A Pluralism of Legal Pluralisms

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Abstract and Keywords

Legal pluralism, as a way of thinking about law, is the seemingly straightforward idea that there is a range of normative orders, which are independent from the state and can be properly described as legal without committing any conceptual mistake. Without giving a full survey of the long and varied history of legal pluralism theory, this article will discuss some central moments in that history. It will focus specifically on the question whether it is possible and useful to capture law as conceptually separate from other normative phenomena so as to speak of specifically legal pluralism or whether it is best to take a panlegalist approach and not draw any clear distinctions between law and other instances of social normativity.

Keywords: Concept of law, Legal anthropology, Legal pluralism, Legal practice, Normativity, Panlegalism, Religion, State law

Introduction

Legal pluralism, as a way of thinking about law, is the straightforward idea that there is a range of normative orders, which are independent from the state and can be properly described as legal without committing any conceptual mistake. However, it soon becomes apparent that things are much more complicated than this. How does one think of law dissociated from the state? Is there a risk of overinflating the concept of law thus making it meaningless? Even if we accept legal pluralism as a fact and we manage to theorize it, how might it be possible for legal orders to be reconciled and coordinated? The intellectual history of legal pluralism is long and varied. This article will therefore not attempt to provide a full account of that history. It will instead highlight some fundamental issues and critically discuss ways in which they have been addressed in the literature.

Some believe that it is possible and useful to capture law as conceptually separate from other normative phenomena so as to speak of specifically *legal* pluralism. This approach is discussed in the first part of the article. Others take a panlegalist approach and do not draw any clear distinctions between law and other instances of social normativity. The second part of the article is devoted to these views.

Law, Closure, Openness

A common pattern emerging across most of modern political and legal philosophy is the attempt at reducing pluralism; pluralism of beliefs, normative commitments, cultural outlooks, and so forth. This came as a response to pluralism being more pronounced, therefore conflict more likely, in conditions, in which communication between strangers with very little other than overlapping interests in common became easier and more frequent. Combine this with an increasing faith in the ability of humans to determine their own conditions of existence and a respect for people's self-understanding, if not as the only source of moral and political rights and duties, at least as closely implicated in generating rights and duties, and we will begin to understand both why pluralism was given independent weight as a social phenomenon and why an urgency was felt to address it.

The way of addressing the perceived problem of pluralism was to formalize law as an institution and connect it to the state, therefore extending the scope of its applicability over everyone within a certain territory. This gave rise to what is generally known as the "state-centered" model of law, as the legal phenomenon is inextricably tied to the activities of the state and its institutions. Consider two central examples of thinking of the law in these terms. The Hobbesian theory of law and the state aims at reconciling the plurality of competing self-interests by subordinating them to the second-order rational interest in survival. This is achieved by generally surrendering one's private judgment to the sovereign. For this to work, of course, the sovereign and her authority must be centrally identified and rule uniformly.[1] Despite the completely different starting point, Kant arrives at the same conclusion. The Kantian civil condition is instantiated, and is indeed coeval, with the emergence of central government, which institutionalizes the external duties of each citizen (within the constraints set by the Universal Principle of Right).[2]

The same pattern is repeated in legal theory more narrowly conceived, that is, the type of theory that aims at working out the conceptual/ontological boundaries of law. Two such theories, which can be placed roughly in the Hobbesian and Kantian traditions, respectively, are those offered by H.L.A. Hart and Hans Kelsen. Hart identifies the very concept of law with a central authority issuing rules, which are then accepted as such, and complied with, by the majority of the population of a specific territory.[3] Similarly, Kelsen is eager to reduce law to a basic source, only this time the source is not a practice, as in Hart, but rather a transcendental presupposition.[4]

Late modernity, however, has brought about changes, which seem to have caused explanatory and normative problems for the state-centered model of law. From a sociotheoretical perspective, law has been decoupled from politics and coupled with the economy. For example, the recent rediscovery of a basic connection between law and the market (which in the Middle Ages was a trope) has triggered a new understanding of the law as fundamentally independent of the state. While politics is still contained within the nation state and its institutions, the globalization of market relations is leading to the emer-

gence of various transnational authorities, which exercise effective governance without them being operationally or normatively linked to any one nation state.

This realization has relatively recently animated the development and rather rapid proliferation of a wide literature that ostensibly takes a pluralist stance toward the law. The main concern in this type of literature is not to single out criteria of identification of law but rather primarily to find a way of reconciling the already existing state-independent, *de facto* authorities in way that is independent of the nation state. In these accounts the plurality of obligation-imposing institutions is not only something begrudgingly to accept as an inescapable state of affairs but, indeed, something to nurture and pursue.

> *Pluralism*, in contrast {to domestic constitutionalism}, is a less orderly affair. It sees such an overarching framework as neither practically possible nor normatively desirable and seeks to discern a model of order that relies less on unity and more on the heterarchical interaction of the various layers of law. Legally, the relationship of 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 relationships between them are left to be determined ultimately through political, not rule-based processes. In this, pluralism eschews a central element of the Western political tradition—the hope to contain politics through the rule of law. Yet {…} the break this implies may be better suited to the radically diverse society characteristic of the postnational space. In this highly contested space, realizing public autonomy and creating order may require a departure from the classical imagination inspired by national social structures.[5]

In a similar vein:

> a cosmopolitan pluralist framework must always be understood as a middle ground between sovereigntist territorialism, on the one hand, and universalism, on the other. The key, therefore, is to try to articulate and maintain a balance between these two poles. As such, successful mechanisms, institutions, or practices will be those that simultaneously celebrate both local variation and international order and recognize the importance of preserving both multiple sites for contestation and an interlocking system of reciprocity and exchange.[6]

Such attempts at reconciling the proliferation of normative authorities diverge on the specifics. Some focus on legitimacy by rethinking democracy and the rule of law so as to make them compatible with legal pluralism, whereas others are mostly concerned with working out the conditions of institutional adjustment and co-ordination, which will ostensibly leave pluralism unaffected. However, and we have already alluded to this earlier, what they *do* have in common is that they take newly emerged institutions as legal unquestioningly on the assumption that this *prima facie* recognition has no impact on the question of legitimacy, which can be addressed only on the level of ideas and political

contestation (which, again, is assumed to remain untouched by thinking of law in terms of institutions).

It therefore transpires that this kind of pluralist theory is hardly pluralist at all. It diverges from the centralist formalism characteristic of modern takes on law in that it identifies more than one formal configurations of normative authority but not on the criteria of identification of these configurations.[7] For this reason, it is potentially just as suppressive of *legal* pluralism as the centralism to which it purports to provide an alternative; pluralism seems only to refer to beliefs or claims, which formalized institutions raising claims to legality can reconcile (in whichever way). Pluralism, however, might be at play long before this. Without revisiting the conditions of existence of the practice of law, it is very likely that phenomena that can be described as legal will fly under the radar. Importantly, this is not simply a diagnostic failure. From a substantive perspective, these conditions of existence of the practice of law might not be visible at the level of contestation. Therefore the suppression of pluralism at that level might have much more far-reaching ramifications. It is possible that by subjecting beliefs, claims, and so forth to institutions, which we have unthinkingly admitted as legal—and simultaneously excluding other legal practices—we externally and therefore coercively determine the self-understanding of the people whose beliefs and claims are to be reconciled at the level of setting conditions of legitimacy. Finally, and this is perhaps at the heart of the problem, this type of "pluralist" take on law is also marked by a staggering anti-theoretical stance. In taking the claims of *de facto* authorities at face value, most versions of "postnational," "global," "transnational" legal pluralism fail to even try to construct a comprehensive, or at least as comprehensive as possible, and coherent scheme of practices, which fall within the same domain of human activity.

The subdiscipline of legal anthropology focused from very early on discovering systems—which anthropologists had no qualms about considering properly legal—which were independent from the law of the state.[8] A great deal of that scholarship was largely ethnographic and more interested in recording legal practices rather than asking either what it might be that makes these practices legal or how they might conceptually connect to each other (this strand of legal pluralism will be discussed later on in this article).

One legal anthropologist who took a conceptual and comparative approach was Adamson Hoebel. In his earlier book, co-authored with Karl Llewellyn, *The Cheyenne Way*,[9] and particularly in his later *The Law of Primitive Man*, Hoebel conducted ethnographic research in a range of communities (and relied on the literature on others), but his aim was more far-reaching than this.[10] He attempted to single out the *differentia specifica* of distinctly legal forms of governance but in a way that would not conflate law with the modern state. This allowed him to draw links between legal phenomena while also singling out their contingent differences. In doing so, he "does not commit the error of dissolving law into ubiquitous social obligation or omnipotent 'custom,' as for example Malinowski did."[11] Hoebel was therefore attuned both to the contingency of the association of the so-

cial phenomenon of law with the modern state as well as the need to delineate “law” from other phenomena by capturing what accounts for the formal closure of law.[12]

For Hoebel, specifically legal governance is not distinguished by abstraction or generalization (a requirement generally understood as central in modern state-centered legal systems) or, indeed, by the existence of a *central* authority issuing and enforcing directive. The irreducible characteristic of law is that it can be legitimately enforced even in the absence of any formal institutions carrying out the coercion. The development of such central, specialized agencies is a feature of developed legal systems but not a necessary requirement of law’s existence.[13] Coercion must be understood rather carefully here.[14] Hoebel does not claim that the imposition of sanctions as an evil is a necessary or sufficient condition of legality like the caricature that Hart drew of John Austin’s jurisprudence.[15] What he emphasizes is the heteronomous nature of law. Law governs our external manifestations and authorizes the *legitimate* exercise of coercion, even if only in the form of public disapproval. Hoebel thus draws a relatively sharp distinction between law and other forms of governing social relations. He therefore maintains both the distinctness of law and, because he draws law’s *differentia specifica* only formally, allows for the comparative study of legal systems paving the way of working out ways, in which dispersed legalities might communicate with each other.

Nevertheless, if we accept that legitimacy is part of the concept of law and if we also think that legitimacy is inextricably linked to the self-understanding of people engaging in legal practices (otherwise, ethnography would be redundant), then something seems still to be missing. A theory that seeks to account for law as a closed yet plural phenomenon, will have to dig deeper in order to discover the conditions of legitimacy of the legal.

A way of doing this is by completely deferring the question to the participants in legal practices. This is the approach taken by Brian Tamanaha.

Tamanaha takes issue with the essentialism regarding the concept of law displayed by most classical legal theory. He correctly criticizes those who reduce law to legitimacy *qua* context—and agent-independent reason for disregarding that law is socially constituted by linguistic practices, which ascribe the world of institutional facts their meaning. He is also critical of empiricist, conventionalist legal positivism of the Hartian variety on the grounds that it succumbs to an essentialism about law, which closes the concept of law irrespective of the actual attitudes of participants in non-state legal practices. Tamanaha then tries to combine conceptual and sociological analysis in order to capture law in terms of both closure and plurality. He subscribes to the two main positivist theses, namely, the separation and social sources theses, but qualifies them substantially and substantively. He extends the former so as to cover functionality as well as morality and modifies the latter:

> Instead of applying this thesis only to state law, it will be applied to all manifestations and kinds of law, including customary law, international law, transnational law, religious law, and natural law. Their specific shapes and features will not be the same as those discerned by Hart for state law, but whatever distinctive fea-

> tures they do have will be amenable to observation through careful attention to the social practices which constitute them. All of these manifestations and kinds of law are social products. The existence of each is a matter of social fact.[16]

A consistent conventionalist social theory of law emerges from this methodological approach. The fundamental thesis is that the attention of the sociolegal theorist should be turned to the way people speak about the law. Tamanaha explicitly privileges the external point of view as the appropriate one and argues that whenever a sufficient number of people (and anyone is a candidate here, not just those assigned with an institutional task like Hart's officials) with sufficient conviction refer to a social practice as law, that practice automatically becomes an object of enquiry for the social theory of law. Finally, a conventionalist social theory of law is essentially and substantively pluralistic. Tamanaha argues that it addresses the problems of early sociological and many contemporary anthropological theories of legal pluralism as well as the reductionism of functionalism and the vagueness of some legal pluralist theories by abandoning the essentialism that haunts the former while still dissociating the concept of law from the state and by offering a criterion for differentiating the law from other nonlegal social norms.

Conventionalism goes some way toward addressing monism and essentialism. It also correctly turns its attention to the self-understanding of participants in legal practices. This does, however, leave an outstanding question. If it is possible to differentiate between uses of the term "law," which are relevant for a general jurisprudence and those which are not, then there must be something in the idea and practice of law that underlies its various instantiations. In order to establish the very possibility of general jurisprudence in a way that will not foreclose the possibility (and empirically proven fact) of pluralism, we would need to discover these underlying conditions of existence of law.

This point is not only of epistemological significance; it has a bearing on substance as well. Famously, Sally Falk-Moore made the convincing and empirically supported argument that legal practices might be closed in the sense that they are circumscribed by the context, in which they develop and which determines them, but at the same time maintain a certain degree of openness that allows for their mutual interpenetration:

> The approach proposed here is that the small field observable to an anthropologist be chosen and studied in terms of its semi-autonomy—the fact that it can generate rules and customs and symbols internally, but that it is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded. The semi-autonomous social field has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance. The analytic problem of fields of autonomy exists in tribal society, but it is an even more central analytic issue in the social anthropology of complex societies. All the nation-states of the world, new and old, are complex societies in that sense. The analytic problem is ubiquitous.[17]

If we are committed to the distinctness of law as a social phenomenon rather than resigning to conceptual indiscriminacy, then the question is what allows for both the closure and the simultaneous openness of legal systems. Is it, however, possible to achieve both this and to avoid essentializing law in a way that forecloses pluralism?

It might help to think of law in strictly formal terms. This is what Günther Teubner tries to do from the perspective of systems theory:

> Legal pluralism is […] defined not as a set of conflicting social norms in a given social field but as a multiplicity of diverse communicative processes that observe social action under the binary code legal/illegal[18]

If the binary code "legal/illegal" is promoted as the element, which crucially determines the legality of regulatory phenomena, legal pluralism shifts its emphasis from the study of social groups developing legal orders to self-regulating discourses and the legalization of various language games. On the programmatic level, on which the legal/illegal distinction is instantiated in light of real conditions, these discourses are closed. Nevertheless, their common coding allows for their relative openness. Connections then become possible through what Teubner terms linkage institutions, that is, those essentially contested concepts, such as *bona fides*, the meaning of which varies depending on the context in which they are placed.

In the new project of legal pluralism, these adaptable linkage institutions facilitate the connection of the law with social processes. Thus, a new channel of communication is established that prevents the law from colonizing its environment and instead enables the productive misreading of the latter by the former. When the law is structurally coupled with society informed by legal pluralistic critique, it becomes more responsive as it coevolves with regulatory discourses dispersed in society.

We seem to have made some progress toward understanding law as relatively independent from the state while at the same time avoiding the risk of distorting the self-understanding of those who engage in legal practices by essentializing the concept of law or attributing universal applicability to contingent manifestations of the legal.

But there is still an elephant in the room. The conclusion we have reached so far defers everything to legal practices themselves, including the terms and possible outcomes of communication between them. This may address much of the criticism that pluralist sociolegal theory has attracted, but, at the same time, many would still remain uneasy with the risk that this deferral strategy raises.

Recognizing legal pluralism as a fact in the social world is partly motivated by the suspicion that neglecting pluralism will mystify and perpetuate power relations developing between stronger and weaker forms of legal governance. Deferring all normative authority for the resolution of pluralism to legal orders themselves does nothing to alleviate that fear; if anything, it might have exactly the opposite effect. It should also be noted that the

danger of social relations being allowed to develop on the terms of the powerful exists within non-state legal orders as well. In the words of Marc Galanter:

> [I]ndigenous law … is not always the expression of harmonious egalitarianism. [It] often reflects narrow and parochial concerns; it is often based on relations of domination; protections that are available in public forums may be absent.[19]

As soon as we accept these risks, we are confronted with another bind. How might it be possible to construct some context-independent substantive way of countering forces driving toward power relations in a way that does not substitute the participants in their self-understanding? Recall also that considering the problem as one of weak value pluralism, that is as beliefs about value, or strong value pluralism that can somehow be reconciled in light of some meta-principles institutionalized in law is not available to a theory of legal pluralism. This is because the basic premise of legal pluralist theory is that the configuration of beliefs or values *in law* adds a layer of opacity, and therefore introduces genuine pluralism, which is itself the problem rather than the solution. Remove this claim and the point of viewing law from a pluralist perspective is already significantly diminished.

Therefore, if a theory of legal pluralism is to reduce pluralism in a way that does not cancel itself out and does not do an injustice to the self-understanding of participants in legal orders, it must do so by singling out some richer commonalities between legal orders, which are derived from their very nature as legal and which do not overdetermine the outcome of communication between them.

For this to be possible, it is necessary to furnish with a *little* more content Teubner's legal/illegal distinction. We might be able to do this by combining ethnographic research with a hypothesis about what governance by law entails. This hypothesis will inevitably be defeasible and falsifiable; a theory of law cannot be constructed from the philosophical point of view by disregarding history. It will also have to be formal and non-essentialist for the reasons already outlined.

One such hypothesis[20] is that law entails governing the external relations between people, that is their real manifestations in a shared space and a shared time frame. Crucially, law entails that its subjects recognize it as a source of obligations and rights; not in the sense of moral endorsement of its requirements but as determining at least some of the ways in which one may or may not act. All this necessarily entails that law must tap into what its subjects already recognize as a possibility in the world. This sense of possibility is not speculative. Law requires a commonly recognized terrain of *normative* possibility, which is determined by people's normative perceptions of the world, such as their normative perceptions of time, space, and connections between events. It requires a background of shared perceptions of how the world may be changed through their normative commitments.

Seeing law in this light reveals the possibility of legal pluralism. The *differentia specifica* of law ceases to be its association with a source or the rightness of its content in compliance to some transcendental moral order but rather its dependence on the way in which the participants in it make sense of the world in its normative meaning. Since this experience is bound to the context, law can emerge in any context in which normative social relations emerge. The dynamic nature and multivariation of these contexts account for the immense complexity and untidiness of the legal universe. For instance, although in some of its manifestations law will be systematized in an arguably coherent whole, that is the conception of law with which we are more familiar, in others it will not be so. And, although we can never be outside law, it is perfectly possible that we are subject to different instances. The same agent may find herself participating in a, unique to her, variety of legal orders.

Note that, thus understood, law is underlain by sets of beliefs. Whether these beliefs are transparent from outside the legal practice constituted by them is a matter of historical contingency. What is important, however, is that they *might* be opaque and only accessible to those who already hold them. It follows that attempts at governing by law without taking into account the risk of the pluralism of beliefs about normative possibility might result in suppressing these beliefs. Positively put, to govern by *law* requires attentiveness to beliefs regarding normative possibility. Recognizing the possibility of legal pluralism forces one not only to be prepared to justify legal claims on the basis of reasons but also to ensure that all those potentially affected will have the opportunity from their perspective (since beliefs are the kind of thing that can be communicated and accessed by others) to assess the intelligibility of how they are required to act and to be able to voice their disagreement. Otherwise, one runs the risk of failing to do law altogether, because one would be expecting others to follow rules, which they are not in a position to follow. So, to make the same point from a different angle, all attempts at making law must first deal with the risk of legal pluralism.

The Panlegalist Challenge: Blurring the Line between the Legal and the Social

At this stage, however, one might question the use of “law” as a descriptive or a heuristic category. In effect, while this latter conceptualization overcomes the problem of essentialization, does justice to genuine pluralism, is sensible to the self-understanding of participants, and opens up to processes of mutual justifiability, it might bring about a conceptual inflation of the terms “law” and “legal.” For they include such an ever-widening range of phenomena that they end up covering *social* normativity in general. Apparently, the more the concept of pluralism is amended to respond to specific challenges, the more the legal and the social tend to be conflated. In order not to narrow down arbitrarily the scope of legality—as we saw some scholars inadvertently do—legal pluralists stretch it to the extent that legal normativity collapses into social normativity. This seems to suggest that the subtler the understanding of legal pluralism, the thinner the line separating the

legal from the nonlegal. William Twining refers to this conundrum as “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.[21]

Twining explains that the pluralist field is characterized by a main divide between scholars who are preoccupied with identifying one or more criteria to distinguish between legal and nonlegal phenomena and others who believe that this is not a worthwhile enterprise or even that it is destined to fail. The authors we have discussed so far largely belong to the first strand, as they seek (in different manners and with different intents) to foreground that which makes some rule-governed contexts specifically legal. That this attempt is by no means futile is proven by the fact that the collapse of this distinction, which leaves theorists and practitioners with no criterion to determine whether they are dealing with legal matters, is a recurrent criticism against legal pluralism. Despite this, some legal-pluralist scholars have openly embraced this conclusion. To address the theoretical and pragmatic problems it engenders, it is worth outlining the view of those scholars.

The major theoretical difficulty the second strand of thinkers runs into is that the *differentia specifica* of law vanishes so much that it makes no sense to speak of law as a recognizable and describable field or normative body. If this is the case, legal pluralism—or at least an extreme version of it—provides the grounds for considering “the legal” as a redundant category, in that law is but an instantiation of the general normativity of social practices. This extreme version of legal pluralism is sometimes labeled *panlegalism*, in the sense that all (the Greek word “pan” meaning “all”) normative phenomena are legal. While this problem has haunted research on the inner plurality of law to the extent that one might say it is a foundational aspect of legal-pluralist scholarship, it should be noted that it has taken two main shapes, according to the way it has been theoretically vindicated. These shapes can be illustrated with reference to the two predicaments in which they (are claimed to) get caught: the Romano dilemma and the Malinowski problem.

As early as 1918, Italian jurist Santi Romano came up with a truly panlegalist view, which triggered heated debates on the role of the state vis-à-vis emerging non-state legal actors.[22] Arguably Romano was the first to theorize legal pluralism from a purely jurisprudential viewpoint. While his contemporary, legal sociologist Eugen Ehrlich, had problematized the role legal rules play in the life of citizens, Ehrlich’s analysis did not focus on the inner plurality of law but on the gap between social life and the activity of state officials.[23] By observing the everyday life of the cosmopolitan region of Bukovina, now split between Romania and Ukraine, he contended that “norms for decision” (i.e., legal rules applied by officials within courts) must be distinguished from the “rules of con-

duct" governing people's everyday life: the former regulate but a minute portion of social life, whereas the latter are the normative guidelines people rely on to conduct their life and to settle conflicts on a daily basis within informal dispute-settling arenas. In addition, Ehrlich juxtaposed the variety and polychromy of social normative regimes producing rules of conduct with the static, bloodless nature of the norms issued by political institutions and used by legal officials within courts. This is why, although Ehrlich is listed among the founding fathers of legal pluralism, his theory is not so much an instance of legal-pluralist scholarship as it is a sociolegal analysis of the interplay between official law and nonlegal rule-governed regimes.[24]

Unlike Ehrlich, Romano avers that law is inherently plural to the extent that all rule-governed regimes are legal regimes. In his book, *The Legal Order*, he put forward an institutional theory that, as a corollary, leads to a pluralist theory of law. On his account, law is hallmarked by three basic features. First, it is an institutional context meant to outlive the individuals who first set it up (this means that normative contexts that terminate as the relationship they govern does—say, a romantic liaison and the set of rules that regulate it—does not qualify as a legal institution, while marriage, as an institutional relationship, is independent of those who marry and continues to exist when they die or divorce). Second, law provides an order to a group of people who would otherwise be but a chaotic aggregation of monads (think of a set of individuals on a bus, who are together by chance, but might decided to turn themselves into an ordered group and get hold of the bus to stage a protest as a stable protest group). Third, this order is not the bare sum of the rules governing the relationships among members, but an underlying material substance that makes a group *that* group. Evidently, Romano has in mind a sort of "material" substance that does not only produce rules but shapes group members' identity and position. Be this as it may, he suggests that all social orders that identify and govern social groups (or, more generally, populations) are *legal* orders, whether cultural, religious, economic, or of a different nature. Indeed, he goes so far as to claim that, regardless of the particular nature of the order, if it possesses these three institutional features, then it has to be considered as legal—just as legal as the state legal regime.

This results in a panlegalist conundrum that can be labeled the "Romano dilemma." It has three layers. First, if any social entity can be a complete institution with an inner legal order, human collectivities are highly likely to get into a chaotic situation in which countless legal orders overlap. Second, it is just as likely that some of them are in overt conflict with some others. Third, if law is no longer an overarching, superior order, with a specific legitimacy to rule over other orders, the fact that in a society particular institutions (e.g., those of the state and those supported by the state) are preserved and promoted by way of legal and political means is nothing but an instance of political injustice and (jurisprudentially) unjustifiable domination. It is evident that a panlegalist solution to the issue of the definitional stop has not only theoretical consequences, as it ushers in a new, potentially explosive understanding of the relationship among social, political, religious, and financial entities that lay claim to legal autonomy.

This pluralist predicament should not be confused with another route to panlegalism, that is, the "Malinowski problem."[25] It is worth expanding on the latter to identify a major difference between them. Polish anthropologist Bronisław Malinowski was not only one of the most important anthropologists of the twentieth century but also one of the eminent fathers of contemporary legal anthropology. In his *Crime and Custom in Savage Society* he wanted to debunk the view, advocated by most of his colleagues, that the legal body of "primitive" populations (as older generations of anthropologists would call indigenous populations) was by and large of a criminal type. With reference to the legal life of the Trobriand Islanders he insisted that the Western label "civil law," although not entirely appropriate, is better equipped to describe the law of that population. For the latter was 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."[26] This definition of law is doubtless relevant to legal theories that play down the role of coercion and penal rules in the definition of law, as the legal practice is claimed to hinge on a widespread mechanism of reciprocity among the members of a population. If this is the case, though, much as Malinowski proved able to turn the table of legal ethnography and to lay the foundations for methodologies less affected by ethnocentric biases—such as the (alleged) innate link between law and a visible coercive apparatus, or a public body of officials, or a set of codified rules prohibiting particular conducts—his account of law is not conducive to a theory of legal pluralism. For, if law is but one aspect of a population's cultural structure, it is reduced to the set of rights and duties that enable social interaction. But, in point of fact, the constitutive structure of moral reciprocity might well benefit from monism, because it rules out alternative moral conceptions that might demote reciprocity to a second-order (or even spurious) feature of morality.

The Malinowski problem overlaps with the Romano dilemma with regard to panlegalism. Both scholars stretch the concept of law to account for normative phenomena that are generally taken out of conventional portrayals of law. Accordingly, in both theories law risks becoming a catch-all conceptual device for describing all rule-governed contexts—so much so that they foreclose the nuances that distinguish some rule-governed contexts from others. On the other hand, however, there is a crucial difference. While the Malinowski problem can be interpreted as a plea for a less parochial approach to legal dynamics outside the West (not necessarily "primitive"), the Romano dilemma poses a more insidious challenge to the way the concept of law itself is crafted, whether for theoretical or cross-cultural purposes. Romano's core claim is that monist concepts of law are produced with a view to nurturing the (fairly recent) type of law developed within national states. State-centered theories of law are modeled upon a transient political form and are destined to die out as that particular form does. In short, while Malinowski's criticism targets legal anthropologists' tendency to project on observed realities concepts and practices that are typical of the ethnographers' cultural milieu, Romano's innovative legal theory defies the basic presuppositions of most legal paradigms of the last three centuries.

To put it otherwise, the Romano dilemma can be interpreted as a deft account of legal theory's own contribution to creating the phenomena it claims to be describing. Romano's institutional view, as long as it grants legal value to all institutional phenomena (as we succinctly described them above), challenges state-centered legal paradigms which take it for granted that the law exists insofar as states or, more generally, political organizations do. Therefore, it is an important legal-pluralist legacy insofar as it decries the conflation between a historical, culture-specific type of law, to wit, state legal systems, and the general phenomenon of law. Marc Galanter has nicely depicted this dehistoricizing form of naturalization (though with no reference to Romano) by saying that the term "law" for distinguishing between official and unofficial orderings in a particular geo-historical context is a contingent, even arbitrary construct based on power differentials.[27] He maintains that referring to a particular rule-governed context as "law" 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 dubbed "law" but are considered as unofficial due to the primacy of their rivals. In this reading, Galanter contends that Western national legal systems are "institutional-intellectual complexes" claiming "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."[28]

A recent, refined version of panlegalism can be found in Gordon Woodman's analysis of customary law.[29] He starts off by arguing the case that all customary law is based on "acceptance," in the sense that legal norms are observed by a widespread majority of a population. He goes on to say that customary rules can be of different types, such as institutive rules that bring something into existence, consequential rules that indicate what consequences the existence of that thing produces in the broader social context, and terminative rules that determine when such a thing comes to an end. Finally, as the validity of rules does not depend on any legislative sources or judicial procedures, rules are valid inasmuch they serve as standards for conduct within a population whose members follow them insofar as the others do the same (for example, describing the rules of a religious customary law from a legal point of view requires viewing them as accepted legal standards, not as personal convictions or religious imperatives—albeit they can be all this at once). Woodman then advances the (thicker) claim that this depiction of customary law offers the basic prototype of all legal phenomena, regardless of the practice they regulate. According to him, this offers a novel understanding of the nature of state law: it is nothing other than a special instance of customary law, the population which observes them being the officials and others who operate the various institutions of the state. Based on this analysis, Woodman arrives at an extreme, though coherent, panlegalist conclusion: if both theoretical and empirical investigations have so far failed to indicate a distinctive line between (what in a given geo-historical context is regarded as) "the law" and other rule-governed contexts, this probably means that such a distinctive line is but a matter of degree, as law covers a continuum which runs from the clearest form of state law through to the vaguest forms of informal social control.

As we have illustrated, panlegalism pursues two main objectives. On the one hand, to purge legal theory of the monistic bias that state-centered paradigms have sneakily introduced into it; on the other hand, to come up with empirical methods that do not project historical and culture-specific constructs on non-Western or emerging realities (in fact, many global law scholars submit that the idea of an intrinsic tie between state and law has long hampered the analysis of supra-state legal phenomena). Yet, according to some critics, such a zeal for epistemic and ethnographic contextualism might end up in its opposite: legal pluralists' and particularly panlegalists' pursuit of a paradigm that does not obliterate the legal in non-Western and non-state contexts might be distorting those contexts for the sake of finding in them something they never experienced. This is a twofold shortcoming: first, pluralists jettison the constitutive link between the historical and culture-specific experience of law and the state; second, in the wake of such an arbitrary decontextualization, they claim they can find law everywhere.

This criticism has been influentially voiced by legal anthropologist Simon Roberts. As early as 1978 he expressed his concern about any facile "exportation" of folk concepts while studying how non-Western populations use rules and settle disputes.[30] He contended that one's smuggling the apparatus of Western jurisprudence into non-Western areas leads to a fundamental distortion of one's findings, as it drives attention away from people's actual performances in dispute-settling contexts and the way values and rules are articulated and reformulated therein. In other words, pluralist scholars who believe law is a ubiquitous phenomenon put their best efforts into isolating a body or rules, principles, and values that, in their Western eyes, can be defined as "law," and end up neglecting the ways order is concretely established, maintained, and restored. Roberts pins the blame of this bias on pluralists' legal training. For legal pluralism is "a creature of the law school: it is something that academic lawyers do; a lawyerly way of looking at the social world."[31] He goes on by laying out two serious risks any such analysis based on the anthropologist's folk categories incurs. First, it silences the subjects the anthropologist studies and posits their categories (which are unlikely to involve reference to such a thing as law) are not refined enough to account for their own experience vis-à-vis the anthropologist's elaborate lexicon. Second, it surreptitiously co-opts those subjects into the justification of a taken-for-granted image of society, one the anthropologist had in mind well before she set out to observe those subjects.

More recently, Roberts returned to the issue of pluralism to formulate a different critique, more concerned with the pragmatic effects of these conceptual biases.[32] He contends that lately legal pluralism has become a new orthodoxy that represents law as existing beyond and above the state. This conceptualization involves an idea of law as separated from the activity of governing. One of the consequences identified by Roberts leads us back to the Romano dilemma. For he remarks that at present what he calls "essentially negotiated orders," whether at local or global level, fall into the overextended category of *legal* orders. The risk is that such an overextension might harm the relation between law and justice, because negotiated orders, and above all transactional social orderings that pervade the global scenario, have their own rationalities, which presuppose a different orientation to rules from those of state law. Furthermore, their decision-making is based

on agreement rather than the decision of a third party.[33] By drawing on legal anthropologist Laura Nader,[34] Roberts notes that a widespread "harmony ideology" is infiltrating the legal world, one that portrays conflict as intrinsically detrimental and agreement as intrinsically beneficial, as the former harms community and the latter has a high survival value. On this account, the conceptual mistake of stretching the heuristic force of the category of law to explain phenomena that fall outside the scope of late-modern statehood eventuates in the exaltation of the nature of essentially negotiated orders and the promotion of emerging legal means that dispense with any reference to justice.

Whether or not Roberts's critique successfully gives the lie to those who believe they found the law where the concept of law plays no part, the panlegalist challenge cannot be easily dismissed as a form of ethnographic myopia. The Romano dilemma brings to the surface a host of political dynamics that hallmark today's political scenario. In effect, there is no denying that at present the legitimacy of state legal orders and their claim to normative supremacy is being put into question by a plethora of sub-state and supra-state actors. Panlegalists are not so much at pains to demonstrate that law is everywhere as to shed light on the fact that state law is by no means the only source of social order. Many segments and fields of society produce rules of their own and organize the life of their members. Certainly, they insist that this is the core of law and that attaching the label "law" only to state law is a conceptual falsification. While solving such a thorny theoretical question exceeds by far the limits of this text, it is nonetheless worth explaining why and how a legal-pluralist sensitivity to present-day political issues might be of help. Indeed, what is increasingly doubtful today is the idea that cultural and religious conflicts can be overcome within the traditional boundaries of constitutionalism and public reason. As Ran Hirschl and Ayelet Shachar observe, the state's claim to serve as a common framework, an ultimate horizon, is perceived more and more as an outdated abstraction. When legislatures and courts tackle this radical challenge, the jargon of tolerance and societal pluralism proves not enough. They have to realize 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".[35]

Concluding Remarks

Legal pluralism today is attracting growing attention because of the conspicuous crisis of traditional politics and the expansion of non-state rule-governed frameworks. Scholars in a variety of disciplines are rediscovering the innate complexity of human assemblages and are becoming more sensitive to the normative lines human beings develop in those more fragmented, sometimes small-scale sites. As we claimed, this is a healthy contextualization of modern politics as an age characterized by the dominance of one political form over many others. At the same time, extreme pluralization can turn into fragmenta-

tion and fractalization. This is why some authors still hold onto the symbolic force of the state as the pivot of politics, one that cannot be easily disposed of lest society breaks down under the weight of untameable conflicts.

Whether or not the state remains the supreme holder of the power to make decisions on the existence of a political community, there is no doubt that some forms or techniques to enable the peaceful coexistence between normative contexts are necessary. Yet, our contention is that legal pluralism is not a forthright defense of the virtues of pluralism as an inescapable fate, as it is the search for more nuanced conceptual instruments that might help conceptualize normative variety in human social life. This is why pluralism stands out as one of the most important contributions to contemporary jurisprudence as a double movement of historicization of dehistoricizing legal paradigms and attunement to the changeable molds of normativity.

Notes:

([1]) Thomas Hobbes, *Leviathan*, Richard Tuck ed. (Cambridge: Cambridge University Press 1996). Original publication: *Leviathan, or, The Matter, Forme and Power of a Commonwealth, Ecclesiasticall and Civil* (1651).

([2]) Immanuel Kant, *Practical Philosophy*, translated and edited by Mary J. Gregor, *The Cambridge Edition of the Works of Immanuel Kant* (Cambridge: Cambridge University Press 1996).

([3]) H.L.A. Hart, *The Concept of Law* (2nd ed., Oxford: Clarendon Press 1997).

([4]) H. Kelsen, *Pure Theory of Law* (Berkeley: University of California Press 1967).

([5]) N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press 2010), 23.

([6]) P.S. Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press 2012), 150.

([7]) In fact, it can be argued that Hartian legal philosophy has a much greater pluralist potential than this. *See* M. Croce, "A Practice Theory of Legal Pluralism: Hart's (Inadvertent) Defence of the Indistinctiveness of Law," *Canadian Journal of Law and Jurisprudence*, Vol. 24, No. 1 (2014): 27–47.

([8]) For a survey and discussion of this literature, *see* F. Pirie, *The Anthropology of Law* (Oxford University Press 2013).

([9]) K.N. Llewellyn & E.A. Hoebel, *The Cheyenne Way* (University of Oklahoma Press 1941).

([10]) E.A. Hoebel, *The Law of Primitive Man* (Cambridge, Massachusetts: Harvard University Press 1954).

([11]) L. Pospisil, "E. Adamson Hoebel and the Anthropology of Law," *Law & Society Review*, Vol. 7, No. 4 (Summer, 1973): 537–560, 538. On the so-called "Malinowski problem," see below.

([12]) This is a concern of much legal pluralist theory. For a series of distinctions between different kinds of related yet different pluralisms, *see* W. Twining, "Normative and Legal Pluralism: A Global Perspective," *Duke Journal of Comparative & International Law*, Vol. 20 (2010): 473–517.

([13]) Note how this departs from Hart's conception of law as co-extant with its institutionalization and systematicity in modern jurisdictions.

([14]) For a discussion of coercion in Hoebel & Kelsen, *see* Croce, "A Practice Theory of Legal Pluralism".

([15]) John Austin, *The Province of Jurisprudence Determined*, Wilfrid E. Rumble ed. (Cambridge University Press 1995); first published 1832.

([16]) Brian Tamanaha, *A General Jurisprudence of Law and Society* (New York: Oxford University Press 2001), 159.

([17]) Sally Falk Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study," *Law & Society Review*, Vol. 7, No. 4 (Summer, 1973), 719–746 at 720.

([18]) Günther Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism," *Cardozo Law Review*, 13 (1992), 1443–1462, 1451.

([19]) Marc Galanter, "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law," 19 *Journal of Legal Pluralism and Unofficial Law*, 1981: 1–47, 25.

([20]) E. Melissaris, "From Legal Pluralism to Public Justification," 12 *Erasmus Law Review* 2013, special issue on "Law as a Plural Phenomenon," Wibo van Rossum & Sanne Taekema eds.

([21]) W. Twining, *General Jurisprudence. Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press 2010), 369.

([22]) S. Romano, *The Legal Order* (Abingdon: Routledge 2017).

([23]) E. Ehrlich, *Fundamental Principles of the Sociology of Law* (New Brunswick: Transaction Publishers 2009).

([24]) On the same wavelength, *see* von F. Benda-Beckmann, "Who Is Afraid of Legal Pluralism?," *Journal of Legal Pluralism*, Vol. 47 (2002): 37–83.

([25]) B.Z. Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism," *Journal of Law and Society*, Vol. 20, No. 2 (1993): 192–217.

([26]) B. Malinowski, *Crime and Custom in Savage Society. An Anthropological Study of Savagery* (London: Routledge & Kegan Paul 1926), 58.

([27]) M. Galanter, "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law," *Journal of Legal Pluralism and Unofficial Law*, Vol. 19 (1981): 1–47.

([28]) *See* Galanter, "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law," 1981, at 19.

([29]) *See*, e.g., G.R. Woodman, "Ideological Combat and Social Observation. Recent Debate about Legal Pluralism," *Journal of Legal Pluralism*, Vol. 42 (1998): 21–59; G.R. Woodman, "The Idea of Legal Pluralism," in *Legal Pluralism in the Arab World*, B. Dupret ed. (The Hague: Kluwer Law International 1999), 3–19.

([30]) S. Roberts, "Do We Need an Anthropology of Law?," *RAIN*, No. 25 (1978), 4–7.

([31]) S. Roberts, "Against Legal Pluralism. Some Reflections on the Contemporary Enlargement of the Legal Domain," *Journal of Legal Pluralism*, Vol. 42: 95–106, at 97.

([32]) S. Roberts, "After Government? On Representing Law without the State," *Modern Law Review*, Vol. 68, No. 1: 1–24 (2005).

([33]) *See* Roberts, "After Government?" 2005, at 23.

([34]) *See* L. Nader, *The Life of the Law* (Berkeley: University of California Press 2002).

([35]) R. Hirschl & A. Shachar, "The New Wall of Separation: Permitting Diversity, Restricting Competition," *Cardozo Law Review*, Vol. 30 (2009): 2535–2560, 2537.

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