

Global Legal Pluralism

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Some challenges of legal globalization closely resemble those formulated earlier for legal pluralism: the irreducible plurality of legal orders, the coexistence of domestic state law with other legal orders, the absence of a hierarchically superior position transcending the differences. This review discusses how legal pluralism engages with legal globalization and how legal globalization utilizes legal pluralism. It demonstrates how several international legal disciplines---comparative law, conflict of laws, public international law, and European Union law---have slowly begun to adopt some ideas of legal pluralism. It shows how traditional themes and questions of legal pluralism---the definition of law, the role of the state, of community, and of space---are altered under conditions of globalization. It addresses interrelations between different legal orders and various ways, both theoretical and practical, to deal with them. And it provides an outlook on the future of global legal pluralism as theory and practice of global law.

INTRODUCTION

Legal pluralism, long a special interest within the specialist discipline of legal anthropology, has recently moved into the mainstream of legal discourse. The most important reason is globalization: Many of the challenges that globalization poses to traditional legal thought closely resemble those formulated earlier by legal pluralists. The irreducible plurality of legal orders in the world, the coexistence of domestic state law with other legal orders, the absence of a hierarchically superior position transcending the differences---all of these topics of legal pluralism reappear on the global sphere. As a consequence, students of globalization have become interested in

legal pluralism, and legal pluralists have endorsed globalization as a new field to which to apply their expertise.

This interest is demonstrated not just by a number of surveys (Merry 1992, von Benda-Beckmann 2001, Gessner 2002, Anders 2003, Pes 2003, de Julios-Campuzano 2005, Griffiths 2006, Berman 2007b, von Benda-Beckmann & von Benda-Beckmann 2007, Tamanaha 2008, Twining 2010), but also by the many recent studies of supra-, inter-, and transnational law that invoke, in one way or another, legal pluralism. This creates a fast-growing but disparate literature, which is increasingly hard to survey in its entirety

The new success of legal pluralism is ironic in view of the virulent criticism of the concept within anthropology: its propensity toward essentialized and homogenized concepts of culture and of law, its difficulty in defining and distinguishing law, its perceived ethnocentrism, its romantic preference for plurality and locality over uniformity and universality. The core question for this newly emerging concept of global legal pluralism is whether it constitutes a mere continuation of traditional legal pluralism---perhaps a mere broadening of focus that now includes transnational, supranational, and international law in the mix of legal orders it looks at---or whether it is something qualitatively new. The related question is whether the new concept can overcome the criticism. The verdict on both questions is not yet out. A new paradigm may be in the making, though whether it will be compatible with traditional legal pluralism remains to be seen.

Although the term global legal pluralism is becoming more frequent (Teubner 1996; Snyder 1999; Perez 2003, 2004; Koskenniemi 2005; Merry 2005, 2008; Michaels 2005; Rajagopal 2005; Berman 2007b), the focus here is broader and covers the interplay between legal pluralism and legal globalization more generally. Neither political pluralism nor general normative pluralism, by contrast, is discussed as such. This review discusses the disparate literature with a view primarily not to its research objects but to its concepts and methods. The question is not what studies have found but how ideas of legal pluralism are used and how useful the concept is for phenomena of the globalization of law. Also, this review adds the perspective of legal theory and doctrine to that of legal anthropology or legal sociology.

The next section of this review discusses two converging developments leading toward concepts of legal pluralism that, owing to their origins, still remain distinct: one that originates in legal pluralism and one that originates in legal globalization. The section on “Disciplines” demonstrates how several international legal disciplines---comparative law, conflict of laws, public international law, and European Union law---have slowly begun to adopt some ideas of legal pluralism. The “Themes” section asks how traditional questions of legal pluralism---the definition of law; the role of the state, of community, and of space---are altered under conditions of globalization. The section entitled “Interrelations” addresses interrelations between plural legal orders and various ways, both theoretical and practical, to deal with them. The concluding section provides an outlook on the future of global legal pluralism as theory and practice of global law.

DEVELOPMENTS

The term global legal pluralism suggests a unified concept, but such a concept does not actually exist. We can observe two converging developments, which lead to two different concepts of global legal pluralism. The first of these developments originates in the concept of legal pluralism as developed in anthropology and sociology and adds globalization as an element. The second development, situated in legal theory and doctrine, starts from globalized law and adds legal pluralism. Both combine pluralism and globalization, but both still display their different origins.

The Globalization of Legal Pluralism

The traditional concept of legal pluralism, developed in legal anthropology and sociology to analyze overlapping normative orders within societies, became popular in the 1970s and 1980s. Definitions of legal pluralism abound but diverge (for discussion, see especially Woodman 1998, von Benda-Beckmann 2002.) However, there is a wide consensus that legal pluralism describes a situation in which two or more laws (or legal systems) coexist in (or are obeyed by) one social field (or a population or an individual). In this way, legal pluralism challenges a perceived monopoly of the state in making and administering law.

Contemporary applications of these concepts must take globalization into account, and many do. The question that remains is whether globalization forces theories of legal pluralism into a new paradigm or whether it merely requires an adaptation. For some, global (sometimes postmodern) legal pluralism represents a third phase, following Merry's (1988, pp. 872–74) distinction of two phases: classical and new legal pluralism. Classical legal pluralism was confined in two ways: geographically, it concerned only the interplay of Western and non-Western laws in colonial and postcolonial settings; conceptually, it treated the indigenous nonstate law as subordinate to the official law of the state as introduced by the colonizing power. The new legal pluralism extends the concept to Western societies and the interplay between official and unofficial law more generally. In this genealogy, the third stage has an even broader focus beyond the individual localized state or community (whether colonial or Western) and toward the transnational sphere (Teubner 1992, 1996; Santos 2002, p. 92; Hertogh 2008, pp. 18–20; Tamanaha 2008, pp. 386–390).

There are problems with this genealogy. As a term, legal pluralism has been used widely only since the 1970s; the colonizers never used it. As an empirical fact, by contrast, legal pluralism existed in the West long before the colonial engagement of Western and non-Western norms. In particular, medieval European law (Goldman 2007, pp. 142–43; Tamanaha 2008, pp. 371–381) and the *ius commune* (Tontti 2001) are now sometimes invoked as alternative precursors of contemporary global pluralism. Similarly, the English common law had experience with pluralism before and beyond colonialism (Arthurs 1985, Sheleef 2000, Woodman 2006).

As an intellectual history, the genealogy describes one particular development especially within Anglo-American research into legal pluralism, but this development is not the only one. Early studies of community-based pluralism within Western systems---Ehrlich's "living law" in Europe, Llewellyn's and Macaulay's studies in the United States, to name just a few---can be added to the genealogy as a prior stage without too much trouble. By contrast, different early conceptions of pluralism based less in communities and more in institutions, established, e.g., by Gierke, Hauriou, Santi Romano, and Gurvitch, must be ignored (Corsale 1994), as are more generally the quite different French and Quebecois traditions of legal

pluralism (Eberhard 2001) and non-Western perspectives on legal pluralism, as formulated in particular by Chiba (1986, 1989, 1998). There is, in other words, a pluralism of pluralisms that the linear genealogy does not fully capture.

Moreover, and importantly for this survey, globalization characterizes not just the third phase---global legal pluralism---but also the prior two, classical and new legal pluralism. The encounter between official and unofficial law addressed by classical pluralism is really a consequence of early globalization, which enabled colonization and in turn made possible the encounter between Western and non-Western laws and normative orders (von Benda-Beckmann 2001, p. 44; Merry 2006b). The new legal pluralism, by applying experiences from colonial law to Western legal orders, elevates legal pluralism (somewhat paradoxically) to a universal concept (Woodman 2007, p. 162). If all legal systems, Western or non-Western, are plural (Merry 1988, pp. 869, 873), then legal pluralism is a global phenomenon. The third phase of legal pluralism is then an almost natural continuation of the second, a combination of different internally plural legal systems.

von Benda-Beckmann (1988, p. 900) has argued that such genealogies broaden the scope of inquiry but do not create methodological paradigm changes. Such a paradigm change, or at least shift in perspective, was posited by Griffiths's (1986) distinction between weak and strong pluralism, which coincides, to some extent, with Merry's two stages. Early studies of legal pluralism in colonies, Griffiths proclaims, describe a legal pluralism that is weak because nonstate law is hierarchically superior to, and depends on the recognition by, the state. They reflect a lawyerly perspective. Strong legal pluralism, which alone Griffiths considers to be true pluralism, depicts an irreducible set of legal orders that can be partly in harmony, partly in contest with each other. In a similar vein, Santos (2002, p. 95), Woodman (1998), and Griffiths (2002) distinguish internal legal pluralism---pluralism within, and administered by, one legal order, again typically (though not necessarily) the state---and deep (or "external"; Anderson 2005, pp. 53–54) legal pluralism, the ultimately insurmountable plurality of laws.

This suggests the possibility of a third paradigm, though its specifics are not yet clear. For example, Santos (1987, pp. 297–99, 2002, p. 92) explicitly posits legal

pluralism in the third phase as the key concept in a postmodern view of the law characterized by interlegality, though it remains unclear whether what defines the third stage is the shift in the debate from national to global legal orders or the postmodern condition of modern law more generally. Teubner (1996) posits a paradigm shift from (ethnic) groups to discourses, which would indeed represent a methodological shift, but hardly one necessarily related to globalization.

The Pluralization of Global Law

At the same time that students of legal pluralism have begun to adopt ideas of globalization, students of legal globalization have become interested in the idea of legal pluralism. They use the concept differently, though (Walker 2010). Scholars of legal globalization are often interested more in the global than in the local, more in legal structures and institutions than in the culture of the communities that create them and live by them, more in a general theory of globalized law than in specific applications, more in the element of plurality and diversity of legal orders---many of them based directly or indirectly on the state---than in the specifics of nonstate law.

One topic of globalization discourse---the rise of global economics at the cost of politics and the state---is reflected in the interest of scholars in a *lex mercatoria*, the alleged self-created transnational law of global commerce (e.g., Cutler 2003, Stone Sweet 2006). Among the several theoretical foundations given for *lex mercatoria* (de Ly 1992), legal pluralism is only one, more in form on the institutional theory of Santi Romano than the community-based theory of colonial pluralism (Kahn 1982). Indeed, the alleged community of transnational merchants is rarely analyzed in depth (but see Dezalay & Garth 1996) and quite certainly is less homogeneous than most communities in traditional studies of pluralism (e.g., Lagarde 1982). Most studies are focused more directly on the content of the legal rules of *lex mercatoria* than on its practice (e.g., Berger 1999), more on its practical applicability by arbitrators and courts than on its social interrelation with state law. Although the autonomy from the state and the self-sufficiency of *lex mercatoria* are often posited, the law of international commerce more likely constitutes an amalgam of state and nonstate rules and institutions and does not differentiate between the two (Michaels 2006).

On the basis of the new *lex mercatoria*, Teubner (1996) has developed a broader, influential theory of global legal pluralism. The hypothesis, grounded in systems theory, is that law is not generated by the state but instead creates itself (autopoiesis), and that the center of lawmaking has moved away from the state and into the periphery of transnational actors. This law is not community-based, and Teubner readily concedes its weak social embeddedness. Instead of communities, he views discourses as the basis of legal pluralism. Under this approach, law exists through the combination of a structural element (use of the binary code legal/illegal; Teubner 1992) with an institutional element (institutionalized processes of secondary rulemaking). The consequence is not a simple shift of law from one system---the political---to another--- the economic, but instead an expansion toward numerous autonomous global functional subsystems of world society, with which different legal orders are coupled (Teubner 2004). It follows that the approach is not only applicable to economic law, but amounts to a general approach to legal pluralism (Teubner 1992) that can encompass, e.g., religious law (Bälz 1995).

Many studies of nonstate law in globalization share the emphasis on functional coupling and institutional foundation over social embeddedness, even if they do not necessarily adopt Teubner's systems theory. This is true for studies of a *lex sportiva* (an autonomous law of sport) (Foster 2003, Latty 2007), a *lex constructionis* (an autonomous law for construction projects) (Molineaux 1997, Perez 2002, Vec 2006), *lex digitalis* (a self-administered law of the Internet) (Karavas & Teubner 2003), and other systems of nonstate transnational law. The result is a global legal pluralism defined more from the top down than from the bottom up: an internal differentiation of global law, not a multitude of varied local laws. Although these approaches helpfully point to law beyond the state, in positing autonomous orders they risk overstating the internal coherence and external autonomy of the transnational legal orders they depict.

DISCIPLINES

Günther & Randeria (2001, p. 21) rightly point out how the three disciplines most equipped to deal with the transnationalization of law---comparative law, private

international law (conflict of laws), and public international law---have been slow to embrace globalization and, one may add, legal pluralism. However, these and other disciplines are beginning to take on ideas of legal pluralism. Mostly what they embrace is weak legal pluralism---nonstate law as inferior to and managed by the state. Nonetheless, the intensified attention to legal pluralism in traditional doctrinal fields may revive legal pluralism at large.

Comparative Law

Comparative law long focused on official, state-based law and left nonstate law to other disciplines, most importantly to anthropology and ethnology. Comparative lawyers looked for the law of countries and assumed their content was unequivocal; even calls to look for the law in action as opposed to law on the books rarely went beyond looking to what state courts do. Supra- and international law were rarely objects of comparative law (Reimann 2001); the same is true for nonstate laws except as elements within the law of states (Bennett 2006). Legal systems are still grouped into legal families defined largely by Western origins; if nonstate laws are considered at all, they are often lumped together in a subsidiary category of “other legal systems” or “religious laws” and “tribal laws.” Even where nonstate law, especially Islamic law, becomes the focus of comparative lawyers, it is often used to designate a legal family and thus suggests, falsely, internal uniformity both of Islamic law itself and of law in Islamic countries.

Slowly, this is changing in two ways relevant for global legal pluralism. First, new attempts at classification take up the anthropological quest not to prioritize Western state law (Moore 1969). Often, they are based not on legal origins but on structural considerations, be they Weberian ideal types (Mattei 1993) or modes of reasoning (Glenn 2007) and are therefore open, at least in theory, for nonstate law. Second, the internal heteronomy of legal systems, traditionally recognized especially by surveys of non-Western laws (Menski 2006), is now more broadly recognized in the concept of mixed legal systems. That concept is no longer confined to legal systems that combine elements of civil and common law but has been extended to all legal systems within which multiple legal traditions are combined, in various ways---which means, effectively, every legal system (Örücü 2007, p. 177). In this

later version, the idea of mixed legal systems is closely linked to that of legal pluralism (Palmer 2008), and pluralism is global because the internal pluralism is the result of massive legal diffusion (Twining 2009, pp. 262–92), including imports of non-Western law into Western countries (Shah 2005, Shah & Menski 2006). The consequence is a stronger emphasis on the dynamic interrelations between laws. Nonetheless, even mixed legal systems are still systems; the interactions between different laws within such systems are not often analyzed.

Conflict of Laws

Conflict of laws is the legal discipline that determines which courts have jurisdiction, which law applies, and what force the decisions a state's courts have outside that state's borders. In the broad sense of a plurality of laws, therefore, legal pluralism has always been its object (Ralsler 2003, Boden 2005). Before the rise of the state, conflict of laws dealt with a myriad of laws, both official and unofficial, and the most important connecting factor was not the territory of a state but rather the community affiliation of the individual (Guterman 1990). Even today, conflict-of-laws rules in colonial and postcolonial settings determine the applicability of the law of internal ethnic or religious communities (Kollewijn 1951, Lipstein & Szászy 1985, Uche 1992). Externally, however, the only applicable law is typically state law, and nonstate law is not designated as the applicable law (Michaels 2005). If culture enters the picture, it is viewed as being represented by states (von Mehren 1981, Jayme 1995).

The exclusive focus on state law was challenged by proposals, made since about the middle of the twentieth century, that courts should accept either the contract itself (as “*contrat sans loi*”; see Beraudo 2005, Gannagé 2007) or the alleged self-made law of the international economy, the so-called *lex mercatoria*, as applicable law (Berger 1999). Such proposals have had some success before arbitrators but not for state courts, which still reject the application of *lex mercatoria*. The same is true, by and large, for religious law before state courts. Proposals to treat the Internet as an independent jurisdiction that deserves deference (Johnson & Post 1996) have been even less successful. Michaels (2005, pp. 1227–35) points out that the state has other ways to account for nonstate law than through choice-of-law rules, in

particular incorporation, deference, and delegation. Berman (2007b, pp. 1196–236) lists a whole series of doctrinal devices to “manage hybridity,” only one among them being conflict of laws.

Proposals for more explicit acknowledgment of legal pluralism have been made. Berman (2005b; 2007b, pp. 1229–36) suggests instilling a more cosmopolitan/pluralist perspective into existing doctrine of conflict of laws to enable courts to look to community affiliation instead of territorial connections and to accept hybrids of multiple laws instead of applying just one law. Teubner & Korth (2009) advocate a bifurcated approach: Conflicts between state law and transnational regimes should be resolved by mixing elements from both legal orders to come up with an intermediate law (see, similarly, Teubner & Fischer-Lescano 2004, pp. 1022–23); conflicts between state law and the law of indigenous cultures should instead be resolved in accordance with the model of the institutionalized and proceduralized protection of basic rights.

Others go beyond adopting and selecting among existing conflict-of-laws doctrines. Wai (2008) proposes transnational private law as a combination of private law and private international law that should be able to deal with challenges of global legal pluralism: Private law contributes its experience with nonstate normative orders; private international law foregrounds its transnational nature. Riles (2008a) argues for an anthropologically informed approach to conflict of laws that can account for cultural conflicts without the need to misrepresent cultures as internally homogeneous entities. Such an approach would also highlight the political nature of mediating such conflicts. Legal pluralism begins to influence conflict of laws; whether conflict of laws will inspire theories of legal pluralism remains to be seen.

Public International Law and European Union Law

Public international lawyers did not, for a long time, address theories of legal pluralism. This is somewhat surprising because the struggle between dualist and monist conceptions of the relationship between international and domestic law closely resembles that between pluralist and monist conceptions of law. Now, legal pluralism is sometimes suggested as a solution, a normative framework to help the

judge choose between international and domestic law (la Torre 1999, von Bogdandy 2008). Delmas-Marty (2002, 2009) argues for a comparable conception of pluralism in the European context and asks, as does La Torre, that this pluralism be ordered by some higher law. Similarly, the pluralism of international law is said to enter domestic courts when they must consider international law, such as when applying the Alien Tort Statute (Ochoa 2005, Antoniolli 2005). Effectively, all these approaches endorse the weak pluralism defined by Griffiths as more in accordance with lawyerly needs: Nonstate law is acknowledged but made dependent on recognition by the state. Even MacCormick, who first (1993) developed a decentralized nonhierarchical concept of the relationship between European and national law, where each of them rests in its own *Grundnorm*, has since weakened this pluralism to a “pluralism under international law” (MacCormick 1999, p. 121). The literature on Europe is discussed by Bacquero Cruz (2008), pp. 412–18).

A second area in which ideas of legal pluralism have been made fruitful is the internal fragmentation of international law. With the proliferation of treaties and institutions and without a central global authority to mediate among these, so the argument goes, international law is becoming decentralized into semiautonomous regimes and can no longer be conceived of as a unity (e.g., Berman 2007a). Consequentially, many speak of the fragmentation of international law, and sometimes ideas of legal pluralism are used to conceptualize the fragmentation. Thus, Burke-White (2004) identifies a tendency toward pluralism, by which he means a weak pluralism within a common and coherent system of international law. Krisch (2006) emphasizes the pluralist nature of global administrative law, in particular the fact that global governance is accountable to a variety of relatively independent actors: domestic courts, international civil society, and competing international regimes. Koskenniemi (2005), the author of the report for the International Law Commission on legal fragmentation, presents a more pessimistic picture of a global legal pluralism as response to fragmented international law; he fears that each expert system will try to impose its own rationality on the entire system. Kennedy (2007) by contrast hopes legal pluralism as the pluralism of professional perspectives can highlight blind spots in international law. As a way to

overcome the alternative among a weak legal pluralism and the chaos of incompatible claims to regulation, Teubner & Fischer-Lescano (2004, 2006) suggest a system of conflict of laws or of rationalities.

THEMES

Legal pluralism as a concept was controversial long before it encountered globalization. The criticism is directed at several of the conceptual prerequisites of legal pluralist ideas. Many of these problems are enhanced under the impact of globalization. The currently prevalent concept of pluralism is still characterized by its origins in the study of small, localized, and relatively cohesive communities, whether in postcolonial settings or in the West. Although this focus has not become useless, it tends to prioritize the “tribal links in the global village” (Arnaud 2003) over other aspects of contemporary life and law.

Law

A perennial topic within the legal pluralism discussion is how to define what should count as law and how law should be distinguished from other normative systems and other modes of governance. Merry (1988, p. 878) argued that “calling all forms of ordering that are not state law by the term law confounds the analysis.” If everything is law, law loses its analytical (and possibly also its normative) force (Koskenniemi 2005, pp. 16–17; Michaels 2005, pp. 1250–59; Teubner & Korth 2009). If, on the other hand, a universal definition distinguishes law from nonlaw, social phenomena are pressed into a potentially distorting categorization.

Not everyone agrees that what is law is even a relevant question (Berman 2007b, p. 18). Griffiths (1986, p. 38) views law as an endpoint of a continuum of normative pluralism; Twining (2000, pp. 83, 231–32; 2010) describes legal pluralism as merely a special case of normative pluralism. Consequently, Griffiths (2005, pp. 63–64) now suggests giving up both law and legal pluralism as concepts because they tend to suggest a difference between law and other normative systems and because use of these terms directs the focus of research on definitional matters and the search for universal concepts rather than on specific analysis. Indeed, for an anthropological

perspective, a focus on what people treat as law may be more rewarding than an analytical definition of law in an abstract way, though such analytical definitions are still common among anthropologists.

By contrast, a distinction between law and other orders is crucial for lawyers as long as the law treats legal and other norms differently (von Benda-Beckmann 2002, p. 40). The question here is not whether nonstate norms and actors are relevant at all---nobody would deny that they are---but whether their relevance requires us to treat them as law. For globalized law, the question links with the two older legal questions discussed above, whether international law is actually law, and whether nonstate law can be the applicable law in a conflict-of-laws analysis.

Suggested definitions of law are too numerous to discuss here, but three tendencies away from essentialist or functionalist definitions toward discursive definitions are worth discussion.

A first tendency develops a universalistic discursive criterion. Luhmann (2004) and Teubner (1993, 1996) define law as the discourse characterized by the binary code legal/illegal; for Günther (2008), use of the word law by various groups enables a universal code of legality that in turn defines the very object of intercommunity debate.

A second tendency starts from a particularistic perspective of different actors: Law for purposes of analysis should be whatever participants in the social field refer to as law (Tamanaha 2000, Berman 2007b) or, disavowing any interpretation by the observer, should be as defined by actual practices in the social field, especially at the moment of contestation of a certain authority (Dupret 2007).

A third tendency combines the universalistic and the particularistic ones and posits that each order defines law for itself and for others, thus with universalistic aspiration but only particularistic effect. Here, the definition of law is negotiated between orders. In Günther's (2008) idea of a universal code, the announcement of law grants a group no more (but no less) than participation in the global discourse. Teubner (1996, pp. 9, 11) appears to go further when he posits that because *lex mercatoria* is law (as discourse), judges must accept and apply it as law, though he ultimately concedes this to be a non sequitur. Berman (2005a, pp. 533–40) takes a

middle position: Although communities can autonomously decide what counts as law, they must convince others through “jurispersuasion” of their competence to do so. Michaels (2005) argues that, at least for purposes of conflict of laws, the definition of a normative order as law depends not on its creator’s definition and convincing power but instead on the observer’s perspective and criteria. The definition of law becomes a task neither for autonomous communities nor for neutral observers but instead for interpersonal and intercommunal negotiation and recognition.

State

It may be fair to say that the main enemy of early studies in legal pluralism was the state, with its assumed monopoly on lawmaking (state centralism) or hierarchically superior position (weak pluralism). Yet even proponents of some kind of strong legal pluralism emphasize the special role that the state has with its monopoly on coercive power and its symbolic identity (Merry 1988, p. 879; Moore 2001, pp. 106–7). The parallel to globalization discourse is obvious: The once-proclaimed end of the state has not occurred, but the state now competes with other states as well as with supra- and international institutions and nonstate actors (Griffiths 2002, pp. 298–302; Michaels & Jansen 2006, pp. 860–73).

Sometimes, mere dichotomies are created: Nonstate law is defined as the opposite of state law, which raises the issue of how to distinguish nonstate law from nonlaw. As a consequence of globalization, scholars are now drawing maps that go beyond the dualism of state and nonstate law, but the analytical value of the categories is not always explained. Santos (2002, p. 85) distinguishes local, national, and global law. Twining (2000, p. 223; 2010) expands this list and distinguishes global, international, regional, transnational, intercommunal, territorial state, substate, and nonstate local laws. Berman (2002, pp. 461–78) juxtaposes subnational, transnational, supranational, and cosmopolitan communities against the state. Gessner (2002) adds a dimension by dividing law into three groups. One contains state law as well as international, supranational, and transnational law; a second group contains nonstate/autonomous norms; a third group contains hybrid norms between state/international legal order and nonstate/autonomous law, autonomously

created but accepted by the state. The central role of the state in the definition of these categories is obvious; in this sense at least, state centralism is not overcome.

One problem is that, in juxtaposing state and nonstate law, the state is sometimes viewed as a monolithic entity sharply distinct from society (Gilissen 1971, Woodman 1998, p. 23; Moore 2001, p. 107; Griffiths 2002, pp. 296–97; Shahar 2008), although already the legal realists in the 1930s established the internal pluralism of the state (Tsuk Mitchell 2007, pp. 55–58, 75–77). This view of the state as internally plural or heterogeneous (Santos 2006), made up of various organizations, cultures, and individuals, translates to the global sphere, in particular with Slaughter's (2004) concept of the disaggregated state (see also Santos 2002, pp. 95–96). Without explicit use of concepts of pluralism, Slaughter demonstrates how much international collaboration takes place not between states at large but instead between specific state agencies. The result is a number of networks, which still clearly show their origin in the state with its separation of powers: judicial networks, administrative networks, and interparliamentary networks.

Another problem is, ironically, state centralism. Arguably, imposing the concept of law as characterized by state law on nonstate communities is the ultimate form of state centralism (Roberts 1998, p. 98; 2005) because it makes the state the center of analysis even for nonstate phenomena (Wastell 2001, pp. 188–92). Indeed, one problem of much literature in legal pluralism has been how much its definitions of law were based on those of state law. For Tamanaha (1993, p. 201), they emulate all elements essential to state law and then subtract all trappings of the state, so what remains as nonstate law is impoverished state law. For example, if law is defined as social control, that definitional concept is borrowed from the state (Strathern 1985). The result, on a global sphere, is, if not a world state (that would be state centralism transposed to the world sphere), then a system modeled on the Westphalian system of multiple states with their laws: a pluralist picture of many legal orders, some state and some state-like, in some interaction. This is not dramatically different from the traditional picture of international law.

Because the centrality of the state cannot be overcome in this way, Michaels (2005, 2006) tries to escape the problem by rephrasing it as one of perspective: From

the state's perspective, all other legal orders depend on recognition by the state, but from the perspective of Islamic law, even the state depends on recognition by Islam. Woodman (2007, p. 165) also emphasizes the multitude of perspectives.

Community

Legal pluralism literature frequently emphasizes the role of communities, often relatively homogeneous, in the creation and administration of norms (Berman 2007b). This is an inheritance from traditional legal pluralism with its focus on law in colonial settings. Sharafi (2008, pp. 145–46) points out how often studies on legal pluralism in the West replicate the colonial origins of the concept by focusing on the relation between Western state law and foreign, often non-Western ethnic communities. To the extent that these ethnic communities are transnational---Jewish orthodox diamond merchants (Richman 2008), Muslims in Great Britain (Yilmaz 2002, Chinese guanxi (Yeung 1998, Hsu & Saxenian 2000)---the move to global legal pluralism adds geographical distance but not much else. Nonethnic transnational communities---social networks, Internet user groups---are sometimes treated similarly as lawmakers, provided they display a certain degree of internal coherence, but here the argument risks circularity: Norms are viewed as laws because they are created by communities, yet the only thing that defines these communities in turn are the norms they share. The creators of bottom-up, international law--like banking regulations (Levit 2005) could be called a community, but what holds them together is a commonality more of interests than of values.

This assumed parallel between law and community does not really lead away from the centrality of the state and the law; rather, it replicates it. Greenhouse (1996, pp. 56–60) points out that the idea of a cohesive and culturally homogeneous community as presumed in legal pluralism is actually modeled after the cultural self-legitimation of the nation-state. The concept of cohesive communities as the cornerstones of society, different from both other communities and from individuals, is increasingly being questioned by anthropologists. Moreover, the expectation that such communities can perform the same tasks as the state is highly idealistic (Tamanaha 1993). Although the law/culture congruence was an important

ideological tool for nationalized law in the nineteenth century, the modern liberal state rests on the assumption of cultural diversity, not cohesion (Wilhelmsson 2004, Denninger 2005), and its ability to create and adjudicate law is based on highly technical institutions---legislators, highest courts---that can determine what counts as law and what does not, regardless of cultural diversities. Outside the state, such institutions are largely lacking.

Arguably, if anything characterizes globalization, it is the reduced importance of community (cf. Fisher 2008). Interactions occur, and laws are made, among dispersed agents who have very little in common. In global commerce, law does not require communities; to the contrary, law makes close community ties dispensable. Closely knit communities are the exception, not the rule, and a theory of law that puts them in the center risks ignoring other laws, created through global chains of law production (Snyder 1999, 2006) or even through the common use of certain documents (Riles 2008b). The grounding of legal pluralism in communities becomes questionable.

Space

If legal pluralism has traditionally been defined as the coexistence of several legal orders within one social field, that social field was usually geographically confined. Traditional studies of legal pluralism, whether in the colonial or postcolonial context or in Western countries, were interested in the local instances, whether in Bukowina, among the Cheyenne, or in American courthouses. Globalization has enhanced attention to space (von Benda-Beckmann et al. 2009), yet although scholars emphasize their interest in the interaction between the global and the local, the focus of their research is typically on the local invocation and creation of global law (von Benda-Beckmann 2001, Gessner 2002).

This is especially visible in studies of human rights, which largely look at local vernacularization, creation, and invocation of these rights (e.g., Merry 2005, 2006c; Goodale & Merry 2007; Sarfaty 2007; Szablowaski 2007). This intensifies legal pluralism, but it alone does not alter it: Human rights law functions on the ground as merely an additional layer of further nonstate law that can be used to undermine the hegemony of state law (Merry 2006a, p. 106). The supranational level represents no

social field and therefore often falls out of sight (cf. Schilling 1997); the focus is on the translation of human rights into local justice (Merry 2006c), less frequently the reverse.

A potential shortcoming of such studies is that they have difficulties focusing on whatever is not local, or confined in borders, be they territorial or social. One response is to reconceptualize the local in a nonterritorial way (Griffiths 2002, pp. 300–1). This results in transnational spaces, which may in turn enable transnational communities (Schiller 2005, Nuijten 2005). Merry (2008, pp. 159–65) explicitly advocates a spatial legal pluralism in strong opposition to the alleged borderless world of globalization.

The problem for legal pluralism remains that even a deterritorialized locality would require some kind of boundaries, a distinction of inside and outside. It would be hard to conceptualize the entire world, or some global subsector, as the social field in this way. Consequently, scholars aiming for a global picture tend to reject the requirement of locality and instead develop holistic concepts of legal pluralism on other grounds (Teubner 1996, Gessner 2002, Twining 2010). By contrast, in Riles's (2008b) study of transnational derivatives contracts, no common locality exists; all that participants share are common documents. Like communities, locality and even social field may prove insufficient as elements of global legal pluralism.

INTERRELATIONS

Of special importance for legal pluralism are the interrelations between laws. In earlier studies, such interrelations could be somewhat neglected because the focus was on emphasizing the existence and importance of nonstate law as such and the comparatively simple vertical relation between state and nonstate law (e.g., Merry 1988, pp. 879–86). Given that the plurality of laws, including nonstate law, on the global scene is an important topic even for traditional studies of law, the specific nature of the interrelations, including horizontal ones, gains more traction in the literature. Again, we can see the two different developments in global legal pluralism play out differently.

State Centralism/State Hierarchy

Much of the traditional literature on legal pluralism was directed not only against monism or legal centralism (the idea that only one institution, typically the state, can and does make law) but also against state law superiority (the idea that nonstate law is hierarchically inferior to and dependent upon state law). In this simple sense at least, such a hierarchy has become harder to defend on the global sphere, where a world state does not exist, international law is not automatically hierarchically superior to state law, and states in turn cannot claim intrinsic superiority over other states. What does prevail as a nemesis for legal pluralism is a view of global law in which international and domestic law may become indistinguishable but the superiority of state law over nonstate law remains: International law is confined to law made by states; even customary international law reflects the conduct only of states. Moreover, weak legal pluralism still exists, except that the hierarchically superior order is no longer the state but rather a supranational level like the European Union or perhaps even a global sphere. This is not surprising; even if the state's predominance has been weakened, the lawyerly perspective that Griffiths associated with weak legal pluralism has not. The hope to manage pluralism, ideally from a neutral superior position, still exists, even though it has become less plausible.

Hybridity/Interlegality

Such a neutral superior position is absent from approaches of hybridity or of interlegality. Hybridity describes, in a somewhat generic way, situations in which laws overlap without fully supplanting each other. Interlegality, a concept introduced by Santos (1987, pp. 297–99; 2002, pp. 427–38) as “the phenomenological counterpart of legal pluralism,” describes the complex and ultimately unstable relation between different laws, either as a psychological state of the individual subject to more than one set of norms or as a description of a dynamic state of affairs. Interlegality has proven to be a popular concept, especially for studies of transnational law (e.g., Amstutz 2002, Hoekema 2004, Wai 2008). The main problem with both concepts is their lack of specificity: A space between is suggested, but that space is not scrutinized further. All kinds of relations are

imaginable---conflict and normative contestation, harmony, differences in scale, reciprocal weakening or strengthening, etc.---but few criteria exist to distinguish or evaluate them. Thus, when Berman (2007b, pp. 1196–236) suggests various strategies to “manage and preserve hybridity,” one is a priori as plausible as the other; the open definition of hybridity allows for all kinds of moves.

A deeper problem is whether hybridity and legal pluralism can coexist. On the one hand, Woodman (2007, pp. 165–66) questions whether management can at all preserve hybridity---for him, hybrid solutions that mix elements entail the demise of legal pluralism because they replace the coexistence of two or more legal systems by a single law. On the other hand, Santos (2002) views interlegality as a definitional feature of postmodern law at large so that it becomes a feature of relations not only between but also within legal orders. From both perspectives, then, hybridity or interlegality transcend the difference between pluralist and nonpluralist situations: Either pluralist situations are rendered into unified situations or legal orders perceived as uniform are shown to really be pluralistic. Legal pluralism as a concept or even as an empirical phenomenon juxtaposed to legal monism disappears.

Mutual Recognition

A different approach views interrelations between orders not from the neutral observer’s perspective but instead from the perspective of each law toward the other. The issue becomes one of recognition and its limits.

Because this focus on recognition is reminiscent of weak legal pluralism, in the context of which nonstate law depended on recognition by the state, it is suspicious. Griffiths (2005) posits that what is law can never be based on recognition because recognition is a hegemonial act. Weiner (2006) points out that recognition of aboriginal property laws by the state implies aboriginal law as a separate cultural domain, although we cannot properly distinguish differences between cultures from differences within a culture. These are elaborations from the critique in law and colonialism that colonial laws were actually created, not found (Snyder 1981, Chanock 1985, Moore 1992; cf. Lipset 2004). The creation of colonial law was neither an innocuous nor a nonviolent act: For the colonizers, it created an order that was categorically similar and thus could be subjected to their own law; for the elites

among the colonized, it opened up avenues toward reaffirming their own power. The problem reappears in different form under globalization, only that now the recognition is not necessarily performed by the state. Thus, *lex mercatoria* is constructed as a largely homogeneous and autonomous body of laws that the state must therefore recognize.

At the same time, the recognition of nonstate orders by the state is an observable fact that for this reason alone cannot be ignored. Legal orders are recognized or denied recognition by the state (or by other actors); they are depicted as coherent regardless of whether this depiction represents a truth or not. This suggests a different role for recognition in dealing with legal pluralism: Recognition is not a normative postulate in the sense that legal orders would be obliged, for some reason, to recognize each other. Nor does recognition amount to an objective definition of laws in the sense that legal orders must be recognized by some official law in order to exist. Instead, recognition is an observation of how in fact plural law behaves. Thus, we see how the recognition of another legal order does indeed bring that order into existence, but only with regard to the legal system that engages in the recognition (Michaels 2005, 2006). Recognition can then be symmetrical (states recognize each other and their laws), asymmetrical (the mutual recognition between state law and nonstate law), or, of course, one-sided (nonstate law recognizes state law as law, but state law does not recognize the nonstate law). This understanding, in which the relationship between laws replicates that between self and other, opens new and promising ways for a new conflict of laws, now understood as a general theory of interlegality, as the way in which the law makes sense of its own plurality. Indeed, when Woodman (2007, pp. 166-8) distinguishes institutional and normative recognition, he replicates, without saying it, the techniques of jurisdiction and of choice of law, respectively.

CONCLUSION

Legal pluralism has thrived under globalization, but its success comes with it its own problems. Several themes of legal pluralism have become common sense: the plurality of legal orders, the decentralized position of the state, the strengthening of

nonstate norms. However, many of its problems remain or have even been enhanced, problems that are due both to the concept's genealogy and to its definition. Legal monism, even legal centralism, have become untenable, but legal pluralism in a deep sense has not arisen as the obvious alternative. Instead, what we see is a proliferation of weak legal pluralism---a proliferation of law, coupled with centralist attempts to manage it.

One problem with legal pluralism, long known, is romanticism: "Folk law good, state law bad" (Allott & Woodman 1985, p. 6). Some praise pluralism as an opportunity for choice between different orders---either for the adjudicator or, perhaps more importantly, for actors. In contrast, Randeria (2007) points out that such pluralism can also enable various actors to pass the blame for failure to act. Some praise the emancipatory power that human rights law gives local actors as tools against the state; others fear the unifying and hegemonial force of human rights. Santos (2002, pp. 85, 89–91) points out that there is nothing intrinsically good about legal pluralism and that pluralist law has both a repressive and an emancipatory potential. Nonetheless, Santos himself is taken to task for drawing an overly rosy picture of unofficial law in Brazil that ignores how the influence of globalization undermines the achievements of the state (Godoy 2004). Barzilai (2008) deplores the absence of political power from many discussions on legal pluralism.

Connected with this romanticism is the remaining central analytical role for the state. The state is still central to studies of legal pluralism, especially in the desire to overcome legal centralism. This is analytically unsatisfactory. Following Griffiths (1986), many scholars have rejected state centralism as a mere ideology. Yet it is not clear why legal pluralism is any more real, or why the pervasive existence of the ideology of state centralism is not in itself an observable reality. There is a tendency away from positing legal pluralism as a fact opposed to the fiction of state centralism (Griffiths 1986, p. 4) and toward recognizing that legal pluralism is no more a reality than legal centralism, but rather is merely another (though potentially superior) representation of legal reality (Belley 1997, Kennedy 2007). However, as

long as legal pluralism remains the mere flipside of legal centralism, legal centralism will not be overcome.

The future---and perhaps the establishment of a third paradigm of legal pluralism---may require two steps. The first step is to overcome the dichotomy between monist and pluralist conceptions of law and thereby to save legal thought from its continued obsession with the state. The current stage of the concept does not sufficiently enable a genuine critique of the state (or of nonstate normative orders). Quite likely, law is always uniform and plural at the same time. In this regard, interlegality may provide a somewhat helpful concept to understand globalized law---not interlegality linked to pluralism, but interlegality as describing law more generally.

However, the reality is that law is regularly perceived as far more orderly than this description suggests and operates as though it were far more coherent. In a second step, it is necessary to acknowledge this propensity toward order as an element of law, too. Studies exist that explain how legal systems create, perhaps counterfactually, both internal order (Teubner 1993) and the facts with which they deal. Legal pluralism suggests a third dimension---how legal systems create, through recognition, other legal systems, and how the mutual recognition among legal systems in turn creates stability (or the illusion of it). Legal pluralism allows for a relativism of position. This is not the simple normative relativism (the recognition that norms may differ and the call for tolerance) that is, in itself, a universalism (Wastell 2001). Instead, it is an epistemic relativism in which law is constructed---not only by communities for themselves, but especially by legal systems for each other. Recognition, so despised by early legal pluralism, reenters the analysis (cf. Tie 1999), but the focus is now on recognition as a practice of the recognizing law rather than as a universal criterion of validity for the recognized law. Recognition, as a juridical category, is thus analyzed as a practice, an anthropological category---here, the juridical and the anthropological perspective may finally be able to make their peace.

DISCLOSURE STATEMENT

The author is not aware of any biases that might be perceived as affecting the objectivity of this review.

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