, part of national law, that define the scope and limits as well as personal and material competence of an officially recognised indigenous (or other distinct, community-based) jurisdiction and/or of an officially recognised, community-based authority to manage the land*. These rules also establish the procedures to solve problems of "mixed" cases and conflicts over jurisdiction between this indigenous justice and the official one.[44] I again have to stress immediately that although I called them "legal", these official rules are not to be approached from the legal point of view but taken seriously only to the extent that they are implemented in reality and have some real impact on the way conflicts between indigenous and state legal orders make themselves felt. Therefore, we have to study firstly what internal conflict rules have been imposed

[42] In the literature this (weak) state law role as conflict rule is not expressed in terms of conflict rules because the term is reserved for the typical official legal discourse about conflicts between inter- and transnational legal regimes (as well as for rules in domestic law that would determine what law goes first in case of conflicts in international marriages or business contracts). The term I want to use has an empirical content and relates to what happens in real life if there is a conflict between legal orders.

[43] 'Internal" to distinguish this category from conflict rules to be found in international private law and in international law regarding the possible harmonization of conflicting norms and decisions from different legal regimes.

[44] Or, in the land rights case, conflicts between the new land management powers of local groups and state competences.

in the existing schemes of recognition of indigenous authority and justice and/or matters of collective land rights and what is the likelihood that these rules are implemented.[45] Secondly: what is the impact of these rules on the opportunities the local communities have to rule themselves, to follow their own policies of development, and to determine their own future autonomously? In other words, what is the effect of specific internal conflict rules on the legal and socioeconomic empowerment of the people involved? This is a new theme that has to be studied urgently. This research has a very specific upshot and is not primarily involved with the broader context a distinct community is involved in, like the array of circumstances, including major and enduring power differences, that empirically make or block opportunities for local people to take advantage of new legal rights, to fight discrimination, and to defend their territory. The broader context has to be taken into account even if one does not study the whole balance of power between the community and the state, but "only" the nature of the internal conflict rules and how they impact on local communities' prospects for determining their own path to the future.

Regarding the internal conflict rules themselves, there have been very few cases so far in which a legislator has laid down the "organic law" that is often required in constitutional grants of official competences in matters of self-governance and communitarian justice for distinct communities.[46] Sometimes a court steps in and develops criteria about where and how to draw a line, as has been done for many years now by the Colombian Constitutional Court.[47]

Politically speaking, this topic is far too sensitive to be solved in law and political regulation, at least when identity-based (often: indigenous) institutions are at stake. As far as I am aware, there are hardly any examples available of a

[45] Or are being debated in serious projects to do so, like the one currently underway in Ecuador.

[46] Recently, David Pimentel wrote a nice piece in which he gives a systematic overview of the main principles that could be used to order the relations between national (state) jurisdiction and local jurisdictions. See: "Legal Pluralism in post-colonial Africa: linking statutory and customary adjudication in Mozambique", available at SSRN: htpp://ssrn.com/abstract=1668063.

[47] More about the Court's rulings in A.J. Hoekema, "A new beginning of law among indigenous peoples", in F.J.M. Feldbrugge (ed.), *The Law's Beginning*, Leiden/Boston, Martinus Nijhoff Publisher, 2003, pp. 181-220.

well-organised and legally coordinated relation between state and non-state justice drafted and passed on the legislature level. However, drafts of coordination rules are abundant in Colombia, Ecuador, and Bolivia.[48]

One item in possible coordination rules, often mentioned *in abstracto* in constitutions and also in ILO 169, is the conflict rule stating that people's local decisions should not violate the constitution, the laws and the internationally accepted human rights. There even seems to be a consensus that these limitations are only natural and obvious. In legal political or socio-philosophical reflections, many authors pronounce themselves in favour of the recognition of local jurisdictions while at the same time suggesting limits, sometimes in an overly optimistic or shall I say naive manner, for instance stating that "obviously local justice shall have to live up to principles of fair play and refrain from using corporal punishments" (just one example of many). May I quote briefly a fairly representative instance of this problem. In an interesting and useful IDLO paper, Ewa Wojkowska and Johanna Cunningham[49] describe and analyse possible justice reform through which customary systems may be recognised as part of the official legal order. But when it comes to a possible elaboration and discussion of internal conflict rules (in my terms), the authors gloss over this problem. Or, rather, they take a great many limits on and restrictions of the recognition of local institutions for granted. The point of departure of their analysis is often a gloomy and critical image of the quality of the local administration of justice. This may well be true in some specific cases, but not in others. While empirical studies of the functioning of extra-legal local justice institutions are available and provide food for critical reflection, a discussion of possible concrete and partially elaborated internal conflict rules is not to be found in this report, nor is reference made to the possible consequences for community empowerment that might be attributed to the introduction of such conflict rules.

[48] At the time of writing this essay, an intensive parliamentary discussion takes place in Ecuador about a proposal for a law to coordinate indigenous administration of justice and the national one. (*Proyecto de ley organica de coordinación y cooperación entre los sistemas de justicia indígena y la jurisdicción ordinaria*).

[49] E. Wojkowska, J. Cunningham, "Justice Reform's New Frontier: Engaging with Customary Systems to Legally Empower the Poor", Rome, IDLO, 2009.

The picture is a bit brighter in the matter of legalizing local tenure arrangements. For instance, the new land laws of Tanzania grant power to the villages to manage and regulate the land according to customary law. These laws are very detailed and contain many internal conflict rules. But this is exceptional.[50] In my article, "If not private property, then what?"[51], I discuss a variety of these coordinating attempts and note many weak spots and missing links in the set of internal conflict rules that are in place.

The second question, how the conflict rules impact the empowerment of the local communities, is still an unknown area given the scarcity of examples. I have to speculate here. Suppose some form of recognition of local, communitarian justice is officially instituted. With this recognition local institutions are given power to adjudicate certain disputes and develop their own norms for dealing with disorderly behaviour. But when that local justice is required:

–to respect internationally guaranteed human rights;

–to refrain from what is called – without definition and discussion – corporal punishment,

–to provide legal professional representation to the accused,

–to give the villagers a choice either to go to the traditional system or to opt for the state judge,

–to require that the local rules and practices be put in writing and the cases noted in a register, while the local competence is restricted to a specific list of minor cases,[52] then the local system is doomed from the very beginning.

The list I just produced is not the fruit of a morbid phantasy but paraphrased from various studies, such as Eva Wojkowska's UNDP report 2006, "Doing

[50] And the level of detail is such that real implementation possibly will not come forward or only haphazardly.

[51] André Hoekema, "If not Private Property, Then What? Legalising Extra-legal Rural Land Tenure via a Third Road", in J.M. Otto and A. Hoekema (eds.), *Fair Land Governance. How to Legalise Land Rights for Rural Development*, Leiden, Leiden University Press, 2012, pp. 135-180.

[52] Van Cott e.g. asks what the linking of this informal justice system to the state system might mean? She underscores the authority, flexibility and dynamism of the local system that flows from its uncodified character and suggests: "Is this authority, flexibility and dynamism lost if community authorities become agents of the state?" The question is raised, but not studied, alas.

Justice: How informal systems can contribute".[53] Moreover, this list fairly truthfully describes the nature of the conflict rules imposed when Mayan communitarian justice was recognised in the Mexican state of Quintana Roo (see above, sec. 2). The conflict rule states that the Mayan judges have to act in strict compliance with human rights, otherwise their decision is invalid because it is illegal, and this rule is fairly strictly enforced.[54] Moreover, the indigenous justice is not obligatory for the Maya, it is defined as alternative only.[55] If, notwithstanding these very restrictive conflict rules, Mayan traditional authorities do cunningly use their limited powers, it might well be that the Mayan communities could take advantage even of this very small grant of recognition for their communitarian law and doing justice, as Herrera predicts.[56]

But we have to confront the question of whether or not implementation of this list of restrictive conflict rules is directly or indirectly pushing the community into becoming something else. For some outsiders, and perhaps for some insiders, this means something positive: the community is at last forced to adopt the traits of a modern rule-of-law society. Others are not so sure. They ask, in terms of a 2009 ICHRP Geneva report[57], whether that customary order, indeed the life of the community as such, can still be called *indigenous* after having lived under the new and very tight recognition regime for some time.[58] We see here intriguing questions arising about legal empowerment on the community level. While some groups or fractions of the community may be empowered through the list of requirements to fight for a better position within that community – a matter very much in the mind of the writers of the ICHPR report just quoted – it may well be

[53] The same tendency to claim a generous use of requirements, conditions and restrictions for recognizing local justice is to be found in M. Stephen, "Local, not traditional justice; the case for change in non-state justice in Indonesia", Word Bank, Justice for the Poor Program, Social Development Unit, Jakarta, 2006.

[54] Herrera, *op. cit.*, p. 74.

[55] *Ibidem*, p. 183.

[56] *Ibidem*, p. 149.

[57] "When legal worlds overlap: human rights, state and non-state law", ICHRP, Geneva, 2009, pp. 31-32.

[58] Presuming the regime will be implemented…!

that instead the community loses opportunities to develop, reconstruct and externally defend its indigenousness.[59] It might for instance not be able to ward off mining projects and other forms of encroachment on their territory.

I can only introduce these questions, knowing that the research into this matter is practically absent[60] at least in terms of grants of (semi-)autonomy for local law and justice. In the other situation, however, grants of a right to regulate and manage their own land, concerning effects of conflict rules on local life, there is a bit more research or at least serious questioning, as in Tanzania.[61] There are some grounds for optimism. In a recent legal anthropological conference in Lima (Peru) in August 2010,[62] I convened a workshop about the impact of conflict rules in cases of granting distinct communities the right to administer their own justice. Some relevant papers were submitted.[63] I will summarise three of them briefly below.

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[59] The case of introduction of local mediation-like institutions or ADR platforms (alternative dispute resolution) is different. ADR is not about respecting indigenous norms, culture and institutions, but about quick and efficient problem-solving. Therefore, ADR does not raise intriguing questions about recognizing "separate" legal orders and "loss of state power".

[60] I know of at least one attempt to follow this route. A research group led by Eva Brems of Gand University (Belgium) wants to take note of the conflict rules recently introduced in South Africa and Bolivia. Together with Colombia, and some examples from the USA and Canada, these countries may form the small block of cases with better elaborated internal conflict rules

[61] Take the case of women and land in rural Tanzania. Is local practice changing for the better *because of the new land laws*, meaning that in matters of land tenure, women fare better "because of" this rule and its socialization on the ground? To investigate this, we need to study concrete events of, for example, the inheritance of land by women, particularly widowed women, as well as internal opposition against discriminatory practices, possible pressure groups, the presence of a local NGO or CSO working together with women's groups to pressure the traditional authorities and the village council, etc. Only along these lines could we get an impression of the ways in which women in these villages are empowered. Moreover, we would have to know the general context of the situation as well as the "baseline situation" (how local life functioned before the recognition came) so as to be able to gauge whether or not some more general tendencies are already working towards a better local legal and social position of women quite apart from any possible effect of the conflict rule I quoted. Such empirical longitudinal evaluative research is very scarce, however

[62] The conference was organized by RELAJU , which is the name of a network of Latin-American legal anthropologists, lawyers, political scientists, and others interested in legal anthropology and in the practice of how to build a genuine multinational society and legal order

[63] Emmanuelle Piccoli, Justicia mixta en Cajamarca (Perú): análisis etnológico de un pluralismo práctico; Todd A. Eisenstadt, *Usos y costumbres* and postelectoral conflicts in Oaxaca, Mexico, 1995-2004 (*Usos y costumbres* y conflictos post electorales en Oaxaca, Mexico, 1995-2004; Irene Ramos Urrutia, El reconocimiento del derecho a la autonomía organizativa de los pueblos indígenas, representantes formales de los pueblos indígenas de la Amazonía Peruana (Comunidades nativas): entre Jueces de paz, notarios y registradores públicos); Marcela Torres

Traditional communities in Peru have obtained official jurisdiction to deal with cases of local conflicts, restricted by the usual reference to the non-violation of human rights. As Piccoli describes, a point of legal interpretation is the first hurdle to take. Do "conflicts" also cover "crimes", or are crimes still the exclusive domain of the police and other state authorities? Local leaders are regularly arrested after having dealt with some cases in the local way, e.g. cattle theft. They are charged with having exceeded their competence. In some places in the Department of Cajamarca, local authorities and various police stations/officers have found ways to engage in a peaceful cooperation and take advantage of each other's strong points. Whether this is the effect of individual personalities on both sides or an example of a more general trend remains to be seen. Restrictive conflict rules and interpretations can be put aside by good personal relations. The case, however, does not emphasise how and to what extent the present conflict rules block local judicial empowerment; it shows how conflict rules even of the restrictive type will not have the last word in the question of how local jurisdictions will develop. In a way this shows the restrictions of my own research into the possible effects of conflict rules. Life is always stronger…

In a case in the Mexican state of Oaxaca, Eisenstadt analyses how indigenous municipalities were officially endowed with the competence of selecting their authorities in their own "traditional way", following what is called "*los usos y costumbres*". Practically no conditions have been set on the way to do it and how to evaluate the results, so here we witness a lack of conflict rules, a kind of unconditional grant of autonomy (albeit only in a very small area of law and public life). It turns out that the local way of selecting authorities is a male affair. Local women started rallying to fight this bias. Here the morale is the following (as I see it): where there are local problems (call these deficiencies), which

Wong, Codificación de normas indígenas en una comunidad Awajun de Datem del Marañon: estrategias de defensa territorial y redefinición de identidades. Emmanuelle Piccoli wrote an article entitled "Las rondas campesinas y su reconocimiento estatal, dificultades y contradicciones de un encuentro: un enfoque antropologico sobre el caso de Cajamarca, Perú", *Nueva Antropologia*, 22 (2009), 71, pp. 93-113.

conflict rules do not address,[64] it is possible that some form of internal struggle will manifest itself inside the communities.

Again in Peru, Ramos deals with the way lowland indigenous communities are legally entitled to become a legal person, an essential condition to make themselves understood and have some voice in the many decisions imposed by governmental entities that result in potential or real encroachment on indigenous land, like mining companies that obtain a concession from the government in disregard of the territorial rights of these groups as prescribed by ILO 169, of which Peru is a member. Now, here come the conflict rules. How does one become a legal person? The communities have to go through an extremely long and expensive procedure, in which obstacles are erected at almost every step. Nevertheless, there are some communities which manage to overcome these complications. Here we have a clear example of conflict rules that practically block the possibility to obtain what the law promised, and thereby to develop a better capacity (be better empowered) to autonomously defend their interests.

Through these empirical studies we are slowly starting to see that after having obtained some form of recognition for their local authorities and ways of administering justice – formal legal pluralism – a new struggle starts for the communities involved, the struggle to obtain a genuine form and space for exercising (semi-)autonomy in some matters. Moreover, the often very restrictive conflict rules sometimes make the scheme a sham from the beginning or, if not, at least pose severe problems to be overcome within the communities. Nevertheless, opportunities are seized at some times and some places, and new, more respectful relations between these communities and people and the dominant state are starting to manifest.

Communal land tenure and legal pluralism

For more than a century now, local, communal land tenure arrangements have been bitterly attacked in the name of evolution and development presumed to be

[64] Or also when conflict rules do cover this problem, or when they cover the problem but do it in a clumsy or unworkable way.

served only by Western private property. But the striking level of empirical legal pluralism in land rights regimes has not disappeared. On the contrary, local communal land tenure in many countries is still alive and considered an asset for development and poverty reduction. Various official land rights laws now officially build on local tenure arrangements. Variations from country to country and also often from region to region remain very great empirically speaking, while the kind of land rights laws that make customary tenure partly official also show a bewildering range of differences. In these new style land law reforms, good advice from Lavigne Delville[65] is the clue: "Rather than suppressing legal pluralism by absorbing one system into another, the aim is to retain the most dynamic aspects of each." And this mixing or hybridisation of elements nowadays is done in many places where governments take local law into account when designing the new land law but also test and reform it against standards of human rights, gender issues, accountability of authority and so on.

A common feature of these land law reforms is the fact that they somehow try to bridge the gap between local, customary rules and state, formal rules, that is, to build a formal state land law on extra-legal grounds, if not on still functioning local law then at least on local needs, interests and sensibilities. This ties in with the present-day stress on the participation of local stakeholders in almost any development project to prevent the project failing. This new land rights policy is furthered by transnational law, like the Inter-American Court of Justice in American countries [it severely reprimanded Suriname for not giving the indigenous peoples of Suriname communal (collective) title to their ancestral lands[66]]. Also, "project law" nurtured by Western experts and consultants in development projects is favouring step by step a prudent approach to the problem of how to legalise rural, non-official land rights. In particular, the notion of communal land holding is being revalued to some extent. To give an idea of the

[65] P. Lavigne Delville, "Harmonising Formal Law and Customary Land Rights in French-speaking West Africa", in C. Toulmin and J. Quan (eds.), *Evolving Land Rights, Policy and Tenure in Africa*, London, IIED, 2000, pp. 97-121, p. 116.

[66] Inter-American Court of Human Rights, Case of the Saramaka People v. Suriname. Series C No. 172 (2007), IACHR 5 (28 November 2007). For the text of the judgment see website www.worldlii.org/int/IACHR/2007/5.html.

main elements of communal land tenure, I reproduce a box summarizing some of the basics.[67]

Box 1. Communal or community-based tenure

In the term c*ommunal*, or what I prefer to call *community-based*, land tenure (after Lynch and Talbot 1995), stress is put on the social corporation, the community, which lends legitimacy and effectiveness to the regime. It comprises both common pool resources shared and held by the collective as well as land on which individual and family use rights exist, alongside community rights to manage and control the land. Often these rights are long-term use rights. Typical for these systems is the role of kinship, territory or generally possessing the "identity" of the community (status) as a condition for being entitled to land. Let me define this institution of community-based ownership of land as a *complex of values, practices and procedures developed and enforced within a specific non-state community or people, regulating legitimate control and management rights as well as use, transaction and inheritance rights over a variety of forms of land like arable land, grazing areas, trees, forest, reserve lands, waters, etc., thereby combining rights in the hands of individuals, families, clans and the community itself or its authorities, often in the form of rights that with regard to a specific piece of land overlap in time or in place.*

Community-based land tenure arrangements and moral economy

In community-based rural tenure arrangements, usually a local corporate entity is expected to act as a kind of trustee for the commoners, the villagers, the indigenous members. Be it a chief, another traditional authority, a "government" (*cabildo*[68]), it is this entity that has socio-political power over the land and is supposed to determine the general uses the land is put to, to solve conflicts, to control transactions among the insiders, to permit outsiders to acquire a piece of

[67] Taken from Hoekema, "If not Private Property, Then What?", cit.

[68] A name given in Latin American countries to local indigenous leadership.

land or refuse them, to represent the people to the outside world. These management rights are justified by the need to keep the landmass intact, to preserve the land for the local people, to prevent absentee ownership of the land ("all the land to the tiller") and to care for former villagers or members who return from the urban areas or from war. Within the community, occasional redistribution takes place if a family sees its subsistence threatened because their children are running out of land. In this arrangement long-term use rights are assigned to individuals and/or families.

Often the use-right holders also have the right to bequeath the plot to children (although strictly speaking this is under the control of the local authority) and sometimes to rent or lease it out for a short period. Sales and other long-term transactions of alienation of land to outsiders are usually forbidden. While in these regimes notions of growth of production and individual market orientation are not absent, these systems aim primarily at the social security of a group. This is captured well in the title of an IIED (2004) brochure: *Land in Africa, market asset or secure livelihood?* [69] The need to survive, to help each other out, render crucial services for each other in harvesting and preparing fields, and the important element of being certain to obtain some piece of land somewhere in case of landlessness, these are features of livelihood security. Attached to every right in the community-based arrangement, we find obligations that can be called a "social mortgage" on your right. Others call it a "moral economy".[70] Authorities and ordinary people alike who possess the status of belonging to the community or to the people carry the moral obligation of stewardship for the benefit of present and future members of the community and the community at large. These obligations cannot be exhausted in a set of precise rules; they are *unspecified* and oblige people to care in a general way for the community and fellow insiders. Everyone is supposed to have the tact to know what this duty entails in some concrete setting and to respond to peer pressure to live up to it.

[69] J. Quan, Su Fei Tan, C. Toulmin, *Land in Africa: market asset or secure livelihood?*, London, IIED, 2004.

[70] P. Robbins, *Political Ecology*, Oxford, Blackwell Publishing, 2004, p. 151.

In legal anthropology this set of obligations is analysed as the embodiment of a principle of reciprocity. This principle implies an obligation of any right holder to restrain the pursuance of his individual interests in times of distress, redefine them and act for the greater benefit of the community out of "free will". But this behaviour is not free in the sense of having a choice, it is enforced by the community; nor is it free in the sense that it is a completely altruistic gift to others. On the basis of this contribution, everyone helps to maintain the social integrity of the community and may reasonably expect to be cared for in turn when subject to adverse conditions. A person is socially bonded, and this bondage embodies a specific solidarity.

As I wrote in the Introduction, the norms in a communal land tenure arrangement often reflect a set of beliefs and values about spiritual relations between man and nature, called a *cosmovisión* in Latin America. Many non-Western people nurture a meaning of what it is to be human which contrasts drastically with Western individualism. Studying ways in which indigenous peoples solve their problems of keeping order and restoring harmony between man, nature and the spirits, we encounter the notion of reciprocity in almost every relationship. Reading the account by Rupert Ross (op cit. note 31) about aboriginal thinking in Canada, one immediately grasps the wide gulf between the West and the aboriginal world with regard to the often implicit feeling and knowledge about how to live decently in a community and how to relate to others and to animals/nature.[71] The aboriginal emphasis on caring for others as well as for nature does not mean, however, that any notion of a personal self and of individual agency, desire and emotion is rejected. Rather, it is another way of perceiving the right balance between individual and general interests in caring for an integrated and just social life. Obviously, these notions also permeate the essence of the land rights and the obligations they carry with them.

[71] Because of this strong difference between individualist versus non-individualist cultural norms, the clash between these land-holding rights and the Western private property approach is among the fiercest in all legal pluralist conflicts (B.Z. Tamanaha, "Understanding Legal Pluralism: Past to Present, Local and Global", *Sydney Law Review*, 30 (2008), pp. 375-410).

These trends in land rights laws demonstrate how legal pluralism is tending to become a building block in designs of the legalisation of land tenure. This is a complicated operation because it is not just a matter of a new law building on existing local tenure *norms,* it is partly a matter of taking aboard *values* that have almost died out in Western societies, like reciprocity. Anyway, this pluralism in land rights is no longer perceived as a sign of underdevelopment to be overcome by the introduction of private property.

But there is more. In recent times, some elements in the values underlying communal land tenure arrangements have again attracted attention regarding modern problems of governance[72] of natural resources in such a way that the inexorable depletion of the natural resources is slowed down. Liz Wily[73] describes such a new style of governance in forest management in Tanzania. The usual centralised, top-down state policies were a blatant failure. Empowering the local communities and creating institutions that foster a partnership between the local stakeholders and public authorities has led to far more successful management. Secure tenure and resource rights for local users are crucial to guaranteeing their position and motivating them to overcome a deep distrust of state power. Such cooperation is not forthcoming unless people are motivated by a sense of reciprocity. In this case one could build on still existing villages communities and the reciprocity people are familiar with. So a mix is constructed out of customary land tenure norms, Tanzanian national law, NGO project law and transnational law on matters of biodiversity, a very pluralistic set-up.

But the new construction has a far wider scope. This Tanzanian experiment is not restricted to this specific situation. It is aligned with widely applied development policies stressing the participation of local stakeholders and civil society actors in designing and executing public policies. These new platforms are

[72] Governance is defined as "a new mode of governing that is distinct from the hierarchic control model, a more cooperative mode where state and non-state actors participate in mixed public-private networks" (R. Mayntz, "New Challenges to Governance Theory", Jean Monnet Chair Papers 50, San Domenico di Fiesole (Italy), European University Institute, 1998).

[73] L. Alden Wily, "From State to People's Law: Assessing Learning-By-Doing as Basis of New Land law", in J.M. Otto and A. Hoekema (eds.), *Fair Land Governance. How to Legalise Land Rights for Rural Development*, Leiden, Leiden University Press, Leiden, 2012, pp. 85-110.

supposed to promote cooperation between formerly antagonistic groups and corporations and thereby lead to more successful management of natural resources.[74]

The values inherent in reciprocity are also making their comeback in the Western world. Complicated problems, "intractable problems" as they are called by Schön and Rein[75], such as how to regulate fishing effectively and save fish stocks from total depletion, are now being tackled by new coordinating institutions designed to foster partnership between all stakeholders.[76] Antagonistic public-private interactions may slowly turn into more cooperative relations, and these in turn may foster mutual trust and in the end a renewed sense of reciprocity.

While the life of "old communities" and the resilience of their ethos of reciprocity are tied to very specific conditions that cannot be reproduced in highly developed countries, there is something to learn from them. Reciprocity under favourable circumstances can return in the *new* community-based institutions of governance of natural resources and thereby give legal pluralism a boost also in public administration, in the form of new modes of governance.

State law pluralism

My final point is to plead for studies of legal pluralism within one so-called legal order, for instance within "an indigenous legal order" or within state law. It is frequently assumed in legal pluralist studies that the two or more overlapping legal orders are complete and coherent by themselves, an object of study that somehow can be defined and outlined as a unitary phenomenon. But it is rather

[74] An example is a UNDP project in Mongolia about sustainable management of grossly depleted grasslands. A project document says: "The goal of this project is to increase the welfare of herding families through the sustainable management of Mongolian grasslands. The main mechanism to achieve the project goal is to strengthen and formalize existing herding community institutions and to strengthen the linkages between them and formal governance structure and the private sector." The project was mainly financed by the Dutch government (UNDP Project MON/02/301, under "Background", website assessed 29-06-2006).

[75] D.A. Schön, M. Rein, *Frame reflection. Towards the Resolution of Intractable Policy Controversies*, New York, HarperCollins Publishers, 1994.

[76] The spirit of this less command-and-control and more cooperative "horizontal" community-based forest management is clearly analyzed in H. Gregersen, A. Contreras, *Rethinking Forest Regulations. From simple rules to systems to promote best practices and compliance*, Washington DC, Rights and Resources Initiative, 2010.

obvious that not much order is present in indigenous communitarian justice and its law, or rather: apart from the possibility of roughly outlining what the local law "is", it is very clear that "the law" has many facets that do not combine into a unity and cannot be perceived as something separate from reality. In doing justice to it, we always meet a manifold of different approaches, many often contradictory sources of justifying one decision rather than another one. Is "the law" to be found in the "acta", in "our customs since time immemorial", in those rules that emerge from the consensus in a general meeting of "all members"? There are no decisive unifying criteria at work, so many kinds of norms overlap and conflict with each other.

To turn now to Western state law, at first this seems implausible as state law is always presented by the legal profession as a coherent unity.[77] Scepsis about this claim opens the door to a debate about so-called "internal state legal pluralism"[78] and urges empirically minded scholars not to believe the usual legal doctrinal claim that the state legal order as such is a coherent unity. Let me provide an example of the usefulness of using legal pluralism in studies of Western state law. Long ago I supervised many investigations into the ways administrative law bureaucracies in the Netherlands applied the relevant rules, e.g. in matters of claims for social benefits. Time and again the researchers found important differences in the way different civil servant groups in different towns and regions determined the merits of claims for benefits. For example, claims submitted by students encountered more difficulties than ones from people who had worked hard for 35 years, had got laid off and finally had to apply for a benefit. This difference is not encoded in the law or standard jurisprudence. It is purely a matter of the way "the law" in its application by a group of civil servants reflects the specific meanings and policy this group brings to bear on deciding claims.

[77] To some extent one can understand the reticence of legal theory to accept this idea. After all in domestic law, but not in international law, the problem of harmonizing different legal rules, different regimes and different legal authorities and law-making bodies is far less plagued by bitter contestation and highly politicized conflicts. But this does not mean that state law can be depicted as a coherent unity.

[78] Particularly Gordon Woodman in his seminal essay in the *Journal of Legal Pluralism* (42 (1998), pp. 21-59) has urged us to include this category in the general characteristic of the themes inherent in empirical legal pluralism.

Formally, these civil servants have no competence to take the decisions, they are only preparing the file for the authorities. But in daily life their judgement regularly decides the case *de facto*. Inside the apparatus of state law, there are many semi-autonomous social fields in Moore's sense.[79] In these fields norms and considerations in one region or even in the same agency overlap and conflict with those of another group as well as with official or less official interpretations of what the state law "is". The use of these local norms mostly goes unchecked, and the civil servants usually have the last word.[80] Through the workings of these social fields different facts are stressed, different qualifications are given to the facts selected, different principles of interpretation are used, different sources of law and bodies of norms are evoked, different policies are used to fill in open concepts, new social developments are taken into account in different ways, and new social norms are drawn from general tendencies in social morals and imposed. Different interpretations of legal rules are not harmonised but persist.

This sketch is a good description of the role of bureaucracies in legal practice, as well as a fair description of some other parts of the official, professional law positions as well, probably checked at times by the professional legal culture. One would have to know if such professional legal culture does exist in a country and what its main contents and procedures are. These professional devices help to reconstruct some degree of intellectual coherence and logical unity in the legal order by situating a decision in some kind of perceived order of existing rules and jurisprudence, and thereby manage to overcome some lingering inconsistencies, but leave many others in an indefinite state of conflict. Inevitably, on a wide scale we encounter "conflicting or inconsistent legal understanding within state agencies and between them in the same political society".[81]

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[79] Moore, "Law and Social Change", cit.

[80] In my civil servants example, clients whose request has been turned down do not often appeal to higher authorities, which helps to unbalance those legal mechanisms that are meant to bring order in legal decisions and their grounds. But also between various courts, among various jurisdictions (e.g. ordinary courts and specialized courts), and in different districts, such unruly pluralism is a lasting element in the real life of state law.

[81] Cotterrell, "Spectres of Transnationalism", cit., p. 4. This state of legal pluralism within state law is not the same as the phenomenon of legal diversity, like applying different considerations to determine if a tort is committed for experienced business people compared with lay people. This is

In other state law systems that put less stress on the kind of logical unity we just discussed, or in states where law is a far distant, haphazard and highly irregular phenomenon, the anthropologist has no problem in pointing to striking instances of internal state legal pluralism. The Peruvian Water Law in Guevara's study has such an erratic presence in daily life that certainly a comparison between various places and regions demonstrates all kinds of contradictory applications that never get resolved in one legal unifying scheme of concepts and higher norms. This is an instance of state legal pluralism. Indeed, in empirical legal pluralist studies we constantly have to rethink critically the "central tenet of orthodox legal thought that the law of every state is derived ultimately from a single source, or from a few which are organised in a recognised hierarchy".[82]

Some final remarks

When scholars use the concept of *legal* pluralism to analyse the many community-based norms people usually feel committed to follow, two important steps have been taken. The anthropologist calls such norms legal, talks about legal orders as being the product of distinct communities and functional associations, and does not reserve this qualification for norms officially baptised as state law. Secondly, such a scholar also claims that state law as a matter of fact often does not possess the exclusive and highest power to regulate and solve overlaps and conflicts between these various legal orders. There is no arbiter effectively indicating which order goes first. These two steps mean dethroning state law as the exclusive regulatory and engineering power in society. Another point to make is the fact that legal pluralism is not only an illuminating concept for studies of colonial or post colonial societies but also for Western societies where the terminology surfaced rather recently but the concept has been around already since the early 20th century legal sociology (Ehrlich, Gurvitch et. al).

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just legal diversity. In legal theory and textbook practice, normally these differences are easily brought into a wider logical frame and therefore are not to be called inconsistent, overlapping or conflicting.

[82] Woodman, *op. cit*., note 5, p. 52.

In the last 20 years or so the same legal pluralist situation has arisen *beyond* the state boundaries, in the global world. Many globally operating communities forming all kinds of transnational corporations, public or private or mixed, produce and enforce normative regimes that the anthropologist, again, calls legal. Many of these regimes affect local people, local communities and also states. Clashes between the transnational regimes are a regular event, e.g. between WTO rules, Biosafety rules, Multilateral Environmental Agreements, or World Health Organisation regulations. Many experts, also among international law scholars, know that in this world of conflicting transnational legal regimes there is no neutral and effective arbiter either.

Only by analysing the confrontations and negotiations between all these legal orders, using a variety of scales, global, national, local, can we find out what and how official law works out in society and how people and communities use some legal elements and fight others. Several questions call for further study. For instance, attention can go to the many ways in which one legal order takes over elements of another one and vice versa: interlegality, producing hybrid legal orders. In this essay many instances of interlegality have been discussed. More fundamentally, one would do good to concentrate on local people and communities and to find out what these actors stand to gain or to loose from the plurality of legal orders that appeal to them and from the contests and conflicts between these orders. In this essay for instance I referred to the fate of the law of distinct communities like indigenous peoples. They often had – and still have - to defend their legal order and their survival as such against pressure from state and state law to suppress pluralism. They have to try to survive as a specific culture in a world in which global commerce, global extractive industries and massive tourism relentlessly homogenise the world. But some recent transnational legal regimes provide these peoples with some opportunities to rally against the state and its law and get an official right to rule themselves and determine their own future.

Another battle about legal pluralism is fought in the domain of resource tenure and environmental governance. In terms of land rights the plurality of land tenure

arrangements including communal land tenure, is now officially taken more seriously and sometimes used as a jumping board for reforms in state land law rights that respect local conceptions of land and resource tenure and the communal values behind these. Transnational law, including "project law" of some NGO's, World Bank and other donors, tends to step back form earlier repression of local law and to accept more legal pluralism.

The future of the distinct communities and their law, however, is not a bright one. But it is different when looking at functional associations. These will constantly grow in weight in complex societies and will force states as well as transnational regulatory centres to forget about top down forms of law, and give legal pluralism a boost in public administration, in the form of new modes of governance. It may even be so that in this roundabout way distinct communities may find new opportunities to prevent their dying out.

The Politics of Global Legal Pluralism

Marco Goldoni

Abstract Pluralism has made its way into European law literature already a long time ago. Some of its main tenets have proved to be apt for describing several forms of supranational constitutionalism (EU, ECHR, WTO). In the first two sections, this article reconstructs the two main pluralist interpretations of supranational constitutionalism: on the one side, McCormick's neo-institutional take on the nature of the EU and, on the other side, Mattias Kumm's constitutional pluralism. The third section illustrates why while they both present sounding descriptive elements, they should be both rejected because they are not normatively appealing. The fourth section elaborates the idea that a certain understanding of pluralism makes supranational constitutionalism politically shallow. Overall, instead of opening up new possibilities for constitutional transformation, pluralism serves the function of entrenching certain interests.

Keywords Global legal pluralism, ordinary politics, constituent power, public autonomy, constitutional fragmentation

The Context of Global Legal Pluralism

This article does not intend to criticize pluralism as a general theory of law, but rather focus on the use of pluralism at the supranational and global level and on its impact on political action as conceived by the recent wave of new publications on this topic. This application of legal pluralism to the domains of the relations between international legal regimes, stemming from various domains, that is, from the WTO to NAFTA and the European Union, and to the relations between regional or subnational domains, represents an application of legal pluralism.[1] In fact, legal pluralism has become one of the main theoretical frameworks open to international lawyers to grapple with the realities of the international and transnational legal orders.[2] The debate on the coherence and identity of international law, known as the 'fragmentation' debate, unsurprisingly elicited

[1] For a relatively optimistic introduction to these issues see S. Cassese, *Diritto globale*, Torino, Einaudi, 2008.

[2] For an overview, see R. Michaels, "Global Legal Pluralism", *Annual Review of Law and Social Science*, 5 (2009), pp. 243-262.

much interest from legal pluralists.[3] In this sense, there are important differences between those whose starting point is the recognition of the 'fact' of legal pluralism (qua descriptive statement) and those who actually celebrate and embrace legal pluralism. This article tackles only with the latest cohort of pluralists for two reasons: the first one is that among these authors there are outspoken supporters of original forms of global legal pluralism; the second one is that in these works, and despite their pretensions, the suppression of the political aspect of constitutionalism is at its peak, to the point of actually debunking political constitutionalism *tout court*. The core criticism put forward in this article is an invitation to resist the celebration of global legal pluralism as an emancipatory move, and to see it as a direct attempt at depleting the resources of meaningful political action. This is the case despite the fact that in global legal pluralism a lot of emphasis is put on the role of contestation among different sites claiming authority on the same conduct. Dialogic exchanges among different layers of governance on one hand, and interactions between institutional and non-institutional subjects on the other hand, make global law increasingly more tolerant and rich. Even more, global legal pluralism makes legal interactions open to severe contestation by a multiplicity of subjects. As such, this form of legal pluralism would open new avenues of conflicts rather than limiting them. However, as we shall see in the following paragraphs, global legal pluralism cannot deliver what it promises. In particular, the framework adopted by legal pluralists cannot accommodate (it actually undercuts the possibility of) the two main features of a political kind of constitutionalism, that is, the possibility of exercising constituent power[4] and the staging of ordinary political conflict.[5] The writings of global legal pluralists extol the virtues of social groups and agents and

[3] To roughly sum up there has been two major responses to the question of transnational law: one, as already mentioned, is the pluralist approach. The other one has been the constitutionalist answer. For an overview of the latter, see C.E.J. Schwöbel, "The Appeal of the Project of Global Constitutionalism to Public International Lawyers", *German Law Journal*, 13 (2012), pp. 1-22.

[4] Constituent power expresses the idea that politics should be fully reflexive. See J. Rancière, *Disagreement*, London, Verso, 2006.

[5] For the importance of a space of appearance for political action see H. Arendt, *The Human Condition*, Chicago, 1958, ch. V.

plead for opening up the space to such forces. The logic of the argument is simple: releasing previously constrained social forces produces beneficial effects to the legitimacy of transnational law. In this respect, globalization has offered a new chance for making visible claims which were previously not recognized. But global legal pluralists postulate that this promise can be redeemed only if politics is not allowed to impact on other systems or if it is displaced by new forums which are supposed to illuminate aspects of social reality previously neglected. In a nutshell, global legal pluralism challenges directly the capacity of the political constitution to recognise, shape and address political conflict.

Embracing Normative Hybridity

A standard recent account of global legal pluralism is the one proposed by Paul Schiff Berman.[6] It presents some of the classic tenets of legal pluralism and apply them to supranational law. Berman's methodology is rooted in the tradition of socio-legal studies and adopts a cultural analysis of law.[7] Within this framework, law is part and parcel of the construction of social reality and its analysis cannot be detached from this aspect. The aim of this kind of enterprise is to retrieve how legal meaning is produced (and the condition of legal intelligibility) rather than to test legal validity. The second tenet is a direct consequence of the former: legal pluralism is neither State-centered nor fully cosmopolitan (at least not in the universalist version of cosmopolitanism). The ideas of an ultimate legal authority and of State sovereignty (at every level, national or international) have to be abandoned precisely because they cannot be supported neither by legal fictions nor by factual monopoly of power.[8] Berman's starting point is the recognition that legal orders in a globalized age cannot exhaust the phenomenology of legal activities taking place across and beyond jurisdictions. At the beginning of his

[6] See his monograph *Global Legal Pluralism: A Jurisprudence beyond Borders*, Cambridge, Cambridge University Press, 2012; see, also, "The Globalization of Jurisdiction", *University of Pennsylvania Law Review*, 2002, pp. 311-529; "A Pluralist Approach to International Law", *Yale Journal of International Law*, 2007, pp. 301- 322.

[7] See P. Kahn, *The Cultural Study of Law*, Chicago, Chicago University Press, 1999; R. Cover, "Nomos and Narrative", *Harvard Law Review*, 1983, pp. 1-68.

[8] For a recent take on this issue and the development of the idea of relative authority see N. Roughan, *Authorities*, Oxford, Oxford University Press, 2013.

monograph it is indeed stated that "we live in a world of multiple overlapping normative communities".[9] This entails that different legal orders might claim the right to regulate the same social field or the same activity. He defines this condition as normative hybridity. No definition is provided for that idea, but it can be loosely reconstructed as the phenomenon of "the relationship among multiple communities and their decision makers".[10] The examples offered by Berman are conspicuous: from state versus state conflict to state versus international norms and state versus non-state law. It remains an open question whether normative hybridity is a peculiar phenomenon of the age of globalization which requires a new approach to law. Nonetheless, for the sake of the argument, we can even concede to Berman that this is the case. Legal hybridity is first a *de facto* reality with which it is necessary to become familiar. The point is that global legal pluralism is a more ambitious theory and it advances stronger claims than just descriptive ones. It is indeed a normative theory because it praises the virtues of a pluralist understanding of legal interactions. What are the virtues of this form of global legal pluralism? The first one is indeed epistemic: recognising the multiplicity of sources of law beyond the States means respecting social groups as autonomous creators of law and recognising their legal impact. The second main virtue is that according to Berman this form of pluralism is empowering because it creates new opportunities for contestation and creative adaptation.[11] Berman believes that pluralism should cope with the phenomenon of hybridity with procedural and not substantive means. Because normativity is pervasive, and the production of legal meanings relentless, substantive principles have to yield to normative proceduralism.[12] No agreement on the content of substantive principles is indeed possible. The recognition of this state of affairs is part and parcel of how the response to legal hybridity takes shape: "to create or preserve spaces for productive interaction among multiple, overlapping legal systems by developing

[9] P. Schiff Berman, *Global Legal Pluralism*, cit., p. 3.

[10] Ibid., p. 117.

[11] Ibid., p. 118.

[12] A. Galán, D. Patterson, "The Limits of Normative Legal Pluralism", *International Journal of Constitutional Law*, 2013, p. 786.

procedural mechanisms, institutions, and practices that aim to manage, without eliminating, the legal pluralism we see around us".[13] The purpose of global legal pluralism is to manage legal hybridity by devising procedures in which the voices of different communities can be heard. Berman believes that this approach can tame conflict between staunchly different and contrasting views of the law and also reply to the democratic objection to the legitimacy of such a pluralist framework. The first point concerns the capacity of procedural forms to channel and eventually tame conflict between opposing normative commitments by building a common social space through the expansion of the range of voices heard or considered.[14] In this way, relations of emnity would be turned into adversarial relationships.[15] As for the second point, the democratic objection, Berman replies by adopting an array of tools for coping with pluralism without supressing it and at the same time giving voice to all those affected by decisions: procedural mechanism, institutional designs, and discursive practices. These mechanisms provide the framework for enabling and at the same time constraining legal pluralism at the global level. Berman concedes also that these procedures are not completely formal, but they cannot decide any issue by introducing substantive reasons. As rightly noted by Galán and Patterson, this requirement makes Berman's pluralism mild and basically grounded in a liberal political philosophy.[16] Not every new voice is legitimate, but only those who put forward reasonable arguments. In the end, the purpose of these mechanisms lies in being "sites for continuing debates about pluralism, legal conflicts, and mutual accommodation".[17] The examples of instantiations of continuing debates put forward by Berman are quite telling. They all point to interactions between different sites of authority or institutional power and rarely discuss informal (meaning social but not institutional) movements. The use of the margin of

[13] Berman, *Global Legal Pluralism*, cit., p. 10.

[14] Berman, *Global Legal Pluralism*, cit., p. 18.

[15] Berman here adapts to his theory an argument formerly put forward by C. Mouffe, *On the Political*, London, Verso, 2005.

[16] A. Galán, D. Patterson, "The Limits of Normative Legal Pluralism", cit., p. 787.

[17] Berman, *Global Legal Pluralism*, cit., p. 153.

appreciation is understood as a form of communication between the Strasbourg court and the constitutional courts of member States. It can be used as a way to signal dissatisfaction with current decisions but it is also a way to calibrate the protection of fundamental rights among different layers. Another example concerns the relationship between NAFTA panels and US state courts in cases[18] which generated new trilateral relations between them and federal institutions. What is valuable in these cases, according to Berman, is the reciprocal influence among different bodies based not on coercion or the threat of sanctions, but on dialogue and criticism among these institutions. Of course, interactions are not limited to institutions but can also occur between informal agents and formal bodies. We are even informed by Berman that this informality can be stretched as far as to the point where "the decisions of arbitral panels may, over time, exert influence on the decisions of more formal state or international bodies, and vice versa".[19] Given the problematic status of arbitral panels, in particular in the case of investment treaty law (which is certainly affecting the supranational level), one wonders how these 'dialectical interactions' can instantiate any form of political conflict or even contestation at the supranational level.[20] In fact, most of the examples provided by Berman do not actually make visible any form of political conflict. To the contrary, they usually are ways of coping with potential conflict 'by stealth', that is, by avoiding the staging of disagreement.

In light of these remarks, the overall upbeat tone deployed by Berman is unwarranted. The containment of pluralism by a series of liberal constraints is not given proper consideration despite the fact that this framework is essential for making global legal pluralism operative.[21] Berman seems to postulate a public reason as a framework for the development of global legal pluralism. Yet, even if

[18] Loewen Group v. United States, ICSID case No. Arb(Af), 98/3, 42 ILM 811 (2003).

[19] Berman, *Global Legal Pluralism*, cit., p. 160.

[20] As known, in certain cases, there is no duty to make the motivations of panels' decisions public, a feature which makes treaty investment law impolitical. For a strong criticism of investment treaty law along these lines see D. Schneiderman, *Constitutionalizing Economic Globalization*, Cambridge University Press, Cambridge, 2008.

[21] See Berman's reply to Galán and Patterson, "How Legal Pluralism Is and Is not Different from Liberalism", *International Journal of Constitutional Law*, 2013, pp. 801-808.

one were to consider appropriate the thin requirements for the validity of reasons exchanged in public reasoning, it would still be difficult to understand how these reasons came into being in the first place. In other words, Berman takes these requirements of public reasoning as a given, a structural feature of certain practices which, in the end, turn out to be already inscribed within a liberal horizon. It is not possible to put into question this framework and therefore the kind of politics envisaged by global legal pluralism is not fully reflexive. In the end, the political added value of this version of global legal pluralism can be summed up in the idea that 'the more, the merrier'.[22] A proliferation of viewpoints, once channelled through certain devices, will improve the representativity and quality (in terms of its contents) of law. Yet, this claim just replicates the logic of competition as a system for enhancing knowledge which is usually applied to the rationality of system markets.

Radical Pluralism?

While Berman's proposal is still attached to some form of liberal constitutionalism, the case of Nico Krisch's work on pluralism appears as partially different. At a certain level, Krisch's understanding of pluralism is definitely more radical than Berman's. He embraces and supports a normative perspective on systemic pluralism. Institutional pluralism is a form of plurality of institutions: different parts of one order operate on a basis of coordination, in the framework of common rules but without a clearly defined hierarchy.[23] Berman's pluralism, in the end, would be just another version of institutional pluralism because it recognises a common framework. Systemic pluralism eschews a common framework in favour of a decentred management of diversity. In this kind of

[22] E. Melissaris, "The More the Merrier? A New Take on Legal Pluralism", *Social & Legal Studies*, 13 (2004), pp. 57-79.

[23] According to Krisch, this is another version of the weak kind of legal pluralism identified in J. Griffiths, "What is Legal Pluralism?", *Journal of Legal Pluralism*, 1 (1986), pp. 4-5. In the debate on supranational law this position is powerfully represented by M. Kumm, "The Cosmopolitan turn in Constitutionalism: In the Relationship between Constitutionalism in and beyond the State", in Dunoff, Trachtman, *Ruling the World*, Cambridge, Cambridge University Press, 2009, pp. 258-324.

pluralism there are no common rules of recognition,[24] but only competing rules coming from a number of different layers.

Krisch's starting point is the new regulatory reality of transnational law. Regulations have become the main legal source for governing supranational or transnational phenomena. One aspect of this landscape is that the State has become much less important as the main site both of legal and political authority.[25] Another essential feature (at least, for the solidity of Krisch's argument) is the proliferation of global regulatory bodies such as international courts, international organisations and supranational regulatory agencies. This point seems to be rather uncontroversial: just to mention one example, according to Karen Alter, eighty-five percent of the total number of international decisions, opinions and rulings have been issued in the last two decades.[26] At the descriptive level, Krisch is basically starting from the thesis of the fragmentation of international law. At the normative level, he is fundamentally advocating the superiority of systemic pluralism to hierarchical and foundational constitutional systems, interstate system, and forms of institutional pluralist law which rest upon general legal rules and/or principles.[27] Once abandoned any reference to a common language or framework, it becomes necessary to provide an alternative explanation for enlightening the interactions among different legal claims. Two normative principles are conjured up by Krisch in order to support his global legal pluralism. The first one is *toleration* and it is directly linked to the epistemic status of systemic pluralism. According to this principle, "regulatory bodies

[24] According to Krisch, this version of pluralism is closer to the one proposed by B. de Sousa Santos, *Toward a New Legal Common Sense*, London, Butterworths, 2002.

[25] It has to be noted that Krisch's treatment of the role of the State is very superficial and inaccurate. He basically accepts the common but shallow interpretation of the decline of the State without really engaging with the topic of the restructuring of the State. For an insightful and still relevant analysis of the State within supranational orders see N. Poulantzas, "Internationalization of Capitalist Relations and the Nation-State", *Economy and Society*, 3 (1974), pp. 145-179.

[26] K. Alter, "The Multiple Roles of International Courts and Tribunals", in J. Dunoff, M. Pollack (eds), *International Law and International Relations*, Cambridge, Cambridge University Press, 2014 (forthcoming).

[27] As noted previously, the reference goes mostly to the literature on constitutional pluralism (Mattias Kumm, Miguel Maduro and the writings by Neil McCormick): see, for an overview, M. Avbelj, J. Komarek (eds), *Constitutional Pluralism in the European Union and Beyond*, Oxford, Hart, 2012.

should tolerate, and respect, the standards and decisions of other bodies".[28] This is a standard prescription for many versions of legal pluralism. In order to operate (and as we shall see later, to flourish), pluralism needs reciprocal and conditional recognition of at least the prima facie value of the legal orders and institutions involved in a transnational legal conflict.

The second principle pertains to the normative justification of systemic pluralism. Here, what is most relevant for the economy of this article is that this justification comes wrapped in a political language. Pluralism, in contrast to constitutionalism, is related to 'political deliberation' because it is supposed to augment the openness to and hence the inclusiveness of many voices. This is how Krisch sums up his position in contrast to the constitutional approach: "constitutionalism and pluralism are distinguished … by the different extent to which [each] formally link[s] the various sphere of law and politics. While pluralism regards them as separate in their foundations, global constitutionalism, properly understood, is a monist conception that integrates those spheres into one. As a result, rules about the relationship of national, regional, and global norms are immediately applicable in all spheres, and neither political nor judicial actors can justify non-compliance on legal grounds".[29] Global legal pluralism, by respecting the separation between different domains, is allegedly political because it promotes the value of *public autonomy*. Much of the argument in support of systemic pluralism revolves around this ideal. Yet, it is striking how poorly this ideal is developed. The argument follows this line of reasoning: social practices alone are not a sufficient ground for the legitimacy of a postnational order. It is necessary to introduce an added value, which is provided, in this case, by the ideal of public autonomy, which among other things has to be compatible with the principle of toleration. But at this stage, Krisch's argument becomes vague and too thin to meet the expectations that radical pluralism has generated in the first place. Social practices are instantiations of public autonomy when "they concretize the discursive requirements that allow all to be the authors of the rules

[28] P. Capps, "The Problem of Global Law", *Modern Law Review*, 74 (2011), p. 798.

[29] N. Krisch, *Beyond Constitutionalism*, cit., p. 242.

to which they are subject".[30] Therefore, social practices realise public autonomy when they are substantiated by a particular kind of political deliberation. In other terms, social practices instantiate public autonomy when they are the specification of the idea of self-legislation.[31]

This is a demanding claim but it should be recognised that Krisch confronts directly the objection of democratic accountability which is immediately raised when a heavy normative principle like public autonomy is conjured up. Global legal pluralism is supposed not to translate standard conceptions of democracy (i.e., representative democracy within the framework of the nation State) to the transnational sphere, but to adapt democratic politics to a new context. In response to the difficulties of postnational democracy, Krisch advocates the virtues of systemic pluralism: revisability, contestation, and checks and balances. Revisability is ensured by the lack of ultimate authority, while checks and balances are operational through the proliferation of sites of authority. However, for the argument put forward in this article, contestation is the most interesting tenet among those three. Contestation is supposed to be the main political component of global legal pluralism and to ensure that accountability is properly in place in the interaction between different legal orders and institutions. Only through contestation it is possible to counter the lack of trust that is created by the absence of a direct representative link between agents and supranational institutions, that is, by the distance between the governing suprational institutions and those governed. To be fair, Krisch does not advocate pluralism's virtues as valid in an absolute sense, but only as comparatively stronger when compared to the constitutionalist approach: "thus a pluralist structure does not, in and of itself, allow for more effective contestation than a constitutionalist one".[32] Note that it is accepted that most global regulation and standard setting in areas such as manufacturing, banking, taxation, bankruptcy, money laundering, air transport, is today generated through processes that connect the decision-making of

[30] *Ibidem*, p. 99.

[31] Krisch follows and quotes Habermas on this point, but adding that 'there is no need to limit this approach to the discourse within a pre-established association': *ibidem*.

[32] *Ibidem*, p. 85.

transnational actors, organizations and state actors, configuring a process which is may be pluralist but certainly not properly political. There is no public forum where positions are articulated, or disagreement becomes visible, but the effects of global legal pluralism are produced just through interactions between different actors and institutions. Bearing in mind this background picture, one might conclude that Krisch adopts a conflict of laws-perspective.[33] However, his allegiance to global legal pluralism commits him to an admittedly stronger stance. The Conflict-of-laws approach understands the relations between different legal claims as a conflict between autonomous orders with a neat distinction between inside and outside.[34] Global legal pluralism's starting point is categorically different because it is concerned with orders that are intermeshed and interconnected and which accept forms of common decision-making. This is reflected in the terminology chosen by Krisch: interactions at the supranational level are not regulated by collision between norms, but by "interface norms" which signal enmeshment and joint engagement in a common space. For courts, for example, this means to move from a self-perception of themselves as the guardians of their legal orders to the role of mediators or arbiters between orders as they start seeing themselves as increseangly belonging to many legal identities at the same time.

As such, the structure of a post-national order is likely to be complex and fluid, but it also lacks any constitutional mechanism to cope with and recognise the contestation which is pervasive throughout the regulatory landscape. In fact, Krisch's main point is that regulatory bodies disagree, compete or contest with each other within global legal pluralism. But what is the object of contestation? This is not immediately clear, but as noted by Patrick Capps, it seems that regulatory bodies, at the transnational level, do actually regulate types of activity

[33] The standard version of this approach is C. Joerges, "Sozialstaatlichkeit in Europe: A Conflict-of-Laws Approach to Law of the EU and the Proceduralisation of Constitutionalisation", *German Law Journal*, 2009, pp. 335-360.

[34] For an analysis of the EU as comprised of many autonomous legal systems see J. Dickson, "Toward a Theory of European Union Legal Systems", in J. Dickson, P. Eleftheriadis (eds), *Philosophical Foundations of EU Law*, Oxford, Oxford University Press, 2012, pp. 25-53.

rather than legal subjects.[35] Competition and contestation arise on a multiplicity of activities. It is this proliferation which secures global legal pluralism's efficacy. Regulatory bodies compete around what a particular legal subject should do or they do conflict in the attempt of imposing standards on each other. But Krisch believes that this is a great advantage for pluralism as it allows for greater flexibility and an improved capacity of adaptation.

In order to assess the virtues of this kind of legal pluralism two factors need to be taken into account. First, it is necessary to accurately describe what is the nature and the content of those interface norms which are supposed to regulate the conflicts ensuing from different legal standpoints. Krisch recognizes that interface norms are based on the principle of public autonomy: they "will also reflects other factors, such as the degree of prior formal acceptance of other norms (for example, through ratification), the proximity of values (for example, equivalence or identity in the interpretation of rights), or functional considerations, such as the utility of cooperation in a regime. Yet, these should be secondary factors, operating within the autonomy-based framework I have just outlined. If a polity has a strong autonomy pedigree, its norms are due respect even if they are based on distinct values or compliance with them does not have immediate benefits".[36] How different claims from various legal standpoints are going to be adjudicated? Krisch's reliance on the principle of public autonomy reveals itself to be again a liberal answer to the question of pluralism. Conflict rules do not have an overarching legal character, but they are "normative, moral demands that find (potentially diverging) legal expressions only within the various sub-orders". How these demands are put forward and then channelled is a question which is left completely unexplored.

Here the second issue kicks in: who is going to adjudicate these difficult cases and how. The answer is rather predictable and it gets Krisch's solution very close to the one proposed by global administrative law. Courts and regulatory bodies are the best suited agents for dealing with these conflicts for two reasons. The first

[35] P. Capps, "The Problems of Global Law", cit., p. 801.

[36] N. Krisch, *Beyond Constitutionalism*, cit., p. 296.

one is a matter of institutional design: in the process of interpreting the law, courts often collect claims from different legal orders, something which usually does not happen to other kind of mostly political institutions. The idea is that courts provide in this way a common space which endows parties with a speaking position. In this way, contestation can take place and be articulated according to a common grammar. The second point is that legal reasoning provides a common language very well-suited to deal with contestation. Revealingly, Krisch admits that judicial minimalism is often the right attitude for dealing with issues of social and political conflict. Against teleological interpretation of the law, he suggests to take up a case by case evolutionary but minimalist approach to legal interpretation. Given that it is not always possible to easily reconcile conflicting claims, decisions should refrain from addressing principles and be restricted to the circumstances of the particular case without developing any wider theory of law. This is very similar to Cass Sunstein's judicial minimalism, based on the so-called 'incompletely theorised agreements', which may help shape a common solution even if disagreement over fundamental issues remains.[37] This approach is instantiated by the European human rights regime and in particular by the use of the margin of appreciation by the European Court of Human Rights. No grand theory of interpretation is employed by the Court, but constant adjustment sensitive to the context involved in a dispute. The dialogue between the Court and the member States is based on interface norms, but these do not function as rules. In fact, "legally, the relationship between the parts of the overall order in pluralism remains open – governed by the potentially competing rules of the various sub-orders, each with its own ultimate point of reference and supremacy claim, the relationship between them are left to be determined ultimately through political, not rule-based processes"[38]. This is a form of balancing case by case

[37] C. Sunstein, *Legal Theory and Political Conflict*, Oxford, Oxford University Press, 1996; Id., *One Case at a Time: Judicial Minimalism on the Supreme Court*, Cambridge, Mass., Harvard University Press, 2001.

[38] N. Krisch, *Beyond Constitutionalism*, cit., p. 23.

which takes place in a judicial setting.[39] In the end, the political test for public autonomy is left to a kind of judicial and administrative politics which is performed on a case by case basis.[40] The idea is that in global law, the judicial channel opens up spaces for political action. The innovative aspect of this approach is that it creates new possibilities for actors in spheres from which they were previously excluded. However, nothing is said by Krisch on whether and how the judicial language colonises political action either in terms of offering a speaking position for disagreement[41] or in allowing any room for the reflexivity of politics, *id est*, to the possibility of discussing the terms of the framework through which contestation takes place.[42] A minimalist understanding of the judicial management of interface norms, even if coupled with rules which make sure that interactions are open to negotiation, seems to hardly be an efficient way to politicise global legal pluralism. It might create a multiplicity of channels open to strategic actions from various actors, but this dispersion does not enhance the visibility of political conflict.

Fragmented Constitutions

The last kind of global legal pluralism to be taken into account is the one celebrated by Gunther Teubner, in particular in his recent *Constitutional Fragments*.[43] Teubner's work is extremely ambitious because it merges legal pluralism and the sociology of constitutions in a highly innovative approach to law and globalization.[44] His starting point is rather different from the previous two theories. He adopts (but modifies) Luhman's theory of systems which puts an emphasis on the autopoiesis or self-generation of every functional system and on

[39] For the idea of "balancing *ad hoc*" see T. Aleinikoff, "Constitutional Law in the Age of Balancing", *Yale Law Journal*, 1984, pp. 979-980.

[40] A. Stone Sweet, *Governing with Judges*, Oxford, Oxford University Press, 2000, p. 78.

[41] This point has been raised, among many others, by J. Rancière, *Disagreement*, cit., p. 77.

[42] It is probably unfair to demand something to global pluralism that it does not promise. But it is important to note that the thesis undergirding this article makes the reflexivity of politics an essential feature for any political approach to the law.

[43] G. Teubner, *Constitutional Fragments*, Oxford, Oxford University Press, 2012.

[44] Cf. C. Thornhill, *A Sociology of Constitutions*, Cambridge, Cambridge University Press, 2011; M. Neves, *Transconstitutionalism*, Oxford, Hart, 2013.

the importance of communication for their stability.[45] As a consequence, law plays an essential role since, once coupled with other systems, it provides the stabilization of normative and communicative expectations and it also protects the autonomy of each system. Teubner links societal constitutions to the problem of double reflexivity. Societal constitutions are defined as "structural coupling between the reflexive mechanisms of the law (that is, secondary legal norm creation in which norms are applied to norms) and the reflexive mechanisms of the social sector concerned".[46] In practice, societal constitutions emerge when their reflexivity is supported by legal norms. Globalization has shown how productive the coupling of law and other systems can be beyond the horizon of the nation State. And in this way it has changed the experiences of the nation state itself. State-based constitutionalism is now threatened by a centrifugal force defined as the double fragmentation of world society. The first fragmentation coincides with the autonomy of global social sectors; the second fragmentation concerns the consolidation of regional cultures and it preempts any possibility of a unitary global constitution. Moreover, the development of global social subsystems has not been realised at the same pace. Social systems still tied to the national State level have not been globalised, creating an asymmetry between different media. However, according to Teubner, this gap is not negative in itself as it can actually enrich contemporary constitutionalism by containing the ambition of the nation State.

As it is evident, the main target of Teubner's work is the political version of constitutionalism, and more specifically, the political constitution of the nation State. His main concern is to liberate the idea of the constitution from the grip of the State because only in this way it will be possible to redeem the promises of constitutionalism. According to him, the drawbacks of political constitutionalism are many: at the epistemic level, political constitutions obscure the role of other societal formations, distorting our knowledge of society; at the normative level, they empower only individuals through public law and in the best case scenario

[45] N. Luhman, *Law as a Social System*, Oxford, Oxford University Press, 2002.

[46] G. Teubner, *Constitutional Fragments*, cit., p. 105.

social groups through norms of private law; theoretically, they are understood in a strictly formalist way to the detriment of the undergirding material constitution. Finally, political constitutionalism is always verging on the brink of a totalitarian turn, that is, a re-shaping of the constitution from a liberal one, where society is just left to the regulation of private law, to one where society is completely controlled by the state constitution. The conceptual underpinning of this position is that, as Teubner recognises, political constitutions do claim a double function: to constitute power and to limit it. But the methodology of constitutional sociology suggests that this double function cannot be limited to the constitution of the nation state. The main insight provided by a sociological study of constitutions is that societies are much more complex than what can be captured by formal constitutions and they contain multiple non-state social orders. The foundation of an autonomous order and its self-limitation are required for vast numbers of institutions. Note that according to Teubner this is actually the main difference between juridification and constitutionalisation. Juridification requires only first-order rules, that is, rules which regulate the behaviour of subjects. Constitutionalisation requires the creation of second-order rules (in H.L.A. Hart's sense) which serve as a containment of the power engendered by the first-order rule. Therefore, constitutionalisation brings about the full autonomy of the system. Teubner's fear is that the political constitutionalisation of social systems may engender new forms of totalitarianism because these claims of social autonomy would not be recognised. State-based constitutionalism is the only form of constitutional law which claims to be able to regulate, at least in principle, all aspects of life. And this is what Teubner fears and why he extols the virtue of global legal pluralism.

Despite its various merits, Teubner's proposal is quite troubling when it comes to his assessment of the role of politics in constraining the expansionist tendencies of social sub-systems. If the logic of functional differentiation is considered as absolute – something which cannot be excluded, given that it represents the logic undergirding each societal constitution – then what is left of politics? Teubner draws a distinction between external and internal politicisation of systems, clearly

lending his support to the latter. On top of that, Teubner disaggregates constitutions and political power at the supranational level, in the sense that the former does not generate the latter. No space is left for external re-politicisation. It is clear that the separation among different functional systems is an essential and sufficient condition for the operativity of the same systems. And this is why the kind of global legal pluralism advocated by Teubner is incompatible with political constitutions.

It is striking to see how much Teubner is underestimating the effects of this separation when it comes to assessing the functioning of politics within market systems. We are even told that "a strengthened politics of reflection is required within the economy, and this has to be supported by constitutional norms. Historically it was collective bargaining, co-determination and the right to strike which enabled new forms of societal dissensus. In today's transnational organisations, ethical committees fulfil a similar role. Societal constitutionalism sees its point of application wherever it turns the existence of a variety of 'reflections centres' within society, and in particular within economic institutions, into the criterion of a democratic society".[47] We are therefore reminded that politicisation can take place internally, i.e., within social subsystems, through politicizing consumer preferences, ecologizing corporations, and placing monetary policy in the public domain. It is apparent that internal politicisation cannot account for political reflexivity because it folds seamlessly back into the logic of the reproduction of the system.[48]

Teubner argues that institutionalized politics has an innate tendency to suppress opportunities and impulses coming from within the social subsystems. In other terms, the political system receives and translates the external impulses into its own code, weakening, in this way, their (of the impulses) transformative potential. While Teubner is right in stressing the reductionist (and exclusionary) potential of constituted powers, he does not recognize the fact that by pleading for the

[47] G. Teubner, *Constitutional Fragments*, cit., p. 17.

[48] E. Christodoulidis, "The Politics of Societal Constitutionalism", *Indiana Journal of Global Legal Studies*, 20 (2013), p. 659.

proliferation and decentralization of politics he is actually proposing to leave many areas outside the possibility of becoming politicised. His indictment of the political constitution does not leave any space for politics beyond the national state on the basis of sociological and normative arguments. It is better to leave to the social sub-system itself to signal when it is the moment of introducing limitations (usually in the forms of rights) through internal processes. The moment when this happens is described as the moment where the system 'hits the bottom'. However, the idea of having hit the bottom is rather insidious. How is it possible to know *ex ante* what is the bottom? Is there anything in social systems that functions as a warning mechanism for avoiding to reach the bottom? Here, a certain unjustified optimism is at work when Teubner assures that "in the long run […] the one-sided 'neo-liberal' reduction of global constitutionalism to its constitutive function cannot be sustained. It is only a matter of time before the systemic energies released trigger disastrous consequences […] a fundamental readjustment of constitutional politics will be required to deal with the outburst of social conflicts".[49] But even if one postulates the bottom being hit, the question whether there would be a basis left upon which building the countermovement of limitation would remain open.[50]

What Global Legal Pluralism Does not Register

It is time to take stock of the remarks made in the previous three sections. As already noted, the strategy adopted by global legal pluralists is two-fold. But either the invitation to bring in new normative worlds[51] or to keep functionally differentiated systems separated are functional to the destitution of traditional constitutionalism and of the characters of political law. Both are also undercutting the possibility of any meaningful and effective political constitutionalism. The kind of constitutionalism that is advocated by global legal pluralists is either

[49] G. Teubner, *Constitutional Fragments*, cit., p. 78.

[50] In another essay, Teubner remarks that a concern for catastrophe is part and parcel of societal constitutionalism: "Constitutionalizing Polycontexturality", *Social & Legal Studies*, 2011, pp. 210-219. One is left wandering what social system would register the signals of an imminent catastrophe when strict functional differentiation is still in place.

[51] R. Cover, "Nomos and Narrative", cit., p. 68.

politically very thin or even paralysing for future political action. First, the possibility of making visible (staging) political disagreement is severely constrained, when not completely impeded. The circumstances of politics are either ignored or masked under the fact of pluralism. There is, in other words, a complete misunderstanding on the way the 'perspective' character of political action, which is denoted by plurality, is put into form through a common political space. Global legal pluralists believe that the opening to pluralism is by itself a sufficient enabling device for politicisation: this is either because of the opening up of channels for voices previously unheard or because the competition between different perspectives will generate the right kind of political conflict.[52]

As a consequence of these remarks, a second important criticism emerges. Global legal pluralism hinders any kind of meaningful constituent power.[53] Within a pluralist understanding of law there is no traction for constituent power, but only the possibility of taking advantage of the normative interstices left open in the interactions between different sites of authority. It is no surprise, for example, that none of these theorists take into account the role played by economic rationality in global legal pluralism. In the end, the politics of global legal pluralism is shaped by the principles of competition and proliferation or, in the case of Teubner, by the politicisation of consumers' behaviours. The rationality of markets cannot be put into question as an appropriate register for dealing with many issues. Full political reflexivity is occluded and cannot be obtained.[54]

Finally, one cannot be reassured by the old belief that the political will somehow reappear under another form as an expression of an immanent conflict.[55] This is a consolatory narrative which is usually adopted by those who believe in

[52] This is a market-oriented conception of politics.

[53] Teubner, for example, is explicit when he advocates the overcoming of the dichotomy between constituent power and constituted powers.

[54] Full reflexivity cannot be obtained because global legal pluralists do not deem possible any kind of metalevel thinking.

[55] Sometimes this seems to be the case for Schmitt and Schmittians. For a sober assessment see M. Croce, A. Salvatore, *The Legal Theory of Carl Schmitt*, London, Routledge, 2012.

the political as an inescapable feature of the human condition.[56] However, even if this possibility were conceded, that is, that there might be a politics compatible with global legal pluralism, this would hardly be an appealing one.

[56] This is the case of Arendtians.

BILLY o del pluralismo procedurale

Un programma di ricerca

Michele Spanò

Abstract This essay focuses both on legal pluralism and legal transplants. Comparative law, legal theory and political philosophy struggle with these two issues all the more since legal globalization seems to be our shared normative landscape. The essay argues for a governmental approach to legal pluralism thanks to which it singles out the concept of procedural pluralism. The essay actually analyses the role of social actors in shaping legal pluralism and considers legal procedure as the best site where to locate the transformative and pluralizing effect that social actors impress to legal orders. While constrained by procedural obligations, social actors contribute to the transformation and growing pluralization of law through procedure itself. In order to show that process, the essay uses the metaphor of the IKEA supermarket, arguing that procedural pluralism works as the famous BILLY bookshelves.

Keywords: legal pluralism; legal transfers; social actors; transnational legal procedure; normative manipulation

En matière de jeu, de lutte stratégique, dans l'écriture même,
l'inconscient, c'est la stratégie de l'autre
(Hubert Damisch)

1. Dibattiti innumerevoli si sono incaricati, e non sempre con successo, di diradare le brume concettuali che avvolgono il pluralismo giuridico; almeno altrettanti studi, d'altra parte, hanno cercato di "raccontarlo" offrendo infinite situazioni che di esso avrebbero dovuto esibire l'esemplare o il caso di specie. Rari, a dispetto di una letteratura vieppiù crescente, i contributi che si limitino a riconoscere nel pluralismo una condizione, un fatto[1]. Per banale che la constatazione possa apparire e sia: il pluralismo descrive nulla di meno che il carattere distintivo del panorama giuridico contemporaneo. L'ambiente normativo entro cui attori sociali e attori istituzionali sono tenuti a muoversi. Proprio una definizione tanto poco

[1] P. S. Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders*, New York, Cambridge University Press, 2012.

rigorosa e insieme difficilmente contestabile, se da un lato rende meno urgenti scrupoli definitori, dall'altro consente di abbinare la discussione del pluralismo giuridico a quella intorno a un altro dei fenomeni giuridici che ha richiesto altrettanto se non maggiore consumo di inchiostro: i trapianti giuridici. È il fatto della globalizzazione che non solo giustifica ma rende necessario questo *couplage*. Altrimenti detto: la globalizzazione giuridica è il vertice ottico che attesta l'indiscernibilità di fatto tra trapianti e pluralismo.

Non si tratta dunque di esplorare la consistenza concettuale del pluralismo giuridico e neppure di illustrarne le vicessitudini storiche ricorrendo a esempi e studi di caso. Moltissimo – e non sempre giungendo a conclusioni soddisfacenti e men che meno ultimative – si è detto sulla prima; infiniti gli studi che hanno concorso a isolare casi, situazioni o momenti salienti nella sua trafila o sequela storica.

Un concetto – ma si potrebbe perfino dire un'immagine – fungibile del pluralismo giuridico ha natura descrittiva o sociologica, almeno nel suo senso medio e vago. Esso descrive la compresenza – nei modi della giustapposizione o della sovrapposizione, della cooperazione o del conflitto – di regimi e registri della normatività non riconducibili a o non esauribili nella giuridicità tipica delle norme poste da uno Stato sovrano (o in altre parole: di un ordinamento nazionale).

Questo orizzonte risolutamente contemporaneo è anche, e deliberatamente, un congedo dalla classica cornice coloniale o postcoloniale che ha lungamente incorniciato il dibattito sul pluralismo giuridico. Non che questa matrice interpretativa si possa dire esaurita; al contrario, essa consente ancora di leggere moltissime delle dinamiche che uniscono, fino a renderli indistinti, ordinamenti normativi che si sono sviluppati parallelamente o nell'intreccio di artificialissimi effetti di *après-coup*. Tuttavia l'esperienza postcoloniale è oggi niente altro che uno specchio ulteriore che riflette e moltiplica l'immagine di un mondo globalizzato. E dunque impone, una volta di più, di pensare al pluralismo giuridico come alla condizione stessa della globalizzazione giuridica e ai trapianti come suoi effetti costanti e ripetuti.

Abbinare i trapianti al pluralismo significa non ridurre quest'ultimo né a un fenomeno "esogiuridico" e neppure "endogiuridico" in senso stretto, ma sbalzare in primo piano gli attori sociali che, attraverso le loro condotte e grazie alle loro competenze, trapiantano e pluralizzano frammenti di diritto in funzione di interessi e desideri specifici e locali.

Diremo dunque che sono in primo luogo le condotte degli attori a modellare diverse configurazioni normative. E che dunque il pluralismo giuridico è insieme la condizione e il prodotto del loro agire in un panorama normativo compiutamente globalizzato.

Va da sé che tali competenze, proprio perché legate in uno speciale rapporto di dipendenza a una condizione di pluralismo normativo, non possono essere considerate un equipaggiamento come un altro, ma debbono esibire, per essere efficaci, un tenore giuridico speciale. Globalizzazione e globalizzazione giuridica, anche a questo livello di generalità, non sono la stessa cosa. Solo laddove la seconda sia compresa entro una cornice governamentale potrà rendersi più chiaro il nodo di potenzialità e vincoli tipico del pluralismo normativo.

2. Il pluralismo giuridico può essere a buon diritto considerato uno dei banchi di prova e insieme una delle più felici verifiche di un impianto analitico ispirato al concetto foucaultiano di governamentalità[2]. Un'ipotesi di tipo governamentale reimpagina i rapporti tra attori sociali e autorità istituzionali. Tra essi non corre nessun rapporto di subordinazione, ma ciò che si produce è un circuito. Per poter incidere sulle seconde, i primi debbono accettare, e dunque "comprendere", l'ordine discorsivo che da esse promana. Tuttavia, è questa stessa dipendenza ciò che abilita gli attori alla trasformazione dell'ordine che decide del loro posizionamento. Si tratta di un rapporto di autonomia limitata o di creatività vincolata che lega, dinamicamente, gli uni alle altre, rendendo effettuali e significative le condotte degli attori così come trasformabili e rivedibili i posizionamenti costruiti dalle istituzioni.

[2] K. Walby, "Contributions to a Post-Sovereigntist Understanding of Law: Foucault, Law as Governance, and Legal Pluralism", *Social & Legal Studies*, 16 (2007), 4, pp. 551-571.

Trattandosi dei due poli di un circuito, attori e autorità hanno bisogno di speciali mezzi che mettano – nei modi della cooperazione o del conflitto – in comunicazione gli uni con le altre. Tali mezzi sono offerti dal diritto. Quest'ultimo esibisce infatti, e al più alto livello di genericità, il carattere tipico di ogni "potere": quello di vincolare allorquando abilita e quello di abilitare allorquando vincola.

Se questa è del diritto la prestazione esemplare, essa trova un'espressione specifica nella procedura. Quel mezzo capace di unire o separare attori e istituzioni attraverso un linguaggio comune[3]: vincolando gli attori a una forma e abilitandoli, per la stessa ragione, a modificarla e trasformarla. Ciò che più conta: non già a dispetto, ma in virtù di quello stesso vincolo. Potere e competenze disegnano il diagramma di una condizione mobile e modificabile: non cieco questo né vuote quelle, ma allacciate – in un litigio, in un dibattimento – in uno speciale rapporto di perpetua dipendenza eccedente che garantisce la stessa dinamica dell'interazione.

3. Sono queste premesse a rendere sensata la prospettiva di un *pluralismo procedurale*. Se la procedura è infatti, allo stesso tempo e allo stesso modo, il luogo e il mezzo dove e grazie al quale attori sociali e istanze istituzionali comunicano (il che, giova ripeterlo, può voler dire indifferentemente: cooperano o confliggono), allora è piuttosto il divenire plurale dei mezzi normativi che non dei contenuti giuridici a costituire il tratto distintivo del pluralismo giuridico. Promuovere le condotte degli attori sociali, le forme di vita a punto d'osservazione sul proliferare di fonti e sul moltiplicarsi di produttori di norme e decisori di casi rende meno urgente la questione della definizione e la ricerca di soluzioni. Si tratta piuttosto di studiare le infinite traiettorie attraverso le quali gli attori sociali utilizzano e, nel farlo, espandono il pluralismo giuridico esistente. Un pluralismo che, per gli stessi motivi – l'essere mezzo e luogo del rapporto tra attori e istituzioni – è in primo luogo un pluralismo dei mezzi e dei luoghi. Un

[3] S. Cerutti, *Giustizia sommaria. Pratiche e ideali di giustizia in una società di Ancien Régime (Torino XVII secolo)*, Milano, Feltrinelli, 2003.

pluralismo del *come* più che del *che*; e nel quale perfino il *chi* è più l'effetto del *come* che lo produce che non del *che* che lo autentica. Un pluralismo capace in altre parole di fabbricare quelle stesse occasioni che ne rendono possibile l'infinito riprodursi; almeno se si accetta che esso costituisca allo stesso tempo la condizione di possibilità e l'effetto delle condotte degli attori sociali che si decidono per la procedura.

La procedura è infatti niente di meno che *l'experimentum crucis* della forma-di-vita: mezzo e luogo in cui una vita incontra una *forma* (*rectius*: deve assumerla) per accedere, compiutamente ma contingentemente, allo statuto di forma di vita. Soggetto e potere, attori e istituzioni subiscono dunque una trasformazione reciproca nella e grazie alla procedura, che così come obbliga i primi a "indossare" il posizionamento detto e prescritto dalle seconde, allo stesso modo e per gli stessi motivi espone quello stesso orizzonte che aveva reso la prescrizione possibile aperto alla più radicale delle trasformazioni. In una procedura i soggetti trasformano almeno tanto quanto sono trasformati in forza e in grazia di quella operazione di doppia modifica cui la procedura – concepita come l'insieme indissolubile di litigio e mezzi del litigio – obbliga e che essa rende allo stesso tempo possibile.

4. Un simile carattere trasformativo è tuttavia, come discende da un'analisi risolutamente governamentale del potere, anche e sempre un vincolo. Un vincolo epistemico e cognitivo che qualifica quelle competenze che gli attori sociali possono spendere in un litigio. Chiameremo quindi questo speciale tipo di risorse cognitive *competenze giuridiche*. Non dunque un generico "saperci fare" sociale e ancor meno una sorta di speciale dotazione epistemica che gli attori sociali si vedrebbero riconosciuta da teorici talvolta troppo inclini al romanticismo sociologico[4]. Le competenze giuridiche sono infatti un *poter fare* almeno tanto

[4] Cfr. L. Boltanski, *L'Amour et la justice comme compétences. Trois essais de sociologie de l'action*, Paris, Métaillé, 1990; L. Boltanski, "Sociologie critique et sociologie de la critique", *Politix*, 10-11, 3, pp. 124-134; su cui si veda S. Cerutti, "Pragmatique et histoire. Ce dont les sociologues sont capables", *Annales*, 6 (1991), pp. 1437-1445.

quanto sono un *dover fare così*: l'uso di certi mezzi obbliga a un protocollo d'uso che decide status dei soggetti e qualità dei fatti; tuttavia, ancora una volta, un simile protocollo d'uso muta e si trasforma a sua volta *nella misura in cui* è usato.

Nel caso del diritto si tratterà sempre di competenze qualificate e mai di competenze generiche. Per pleonastico che possa apparire, è proprio perché il diritto – e la procedura specialmente – è una grande macchina di qualificazione, che le competenze che essa richiede e insieme attiva debbono dover parlare il suo stesso linguaggio. La disponibilità e la flessibilità che le procedure esibiscono in rapporto agli attori sociali e alle loro condotte non è dunque frutto di una povertà di vincoli; al contrario: esse sono l'effetto della natura puramente formale di questi. È nella procedura che gli attori sociali (che potrebbero e forse dovrebbero essere, a rigore, qualificati anch'essi come attori giuridici) attivano le loro competenze e trasformano il diritto. Per farlo si trasformano e trasformano gli eventi oltreché modificare allo stesso modo quegli stessi ordinamenti che – in forza di vincoli e forme – quella trasformazione avevano reso e rendono possibile ogni volta di nuovo.

5. Si capisce allora fino a che punto procedura e pluralismo siano legati. L'una è condizione dell'altro e viceversa. E se quella di pluralizzare sembra la prestazione cruciale della procedura, essa è adesso moltiplicata scalarmente dalla stessa condizione di globalizzazione che ha contribuito a creare. Se l'attore di una procedura sfrutta il proprio vincolo sino a farne il grimaldello di trasformazione della condizione stessa che lo ha prodotto, il pluralismo procedurale rende questa condizione esperibile da un numero sempre maggiore di soggetti moltiplicando, allo stesso tempo, e i vincoli e le possibilità di trasformazione. Ciascun attore che si impegni in una procedura, provocandone, in virtù della sua condotta, la qualità transnazionale, diviene in altre parole il possibile autore di un trapianto giuridico.

Tuttavia, ciò che nella letteratura sui trapianti e sul pluralismo giuridico è spesso assente è proprio la condotta degli attori. Le *performances* dei soggetti sembrano essere assolutamente sottodimensionate in linee di ricerca che si occupano sempre e solo di ordinamenti, sistemi, insiemi di norme, o anche di

istituzioni, ma molto raramente, per non dire mai, dei soggetti che di questo insieme normativo sono gli utenti, e, in chiave procedurale, i produttori in ultima istanza. Ma se le procedure costituiscono il sito elettivo di questo rapporto tra soggetti e poteri sarà lì che il pluralismo giuridico esibirà tutte le sue potenzialità trasformative. L'uso che i soggetti possono fare di regimi e registri giuridici diversi, a prescindere, e dunque anche a dispetto, del proprio ordinamento nazionale, getta una luce completamente nuova sulla globalizzazione giuridica e sulla sua possibile interpretazione.

L'attore giuridico chiamato in causa nella procedura ha infatti poco o nulla a che vedere con il classico oggetto delle teorie giuridiche sul pluralismo giuridico. Cruciale, per seguirne la traiettoria, è infatti isolare quella condotta che è l'effetto del sovrapporsi di un bisogno a una forma; almeno se si vuole salvare l'idea di attore sociale e non ridurre anche il soggetto della (o alla) procedura a un macro-soggetto giuridico qualsiasi (legislatore, giudice, arbitro, studio legale). Interessa meno il legittimato produttore di norme valide che il possibile utente di norme utili. Colui o colei che, attraverso l'attivazione vincolata di competenze giuridiche, innesca la riproduzione costante di un orizzonte giuridico plurale. Se è chiaro che il ruolo degli attori e delle loro competenze deve misurarsi con quello specialissimo medium che è il diritto, se esso, come è evidente, non è un medio come un altro, è vero altrettanto che quanto resiste ai due programmi complementari di rafforzamento della sovranità nazionale da un lato, e di estensione planetaria del *Rule of Law* dall'altro, sono meno vincoli di ordine istituzionale che *performances* di carattere soggettivo.

6. Pochi autori come Marc Galanter hanno intuito questo processo di pluralizzazione che investiva, per ragioni che attengono alla logica stessa del diritto (ma, si potrebbe chiosare, che ne esprimono a livello specifico un carattere generico solo nella procedura), ogni ordinamento e ogni insieme di norme[5]. Il

[5] M. Galanter, "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law", *Journal of Legal Pluralism*, 19 (1981), pp. 1-47; M. Sharafi, "Justice in Many Rooms since Galanter: De-Romanticize Legal Pluralism through the Cultural Defense", *Law and Contemporary Problems*, 71 (2008), pp. 139-146.

romanticismo quasi inderogabile che conduce a leggere più e meno espliciti sintomi di resistenza in qualsiasi ordinamento non sia posto dallo Stato veniva sobriamente frustrato dall'indagine su quell'insieme di ambivalenze che, ricorsivamente, si applicavano a ogni ordinamento: una macchina delicata e complessa in cui regolazione e negoziazione si rendevano indiscernibili proprio perché cuciti della stessa stoffa, ma "decisi" solo da attori disposti a parlare, per modificarla, la medesima lingua della macchina.

Abbandonare orientalismi e moralismi è ciò che esonera l'analisi dal prendere partito per una difficilmente immaginabile restaurazione di sovranità statuali male in arnese o a inclinare verso ipotesi cosmopolitiche di armonizzazione. Si tratta invece di studiare, e forse anche di strutturare, quei mezzi che permettono agli attori – la cui vocazione "plurale" discende dallo stesso carattere delle forme di vita contemporanee – di litigare transnazionalmente[6].

Se una delle acquisizioni decisive del dibattito sul pluralismo giuridico è aver distinto il piano della normatività da quello della giuridicità, il saggio fondamentale di Galanter sull'ubiquità della giustizia rimane ancora, e per più versi, esemplare. Da un lato, permetteva di non identificare necessariamente situazioni di pluralismo giuridico con ordinamenti postcoloniali, mostrando la centralità di questo tipo di esperienza a tutte le società occidentali contemporanee; dall'altro, gettava uno sguardo disincantato sulla inderegabile funzione progressiva del pluralismo, illuminandone le non esigue zone d'ombra e le strutturali ambivalenze.

Il rapporto fra attori e corti diveniva cruciale anche a prescindere dal fatto che la disputa fosse infine litigata. Il ruolo di quei soggetti istituzionali che allestiscono la cornice formale della disputa è risolto infatti meno nella decisione del caso che nel fatto che essi forniscano quello stesso quadro normativo di riferimento che permette agli attori di negoziare. Le corti conferiscono agli attori un *bargaining endowment* e un *regulatory endowment*. Equipaggiati di una simile dotazione, essi possono trascorrere da un capo all'altro dello spettro che separa –

[6] R. S. Wai, "The Interlegality of Transnational Private Law", *Law and Contemporary Problems*, 71 (2008), pp.107-127.

prima, dopo e durante una disputa – la negoziazione dalla regolazione. Ciò è possibile tuttavia soltanto laddove il caso sia stato trasformato in una causa; laddove cioè tanto la cosa litigata che i soggetti litiganti siano adattatati e resi conformi alle categorie giuridiche che li qualificano e che li rendono perciò disponibili a essere giustiziati e giudicati.

La scena che lega attori, dispute e corti ospita dunque una pluralità di relazioni e rapporti che non si esauriscono nella sola risoluzione della controversia. Le corti producono infatti, più che soluzioni e percorsi d'azione, messaggi: risorse discorsive che possono essere diversamente utilizzate e attivate dagli attori soltanto in funzione delle loro competenze. Al punto che le disposizioni legali possono essere considerate delle vere e proprie ricette e conseguentemente "law may be used as a cookbook from which we can learn how to bring about desired results"[7]. Esiste dunque una sofisticata dialettica di *endowments* e *effects* che replica – entro uno scenario squisitamente *common law* – quel circuito tra competenza e vincolo che la procedura innesca e riproduce.

L'operazione che appare in ogni caso cruciale è quella che isola lo strato della normatività da quello della giuridicità; l'intuizione che afferma che può tenere luogo di norma anche ciò che non è legge. Oggi questa constatazione si rivela la più efficace delle descrizioni della globalizzazione giuridica[8]. Anche a voler assumere il dato positivisticamente (si pensi solo al dibattito sulla catastrofe delle fonti) il risultato non cambia. Si tratta di comporre l'asse sintagmatico con quello paradigmatico del pluralismo: quello che pluralizza i siti e i *corpora* normativamente salienti su scala planetaria e quello che moltiplica e complica le fonti dei singoli ordinamenti nazionali. Ma si tratta, anche e forse soprattutto, di indicare negli attori e nelle loro condotte i protagonisti di questa dinamica.

Non è una petizione teorica. La globalizzazione giuridica coincide infatti, innanzitutto e perlopiù, con una inaudita pluralità degli spazi giurisdizionali. Ovvero con una crescente moltiplicazione di sedi e di mezzi che permettono agli

[7] M. Galanter, "Justice in Many Rooms", cit., p. 12.

[8] F. Vassalli, *Estrastatualità del diritto civile*, in Id., *Studi giuridici*, III vol., t. II, Milano, Giuffré, 1960, pp. 753-764.

attori giuridici di litigare e dibattere, cooperare o confliggere. Anche senza indulgere al neomedievalismo: la centralità è tutta della *iurisdictio* e la sua progressiva deterritorializzazione è lo stesso piano di consistenza delle *performances* degli attori. Dunque le mediazioni non sono soltanto di ordine strutturale (o cognitivo) ma anche legate al fatto bruto che sono decisori molteplici a farsi carico di un babelico tribunale transnazionale.

7. Sembra che per svilire qualcosa niente, tra i dispositivi retorici disponibili, sia più adatto che paragonarla a una merce[9]. Anche le norme hanno subito la stessa sorte. Inscrivere il rapporto con il dominio normativo nell'ordine simbolico dello scambio – della vendita e dell'acquisto, della scelta e del consumo – offrirebbe, stando a questo collaudato meccanismo, uno specchio della degradazione del panorama giuridico indotto dalla globalizzazione giuridica dipinta sotto le spoglie della catastrofe.

Se le norme sono merci, infatti, gli attori sociali – le persone – divengono immediatamente utenti e consumatori. Lo *shopping* e il turismo sono le immagini mobilitate a descrivere le condotte degli attori. Status o categorie meritevoli di biasimo e moralmente squalificate. È venuto il tempo non solo di prendere alla lettera questo arsenale metaforico, ma, soprattutto, di spogliarlo del suo inderogabile portato moralista e di restituirlo così a un nuovo possibile uso.

Recentemente la pratica del trasferimento o del trapianto giuridico è stata paragonata al celebre modello IKEA[10]. Chi lo ha fatto aveva in animo di contribuire all'ormai annoso dibattito sul trapianto giuridico. Va da sé che, qui come altrove, la metafora aveva scopo provocatorio e moralistico. Varrebbe piuttosto la pena di cimentarsi con una interpretazione letterale della teoria IKEA, ma i cui protagonisti dovrebbero essere necessariamente quegli attori sociali che

[9] E. Coccia, *Le Bien dans les choses*, Paris, Payot & Rivages, 2013.

[10] G. Frankenberg, "Verfassungsgebung in Zeiten des Übergangs", in Id., *Autorität und Integration. Zur Grammatik von Recht und Verfassung*, Frankfurt am Main, Suhrkamp, 2003, pp. 115-135; Id., "Constitutional transfer: The IKEA theory revisited", *International Journal of Constitutional Law*, 8 (2010), 3, pp. 563-579; Id., "Constitutions as Commodities: Notes on a Theory of Transfer", *Comparative Law Review*, 4 (2013), 1, pp. 1-30.

scambiano *items* giuridici sul mercato globalizzato del diritto. Altrimenti si corre soltanto il rischio di contribuire, dimenticando i soggetti, a ingrossare le fila di una retorica moralista che, quando non contribuisce all'intelligenza dei fenomeni che studia, comincia a renderli più opachi e fumosi.

La formula IKEA descrive le modalità attraverso le quali i materiali normativi con cui si "fabbricano" le Costituzioni vengono trasformati in merci scambiabili sul "mercato giuridico". In un immaginario supermarket giacciono le merci, pronte, dopo essere state comprate a un certo prezzo, a essere montate e assemblate in nuove case. Anche a prescindere dall'intrinseca coloritura morale negativa, la questione che la metafora occulta e custodisce è interamente legata a chi si immagina siano e possano essere i soggetti titolati a attraversare questi scaffali. Per l'autore si tratta sostanzialmente di persone a lui simili: accreditati costituzionalisti occidentali pagati per "fabbricare" le Costituzioni di paesi "in transizione".

Viene fatto di pensare che una metafora intrisa di moralismo nasconda a mala pena la cattiva coscienza di chi la impiega. Sia come sia, quella del supermercato – e delle operazioni che a esso si collegano – è in verità un'immagine formidabile per descrivere il pluralismo giuridico, i trapianti e le condotte degli attori giuridici su scala transnazionale. Nulla, tra l'altro, impedisce di immaginare le norme come "merci" (benché dotate di storia, dense e quasi "impregnate" di aspirazioni e di discorsi molteplici e non necessariamente convergenti), né il loro assemblaggio sotto la specie dello *shopping* e del *bricolage*. Al contrario: se ciò non dispensa da un'analisi accurata e testarda dei capitali disponibili agli attori nel muoversi attraverso gli scaffali (l'insieme di ciò che condiziona l'investimento: dal potere d'acquisto al *marketing*), resta cruciale indagare la condotta degli attori sul mercato globale delle norme. L'errore da evitare sarebbe piuttosto quello di condurre una ricerca – come avviene perlopiù negli studi giuscomparatistici – chiedendosi tutto fuorché chi siano gli "shoppers".

Ma c'è di più: se quella di IKEA è l'immagine scelta per descrivere la circolazione globale di materiali costituzionali, nulla impedisce di farne il prototipo stesso del pluralismo giuridico. Un enorme supermercato di norme in

cui, per entrare, è necessario sapere che gioco si gioca (attivare dunque le competenze giuridiche) e insieme, potenzialmente, sapere che i mezzi che si "comprano" sono anche quelli con cui il supermercato può essere trasformato (a rigore: distrutto o ampliato). IKEA è allora il nome stesso del pluralismo procedurale: le procedure altro non sono che la famigerata libreria BILLY, che, dal 1978, e subendo continue (e non inessenziali) modifiche, è uno dei mobili più venduti in tutto il mondo; un modulo che, vincolato a essere assemblato secondo un protocollo definito, permette non solo notevoli variazioni, ma, soprattutto, che sopra possa esservi posata qualsiasi cosa. BILLY ha un prezzo modesto; implica un certo conformismo – cambiano in effetti solo i colori e lo spazio che può separare le diverse mensole – ma non impedisce di essere "riempita" secondo il proprio desiderio e la propria necessità.

Di fronte all'ambivalenza di BILLY, all'impasto di vincolo e possibilità tipico della procedura, ha meno presa l'immagine avanzata da Frankenberg secondo cui sarebbero i cosiddetti *odd details* a fare resistenza in questo mercato dove tutto si compra, tutto si trasferisce e tutto si accomoda. Gli *odd details* genuini altri non sono che gli attori sociali stessi: è nelle loro condotte che risiede e si esprime la creatività e il bricolage, l'uso imprevisto e la combinazione inanticipabile. Tutto avviene però secondo regole. Tutto ha un "certo" prezzo. Il prezzo "giuridico" della competenza che fa della procedura la soglia di un'ancipite trasformazione: quella dell'attore che vi si impegna e quella dell'ordinamento che la rende possibile.

Occorre dunque smascherare una posizione che appare insieme cinica (le Costituzioni sono frutto di *bricolage*) e moralista (questo non è bene e non è bene farne un uso da *bricoleurs*). Le operazioni di reificazione, formalizzazione, idealizzazione cui ci si riferisce come all'ossatura che permette alle norme di rendersi scambiabili al supermercato, acquistano, a una lettura meno carica di pregiudizi, lo statuto di operazioni assolutamente congrue e pertinenti agli occhi e nelle mani di attori sociali intenti a transitare da un regime normativo all'altro, scegliendo, scartando, abbinando e accordando.

Gli attori, in altre parole, in virtù delle loro condotte, obbligano i sistemi a operare trapianti; a rigore: a non essere altro che il frutto di trapianti. È allora meno interessante individuare con esattezza chi siano gli "esecutori" del trapianto che non riconoscere nel pluralismo che ne deriva insieme il destino e il processo attivato dall'incontro tra un attore e una procedura. È il diritto stesso, allora, a mostrare la sua qualità strutturalmente plurale e integralmente spuria o apocrifa. Una pluralità e un'impurità che sono insieme il riflesso e il prodotto delle forme di vita contemporanee.

È chiaro: al supermercato della procedura la diseguaglianza non solo non scompare, ma a sua volta si pluralizza. Tornano a fiorire gli status, a prodursi i diritti speciali (per categorie innumerevoli, secondo specializzazioni crescenti). A ciascuno il suo diritto, così come il suo prodotto. Diritto commerciale e diritto umanitario possono trovarsi a distanza di qualche scaffale. Ma interessa meno la giustizia distributiva che l'indefinito pluralizzarsi delle giurisdizioni, ovvero dei mezzi e delle possibilità di cui la presenza stessa degli "scaffali" (questi o quelli, ospitanti più o meno prodotti) non è che un effetto.

Se negli Stati Uniti si discutono proposte legislative che impediscano a giudici americani di citare sentenze straniere, è nello stesso paese che si ospitano e si decidono casi con effetti in grado di ristrutturare da cima a fondo i diritti processuali europei[11]. Se i diritti umani, con tutta la loro ambivalenza, vengono investiti di un potere simbolico formidabile è perché essi si "conformano" alle esigenze di attori diversi che operano – forti di questo nuovo titolo transnazionale – processi di vernacolarizzazione: una speciale traduzione locale e dialettale di un idioma che, per il suo carattere di generalità e di indeterminatezza formale, si dispone indistintamente all'uso e all'abuso. Far valere l'uno più dell'altro equivarrebbe a non vedere quello che già accade in un'innumerevole serie di casi: attori locali che importano regole straniere; decisioni straniere che obbligano a mutamenti ordinamentali anche profondi. Tra la *langue* dell'ordinamento e la

[11] V. G. Curran, "Globalization, Legal Transnationalization and Crimes Against Humanity**:** The Lipietz Case", *The American Journal of Comparative Law*, 56 (2008), pp. 363-402.

parole degli attori sociali, il trapianto si trasforma in un'inesausta opera di traduzione.

8. Il pluralismo procedurale non ignora i rapporti di forza che orientano i trapianti, le asimmetrie (ricercate o subite) tra i contesti di ricezione e quelli di produzione[12], ma considera prioritario il ruolo degli attori sociali: il fatto che il trapianto o il trasferimento di sapere normativo e il pluralismo che ne discende siano l'effetto vincolato dell'azione degli attori. Il rapporto tra questi ultimi e le norme è dunque tutto fuorché completamente libero e strategico; al contrario: la relazione tra la rigidità delle norme e il loro mutamento possibile è cruciale. Tuttavia non si tratta di offrire argomenti *pro* o *contra* (più rigidità o più manipolazione), ma di lasciare emergere la dialettica che annoda la capacità degli attori di usare il diritto e i vincoli che questo impone loro. Un argomento insomma che "sfrutta" lo *status quo* e le sue resistenze per aprire – dentro di esso, ma non a dispetto di esso – un diverso "possibile".

Se da un lato le iniziative degli attori sfruttano il pluralismo che c'è, dall'altro ne amplificano continuamente il raggio d'azione. Essi, in altre parole, pluralizzano il pluralismo. Si pensi, a titolo di esempio, agli usi molteplici e alle più diverse pronunce che si sono richiamate all'articolo 56 del Trattato sul funzionamento dell'Unione europea; esso recita: "Nel quadro delle disposizioni seguenti, le restrizioni alla libera prestazione dei servizi all'interno dell'Unione sono vietate nei confronti dei cittadini degli Stati membri stabiliti in uno Stato membro che non sia quello del destinatario della prestazione. Il Parlamento europeo e il Consiglio, deliberando secondo la procedura legislativa ordinaria, possono estendere il beneficio delle disposizioni del presente capo ai prestatori di servizi, cittadini di un paese terzo e stabiliti all'interno dell'Unione".

Se si facessero valere immediatamente letture moralisteggianti di un simile dettato, moltissimi casi legati alla sessualità e al cosiddetto "turismo procreativo"

[12] U. Mattei, "Miraggi transatlantici. Fonti e modelli nel diritto privato dell'Europa colonizzata", *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 31 (2002), pp. 401-423.

sarebbero impossibili da leggere e da comprendere[13]. Perché lo *shopping* o il turismo dovrebbero infatti essere considerate pratiche biasimevoli o condotte reprensibili? Occorrerebbe piuttosto immaginare il pluralismo procedurale come una forma di vero e proprio turismo ordinamentale. Si tratta infatti meno di coltivare il dubbio se si tratti di un pluralismo ricercato o subito che di allestire una casistica il più possibile dettagliata e accurata delle innumerevoli reazioni degli ordinamenti alle iniziative degli attori.

Come un modulo BILLY su uno scaffale IKEA, il diritto comunitario (e in generale corpi di norme la cui origine statuale e nazionale è meno che evidente) è un *réservoir*, uno stock di materiali normativi in grado, se attivato e "configurato" da attori competenti, di "pluralizzare" gli ordinamenti nazionali. Per ricostruire e riconoscere simili situazioni in cui forma e vita urtano al punto da poter produrre una forma-di-vita, occorre farsi capaci di accedere a una specialissima forma di ragionamento pratico: il modo di ragionare degli attori nella globalizzazione giuridica risponde infatti alla pertinenza di un dispositivo e alla sua plasticità a esigenze e bisogni. Tuttavia si tratta di una misura che si rende commensurabile soltanto laddove essa sia giuridicamente conformata. È in questo senso impossibile moralizzare (almeno tanto quanto è opportuno non romanticizzare) le condotte "procedurali" degli attori; la competenza degli attori trova il suo limite e la sua possibilità in quella stessa procedura che la mette alla prova: "En analysant le travail de généralisation sur la forme des éléments de preuve et sur la cohérence de leur association, nécessaire pour les faire valoir de façon acceptable dans le cours d'un litige on peut accéder à l'idée de justice par des voies inhabituelles. L'approche ne s'effectue pas par l'intermédiaire d'une règle transcendantale, comme c'est traditionnellement le cas, mais en suivant les contraintes d'ordre pragmatique qui portent sur la pertinence d'un dispositif ou, si l'on veut, sa justesse"[14].

[13] E. von Bardeleben, "Filiation et couples de personnes de même sexe : et si une réponse était donnée par le droit de l'Union européenne", *Droit et Société*, 84 (2013), pp. 391-409.

[14] L. Boltanski, L. Thévenot, *De la justification. Les économies de la grandeur*, Paris, Gallimard, 1991, p. 19.

Il rapporto tra procedura e status produce un mutamento ambivalente ma profondo, riorganizzando da cima a fondo quello che lega la norma alla persona. La profezia di Henry Sumner Maine appare infine radicalmente capovolta. Sono criteri di carattere contestuale e pragmatico che decidono di questa situazione. Benché, e conviene rammentarlo una volta ancora, si tratti di situazioni lungi dall'essere sregolate. Il paradigma della manipolazione normativa non può essere considerato soltanto il frutto fortuito e casuale di una contraddizione tra sistemi normativi divergenti[15]. Gli attori sociali non sono più intelligenti degli ordinamenti che "offrono" loro quella sofisticata situazione interazionale che si accampa in una procedura. Perché se non se c'è strategia a meno di comprensione, ogni strategia non potrà non avere un tenore cognitivo rilevante e indepassabile: essa è cioè senz'altro effetto della pluralità e della creatività degli attori sociali e delle loro condotte, ma anche, e forse sopratutto, della vincolante consistenza dei sistemi normativi e del linguaggio così speciale che questi non smettono di parlare.

[15] R. Ago, "Cambio di prospettiva: dagli attori alle azioni e viceversa", in J. Revel, (a cura di), *Giochi di scala. La microstoria alla prova dell'esperienza*, Roma, Viella, 2006, pp. 239-250; G. Levi, *L'eredità immateriale. Carriera di un esorcista nel Piemonte del seicento*, Torino, Einaudi, 1985.

Pluralismo giuridico in Somalia

Trascorsi storici e sviluppi recenti

Salvatore Mancuso

Abstract The issue of legal pluralism has in Africa one of its most evident manifestations. Despite the long-standing debate on the non-merely anthropological value of legal pluralism in Africa, the search for solutions that can lead to a more "operational" legal pluralism in African countries remains one of the most fascinating issues to be resolved by African legal scholars. Beyond the mere statements of principle, even at the constitutional level, the question of how to make legal pluralism officially operating remains unresolved. Somalia presents a particular situation with regard to legal pluralism. To the classic components of traditional and State law a strong religious component of Islamic law is added. A peculiarity of the whole of Somalia is the fact that the fall of the Siad Barre regime in 1991, with the subsequent decay of the state, led to dissolution of the official law layer that is only now – with difficulty – the new Somali state is trying to begin to rebuild. The epiphany of autonomist experiences determines an additional variable that is part of the already weak and at the same time varied, Somali legal framework. The paper will examine the ways in which the issue of legal pluralism has developed in Somalia, beginning with a brief analysis of the structure of Somali society to move to the colonial period. Then the way how legal pluralism was present in the Somali state will be observed, to analyze after the period of the failed state and the presence of a pluralistic phenomenon in the absence of a central state. Finally, the new provisional constitution of October 2012 will be considered, as a guiding instrument for the new Somali state and its approach to the issue of legal pluralism.

Keywords: legal pluralism; Africa; Somalia; Islamic law; colonial law

Introduzione

La questione del pluralismo giuridico vede in Africa una delle sue manifestazioni più eclatanti. Malgrado l'annoso dibattito sul valore non meramente antropologico del pluralismo giuridico in Africa, la ricerca di soluzioni che possano portare ad un approccio più "operativo" del pluralismo stesso nei Paesi africani rimane uno dei temi più affascinanti da risolvere per gli studiosi del diritto africano. Al di là di

mere dichiarazioni di principio, anche a livello costituzionale[1], il problema di come rendere il pluralismo giuridico formalmente operante rimane ancora irrisolta.

Dal fenomeno pluralista non è esclusa, ovviamente, la Somalia. Qui il pluralismo giuridico assume aspetti del tutto peculiari, date le caratteristiche del diritto tradizionale somalo e l'esperienza storica dello Stato – e più recentemente del non-Stato – somalo.

La caratteristica fondamentale del diritto tradizionale somalo (come del resto del diritto originariamente africano in generale) è rappresentata dalla sua estrema flessibilità; conseguentemente, il rapporto tra diritto ufficiale e tradizionale risulta alquanto complesso e dialettico. In linea con quanto avviene nel resto dell'Africa sub-sahariana, anche in Somalia il diritto statale influisce sulle tradizioni locali, sebbene, comunque, la norma tradizionale resista ai tentativi di erosione e tenda ad adattarsi alla nuova realtà[2]. A ciò si aggiunge che in Somalia il sistema tradizionale di risoluzione delle controversie esercita, come si vedrà nel corso del presente lavoro, una forte influenza sull'esercizio del potere giurisdizionale ufficiale, influenza determinata dalla cronica debolezza dell'apparato statale[3]. Inoltre, va evidenziata l'importanza della cultura islamica in generale, e del ruolo del Corano e della *sharī'a* in particolare nei fenomeni di erosione dei principi cardine del diritto tradizionale (*xeer*)[4]. A tutto ciò si contrappone la ben nota, e già citata, debolezza del sistema politico ed amministrativo statuale da cui emana (o

[1] L'esempio più famoso è, ovviamente, quello dell'Art. 4 della Costituzione mozambicana.

[2] Il fenomeno è ampiamente studiato e documentato. Tra i tanti si v R. Sacco, *Il diritto africano*, Torino, UTET, 1995; M. Guadagni, *Il modello pluralista*, Torino, Giappichelli, 1995; M. Alliot, "Les résistances traditionnelles au droit moderne dans les Etats d'Afrique francophones et à Madagascar", in J. Poirier (a cura di), *Études de droit africain et de droit malgache*, Parigi, Cujas, 1965, pp. 235-256. Da parte mia ne ho dato conto, con riferimento al diritto di famiglia in una realtà lusofona, in "O direito da familia num contexto pluralista: o caso de Moçambique", in D. Wei, O. Massarongo, *Contribuições jurídicas sobre a união de facto e direitos sobre a terra em Macau e Moçambique*, IEJA Universidade de Macau, 2011.

[3] In argom. v. F. Battera, "State-building e diritto consuetudinario in Somalia", in S. Baldin (a cura di) *Diritti tradizionali e religiosi in alcuni ordinamenti contemporanei*, Trieste, EUT, 2005, pp. 27-47.

[4] R. Sacco, *Introduzione al diritto privato somalo*, Torino, Giappichelli, 1973.

dovrebbe emanare) il diritto ufficiale ed il connesso esercizio della funzione giurisdizionale.

Il presente lavoro non intende affrontare l'argomento del pluralismo giuridico in generale. Piuttosto, si cercherà di descrivere come il fenomeno pluralista si sia presentato in una realtà, quella somala, che costituisce un esempio emblematico per quanto concerne la commistione fra diritto statale, tradizionale *(xeer)* e di derivazione religiosa, e che presenta situazioni particolari; il tutto per coglierne gli aspetti specifici e peculiari. Si cercherà, inoltre, di capire come uno stato che rinasce intende – se intende farlo – affrontare la questione del pluralismo.

Pluralismo e diritto tradizionale

È stato già osservato come la società somala rientrasse tra le cosiddette società a potere diffuso[5].

Storicamente, la società somala è una società tribale e nomade, la cui forma di organizzazione sociale è costituita dalle cabile (clan) in cui la figura dell'individuo si fonde nella comunità, unico centro di decisione e di azione per tutti i suoi membri[6]. I gruppi che compongono il clan allargato spesso sono entrati in competizione per le scarse risorse, mentre, all'esterno, il clan esprime una vaga identità comune determinata da genealogie imprecise e dalla condivisione di tratti culturali comuni[7]. Anche gli atti di violenza non sono originati dal singolo, ma decisi dall'intera cabila quali atti di punizione, vendetta o rappresaglia. Tutti i Somali vivono in piccole comunità chiamate *rer* o, più comunemente *karia*, la parola araba per "villaggio". I *rer* Somali possono essere composti da una singola famiglia allargata, o da diverse famiglie imparentate tra loro che si riuniscono per garantirsi protezione comune. A differenza di gran parte del continente africano, il popolo somalo parla un'unica lingua, suddivisa in tre dialetti principali

[5] M. van Notten, *The law of the Somalis: a stable foundation for economic development in the Horn of Africa*, Lawrenceville, The Red Sea Press, 2005.

[6] I.M. Lewis, *A pastoral democracy: a study of pastoralism and politics among the northern Somali of the Horn of Africa*, , Oxford, James Currey Publishers, 1999.

[7] F. Battera, *op. cit.*, p. 29.

compresi ovunque, e non esistono lingue diverse tra i diversi clan che possono ostacolare la comunicazione.

Il sistema di regole dello *xeer* disciplinava la vita dell'intero gruppo clanico partendo dalle aggregazioni più ampie sino ad arrivare al singolo clan. Esso demandava a questi gruppi compiti di difesa collettiva e dei singoli membri, nonché, in caso di necessità, anche di rappresaglia ed offesa; regolava l'organizzazione del gruppo attraverso assemblee (*shir*) e l'attività dei capi (*suldaan, boqor, garaad, ugaas, islaan*) che sono chiamati a svolgere funzioni di mediazione, per le quali essi ricorrono al supporto di altri anziani verso cui la comunità nutre particolare rispetto per il loro *status* e la loro conoscenza del diritto tradizionale, mediato dalle regole della *sharī'a*. Il diritto tradizionale stabiliva che la risoluzione delle controversie avvenisse attraverso conciliazioni ed arbitrato; conteneva regole in materia di capacità giuridica basate sulla la contrapposizione tra uomo e donna, libero e schiavo, membro del gruppo e forestiero, e sulla posizione sociale mediante la suddivisione dei membri del gruppo in base all'occupazione e alla funzione economica di ognuno di essi. Lo *xeer* conteneva, inoltre, regole in materia di uso individuale (subordinato) e di gruppo (principale) della terra, dei pozzi e del bestiame. Esso prevedeva, ancora, regole specifiche per quanto riguarda le donazioni e gli adempimenti di natura patrimoniale anteriori al matrimonio, la famiglia e le successioni. Infine, stabiliva le regole per il risarcimento derivante da atti illeciti[8].

Il sistema di regole appena accennato doveva necessariamente scontrarsi con l'introduzione di modelli giuridici di tipo occidentale a seguito della colonizzazione italiana[9]: il risultato è un complesso di soluzioni basate sul diritto

[8] R. Sacco, *Introduzione al diritto privato somalo,* cit., p. 18.

[9] Guglielmo Ciamarra, Giudice della Colonia in Somalia a partire dal 1910, così descrive perfettamente – ma sempre, chiaramente, con un approccio etnocentrico – questo incontro/scontro delle due culture giuridiche: "Le condizioni delle popolazioni della Somalia, specialmente nelle regioni di nuova occupazione, sono tuttora quelle di tribù primitive, fra le quali la situazione normale è lo stato di guerra. Ciò mentre da un canto porta una concezione diversa negli indigeni circa il rispetto della vita e dei beni altrui ,d'altra parte imprime agli atti d'ostilità, compiuti dalle tribù in lotta, un carattere di solidarietà e per conseguenza di responsabilità collettiva. In queste contingenze è facile scorgere come l'autorità che sia investita del giudizio debba trovarsi di fronte a due gravissime difficoltà. L'una della impossibilità materiale dell'accertamento dei colpevoli, l'altra quella difficoltà anche maggiore della determinazione giuridica delle responsabilità

metropolitano mediate dalla considerazione della realtà locale. Così, la vendetta era del tutto incompatibile con la premeditazione e veniva punita con l'attenuante della provocazione[10]; la razzia non era considerata come rapina, ma doveva essere punita con minore gravità[11]; il reato commesso in applicazione di una regola tradizionale perdeva – in generale – gran parte della sua gravità[12], sino ad arrivare all'assoluzione per difetto dell'elemento del dolo[13]. Spesso lo scontro si risolveva con la vittoria del più forte (il diritto metropolitano) sul più debole (lo *xeer*): così la *diya* (ossia il pagamento del prezzo del sangue, per effetto dell'applicazione del taglione) non venne più considerata come fattispecie estintiva degli effetti penali dell'atto illecito, sebbene gli effetti civili continuassero ad essere regolati su base tradizionale con responsabilità collettiva, allargata ai membri dell'intero gruppo[14]; l'istituzione del demanio coloniale e del regime delle concessione in favore dei

individuali. Giacché, mentre nelle nostre legislazioni civili manca ogni mezzo legale per colpire la collettività che ha la responsabilità maggiore di tali avvenimenti, troppo gravi e sproporzionate si presentano spesso le disposizioni di legge atte a reprimere il reato individuale, data la mentalità degli indigeni ed il modo come tali fatti si svolgono. Alla stregua delle nostre leggi questi fatti frequentissimi della vita indigena non possono che trovare una repressione inadeguata o l'impunità. […] Non è possibile quindi applicare a questi fatti le nostre norme giuridiche, fondate sul principio della individuazione della colpa e della pena, perché l'individuo è scomparso nel seno del gruppo sociale, che a sua volta assurge, nei suoi rapporti esterni con altri gruppi, ad una spiccata unità economica e giuridica. Sparisce allora la questione della prevalenza dei nostri principi di diritto, che la legge di ordinamento della Somalia ha sancito, in confronto alle istituzioni indigene che maggiormente li contrastino, siano queste consacrate nella scerìa o in determinate consuetudini. Innanzi a queste sopravvivenze di manifestazioni etiche di popoli primitivi si impone tutta una diversa valutazione dei fatti, da cui facilmente si desume che i nostri stessi principi di diritto rettamente intesi, non consentono l'applicazioni delle rigide sanzioni di legge a fatti che non ricorrono presso i popoli civili e richiedono invece maggiore elasticità e larghezza di repressione. Ciò importava che, oltre al sottrarre alla giurisdizione indigena il giudizio su questi fatti, l'intervento delle sanzioni di legge dovesse essere in tali contingenze libero dai legami di una rigida applicazione della legge stessa". Cit. in N. Papa, *L'Africa italiana*, Roma, Aracne Ed., 2009, pag. 106 e ss.

[10]Assise Mogadiscio 1 marzo 1912 e Assise Mogadiscio, 15 luglio 1912, entrambe in G. Ciamarra, *La giustizia nella Somalia. Raccolta di giurisprudenza coloniale*, Napoli, R. Tip. F. Giannini & figli, 1914.

[11] Giudice della Somalia, sent. 20 marzo 1912, in G. Ciamarra, *La giustizia* cit., p. 198.

[12] Giudice della Somalia, ord. 12 settembre 1912, in G. Ciamarra, *La giustizia* cit., p. 249.

[13] È questa l'intrepretazione che ricava R. Sacco, in *Introduzione al diritto privato somalo*, cit., p. 19, dall'esame della giurisprudenza contenuta in G. Ciamarra, *La giustizia nella Somalia. Raccolta di giurisprudenza coloniale,* cit.

[14] Il tutto ancora in R. Sacco, *Introduzione al diritto privato* somalo, cit. *ibidem*.

coloni assestò un duro colpo al sistema fondiario di matrice tradizionale[15]. A ciò va aggiunto il fatto che la struttura giudiziaria introdotta con la colonizzazione si limitava al riconoscimento del giudice islamico (*qadi*) senza prendere in considerazione l'applicazione in via ufficiale del diritto tradizionale, che, come visto in precedenza, veniva considerato come elemento integrativo nell'applicazione dei principi generali del diritto italiano laddove l'applicabilità del diritto metropolitano *sic et simpliciter* venisse giudicata inopportuna[16], vedendosi tale diritto quindi ridotto al ruolo di formante nell'applicazione delle regole del diritto metropolitano.

Con la nascita dello stato indipendente prosegue il tentativo di demolizione dello *xeer*. La costituzione somala del 1960 introduceva il principio di uguaglianza[17] (sebbene il richiamo ai principi della religione musulmana[18] potesse essere interpretato nel senso di lasciare uno spiraglio alla sopravvivenza di qualche diversità), eliminando così tutte le discriminazioni fondate sull'applicazione dei principi tradizionali, e la legislazione successiva si è incanalata nella stessa direzione. Essa inoltre si preoccupava di vietare qualsiasi forma di pena collettiva[19]. La legislazione seguita alla rivoluzione socialista di Siad Barre si spinge oltre, abolendo espressamente le strutture claniche ed il diritto ad esse pertinente, sino ad arrivare a considerare come reato il compimento di atti tendenti a riportare in vita in qualsiasi forma le istituzioni claniche o che siano basati sui principi del diritto tradizionale[20], la cui applicazione rimane limitata ad alcuni aspetti particolari dei rapporti individuali[21]. La struttura giurisdizionale introdotta a seguito dell'indipendenza muta la denominazione del

[15] Sul tema fondiario v. più ampiamente M. Guadagni, *Xeerka beeraha: diritto fondiario somalo*, Milano, Giuffrè, 1981.

[16] App. Mogadiscio 25 maggio 1912 ed Assise Mogadiscio 16 gennaio 1913, entrambe in G. Ciamarra, *La giustizia nella Somalia. Raccolta di giurisprudenza coloniale*, cit.

[17] Art. 23 Cost. del 1960.

[18] Art. 1 comma 3 Cost. del 1960.

[19] Art. 43 Cost. del 1960.

[20] Il provvedimento normativo al riguardo è la Legge 1 novembre 1970 n. 67 (denominata "legge sulla protezione e la prevenzione di taluni gravi delitti contro la vita, la sicurezza e la proprietà individuale", nota come "legge di protezione sociale").

[21] R. Sacco, in *Introduzione al diritto privato somalo*, cit., p. 22.

qadi in "giudice distrettuale", lasciando – di fatto – inalterata la situazione precedente.

Pluralismo e diritto religioso

I somali sono un popolo musulmano che ha sposato l'islam sunnita interpretato secondo il rito shafiita, accogliendo le regole della *sharī'a* (originariamente secondo l'interpretazione datale dal rito shafiita) e la giurisdizione del *qadi*[22].

Il rapporto tra regola sciaraitica e norma tradizionale non è del tutto lineare. Se, da un lato, la prima ha generalmente prevalso sulla seconda, grazie anche alla diffusione sul territorio dell'attività dei *qadi*, d'altro canto la norma tradizionale ha talvolta mantenuto le sue caratteristiche principali, pur se a volte mediata da un certo grado di islamizzazione, soprattutto nell'ambito delle materie riguardanti lo statuto personale.

Così, in senso favorevole al diritto islamico, l'affermazione delle congregazioni religiose (*jamiica*), basate su rapporti di tipo associativo piuttosto che gentilizio, ha avuto influenze notevoli sul regime fondiario: le congregazioni si sono orientate verso attività sedentarie rigettando il nomadismo e hanno ottenuto in modo diverso diritti sulla terra che è stata – poi – suddivisa tra i membri della congregazione stessa. Se lo *xeer* considerava queste terre come una sorta di concessione dal gruppo tribale alla congregazione nel tentativo di continuare a riconoscere una signoria (seppur limitata) sulla terra in capo al gruppo, da parte sua la congregazione considerava la terra sottoposta al regime del *waqf* in applicazione dei principi musulmani, senza riconoscervi altri diritti concorrenti[23].

Dall'altro lato, ad esempio, l'esogamia ha mantenuto un ruolo fondamentale per determinare i confini dell'identità del gruppo (il clan), e nel caratterizzare ogni

[22] G. Milesi, *Il diritto presso i somali*, Mogadiscio, Tip. Della Colonia, 1937; la necessità di insegnare agli studenti il diritto islamico praticato in Somalia portò alla realizzazione del volumetto *Corso di diritto islamico secondo la dottrina sciafeita*, Mogadiscio, Istituto Universitario della Somalia, 1960.

[23] R. Sacco, *Introduzione al diritto privato somalo,*cit., p. 27.

ambito della vita sociale, ivi inclusa la determinazione delle regole giuridiche[24]. Quindi, se i matrimoni erano normalmente soggetti all'applicazione delle regole sciaraitiche, con conseguente centralità della figura del *wali*, l'intervento della regola tradizionale, attraverso istituti come il levirato e il sororato, serviva a ricondurre il matrimonio all'interno del gruppo esogamico, evitando così la possibile commistione tra gruppi diversi che la libertà insita nella regola musulmana avrebbe potuto causare.

Ancora, il diritto tradizionale – in contrasto con la *sharī'a* – normalmente non ammetteva le donne alla successione, per evitare che le proprietà potessero fuoriuscire dal gruppo esogamico. Allo stesso modo, pur essendo consentita la proprietà privata, i beni considerati come essenziali per il gruppo (terra, bestiame) erano inalienabili al di fuori del gruppo stesso. Il diritto tradizionale ha modificato i principi sciaraitici in tema di responsabilità per atto illecito (la distinzione tra responsabilità civile e penale sembra essere ignota ai somali[25]): questa non era individuale ma sorgeva in capo al gruppo[26]; conseguentemente, la commissione di un atto illecito poteva determinare la vendetta del gruppo della vittima nei confronti di qualsiasi membro del gruppo cui apparteneva l'autore dell'illecito, vendetta che veniva spesso sostituita dal risarcimento (*diya*), concordato dalle assemblee dei rispettivi clan e pagabile dal gruppo dell'autore dell'illecito in favore del gruppo cui appartiene la persona offesa, in ossequio al principio tradizionale per cui "nessuno riceve o paga un risarcimento individualmente"[27].

[24]Attraverso l'esogamia si limita la possibilità di contrarre matrimonio all'interno del gruppo di appartenenza. Ogni clan si presenta come un blocco unico all'esterno e ha una leadership comune, sebbene, al suo interno, la competizione o il conflitto fra altri gruppi agnati – generalmente *diya-paying groups (jilib)* – sia spesso inevitabile. Cfr. I.M. Lewis, *A pastoral democracy*, cit.

[25] Questa difficoltà nel cogliere la differenza indicata nel testo sembra evincersi chiaramente dai lavori preparatori della Costituzione somala del 1960, ed in particolare in tema di rapporto tra *diya* e responsabilità penale personale, riportati nella sent. della Corte Suprema somala n. 2 del 16 maggio 1964, in *Journal of African Law*, 9 (1965), 3, p. 170 e ss.

[26] Il fatto che il diritto tradizionale abbia modificato i dettami della *sharī'a* in questo delicatissimo argomento lo si trova espressamente riconosciuto nella sentenza n. 2 del 1964 appena citata.

[27] P. Contini, "The evolution of blood money for homicide in Somalia", in *Journal of African Law* 15 (1971), 1, p. 78, il quale riferisce, inoltre, come il gruppo responsabile per il pagamento del risarcimento sia denominato *diya-paying group*, e la sua composizione varii da qualche centinaio a qualche migliaio di uomini. All'interno di esso ciascuno paga e riceve la *diya*, cosicché il gruppo diviene garante della protezione della vita e dei beni dei suoi membri, e ciascun membro

In generale, la fedeltà alla religione musulmana ha rappresentato un fattore essenziale nella costruzione dell'identità somala. Peraltro, a differenza di altre esperienze del mondo musulmano, in Somalia la sua importanza nel processo di formazione dello Stato risulta assai poco rilevante, data la forte caratterizzazione della società somala quale società nomade. Pertanto, l'assenza di una struttura statale accompagnata da istituzioni religiose competenti per l'applicazione del diritto sciaraitico induce a ritenere che la Somalia non fosse governata dalla *sharī'a* prima della colonizzazione europea, e che l'islam interagisse con le tradizioni locali senza però sostituirsi ad esse[28].

Il pluralismo in colonia

Alla fine del diciannovesimo secolo, l'Italia colonizzava i territori della Somalia meridionale[29], mentre gli inglesi acquisivano il controllo della parte settentrionale. Conseguentemente, nella prima fu introdotto un sistema di *civil law*, mentre nella seconda un sistema basato sul *common law* inglese.

Entrambe le potenze coloniali presero immediatamente coscienza della divisone clanica e della forza dello *xeer*, ed evitarono di introdurre cambiamenti drastici per non sovvertire la struttura della società somala, limitandosi ad intervenire in quei casi – fondamentalmente concentrati nelle aree urbane – in cui la pace e l'ordine venivano minacciati dai conflitti tra i diversi clan.

L'ordinamento giuridico della Somalia italiana ebbe un suo sviluppo autonomo. I cittadini italiani erano soggetti al diritto italiano, mentre le popolazioni locali erano sottomesse alle norme della *sharī'a* e dello *xeer*. Alla giurisdizione del *qadi* fu mantenuta la competenza in materia penale secondo le regole del diritto locale (tradizionale o religioso), e venne istituito un secondo grado di giurisdizione indigena, affidato al Tribunale Indigeno. Il principio di determinazione della legge applicabile in base alla provenienza dei soggetti trovò

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acquista il ruolo di garante e di soggetto protetto. Il tema è sviluppato più ampiamente in I.M. Lewis, *A pastoral democracy*, cit.; ed in M. van Notten, *op. cit.*

[28] In tal senso v. F. Battera, *op.cit.*

[29] Sul processo di colonizzazione italiana della Somalia v. N. Papa, *op. cit.*, Cap. III.

una sua prima applicazione nell'Ordinamento Giudiziario del 1911, ispirato alla necessità di assicurare a tutti i cittadini italiani e stranieri un'amministrazione della giustizia basata sul sistema metropolitano adattato alla locale necessità di maggiore semplicità, di mantenere per la popolazione locale le istituzioni indigene nella misura in cui fossero compatibili con i principi generali del diritto italiano, di consentire il ricorso all'equo apprezzamento del giudice per adattare la norma tradizionale alle esigenze del diritto italiano qualora l'applicazione di quest'ultimo mal si adattasse alla realtà locale attraverso la giurisdizione dell'*indigenato* amministrata dai Tribunali Regionali. La cura con la quale i magistrati locali studiarono ed applicarono le tradizioni locali nel desiderio di comprendere la realtà locale sono un ulteriore segno dell'intenzione di adattare la regola tradizionale ai principi del diritto metropolitano.

I principi fondamentali previsti nell'Ordinamento Giudiziario del 1911 vennero ripresi nell'Ordinamento organico per l'Eritrea e la Somalia emanato con L. 6 luglio 1933, secondo il quale "I codici civile, commerciale e penale, di procedura penale, i codici penali per l'esercito penale marittimo, e le relative disposizioni complementari oggi in vigore nel Regno sono estesi di diritto all'Eritrea e alla Somalia e devono essere osservati per quanto è consentito dalle condizioni locali e salve le modificazioni che ad essi possono essere apportate con le norme speciali per l'Eritrea e per la Somalia Italiana"[30]. Al Governatore era concessa la facoltà di introdurre nel diritto indigeno, con decreto motivato, le modificazioni necessarie a renderlo compatibile con i principi generali dell'ordinamento giuridico italiano. D'altro canto, le parti potevano provare con ogni mezzo l'esistenza della consuetudine della quale chiedevano l'applicazione, ed il giudice poteva disporre, anche d'ufficio, i mezzi più idonei ad accertarne l'esistenza.

Nello svolgere il proprio compito di amministrare giustizia, il giudice coloniale si trovò, quindi, alla continua ricerca di un punto di equilibrio tra le nozioni di diritto metropolitano apprese nelle università italiane e le regole giuridiche proprie della realtà somala. Egli non tardò molto ad accorgersi che il modello europeo – frutto di secoli di prove, errori, fallimenti ed aggiustamenti – non poteva essere

[30] Art. 37.

imposto come soluzione definitiva da accettarsi acriticamente, mancando, inoltre, la prova che la sua adozione avrebbe portato ad un miglioramento della situazione. Da qui la ricerca di soluzioni mediate che, mascherate da principi generali del diritto, equo apprezzamento del giudice o similari, divengono "una sorta di diritto naturale, che non si sa bene cosa sia, ma è comprensibile ed accettabile da tutti gli esseri umani"[31].

Ne risultò lo sviluppo di un modello italiano che potremmo definire "atipico". L'assenza di norme precise, unita all'assenza di raccolte organiche di tradizioni giuridiche locali richiedeva, quindi, uno sforzo "creativo" del giudice coloniale che si trovava a rendere giustizia utilizzando la sua personale conoscenza del diritto italiano mediata dall'importantissima, e personalissima, esperienza delle tradizioni giuridiche locali, maturata sul suolo somalo attraverso i casi a lui sottoposti. Il giudice era dunque chiamato a temperare le disposizioni codicistiche in ogni caso in cui egli le avesse giudicate incompatibili con le condizioni locali. Conseguentemente, sistema portava la magistratura coloniale ad essere essa stessa fonte del diritto, dal momento che i precedenti giurisprudenziali, nel citare una tanto ricca quanto diversa quantità di fonti, costituivano traccia per la conoscenza delle tradizioni giuridiche locali e guida per i giudici nell'applicazione della legge secondo le esigenze della colonia[32].

Così, ad esempio, nel settore penale, l'introduzione del diritto metropolitano (tanto inglese, quanto italiano) non impedì che la *diya* continuasse ad esistere, venendo anzi addirittura incorporata nel diritto ufficiale[33]. Ne derivò che – seppure su presupposti diversi (procedimenti separati, ufficiale per la prosecuzione del reato e tradizionale per gli effetti risarcitori, nel caso inglese; ricorso al principio della responsabilità solidale in quello italiano) – la *diya*

[31] G. Marotta Gigli, *Giustizia sotto l'albero: taccuino di un giudice italiano in Somalia*, Roma, F.lli Palombi Ed., 1989, p. 35.

[32] N. Papa, *op.cit.*

[33] S. Santiapichi, *Il prezzo del sangue e l'omicidio nel diritto somalo*, Milano, Giuffrè, 1963.

assunse il ruolo di strumento attraverso il quale vennero regolati quelli che il diritto europeo considerava gli effetti civili del reato[34].

D'altro canto, se il diritto occidentale riuscì a conciliare abbastanza agevolmente la punizione delle fattispecie che esso considerava come criminose senza intaccare nella sostanza il risarcimento secondo il diritto tradizionale, quest'ultimo si trovò in difficoltà nel comprendere le ragioni dell'intervento operato dal giudice metropolitano: la commissione di un atto illecito causava delle conseguenze che erano ben definite dal diritto tradizionale e che chiudevano ogni situazione derivante dall'atto illecito una volta raggiunto il componimento e pagato il risarcimento, per cui non era dato comprendere le ragioni per cui, malgrado la risoluzione (già completa) del caso effettuata secondo il diritto tradizionale, lo Stato continuasse a perseguire il colpevole per aggiungere un'ulteriore sanzione comminata dal giudice metropolitano[35]. Più in generale, il principio di separazione dei poteri – cardine del modello giuridico metropolitano – male si conciliava con la concezione indigena secondo cui il capo che non amministra la giustizia non è un capo[36].

Di contro, il rapporto tra diritto coloniale e *sharī'a* è stato sostanzialmente tranquillo. Le amministrazioni coloniali (italiana e britannica) ne hanno riconosciuto l'applicabilità quale fonte giuridica esclusiva in materia di statuto personale per i musulmani, e, più in generale, nei rapporti tra musulmani qualora le regole applicabili non fossero contrarie ai principi di ordine pubblico del Paese colonizzatore.

In generale, l'introduzione del modello occidentale in Somalia (come, del resto, in Africa) ha determinato una situazione di "pluralismo fittizio" dove gli altri ordini giuridici presenti nel Paese (diritto tradizionale e/o religioso) erano riconosciuti a determinate condizioni, la più importante delle quali era quella di essere conformità con i principi generali dell'ordinamento giuridico

[34]P. Contini, "The evolution of blood money for homicide in Somalia", cit.; S. Santiapichi, *op. cit*.

[35] P. Contini, "The evolution of blood money for homicide in Somalia", cit.; G. Marotta Gigli, *op. cit*.

[36] N. Papa, *op. cit*., p. 183.

metropolitano, il che determinava, a volte, un adattamento della norma proveniente dagli ordini alternativi per addomesticarla al diritto di matrice europea. L'obiettivo finale era quello di dare una certa forma di riconoscimento a tali ordini giuridici – nella loro versione "diluita" attraverso il suddetto filtro di conformità – nell'ordinamento giuridico coloniale: il risultato fu la creazione di una sorta di "diritto tradizionale con caratteristiche europee". Conseguentemente lo spazio per un reale pluralismo giuridico rimase – almeno ufficialmente – sostanzialmente nullo. La stessa definizione di "customary law" coniata durante il periodo coloniale, come "a residual category of local norms claiming tradition as legitimation that pertain to maters on which there has been no legislation or binding judicial rulings by the central state, yet which the state is willing to acknowledge and enforce"[37], presenta sostanziali differenze con la concezione tradizionale di "consuetudine" fondata sulla reale natura e sulle caratteristiche di questo particolare aspetto della realtà normativa africana.

In ogni caso, questo approccio positivista del legislatore coloniale non ha impedito al diritto tradizionale di continuare a mantenere il suo ruolo centrale all'interno delle società africane, malgrado il tentativo dell'ordinamento coloniale di assoggettarlo al suo controllo. Da qui il ben noto fenomeno della resistenza del diritto tradizionale africano e la conseguente continuazione (in forma sommersa) del pluralismo giuridico come coesistenza di ordini normativi del medesimo livello concorrenti tra loro[38].

Il pluralismo nel primo stato somalo

Nel 1960 i territori della Somalia italiana e di quella britannica divengono indipendenti e si uniscono nel nuovo Stato somalo.

La politica del nuovo governo somalo fu fu subito orientata a combattere qualsiasi forma di tribalismo, nel tentativo di prevenire ogni forma di divisione e

[37] S. Falk Moore, "History and the redefinition of custom on Kilimanjaro", in J. Starr & J.F. Collier, *History and Power in the Study of Law: New Directions in Legal Anthropology*, Ithaca, Cornell University Press, 1989, pp. 277-301, a p. 300.

[38] J. Vanderlinden, "Les droits africains entre positivisme et pluralisme", in *Bulletin des séances de l'Académie royale des sciences d'outre-mer*, 46 (2000), pp. 279-292.

favorire la formazione di una coscienza nazionale: da qui l'opposizione verso il diritto tradizionale di cui si è fatto cenno in precedenza.

Sotto il profilo giuridico l'unione delle due colonie portò alla creazione di un sistema[39] in cui i codici civile, commerciale e di procedura civile erano basati sulla tradizione giuridica di *civil law*, ed in particolare sul modello italiano, ad eccezione di quello civile basato sul codice egiziano (con qualche infusione proveniente dal codice italiano)[40]. Nel settore penale, il codice di diritto sostanziale costituiva una copia pressoché identica del codice italiano del 1942, mentre il codice di procedura penale[41] seguiva il modello inglese (attraverso l'omologo codice indiano), con qualche elemento mutuato dal codice italiano[42].

La forza dello *xeer* era però tale da riuscire a reagire ai tentativi di marginalizzazione del diritto ufficiale. Rimanendo all'esempio della *diya*, forse il più rappresentativo (di certo il più studiato) del diritto somalo, il tentativo di sopprimere la responsabilità collettiva per il pagamento della *diya* operato in sede di redazione della carta costituzionale non ebbe successo[43]. Le influenze del diritto tradizionale sul codice penale possono essere riscontrate nell'omissione della pena accessoria (prevista nel codice italiano) della perdita della patria potestà e della potestà maritale in omaggio al carattere patrilineare della società somala, e nella diminuzione di pena qualora le lesioni ad un bambino siano state causate dai suoi genitori[44]; nonché nella previsione di un aggravante nel reato di

[39] Sui problemi di costruzione del sistema giuridico derivanti dall'unificazione delle due colonie v. P. Contini, *Integration of Legal Systems in the Somali Republic*, in 16 *Int'l & Comp. L. Q.*, 1967, pp. 1088-1105.

[40] Detti codici si trovano raccolti in un volume contenente la legislazione fondamentale nel settore privatistico curato da I. Hassan Scek, *I codici e le leggi civili della Somalia*, Mogadiscio, 1978.

[41] Decreto Legislativo 1 giugno 1963 n. 1, come modificato dalla Legge 12 dicembre 1972 n. 84.

[42] P. Contini, *The Somali Republic: An Experiment in Legal Integration*, Londra, Frank Cass, 1969. Il codice venne commentato da I. Singh, M. Hassan Said, *Commentary on the Criminal Procedure Code*, Mogadiscio, 1978.

[43] Un'accurata descrizione dei lavori preparatori relativi all'argomento si trova nella sentenza della Corte Suprema n. 2 del 16 maggio 1964.

[44] M. R. Ganzglass, *The Penal Code of the Somali Democratic Republic*, New Brunswick, Rutgers University Press, 1971.

ingiuria quando l'offesa è portata attraverso l'uso di parole o atti che, secondo le tradizioni locali, sono idonee a provocare la reazione dell'offeso[45].

Di contro, il diritto tradizionale dovette adattarsi alla presenza del diritto statale e trovare spazio nelle maglie da esso lasciate aperte. Sempre in tema di *diya*, l'evoluzione del significato del risarcimento così pagato nel senso di rappresentare il risarcimento derivante dagli effetti civili dell'atto illecito trovava definitiva conferma nella giurisprudenza della Corte Suprema somala[46] la quale menzionava espressamente come l'evoluzione del diritto tradizionale somalo per effetto dell'introduzione del diritto occidentale avesse fatto divenire la *diya* un risarcimento della responsabilità civile[47], anche se resta sempre da vedere quanto per il somalo avesse senso una distinzione tra effetti penali e civili dell'illecito. Di più, la stessa corte dichiarava espressamente come il pagamento del risarcimento sotto forma di *diya* non fosse in contrasto con l'indirizzo politico dello Stato di costruire una società priva di divisioni tribali.

Nel discutere il rapporto tra diritto statale e diritto tradizionale, la stessa Suprema Corte si è spinta fino a dichiarare ammissibile l'uscita volontaria del singolo dal proprio *diya-paying group*, ricorrendo al principio costituzionale secondo cui nessuno poteva essere costretto a far parte di una qualsiasi forma di associazione[48].

Diritto ufficiale e *sharī'a* hanno – in questo periodo – un rapporto controverso.

Se la clausola di esclusione costituita dal rispetto dell'ordine pubblico costituiva, nel periodo coloniale, un escamotage per sfuggire all'applicazione dei principi della sharī'a, questa possibilità veniva meno con la nascita dello Stato sovrano. Riconoscere il limite dell'ordine pubblico avrebbe significato accettare

[45] Art. 451 secondo comma, lettera "c", c.p.

[46] Cfr. la sent. della Corte Suprema n. 2 del 16 maggio 1964 cit., nonchè la sent. n. 7/1962 e la sent. n. 25/1964, entrambe cit. in P. Contini, "The evolution of blood money for homicide in Somalia" , cit. In argom. v. anche R. Angeloni, *Codice penale somalo, commentato ed annotato in base ai lavori preparatori*, Milano, Giuffrè, 1967, p. 22.

[47] Su *diya* e responsabilità civile si v. P. Cendon, "La responsabilità civile in Somalia", in *Resp. Civ.*, 1988, p. 157-193.

[48] Il principio si trova affermato nella sent. n. 25/1964, cit., la quale richiama espressamente il secondo comma dell'Art. 26 Cost.

l'esistenza di un ordinamento ulteriore e potenzialmente in conflitto con la *sharī'a*, circostanza, questa, inammissibile secondo i canoni del diritto islamico[49].

Nella Costituzione del 1960 l'Islam assumeva un ruolo centrale[50], rappresentando – tra l'altro – la fonte principale delle leggi dello Stato[51], e le leggi successive si sono incanalate formalmente nella stessa direzione. Alcuni principi del diritto islamico sono stati incorporati dal legislatore nel codice penale somalo, per il resto largamente copiato dal codice italiano dell'epoca: valga per tutti l'esempio del mantenimento della pena di morte in caso di omicidio volontario[52] e quello del reato di consumo e vendita di bevande alcoliche riservati entrambi ai cittadini musulmani[53]. La presenza di giudici specializzati garantiva, poi, alla *sharī'a* la possibilità di trovare un'applicazione effettiva in sede giudiziaria.

Con la nascita dello Stato somalo il diritto musulmano veniva, quindi, recepito per la prima volta in forma ufficiale nel tessuto normativo dell'ordinamento, non solo quale fonte ultima per colmare lacune legislative, ma, soprattutto, per conferire legittimità al nuovo sistema istituzionale.

Si è già accennato come il ruolo formale del diritto tradizionale sia stato ulteriormente ridotto, per non dire annullato, con l'avvento al potere di Siad Barre: nella scelta dell'opzione socialista, con la necessità di creare uno Stato centrale fortemente dirigista, la Costituzione somala del 1979 eliminava ogni forma di tribalismo e la legislazione successiva doveva necessariamente svilupparsi in quest'alveo[54]. Peraltro, l'impronta chiaramente clanica data da Siad Barre alla gestione del potere, in uno alla scarsa affermazione del diritto ufficiale, sono tra i fattori che permisero alla tradizione di mantenere la sua forza nella

[49] R. Sacco, *Introduzione al diritto privato somalo* cit., p. 28.

[50] Ad es., secondo l'Art. 71 comma 1, uno dei requisiti di eleggibilità del Presidente della Repubblica era quello di essere musulmano.

[51] Art. 50 Cost. del 1960.

[52] Art. 434 c. p. V. in tal senso, R. Angeloni, *op.cit*., p. 56.

[53] Artt. 411 e 412 c.p.

[54] Sulla costituzione somala del 1979 v. G. Ajani, "The 1979 Somali Constitution: the Socialist and the African Patterns and the European Style", in *Review of Socialist Law*, 8 (1982), pp. 259-269.

gestione della vita quotidiana della società somala, nella quale lo Stato e il suo diritto riuscivano a penetrare solo superficialmente.

La Costituzione del 1990 – che Siad Barre aveva emanato nel tentativo di conservare il potere e di traghettare il Paese verso un sistema più moderno abbandonando l'opzione socialista – non riuscì a lasciare il segno: i forti disordini che si svilupparono a Mogadiscio e nel resto del territorio già alla fine di quell'anno impedirono alla nuova carta costituzionale di avere un qualsiasi impatto nella vita giuridica del Paese. In essa la *sharī'a* era definita "un'importante fonte normativa"[55] e i provvedimenti aventi valore di legge dovevano essere conformi ai "principi generali dell'Islam", oltre che alla Costituzione[56]. Nessun cenno, invece, in merito al diritto tradizionale[57].

Lo Stato scompare: il pluralismo atipico

Il 27 gennaio 1991 Siad Barre veniva rovesciato, e si apriva una lunga e sanguinosa fase caratterizzata dalla totale assenza di un Stato centrale e di organi in grado di esercitare il controllo sul territorio e le funzioni essenziali dello Stato (c.d. *failed state*), fase dalla quale solo adesso si cerca – assai faticosamente – di uscire[58]. Se il sistema giuridico in vigore al momento della caduta di Siad Barre restava formalmente in vigore, la totale mancanza di strutture di esercizio delle attività legislative e giudiziarie ne determinava – di fatto – la scomparsa, a cui contribuivano significativamente la guerra civile, la chiusura dell'Università Nazionale Somala, la distruzione della gran parte delle fonti scritte sul diritto somalo a causa della guerra stessa.

Nel frattempo, nell'ambito giurisdizionale si sviluppava un modello di giustizia sostitutivo di quello ordinario, modello che si è rafforzato nel corso del tempo, quando il funzionamento di tutte le istituzioni è stato definitivamente

[55] Art. 3 Cost. 1990.

[56] Art. 113 Cost. 1990.

[57] Sulla costituzione somala del 1990 si v. A.A. Bootan, "La costituzione somala del 1990", in E. Grande (ed.), *Transplants, innovation and legal tradition in the Horn of Africa*, Torino, L'Harmattan Italia, 1995.

[58] Sulla caduta del regime di Siad Barre e l'apertura della fase di *failed state* v. A.M. Issa-Salwe, *The collapse of the Somali state*, London, Haan Associates, 1994.

compromesso dal conflitto[59]. Questo modello di giustizia alternativo, fondato su basi claniche, male si adattava, peraltro, a controversie (come quelle commerciali) che esulavano dal mero rapporto clanico e presentavano fattispecie sconosciute ai sistemi tradizionali[60].

Ne è risultato un sistema sviluppatosi su canoni completamente diversi da quelli ai quali un giurista occidentale è avvezzo, fondato su equilibri diversi, propri di una realtà in cui la componente rappresentata dallo Stato è del tutto assente. Valgano, per tutti, gli esempi che seguono. In assenza di organi preposti alla costituzione ed alla registrazione delle società, per lo svolgimento delle loro attività commerciali i somali hanno utilizzato società costituite all'estero (normalmente Dubai), importando regole e concetti di funzionamento delle società proprie di quei sistemi e che venivano praticate nel territorio somalo in mancanza di regole locali. Ancora, in assenza di qualsiasi governo funzionante dal 1991, sono nel frattempo apparse tre società per l'offerta dei servizi di telefonia fissa, mobile e di collegamento alla rete internet: l'assenza del filtro della licenza governativa per entrare nel mercato ha fatto sì che questo si sviluppasse sulla pura competizione di mercato con prezzi che sono risultati essere i più bassi di tutta l'Africa, mancando sia il controllo dello Stato sull'accesso al mercato (con il conseguente costo dell'ottenimento e del mantenimento delle licenze di esercizio, o il rischio di distorsioni causate dall'ingresso nel mercato di una società a controllo statale), sia, più in generale, l'esazione di tributi. Ma ciò che è più significativo è il fatto che, malgrado la totale assenza di un sistema di diritto ufficiale e di un sistema di corti funzionante, il livello di sofferenze e di inadempimento contrattuale erano praticamente inesistenti, essendo i pagamenti e l'adempimento contrattuale assicurati attraverso i sistemi tradizionali di risoluzione delle controversie e di responsabilità di tipo solidale[61].

[59]F. Battera, *op. cit.*, p. 27.

[60] Cfr. T. Nemova & T. Hartford, *Anarchy and Invention. How Does Somalia's Private Sector Cope without Government?*, The World Bank Group – Private Sector Development Vice-Presidency, November 2004, note number 280.

[61]J. Winter, *Telecoms thriving in lawless Somalia*, BBC News (19 November 2004), disponibile all'URL: http://news.bbc.co.uk/2/hi/africa/4020259.stm (visionato il 13 gennaio 2012).

In questa fase storica il diritto religioso permane e si rafforza, tra osservanza spontanea e derive fondamentaliste. Corti religiose più o meno ortodosse amministrano la *sharī'a*, a volte nelle sue forme interconnesse con le regole tradizionali, altre in una forma che si vorrebbe pura e strettamente osservante dei soli principi provenienti dalla lettura delle sacre scritture.

Durante il periodo del *failed state* si è, quindi, sviluppata una forma di pluralismo che potremmo definire atipico[62]. Atipico se si considera che il concetto classico di pluralismo giuridico sottintende l'esistenza di uno o più ordini giuridici concorrenti ed alternativi tra loro, di cui uno è quello statale; in questo caso manca, invece, proprio l'ordine normativo statale.

Il discorso pluralistico si è sviluppato su binari parzialmente differenti – e, se si vuole, più in linea con i canoni classici del pluralismo giuridico – nel territorio dell'ex Somaliland britannico. Dopo il disfacimento dello Stato somalo, la necessità di prevenire l'instabilità in quel territorio venne immediatamente avvertita. Si tenne quindi a Borama (una città del Somaliland) una conferenza tra i vari clan del territorio per discutere del futuro del territorio. Il 18 maggio 1993 il Somaliland si autoproclamava Stato indipendente e sovrano, la Repubblica del Somaliland[63], ma il nuovo Stato non ha ottenuto il riconoscimento internazionale[64].

Qui il mancato riconoscimento internazionale non ha impedito il sorgere di strutture statali che hanno applicato, ed applicano tuttora, un sistema giuridico composto dal diritto religioso, da quello tradizionale, dal diritto somalo pre-1991 e da quello successivamente emanato dal Somaliland, in un coacervo di regole scritte e non scritte nel quale è assai difficile districarsi, in cui la caratteristica

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[62] Un esempio in G. Woodman, "A survey of customary law in Africa in search of lessons for the future", in J. Fenrich, P. Galizzi e T. Higgins (a cura di), *The future of African customary law*, Cambridge, Cambridge University Press, 2011, p. 11

[63] Sul processo che ha portato il Somaliland all'autoproclamazione dell'indipendenza, e sulla storia recente del territorio, v. I.M. Lewis, *Understanding Somalia and Somaliland*, Londra, Hurst, 2008.

[64] Sulla questione del mancato riconoscimento internazionale della Repubblica del Somaliland v. Government of Somaliland, *Briefing Paper. The Case for Somaliland's International Recognition as an Independent State*, Hargeisa, Ministry of Foreign Affairs, 2007.

essenziale è data dall'istituzionalizzazione delle componenti del diritto tradizionale all'interno del sistema ufficiale[65].

Cosa succede adesso?

L'esistenza del problema del pluralismo è ben nota. Basti citare il fatto che la necessità di armonizzare i vari ordini normativi esistenti viene considerata come il problema fondamentale da risolvere per lo sviluppo del sistema giuridico del Somaliland[66].

L'intenzione per il futuro del nuovo Stato somalo è quella di formare uno Stato federale. L'obiettivo è chiaro: oltre 20 anni di assenza totale dello Stato centrale hanno determinato l'epifania di forme autonomistiche più o meno spinte, la cui forza centrifuga mal si concilierebbe, in ogni caso, con la loro riduzione all'interno di uno Stato unitario centralizzato.

In attesa della realizzazione dello Stato federale, la Regione Autonoma del Puntland ha approvato, nell'aprile 2012, una costituzione che inquadra il territorio quale Stato autonomo della futura Repubblica Federale Somala. Qui la *sharī'a* assurge al ruolo di principio guida sul quale è basato il sistema politico del Puntland[67], mentre la religione islamica è l'unica ammessa nel territorio dello Stato autonomo[68]. Ciò che, però, appare più significativo ai fini del presente studio è la previsione dell'Art. 101, intitolata "Riconoscimento delle norme e degli usi tradizionali". La norma si apre con la declamazione secondo la quale la Costituzione riconosce le regole tradizionali che non siano in contrasto con la *sharī'a*, la stessa Costituzione e le leggi del Puntland (richiamando, per certi aspetti, la clausola di conformità dei temi coloniali), e con l'espresso

[65] S. Mancuso, "Short Notes on the Legal Pluralism(s) in Somaliland", in corso di pubblicazione in S.P. Donlan, L. Heckendorn Urscheler (a cura di), *Concepts of Law: Comparative, Jurisprudential, and Social Science Perspectives*, Londra, Ashgate.

[66] B. Hart e M. Saed, "Integrating Principles and Practices of Customary Law, Conflict Transformation, and Restorative Justice in Somaliland", in *Africa Peace and Conflict Journal*, 3, (2010), 2, pp. 1-17; S. Mancuso, *op. cit.*

[67] Art. 3 comma 6. Il suo primato nella gerarchia delle fonti legislative lo desumiamo dal primo comma dell'Art. 101, ove viene indicata quale primo strumento normativo cui le norme tradizionali devono essere conformi.

[68] Art. 8.

riconoscimento che gli anziani legittimati (secondo le regole tradizionali) considerati come i depositari dell'autorità tradizionale[69]. Il ruolo centrale riservato all'autorità tradizionale lo si riscontra facilmente nei tre commi successivi: in caso di dispute o "malintesi" (la norma recita "misunderstanding") che possano minacciare la pace tra i clan o i sub-clan, gli anziani devono essere chiamati ("will be called") per dare un parere o trovare una soluzione pacifica. La decisione raggiunta dagli anziani applicando le norme ed i metodi tradizionali viene riconosciuta come valida da qualsiasi autorità, che deve fornire il proprio supporto per l'esecuzione della decisione; la decisione presa dagli anziani secondo i principi del diritto tradizionale deve inoltre essere registrata presso la *Magistrate Court* (giudice di primo grado) del distretto nel quale il caso è stato risolto. Se si considera che, secondo le regole tradizionali, sostanzialmente tutte le controversie sono a livello di relazioni tra clan o sub-clan, appare immediatamente chiaro l'impatto che la norma in questione può – potenzialmente – avere nell'ambito della risoluzione delle controversie.

Una situazione simile, del resto, la si registra anche in Somaliland. Lì la Costituzione (volta al riconoscimento del territorio come Stato indipendente) riconosce la *sharī'a* come la fonte suprema del diritto alla quale anche la stessa Costituzione è chiamata a conformarsi[70]. Anche in assenza di una previsione a livello costituzionale simile a quella vista in precedenza per il Puntland, gli anziani spesso richiedono al giudice ordinario di risolvere direttamente le controversie, e sono gli stessi giudici a favorire questa soluzione di tipo stragiudiziale basata sul consenso delle parti. Nel settore civile ciò può avvenire in qualsiasi grado del giudizio, e l'*escamotage* cui si ricorre è l'utilizzo, a seconda del grado del giudizio, degli Articoli 117 e 239 del Codice di Procedura Civile somalo. Secondo i citati Articoli, mutuati dal codice italiano, il giudice può invitare le parti a trovare una soluzione extragiudiziale della controversia; l'interpretazione data a questi articoli è stata sempre nel senso di consentire alle

[69] Al fine di preservarne l'imparzialità e la dignità, la norma vieta loro di far parte di associazioni o partiti politici.

[70] Art. 5 Cost. Somaliland.

parti di trovare una soluzione della controversia applicando regole e metodi del diritto tradizionale. Qui non è il giudice ad applicare il diritto tradizionale: egli si limita a prendere atto dell'avvenuta soluzione della controversia in applicazione del diritto tradizionale da parte delle autorità competenti in materia. Le parti registrano l'intervenuto accordo presso il giudice ufficiale al mero fine della chiusura del fascicolo, essendo la stessa esecuzione dell'accordo lasciata ai meccanismi previsti dal diritto tradizionale. Lo stesso fenomeno si verifica anche nel settore penale. Qui i giudici considerano questa modalità di soluzione delle controversie un'applicazione del principio di diritto islamico secondo il quale la persona offesa (o i suoi eredi) hanno diritto di scegliere se l'autore del fatto illecito debba essere punito personalmente, o se la questione debba essere risolta attraverso il pagamento della *diya* attraverso il risarcimento. In tal caso, il giudice accetta la decisione extragiudiziale assunta dagli anziani, imponendo una pena simbolica che rappresenta la punizione dell'offesa contro lo Stato.

Va, inoltre, menzionata la Costituzione dello Stato dello Jubaland (l'Oltre Giuba del periodo coloniale italiano), anch'esso considerato come Stato della futura Repubblica Federale Somala. Anche in questo documento la *sharī'a* assurge a fonte suprema della legge cui tutti gli atti normativi – Costituzione compresa – sono chiamati ad essere conformi[71]. Ciò che è interessante osservare è il riconoscimento centrale dato al diritto tradizionale, quale fonte sulla quale la Costituzione è basata, unitamente alla *sharī'a*[72].

La Costituzione provvisoria della nuova Repubblica Federale Somala dell'1 agosto 2012 ribadisce il primato della religione islamica e della *sharī'a* quale fonte suprema alla quale tutti i provvedimenti normativi dello Stato devono essere conformi[73], ed alla quale la stessa Costituzione è dichiarata essere conforme e subordinata[74]. Di contro, alle donne deve essere riconosciuto il diritto di essere

[71] Artt. 2 e 3 Cost. Jubaland.

[72] Art. 2 comma 2 Cost. Jubaland.

[73] Art. 2 Cost. provv. È interessante osservare come, sebbene il secondo comma dell'Art. 2 cit. (confermato dal secondo comma dello stesso Art. 17) non consente di propagandare alcuna religione diversa da quella islamica nel Paese, il primo comma dell'Art. 17 prevede la libertà religiosa e di credo, in conformità alla Costituzione del 1960 (Art. 29).

[74] Artt. 3 comma 1, e 4 comma 1 Cost. provv.

ammesse a ricoprire cariche pubbliche[75], e, più in generale, la Costituzione provvisoria conferma il principio di uguaglianza dei cittadini di fronte alla legge senza discriminazioni basate – tra l'altro – su sesso o religione[76].

Con riguardo alle norme tradizionali, non esistono disposizioni specifiche. La Costituzione provvisoria si limita a sancire un generale riconoscimento delle "tradizioni positive e pratiche culturali del popolo somalo", impegnandosi a rimuovere quelle che possano influire negativamente sull'unità ed il benessere della popolazione[77]. Nell'ottica del tema del pluralismo giuridico è inoltre necessario segnalare il disposto dell'Art. 139, il quale prevede il principio di continuità di applicazione delle leggi in vigore anteriormente all'entrata in vigore della Costituzione provvisoria. Se la norma può sembrare quasi ovvia da un punto di vista puramente tecnico, le conseguenze applicative sono al momento assolutamente imprevedibili, se si considera che le norme a cui la regola costituzionale fa riferimento sono quelle del primo Stato somalo (dopo la caduta di Siad Barre e la dissoluzione dello Stato centrale nessuna autorità poteva legittimamente intervenire per modificarle), con tutti i problemi di ricostruzione del tessuto normativo ed interpretativo facilmente immaginabili; e che i territori del Somaliland e del Puntland hanno proceduto ad attività legislative autonome la cui sorte è tutta da stabilire, nel contesto di uno Stato federale somalo ancora tutto da costruire.

Se la centralità della *shari'a* non viene, formalmente, messa minimamente in discussione (le caratteristiche del nuovo Stato somalo ci diranno la centralità effettiva che la stessa assumerà), più controverso sembra essere, a prima vista, il ruolo del diritto tradizionale. Se, come appena visto, le carte "costituzionali" di Somaliland, Puntland e Jubaland riconoscono – seppure in forma diversa – la centralità della tradizione, lo stesso non avviene nella nuova costituzione provvisoria somala. Non vi è dubbio che, al di là del mero riconoscimento formale (occorrerà vedere cosa prevederà – se lo prevederà – al riguardo la costituzione

[75] Art. 3, quinto comma, Cost. provv.

[76] Art. 11 Cost. provv.

[77] Art. 31 Cost. provv.

definitiva), l'essenzialità della tradizione è nei fatti della vita quotidiana delle genti somale. Il tema sarà, dunque, come affrontare praticamente la questione del pluralismo, e la necessità di ricostruire il sistema giuridico della nuova Somalia potrebbe rappresentare un'occasione unica, pur nella coscienza della mancanza di soluzioni che possano magicamente risolvere definitivamente il problema.

Di certo, la stratificazione delle fonti e il pluralismo giuridico in atto potrebbero considerarsi una risorsa importante per lo sviluppo istituzionale e giuridico della Somalia. Peraltro, ciò dipenderà in gran parte sia dalla capacità della *shari'a* di ritagliarsi uno spazio centrale, ma non oppressivo, degli altri sistemi normativi, sia dal ruolo che ricoprirà il diritto tradizionale e la misura in cui ne sarà possibile un'integrazione nel sistema giuridico ufficiale in una prospettiva di lungo periodo, ed in una forma dinamica nella quale i meccanismi di interazione dei vari ordini normativi si sviluppino in senso cooperativo e non conflittuale nella ricerca della soluzione migliore possibile per ogni singolo caso.

What Is Legal Pluralism All About?

The Disquieting Effect of Deconstructing Narratives

Mariano Croce

Abstract In the last decades a prolific field of study has been developing where scholars from different fields and disciplines have brought to the table a series of conundrums able to trigger a profound rethinking of a central institution of Western culture such as the law. This field of study, generally known as "legal pluralism", is neither a recognisable subject area nor a homogeneous perspective. Rather, it is a broad space for discussion and exchange where scholars, practitioners and activists elaborate new theoretical instruments and conduct empirical studies in order to overhaul the concepts and devices produced by two centuries of Western jurisprudence, colonised by the haunting presence of the state. In this article I shall make a journey into the history of legal pluralism from a particular vantage point: I shall be concerned with its polemical-dialectical relation to traditional legal theory in order to fathom the impact of this relation on the way legal pluralism has shaped up. My (sympathetic) account will look at some decisive junctions whereby Western exponents of the legal-pluralist scholarship have sought to debunk some of the traditional assumptions of the Western conceptual tapestry. The conclusion will be that legal pluralism prompts the deconstruction of a narrative that has long supported a limited and biased understanding of law.

Keywords Legal pluralism; jurisprudence; state; indigenous law; recognition.

Introduction

In the last decades a prolific field of study has been developing where scholars from different fields and disciplines have brought to the table a series of conundrums able to trigger a profound rethinking of a central institution of Western culture such as the law. This field of study, generally known as "legal pluralism", is neither a recognisable subject area nor a homogeneous perspective. Rather, it is a broad space for discussion and exchange where scholars, practitioners and activists elaborate new theoretical instruments and conduct empirical studies in order to overhaul the concepts and devices produced by two

centuries of Western jurisprudence, colonised by the haunting presence of the state. In fact, as I shall argue in this article, the first, discomforting move of most legal pluralists was to bring into question the presumed identity between the broad phenomenon of law and transient shape taken by the law *within* the state. The fault legal-pluralist scholarship, generally speaking, wanted to denounce is a mismatch between the universal claims made by mainstream legal theorists and the narrow nature of the entity they were actually accounting for: whether knowingly or not, traditional jurisprudential thinking has mistakenly claimed the law in general to coincide with the type of juridico-political setting that modern states have built in the wake of wide-ranging social and political revolutions of the eighteenth century.

That said, there is little doubt that defining what legal pluralism really is, beyond this important polemical stance, is far from easy. In this article I shall explore some of the paradoxes that surround legal pluralism and impede a clear identification of its nature and scope. Is legal pluralism an attitude, a style, a method, a conceptual toolkit, a concrete state of things? What type of threat (if any) does it pose to traditional jurisprudence? What type of threat (if any) does it pose to the political stability of Western polities? Is the lesson it claims to be teaching compatible with the cultural and political identity of Western societies?

In the following pages I shall make a journey into the history of legal pluralism from a particular vantage point: I shall be concerned with its polemical-dialectical relation to traditional legal theory in order to measure the impact of this relation on the way legal pluralism has shaped up. My (sympathetic) account will look at some decisive junctures whereby Western exponents of the legal-pluralist scholarship have sought to debunk some of the traditional assumptions of the Western conceptual tapestry. I shall first discuss the role played by two prominent authors, Bronisław Malinowski and Eugen Ehrlich, in the emergence and development of legal-pluralist scholarship. I shall claim that theirs is not a genuine contribution to legal pluralism, although their impact on it is undeniable. I shall then try to identify the genuine core of a pluralist view of law by addressing Marc Galanter's conceptualisation of indigenous law. This will lead me to discuss

a typical impasse which many legal pluralists tend to incur, that is, the panlegalist dilemma. I shall finally sketch what I believe to be a sound characterisation of legal pluralism by examining Gordon Woodman's and Franz von Benda-Beckmann's theories.

The conclusion, to put it bluntly, will be that legal pluralism is neither a concrete state of things, whereby different legal orderings coexist, nor a methodology to approach such state of things when and if it occurs. Rather, I shall claim that legal pluralism mainly plays as the deconstruction of a narrative that has long supported a limited understanding of law and, by doing so, has hampered broader investigations into such a constitutive feature of social order. Legal pluralism's main lesson, I shall contend, is a plea for a multifocal analysis of the way law works in the social realm, well beyond the traditional, deep-seated boundaries of the various scientific disciplines.

Where does it come from?

Legal pluralism, as we know it today, emerged in the two areas of legal anthropology and legal sociology as a more suitable approach to the several elements of law that positivist theories had left unexplored. On the one side, legal anthropologists wanted to map and investigate the life of the law outside the West, in geographical areas where Western colonial law had incurred numerous conflicts with indigenous systems of organisation. On the other side, legal sociologists set out to question the structure itself of modern states, whose construction had required the erasure of more ancient, alternative legal traditions, institutions and practices. It is no accident that the Anglophone debate on legal pluralism has devoted some attention to the question of whether the genuine initiator of legal pluralism is Malinowski or Ehrlich, that is, noble fathers of (respectively) legal anthropology and legal sociology.

Famously Malinowski wanted to demonstrate that, *pace* his predecessors and contemporary colleagues, the legal body of the "savages" was not of a criminal

type, that is, merely comprised of rules prohibiting specific conducts[1]. Malinowski claimed that primitive law (or, to be more precise, the law of the Trobriand Islanders he was studying) should be described as of a "civil law" type, understood as a "body of binding obligations, regarded as a right by one party and acknowledged as a duty by the other, kept in force by a specific mechanism of reciprocity and publicity inherent to the structure of their society"[2]. His all-embracing definition of law aimed to minimise the relevance of Western notions such as coercion and authority for the analysis of non-Western legal realities. Malinowski believed that the mechanism meant to assure compliance was the publicness of rules and the reciprocity among community members. So conceived, law turns out to be an internal mechanism of social life, inscribed in the web of interactions developed by social agents. As I shall say afterwards, this caused many theoretical dilemmas in the field of legal pluralism. For the time being, however, it is important to understand how this view opened the door to legal pluralism: while anthropologists and ethnologists were struggling to detect law in non-Western social settings by applying Western conceptual tools such as authority, coercion, monopoly of force, enforcement, Malinowski overturned the classic approach. If law, as he believed, is an innate mechanism of social life based on expectations and reciprocity, hardly can any functioning society be lawless, whether or not its law exhibits the typical traits of Western legal systems.

For his part, Ehrlich was engaged in a battle against positivist theorists to lay bare the myopia of monistic, state-centric understandings of law. At the core of his theory is the distinction between «Rechtssatz» (legal proposition) and «Rechtsleben» (life of the law). Legal propositions, Ehrlich contends, are addressed to legal officials and comprise legal codes and statutes. They are by nature immobile and bloodless. The life of the law, on the contrary, is much broader and richer. It is the fuzzy ensemble of the myriad rules developed by the inner orders of the various associations of human beings which are at work well

[1] B. Malinowski, *Crime and Custom in Savage Society. An Anthropological Study of Savagery*, London, Routledge & Kegan Paul, 1926.

[2] Ivi, p. 58.

before state courts give them official recognition. Ehrlich thus advocates a change in focus: if legal scholars want to pin down the nature of law, then they must look outside parliaments and tribunals and place their attention on the venues where the content of official law is produced and where rules are variously applied regardless of what state officials say and do. In summary, if an official legal rule, in Ehrlich's view, is "a rule according to which the judge must decide the legal disputes that are brought before him"[3]; the life of the law is to be found in the multiple associations that constitute social reality, where "a plurality of human beings who, in their relations with one another, recognize certain rules of conduct as binding, and, generally at least, actually regulate their conduct according to them"[4].

Much as these two leading figures have been important to the development of legal-pluralist scholarship, if we ponder on the core tenets of their theory, it is easy to conclude that theirs are not contributions to legal pluralism. While Malinowski's concern was to do away with what he claimed to be a narrow conception of law, which impeded ethnographical research, Ehrlich aimed to launch an attack on those who believed that the life of the law is confined to official venues. Accordingly, if the first can be read as a plea for a less parochial conceptualisation of law, the second is an attempt at supplementing mainstream legal analysis with a socio-legal approach sensitive to what is outside official constitutions, codes, statutes and the like.

I believe it is crucial to detect the core elements of legal pluralism and to isolate them, precisely because legal pluralism is often confused with a pluralist understanding of social reality and social normativity. To provide further evidence, let me briefly examine what is considered to be one of the most significant contributions to the contemporary debate on legal pluralism, that is,

[3] E. Ehrlich, *Fundamental Principles of the Sociology of Law*, New Brunswick, Transaction Publishers, 2009 (or.: *Grundlegung der Soziologie des Rechts*, Munich and Leipzig, Duncker and Humblot, 1913).

[4] Ivi, p. 39.

Sally Falk Moore's seminal article on semi-autonomous social fields[5]. On the one hand, like Malinowski, Moore is concerned with refining the theoretical tools ethnographers utilise when they study social reality. On the other hand, like Ehrlich, she claims that law cannot be understood unless scholars pay heed to the social context in which it operates. In this regard, Moore's is a remarkable contribution to social theory, for she demonstrates that societies are not homogeneous totalities, but compositions of semi-autonomous social fields[6]. Yet, this hardly amounts to the vindication of legal pluralism.

Doubtless, Moore goes a step farther than Ehrlich as she deftly insists that social fields are not (or at least not always) stable and isolable associations, but flexible and transitory contexts of interaction which most often intersect and overlap. Be this as it may, the characteristic of all these fields, in Moore's view, is that they are able to *make people comply with their inner rules*, in that they possess not only rule-making capacities, but also the means to induce or coerce compliance. Most of the time, she goes on to argue, the state, whether inside or outside the West, relies on the internal mechanisms of these fields, since "the various processes that make internally generated rules effective are often also the immediate forces that dictate the mode of compliance or noncompliance to state-made legal rules"[7]. This is a valuable contribution to legal theory generally: state's mechanisms to coerce compliance are too weak and poor to assure widespread acceptance of its rules. Therefore, the state (whether overtly or not) must seek compromises with the fields which possess these means and are able to enforce legal rules. At the same time, Moore points out, this far-reaching compromise does not leave the fields involved untouched. They get inevitably transformed and altered in the intercourse with the state. Hence, the interaction between the state and the semi-autonomous fields is a one-to-one relationship. Rather, the former

[5] S.F. Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study", *Law & Society Review*, 4 (1973), pp. 719-746.

[6] In her lexicon, a "field" is a context governed by "rules and customs and symbols internally", which is semi-autonomous because "vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded" (ivi, p. 720).

[7] Ivi, p. 721.

recognises and relies on the latter while the latter are influenced and to some extent shaped by the former.

Without a doubt, Moore's is a significant advancement in the conceptualisation of how the state operates on social actors and how social actors, in their turn, are involved in the regulation of society. But hardly can this view be conducive to a pluralist theory of law. Not only does she give away her misgivings when, at the end of the article at stake, she avers that "on the point of melting it all together as 'law', this is a question of what one is trying to emphasize for analysis"[8]. More importantly, she suggests it may be important for scholars to distinguish among sources of rules and mechanisms for complying coercion, as the role and functions of the state should not be confused with those of other fields. This is why Moore's view could well complement any open-minded positivist theory that seeks to explain how *valid* legal rules of the legal system find acceptance within the population they govern.

What is really at stake?

A decisive (though incomplete) step to a truly pluralist view is Marc Galanter's influential analysis of indigenous law and its relation to official law[9]. Galanter's two main innovations remove the limits that Malinowski and Ehrlich had inadvertently imposed on legal pluralism: its confinement to the analysis of non-Western societies and a distinction among sources of law that let the traditional concept of law off the hook. In fact, Galanter sets forth a view of legal reality that clearly captures the patchwork nature of state legal orders (whether inside or outside the West) and at the same time brings into question the legitimacy of the taken-for-granted connection between the label "law" and the activity of the state.

The points made by Galanter are strictly connected to one another: once he shows that legal reality is not the monolith most positivists believe it to be, then he comes to the conclusion that the way in which the label "law" is used can be

[8] Ivi, P. 745.

[9] M. Galanter, "Justice in Many Rooms: Courts, Private Ordering, and Indigenous law", *Journal of Legal Pluralism and Unofficial Law*, 19 (1984), pp. 1-47.

subject of controversy. The argument reads as follows: legal reality, Galanter claims, is by no means a homogeneous body of rules and procedures established by state agencies. As he reveals with reference to many actual cases and disputes where the law is hardly or partially involved, the area where the law develops and lives is composed of partially self-regulating fields or sectors, organised along spatial, transactional or ethnic-familial lines, ranging from primary groups in which relations are direct, immediate and diffuse to setting in which relations are indirect, mediated and specialised. Galanter's suggestion is a refined one. He does not claim that the use of the label "law" is straightforwardly arbitrary or mistaken. He maintains that using "law" for distinguishing between official and unofficial orderings in a particular geo-historical context is always the outcome of a *struggle over meaning* in which there are winners and losers, and where the group of losers is composed of all those unofficial orderings which might be properly seen as having a "law" but are considered as unofficial due to the primacy of their rivals. In this light, Galanter eventually concludes that Western state legal systems are nothing other than "institutional-intellectual complexes" that claim "to encompass and control all the other institutions in the society and to subject them to a regime of general rules [...]. These complexes consolidated and displaced the earlier diverse array of normative orderings in society, reducing them to a subordinate and interstitial status"[10].

To put it otherwise, this is a remarkable attack on the uniqueness of law as it is postulated by most mainstream legal schools. As I said before, legal theorists and jurists, with some notable exceptions[11], could have accommodated a view of legal reality which accords relevance to social normativity. H.L.A. Hart's strong emphasis on *social* practice can be read as a nod to a more sociologically alert understanding of *legal* practice. Although his theory has been subject to innumerable interpretations and reinterpretations, to the degree that today saying what he really meant or wanted to achieve seems almost impracticable, his own

[10] Ivi, p. 19.

[11] Santi Romano, on whose theory I will get back afterwards, figures as an exception.

mention of "descriptive sociology"[12] is a further proof of his interest in social normativity. Even more clearly, Hart's commitment to a broad-minded conceptualisation of law, which takes into account non-state scenarios, is testified by his reference to Malinowski and other prominent anthropologists who were studying the law of stateless societies, like Edward Evans-Pritchard and Max Gluckman. Based on the already extensive literature, Hart came to recognise that "[i]t is, of course, possible to imagine a society without a legislature, courts, or officials of any kind. Indeed, there are many studies of primitive communities which not only claim that this possibility is realized but depict in detail the life of a society where the only means of social control is that general attitude of the group towards its own standard modes of behaviour"[13].

However, this *is not* the dilemma that lies at the heart of legal pluralism. What needs to be determined *is not* if something can be called law despite the fact that this something lacks some or all of properties that are claimed to characterise the law of full-fledged state legal orders[14]. Rather, the question of legal pluralism, as I understand it, is if in the same geo-historical context two or more entities can lay claim to them being called "law". Whether or not such a symbolic question has any relevance – which I will discuss later on – Galanter's pluralist views goes down that way because he debunks the idea that within a given social setting there can be the law, on the one side, and the rest of non-legal normative orderings, on the other. Galanter rejects the idea that the relation between law and non-legal entities is a clear-cut, bipolar one, whereby law stands on one pole and social

[12] H.L.A. Hart, *The Concept of Law*, ed. by Penelope A. Bulloch & Joseph Raz, Oxford, Oxford University Press, 1994.

[13] Ivi, p. 91. Unfortunately, he gets Malinowski thoroughly wrong, as Hart claims that these are types of society where only primary rules of conduct are present, while the Polish anthropologist had in mind, as I said before, a far broader civil-law-like system with complex procedures for enforcing rules. Nonetheless, a fact remains: Hart acknowledges that the legal phenomenon must be characterised in such as a way as to encompass societies that lack the state apparatus.

[14] On this issue, I would like to say in passing, Hart is very ambiguous. He continually oscillates between two conflicting views: primitive laws are laws that lack a more complex structure made up of secondary rules for recognising, creating and enforcing rules, on the one hand; primitive laws are only law-like systems because a proper legal system is a combination between primary and secondary rules, on the other hand.

reality on the other pole. He maintains that legal reality is a continuum, where "no dichotomous distinction can be made"[15]. He then introduces the image of

> a scale with pure types at either ends. At the official 'exogenous' end might be formal written rules remote from everyday understandings, enunciated by trained specialists, enforced by governmental coercion. At the indigenous end would be simple (?) rules, close to everyday perceptions, applied by non-specialists, internalised by participants and enforced by diffuse social pressure[16].

In brief, there are two basic "pure", ideal types of ordering to which the multiple normative orderings approximate to a greater or lesser degree: an exogenous specialised one managed by experts and implemented by governmental agencies and an indigenous unspecialised one managed by non-experts and implemented by the rule-abiders in general. The pure prototypes, Galanter clarifies, can only be imagined, for social reality is generally inhabited by spurious and mixed types.

The point is by no means facetious. Galanter claims that the distinction between official law and indigenous law is artificial, historic, constructed. Therefore, if we look for the distinguishing line between the legal order and the other rule-governed contexts, we should take into account the historical contingencies and power differentials that have played a role in drawing the boundaries of the legal field and have dislodged a wide array of former legal actors from it.

What are its endpoints?

Let me now try to tease out (what I believe to be) the most challenging claim raised by legal pluralism once we push it to its extreme endpoint: the attribution of the label "law", if not arbitrary, is at least contingent. One normative system imposes its own set of rules and administrative mechanisms on the other normative systems, which are demoted to the non-legal sphere. This theoretical

[15] Galanter, "Justice in Many Rooms", cit., p. 18.

[16] *Ibid*.

move can be seen as a fierce attack on all traditional jurisprudential approaches that omit to take up the issue of how a given legal system entered into force and, because of this, cut out other legal actors and systems. In particular, positivist theorists' struggles to define the boundaries of law, from John Austin to Hans Kelsen and Hart, prove nothing other than sophisticated attempts to confer an aura of "scientificness" on a *political* state of affairs whereby a normative entity prevailed over others.

If from the point of view of the critique of ideology this claim is well-placed, it gets caught in a series of theoretical dilemmas. One of the most debated ones is what William Twining calls "problem of the definitional stop": "If one opens the door to some examples of non-state law, then we are left with no clear basis for differentiating legal norms from other social norms, legal institutions and practices from other social institutions and practices, legal traditions from religious or other general intellectual traditions and so on"[17]. Such a conundrum is hardly new in the field of legal theory. In his path-breaking inquiry into the nature of law as institution, Santi Romano evokes the Latin sayings "ubi societas ibi ius" and "ubi ius ibi societas" to make it clear that law is involved whenever a working interaction comes into being[18]. On this *panlegalist* account, law is no longer viewed as a special system holding sway over other normative systems. Law is a specific mode of organisation, as Karl Llewellyn insists in his seminal article on law-jobs[19] – one that defines relationships, allocates authority, settles trouble cases, handles social change. Every organised group that wants to outlive the existence of actual members needs an organisational device of this sort. The specificity of law dissolves at a stroke, to such a degree that nothing helps discriminate between legal institutions and practices and other social institutions and practices.

[17] W. Twining, *General Jurisprudence. Understanding Law from a Global Perspective*, Cambridge, Cambridge University Press, 2009.

[18] S. Romano, *L'ordinamento giuridico*, 2nd revised and enlarged edition, Firenze, Sansoni, 1977.

[19] K.N. Llewellyn, "The Normative, the Legal and the Law-Jobs: The Problem of Juristic Method", *Yale Law Journal* 49 (1940), 8, pp. 1355-1400.

The symbolic weight of this theoretical move is considerable. The self-validating legitimacy linked up with the label "law" is no longer available to one system only. The struggle over meaning that lies beneath the attribution of this label is laid bare. Many sub-state religious and ethnic groups, along with sub- and supra-state corporate groups, businesses, and organisations, can claim to be the creators of their own law, as they all rely on organisational devices carrying out law-jobs. Is this not Carl Schmitt's prophecy in the 1930 essay "Ethic of State and Pluralistic State"[20]? Schmitt is well aware that no Hobbesian state has ever existed, in which masses of atomistic, rational, self-centred individuals are directly connected to the state. Much in the same vein as Ehrlich (albeit with quite different intents), Schmitt maintains that every individual belongs to a group, which confers a particular kind of identity on the former. The identity of individuals is moulded within the communal context to which they belong: religious groups, civic associations, schools, universities, unions, parties, and many others. Accordingly, Schmitt goes on to say, the individual "finds obligations of loyalty and fidelity everywhere"[21], to the extent that "[t]he unity of the state has always been a unity of social multiplicity"[22].

If this is the analytical portrayal that Schmitt shares with contemporary supporters of legal and social pluralism, the conclusion he draws is significantly different. His passion for social and political homogeneity urges him to look at the innate pluralism of society as something to combat and reduce. He fears that, if discrete groups prevails over the state as a uniform entity establishing the conditions of "normal life", then what counts as a common standard in the here and the now of the community life is decided by the groups themselves, or worse, by some of them[23]. In Schmitt's view, only the state is able to mediate among the

[20] C. Schmitt, "Ethic of State and Pluralistic State", trans. David Dyzenhaus, in C. Mouffe (ed.), *The Challenge of Carl Schmitt*, London, Verso, 1999.

[21] Ivi, p. 196.

[22] Ivi, p. 201.

[23] To best understand the core of this criticism, I should go into what A. Salvatore and I called "Schmitt's institutional turn", whereby Schmitt came to revise substantial parts of his previous decisionist view of law and politics. See M. Croce, A. Salvatore, *The Legal Theory of Carl Schmitt*, Abingdon, Routledge, 2013.

conflicting interests of the many institutions that inhabit the social domain. If the state collapses and social groups acquire power, he contents, "one or the other social group, and not the state, determines the concrete normality of the situation in which individuals live"[24]. Hence, the state has to make sure that *social* pluralism – which is an inevitable trait of society – does not turn into a *legal* pluralism – which is a degeneration of social pluralism – whereby groups and associations themselves claim to have the right to produce and enforce legal rules within the limited but inviolable domain of their territory or field.

If Schmitt's radical understanding of political homogeneity and its totalitarian upshots are no doubt misplaced and deplorable, it cannot be denied that he sagaciously predicted the havoc that legal pluralism would cause. Legal pluralism in today's Western political scenario is casting a sinister light on the credo of liberal states, which appears more and more as the self-celebration of an arbitrary expropriation. The political paradox is that this type of conflict exceeds the traditional boundaries of constitutionalism and the comforting refrain of public reason. These traditional elements of liberal politics show hegemonic discourses designed to justify a juridico-political state of affairs which produced and still produces exclusionary effects. As Ran Hirschl and Ayelet Shachar observe, at present what is at stake is precisely the state's claim to serve as a common framework, an ultimate horizon. When legislatures and courts tackle this radical challenge, the jargon of tolerance and societal pluralism proves not enough. They have to realise that the current situation reflects "a more foundational power struggle between competing systems of knowledge and interpretation: the earthly, human-enacted constitution and the claim to speak in a vernacular of a revealed or divine authority. When faced with this kind of a challenge, even the most generous and even-handed officials of the state are structurally not in a position to rule from a 'point of view from nowhere'"[25].

[24] Ivi, p. 99.

[25] R. Hirschl, A. Shachar, "The New Wall of Separation: Permitting Diversity, Restricting Competition", *Cardozo Law Review*, 30 (2009), pp. 2535-2560.

Though Hirschl and Shachar in this juncture specifically refer to religious bodies of norms, the law of religious groups is not the only type of ordering that poses a threat to the would-be uniqueness of state law. In fact, if we want to do justice to panlegalism, we have to take its challenge seriously. To my knowledge, Gordon R. Woodman offers its most compelling formulation: if both theoretical and empirical investigation have so far failed to indicate a distinctive line between (what in a given geo-historical context is regarded as) "the law" and other normative systems, this is because such a distinctive line is a matter of degree, law covering "a continuum which runs from the clearest form of state law through to the vaguest forms of informal social control"[26]. Woodman bases this conclusion on a more general theory of rules – which I claim to be in line with Hart's practice theory[27] – that leads to the truly panlegalist conclusion. In fact, Woodman believes that all types of rules are based on "acceptance" on the part of a population[28], and that their specificity lies in the fact that members look at these rules as public standards. This is all the more important, as it illustrates that the property of "being legal" is at one with "being a standard". More specifically, though I cannot delve into this topic here, a standard is something which serves as a common instrument of coordination, whereby one follows what the rule states not because of one's personal motivations but because the others are supposed to be adopting the same conducts in the relevant circumstances.

The conjunction between these two aspects of Woodman's argument is manifest: if the only and genuine source of effectiveness and validity of rules is nothing other than rules being used as standards, it follows that no distinctive line at all can be drawn between, say, the rules governing dress habits and those prohibiting murder. This is an *hyper-panlegalism*, because it submits that there are

[26] G.R. Woodman, "Ideological combat and social observation. Recent debate about legal pluralism", *Journal of Legal Pluralism*, 42 (1998), pp. 21-59, p. 45.

[27] See M. Croce, "All Law is Plural. Philosophical Foundations for Legal Pluralism", *Journal of Legal Pluralism and Unofficial Law*, 65 (2012), pp. 1-30.

[28] A population is defined as a group of humans that "may be a handful of people or a large number running into millions" (G. R. Woodman, "Diritto consuetudinario e diritti consuetudinari: una considerazione comparativa sulla loro natura e sulle relazioni tra tipi di diritto", *Politica & Società*, 2 (2009), pp. 91-107, p. 92).

as many laws as there are sets of rules serving as standards, from etiquette to religion, from university regulations to international law. No theoretical tool can be applied which may help scholars pigeonhole these bodies of rules as legal or non-legal. The most disconcerting consequence in terms of mainstream jurisprudence – which I believe to be not disconcerting at all, for this is Hart's own conclusion[29] – is that state law is nothing but the set of rules governing the activities of a specific population, that is to say, those who "observe them being the officials and others who operate the various institutions of the state"[30].

Who recognises what?

In the light of what I said above, there is little doubt that legal pluralism today is posing a threat to the very same narrative of the state as the place where the conflicts of the civil society have to be solved. The resources of public reason run out in the face of conflicts that overcome its bounds. The whole structure of the state has to be rethought in order to face the panlegalist challenge.

Based on a solid background of empirical research, Woodman outlines different options to face this challenge. He examines two alternative ways for the state to develop a relationship with the laws that are followed and accepted within the various sub-state fields by various sub-state populations. He distinguishes two types of recognition, which are each meant to encourage or give effect to another non-state law: *institutional* and *normative* recognition.

When a state adopts the first type of recognition, it acknowledges the existence of institutions and structures that belong to non-state laws and recognises the legal validity and legal effects of the activities they carry out. Such an institutional recognition restricts the jurisdiction of state agencies and allows non-state ones to wield authority over those areas from which the state withdraws. Even though in this case, Woodman explains, the relative competences of state and non-state agencies are formally established, institutional recognition can in some

[29] See M. Croce, "A Practice Theory of Legal Pluralism: Hart's (inadvertent) Defence of the Indistinctiveness of Law", *Canadian Journal of Law and Jurisprudence*, 24 (2014), 1, pp. 1-21.

[30] G. R. Woodman, "Diritto consuetudinario e diritti consuetudinari", cit., p. 97.

circumstances operate tacitly, when the institutions of state law decline to exercise functions in cases in which those of another law are acting. On the contrary, normative recognition does not presuppose any restriction on the state jurisdiction. Rather, the state recognises some of the norms of the non-state law and takes it upon itself to apply them. From a formal viewpoint, we could say that the norms of the recognised law are replicated within state law. Generally speaking, state law can accept some of the norms of another law in a given area but can establish some sort of principle which excludes the recognition of other norms which are believed to be at odds with relevant parts of state law.

Woodman distinguishes two scenarios that follow from either one or the other recognition. Institutional recognition would lead to a condition of what he calls "deep legal pluralism", that is to say, distinct sets of laws with their own different sources of authority and separate jurisdictions. Normative recognition would eventuate in "state law pluralism", in which a (by and large) uniform state law would make room for distinct bodies of norms that have their origin in different normative contexts. As elsewhere noted by Woodman[31], whether state law pluralism can really be categorised as a type of legal pluralism is a moot point. Famously, John Griffiths rejects this view: what he defines as "weak" legal pluralism is but a spurious type[32]. In his opinion, when the state incorporates a norm which belongs to another type of law, the latter cannot be considered as a type of law by any means. State law retains his supremacy over other normative non-legal orderings. From a *descriptive* point of view, Griffiths holds, it would make no sense to account for state law pluralism as the coexistence of two laws. The distorting view that state law pluralism amounts to a condition of legal plurality is the result of a "juristic" reading of the relationship between official law and non-legal orderings.

If this is so, then we are left with a serious dilemma: the state as a political structure is not compatible with a pluralist scenario. Either we have state law,

[31] G. R. Woodman, "Ideological Combat and Social Observation. Recent Debate about Legal Pluralism", cit.

[32] J. Griffiths, "What is legal pluralism?", *Journal of Legal Pluralism and Unofficial Law*, 24 (1986), pp. 1-55, p. 5.

which retains its pre-eminence over other types of orderings and preserves the separating line between the legal and the non-legal, or we have a social setting characterised by a multiplicity of legal sources, legal actors, legislative authorities and judicial forums, where none of them enjoys more power than the others. As this dilemma materialises, the very possibility of legal pluralism in the contemporary juridico-political scenario vanishes. The act of recognising non-state law turns out to be a further act of subjugation whereby state law is sanctified as the normative order which takes it upon itself to recognise and thus legitimise the others.

A way to solve this dilemma is to revise the frame itself within which the process of recognition occurs: to realise that the interplay between laws exceeds the mere relationship between bodies of rules and to concentrate on the multifaceted dynamics that make a given set of normative prescriptions legal. Such an overhaul of the theoretical framework would allow conceiving legal pluralism as a more complex constellation of actors and normative claims that are engaged in a struggle over meaning to determine what counts as a legal standard in the here and the now of a specific geo-historical context. On this account, legal pluralism would not be an actual state of affairs whereby types of law coexist, but a methodological approach to the controversial interplay between the social and the legal.

The way to this approach has been paved by Franz von Benda Beckmann's understanding of legal pluralism as a set of analytical tools for comparative purposes[33]. He sees the pluralist toolkit as a theoretical set of criteria designed to help scholars ascertain similarity and difference in cross-societal and diachronic comparison. Therefore, *pace* Griffiths, legal pluralism is not the description of the concrete coexistence of legal orders. Legal pluralism is a *theoretical possibility* that the models elaborated at a conceptual level actually coexist in the same time and space. Benda-Beckmann's is by no means a reductionist claim. He contends that, although law is *prima facie* comprised of duty-imposing and power-

[33] F. von Benda-Beckmann, "Who is Afraid of Legal Pluralism?", *Journal of Legal Pluralism and Unofficial Law*, 47 (2002), pp. 37-83.

conferring rules, it is first and foremost a set of *cognitive* indications that are involved in the construction of social reality. Legal rules establish what counts as a valid action and/or interaction in a given geo-historical context and, at the same time, exclude alternative actions and interactions. The types of actions and interactions whose validity has been legally established are presented as binding and, when necessary, are accompanied with a threat of sanction. The other standards are considered as null from a legal vantage point, and thus devoid of official consequences. In doing so, the law promotes a series of "objectified reifications" with which rule-abiders are required to conform if they want their actions to have legally valid consequences.

Benda-Beckmann concludes that, in order to be defined as legal, a given social phenomenon must be assessed according to specific, although changing variables: the scope of institutionalisation; the extent to which knowledge, interpretation and application of law have been differentiated from every day knowledge; the extent of professionalisation, theoretisation and scientification; the extent to which legal rules are defined as mandatory; the technology of transmission; the social and/or geographical scope for which validity is asserted; the type of foundation that gives it validity (be it a customary practice, a social contract or a written constitution).

This contribution is an important step forward for legal pluralism and has an important lesson to teach about the issue of recognition. Indeed, Benda-Beckmann makes it clear that the process of recognising alternative types of law does not merely involve a negotiation over the rules that can find space within state law. Nor does it entail a straightforward withdrawal of state law in specific areas. On his account, legal pluralism reveals itself as a sounder approach to the study of the organisational dynamics of groups, fields and sectors in accordance with a set of criteria that allow assessing their normative structure. If the coexistence of legal orders does not merely have to do with the integration of distinct bodies of norms, research on legal pluralism has to be based on a wide-spectrum analysis of the forces and dynamics operating behind the curtain of normative practices. To put it otherwise, if law cannot be reduced to prohibitions and attributions of powers, then scholars have to take seriously the regimes and processes of knowledge that

inform the activities of those who administer law (that is to say, the aspects of professionalisation, theoretisation and scientification Benda-Beckmann believes key to providing an account of the various types of law). By the same token, scholars have to place their attention on what makes law mandatory in the here and the now for a range of people and thus shape their perception of the role (their) law play in the development of their existence. In other words, when observing and describing a law, what has to be traced is first and foremost the justificatory schemes a type of law deploys and sets in motion in order to claim, obtain and maintain unquestionable pre-eminence over other normative orderings.

This broader view of law has two main advantages. First, it ducks the panlegalist impasse I examined above because it does not take it for granted that every set of rules is *ipso facto* legal. Indeed, rules must be positioned in a context that makes them legal – a context that, however, does not amount either to a mere relation of reciprocal validation among norms or to a mere set of procedures of creation and enforcement. The "legality" of a normative regime involves aspects that call for an analysis of the complex structure in which law is brought into life and nurtured: categories of perception, differentials of power, distribution of knowledge, differentiation of roles. If this is true, then no previous definition of law can be *in se* the determinant of whether or not a set of rules is legal. What must be inspected is the multiple ways in which the set of rules in question operates on social reality: from the range of people who are called upon to oversee rules and to apply them, through the degree of formality that characterises this structure, to its specific impact on people's life and identity. In other words, this perspective recommends a change in focus. Legal scholars should not concentrate on how much the label "law" can be stretched in order for it to cover a broader set of phenomena than the law of the state. Rather, their objective should be the identification of the characteristics whereby a given normative system ends up being key to a population's life.

The second chief advantage of this view is that it serves as a plea for a multifocal investigation, one that relies on multiple disciplines, methodologies and forms of knowledge. In this framework, conceptual analysis proves as

indispensable as it is a micro-inspection of the social context where law is at work, based on socio-anthropological enquiries. The bounds of different disciplines have to be reworked so as that they all may benefit from each other's findings and jointly contribute to a more refined account of the legal phenomenon. Legal theory as a whole turns out to be as one component, though an important one, of a socio-anthropological investigation of social order.

In the wake of this change in focus, legal pluralism appears as the deconstruction of a narrative that has long framed the legal discourse in terms of prohibitions, authority and adjudication and pluralism in terms of conflict between orderings. Legal pluralism as an approach is conducive to quite a different image of the legal field as a sphere where an ongoing symbolic struggle takes place. This struggle is meant to determine "what counts as what" in a given geo-historical context, while this "what" is assigned a special position in the semantic tapestry of the population who lives therein. This is why the plurality that matters comes about at the level of language and discourse, to the extent that actual negotiations among groups and authoritative bodies proves epiphenomenal. In this new light, pluralism has mainly to do with the disposal of the hegemonic attitude whereby every process of legislation and adjudication is couched with reference to a pre-structured lexicon, which transforms and transfigures what it wants to include and legitimise. Legal pluralism is the recognition that the traditional rhetoric of state law (along with its conceptual tools, symbols and justificatory apparatus) should lend itself to deep revisions if law wants to stay abreast of the changes that are affecting today's world[34].

[34] To offer a telling example I cannot explore here, the regulation of sexuality shows how pluralism exceeds the cramped area of mutual recognition among orderings. In the wide debate on homosexual marriage, the stripe of authors sensitive to the struggles of homosexual people and yet suspicious of institutional forms of inclusion (such as marriage) argue for a form of legal pluralism that at the same time would be able to trigger a profound revision of state law. In short, the reframing of state law in terms of personal laws – which would allow circumventing the heated polemic on whether or not marriage is a "straight" institution – would be conducive to a truly pluralist scenario. For instance, Jeffrey Redding argues that only a personal law system could really offer gays and lesbians "the very real possibility of exercising a certain kind of political ownership over 'domestic partnerships', 'civil unions', or other forms of gay and lesbian relationship-recognition that any given state legislature might create" (J.A. Redding, "Dignity, Legal Pluralism, and Same-Sex Marriage", *Brooklyn Law Review*, 75 (2010), pp. 791-863, p. 836 . The question of whether traditional instruments of Western legal orders should be overhauled in order to accommodate emerging forms or relationships is a legal-pluralist question, one that casts

Conclusion

Now, let me get back to the initial question: Why is it important to ascertain what legal pluralism is about? Why bother? I sought to show that it is by no means either a semantic or a merely theoretical issue. Getting legal pluralism right has many practical bearings. Among other things, it paves the way for a pondered rethinking of traditional state law in ways that most probably are at odds with what today is emerging as global legal pluralism[35]. Offering a different understanding of pluralism, one that really challenges tradition assumption of the law and politics of statehood, is possible. The image of future we are left with is perhaps disquieting, since the conflicts legal pluralism carries with itself cannot be settled with the resources of liberal political and legal thinking. Legal pluralism is a theory of society and social order, a method for inspecting social reality in such a way as to map its complex organisations dynamics, a plea for a disenchanted meta-history of Western societies. As such, legal pluralism crosses the boundaries of disciplines and calls for wide-ranging analyses of what brings a social collectivity into existence and what are the costs of this generative enterprise. In this fashion, the strategies to accommodate pluralism are various and exceed the mere interplay between orders. The first step, in any case, is the disposal of traditional views of law that isolate it and subtract it from the context law is designed to govern and preserve. So, if the claimed fathers of legal pluralism were wrong as to what legal pluralism is, they were certainly right in defying hegemonic visions that mainly contribute to perpetuating a comfortable status quo.

light on the limits of a state-centric model whereby the state operates as an ethical machinery of selection and legitimation.

[35] See in this special issue Marco Goldoni, "The politics of global legal pluralism".

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