

Understanding Legal Pluralism: Past to Present, Local to Global[†]

BRIAN Z TAMANAHA^{*}

Abstract

The notion of legal pluralism is gaining momentum across a range of law-related fields. Part I of this article will portray the rich history of legal pluralism, from the medieval period up to the present. Part II will explain why current theoretical efforts to formulate legal pluralism are plagued by the difficulty of defining "law." Finally, Part III will articulate an approach to contemporary legal pluralism that avoids the conceptual problems suffered by most current approaches, while framing the salient features of legal pluralism.

1. Introduction

Legal pluralism is everywhere. There is, in every social arena one examines, a seeming multiplicity of legal orders, from the lowest local level to the most expansive global level. There are village, town, or municipal laws of various types; there are state, district or regional laws of various types; there are national, transnational and international laws of various types. In addition to these familiar bodies of law, in many societies there are more exotic forms of law, like customary law, indigenous law, religious law, or law connected to distinct ethnic or cultural groups within a society. There is also an evident increase in quasi-legal activities, from private policing and judging, to privately run prisons, to the ongoing creation of the new *lex mercatoria*, a body of transnational commercial law that is almost entirely the product of private law-making activities.

What makes this pluralism noteworthy is not merely the fact that there are multiple uncoordinated, coexisting or overlapping bodies of law, but that there is diversity amongst them. They may make competing claims of authority; they may impose conflicting demands or norms; they may have different styles and orientations. This potential conflict can generate uncertainty or jeopardy for individuals and groups in society who cannot be sure in advance which legal regime will be applied to their situation. This state of conflict also creates opportunities for individuals and groups within society, who can opportunistically select from among coexisting legal authorities to advance their aims. This state of conflict, moreover, poses a challenge to the legal authorities themselves, for it means that they have rivals. Law characteristically claims to rule whatever it addresses, but the fact of legal pluralism challenges this claim.

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^{*} Chief Judge Benjamin N Cardozo Professor of Law, St John's University, New York. The author thanks Neil Walker, Paul Schiff Berman, and an anonymous reader from the *Sydney Law Review* for very helpful critical comments on an earlier draft of this article.

There is another sense in which legal pluralism is everywhere. In the past two decades, the notion of legal pluralism has become a major topic in legal anthropology, legal sociology, comparative law, international law, and socio-legal studies, and it appears to be gaining popularity. As anyone who has engaged in multidisciplinary work knows, each academic discipline has its own paradigms and knowledge base, so it is unusual to see a single notion penetrate so many different disciplines.

This article will lay out a framework to help us examine and understand the pluralistic form that law takes today. The first part of the article will place modern legal pluralism in historical context, for the only way to grasp where we are and where we are headed is to have a sense of how we arrived at the present. Legal pluralism, it turns out, is a common historical condition. The long dominant view that law is a unified and uniform system administered by the state has erased our consciousness of the extended history of legal pluralism. To resurrect this awareness, the first part of this article will portray the rich legal pluralism that characterised the medieval period, and it will describe how this pluralism was reduced in the course of the consolidation of state power. It will then elaborate on the new forms of legal pluralism that were produced through colonisation, when Western European colonisers transplanted legal regimes abroad. These historical contexts will set the stage for contemporary legal pluralism, which combines the legacy of this past with more recent developments connected to the processes of globalisation.

The next part of the article will shift to the academic discussion of legal pluralism. Although the notion of legal pluralism is gaining popularity across a range of academic disciplines, from its very inception it has been plagued by a fundamental conceptual problem — the difficulty of defining ‘law’ for the purposes of legal pluralism. This issue lies at the very core of ‘legal pluralism’. Debates surrounding this conceptual problem have continued unabated for three decades, often in unusually acerbic exchanges. Recent theoretical developments have taken a remarkable turn. Just as the notion of legal pluralism began to take off, the theorist who contributed the most to its promotion announced that, owing to its insoluble conceptual problem, legal pluralism should be discarded. This part will lay out a brief account of the conceptual problem that plagues legal pluralism and will indicate why it cannot be resolved. Scholars who invoke legal pluralism without an awareness of this conceptual problem and its implications will risk building upon an incoherent and unstable foundation.

The final part will articulate an approach to contemporary legal pluralism that avoids the conceptual problems suffered by most current approaches, while framing the important features of legal pluralism. It is drawn from and combines the insights produced in legal anthropology, comparative law, international law, and globalisation studies, in the hope that the framework can provide common ground for a cross-disciplinary focus on legal pluralism.

2. *Legal Pluralism Past and Present*

A. *Legal Pluralism in the Medieval Period*

By general convention, the medieval period covers about 1000 years, commencing with the 5th century collapse of the Roman Empire and coming to a close with the 15th century Renaissance. The earlier centuries of this period have the forbidding appellation, the Dark Ages, when the once great Roman Empire that extended from North Africa and the Middle East to Western Europe was overrun by successive waves of Germanic tribes, and later suffered incursions by Huns, Moslems, Norsemen, Magyars, and other fearsome external invaders. European society closed in upon itself, commerce slowed, feudalism developed, local dukes or barons were more powerful than distant kings or princes, and learning was limited, carried on mainly in the Roman Catholic Church. The 12th and 13th centuries, marked by the rediscovery of the works of Aristotle and the Justinian Code, and by the establishment of universities, was the first stage in the awakening of Europe from this long period of slumber.

The mid-to-late medieval period was characterised by a remarkable jumble of different sorts of law and institutions, occupying the same space, sometimes conflicting, sometimes complementary, and typically lacking any overarching hierarchy or organisation. These forms of law included local customs (often in several versions, usually unwritten); general Germanic customary law (in code form); feudal law (mostly unwritten); the law merchant or *lex mercatoria* — commercial law and customs followed by merchants; canon law of the Roman Catholic Church; and the revived Roman law developed in the universities.¹ Various types of courts or judicial forums coexisted: manorial courts; municipal courts; merchant courts; guild courts; church courts and royal courts. Serving as judges in these courts were, respectively, barons or lords of the manor, burghers (leading city residents), merchants, guild members, bishops (and in certain cases the pope), and kings or their appointees. Jurisdictional rules for each court, and the laws to be applied, related to the persons involved — their status, descent, citizenship, occupation or religion — as well as to the subject matter at issue.

‘[T]he demarcation disputes between these laws and courts were numerous.’² Conflicts arose regularly with Church courts in particular, which claimed authority over matters dealing with marriage, property inheritance, and anything involving church personnel; ‘[m]any offences could in principle be tried either in a secular or in an ecclesiastical court.’³ Not only did separate legal systems and bodies of legal norms coexist, a single system or judge could apply distinct bodies of law. In the 8th through 11th centuries, for example, under the ‘personality principle,’⁴ the

1 A detailed account of the different laws and institutions can be found in Olivia Robinson, Thomas Fergus & William Gordon, *European Legal History* (2000).

2 See Raoul van Caenegem, *Legal History: A European Perspective* (1991) at 119.

3 Gillian Evans, *Law and Theology in the Middle Ages* (2002) at 1.

4 An informative description of this principle and the legal pluralism that resulted from it is contained in Frederick Maitland, ‘A Prologue to the History of English Law’ (1898) 14 *Law Quarterly Review* 13.

same judges applied different laws depending upon whether one was Frankish, Burgundian, Alamannic, or a descendent of Roman Gaul.⁵ Things were even more complicated in cities with Jewish populations or on the Iberian Peninsula following the Muslim invasion, for Jews and Muslims had their own comprehensive bodies of law, yet they interacted with one another and with Christians.

The mid through late Middle Ages thus exhibited legal pluralism along at least three major axes: coexisting, overlapping bodies of law with different geographical reaches; coexisting institutionalised systems; and conflicting legal norms within a system. In terms of the first axis — bodies of law — the *ius commune*, the *lex mercatoria*, and ecclesiastical law spanned separate kingdoms across a large swath of Europe; this transnational law (loosely described as such, for nations were not yet fully formed) coexisted with codified Germanic customary law on a national level, and with feudal law, municipal law and unwritten local customary laws on the local level.⁶ In terms of the second axis — coexisting institutionalised systems — in the words of medieval scholar Raoul van Caenegem, ‘there were also vertical dividing lines between legal systems: those which separated townsmen from countrymen, churchmen and students from laymen, members of guilds and crafts from those not so affiliated. The great (and the smaller) *ordines* of society lived according to distinct sets of rules, administered by distinct networks of law courts, for it was understood that everyone should be tried by his peers.’⁷ In addition, royal courts could hear cases in the first instance or on appeal from other courts. In terms of the third axis — conflicting legal norms — within a single system and social arena there could be different bodies of legal norms, especially of customary law. ‘It was common to find many different codes of customary law in force in the same kingdom, town or village, even in the same house, if the ninth century bishop Agobard of Lyons is to be believed when he says, “It often happened that five men were present or sitting together, and not one of them had the same law as another.”’⁸

Medievalist Walter Ullmann summarised the legal situation in late Middle Ages in the following terms:

The medieval system of positive law cannot be conceived as a homogenous and unified body of legal rules. Three distinct systems of statutory enactments can be discerned: Roman law, as transmitted through Justinian’s compilation and modified subsequently by additional legislation of the Emperors; canon law, as represented in various collections; and thirdly, the Germanic Lombard law. To these must be added the numerous statutes of the municipalities and independent States, around which enactments there cluster many customary formations of law, mostly of a supplementary and interpretive character. This complex mosaic of

5 See van Caenegem, above n2 at 117–18. See also Patrick Geary, *The Myth of Nations: The Medieval Origins of Europe* (2002) at 152–154.

6 See Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983); Walter Ullmann, *The Medieval Idea of Law* (1969).

7 van Caenegem, above n2 at 118.

8 John Morrall, *Political Thought in Medieval Times* (1980) at 17.

legal systems naturally presented many difficulties to the application of abstract legal rule to the given set of concrete circumstances.⁹

To modern ears this multifarious legal situation sounds unusual, but historians have shown that the coexistence of more than one body of legal norms and systems was the normal state of affairs for at least 2000 years of European history, certainly since the heyday of the Roman Empire (which allowed local laws to remain in force), and especially so after its collapse.

The fact that we have tended to view law as a monopoly of the state is a testimony to the success of the state-building project and the ideological views which supported it, a project which got underway in the late medieval period. For almost the entirety of the medieval period, the state system we are now familiar with was not in place in Western Europe. England had a relatively centralised system from the 12th century on, following the Norman conquest, but the continent was divided among various competing major and minor kings and princes, who had scant effective control of much of the landscape. Wars during this period were not fought between states as such, but rather were efforts by kings and princes to add territory to their personal holdings. There was no public/private separation of offices or assets. The primary sources of income for kings were their feudal lands, special customs they collected and fees from royal courts. Leading officials who handled their affairs were members of their personal staffs.

It took centuries to move from this situation to the establishment of states run by government bureaucracies, a story which cannot be told in detail here. Kings and princes first had to bring the nobility and the cities under their control.¹⁰ A common strategy toward this end was to place members of the higher nobility on their payroll, while forming strategic alliances with leading burghers of the cities against the lower barons. It was also essential for sovereigns to establish their autonomy from the Church. This was facilitated by the Reformation, which broke the hegemony of the Roman Catholic Church and enabled sovereigns in Protestant regions to seize Church assets. Two famous treaties serve as early markers of the state building process. The Treaty of Augsburg in 1555 established the principle that sovereigns could decide the religion of citizens within their territory.¹¹ The Treaty of Westphalia of 1648 divided Europe into separate, secular territories under the authority of sovereigns. The treaty recognised that heads of state control internal affairs and have the right to defend territorial boundaries.¹² Although various forms of political organisation thrived prior to this time (including city states and urban leagues),¹³ thereafter, territorial states would become the central political and legal unit of Western Europe.

9 Ullmann, above n6 at 71.

10 A superb exploration of the development of the state can be found in Martin van Creveld, *The Rise and Decline of the State* (1999) Chapter 2.

11 Hendrik Spruyt, *The Sovereign State and its Competitors: An Analysis of Systems of Change* (1994) at 191.

12 van Creveld, above n10 at 68.

13 Spruyt, above n11.

Consolidation of law in the hands of the state was an essential aspect of the state-building process. Central to this process was the implementation of an administrative apparatus that oversaw tax collection, law enforcement, and judging — different roles that were often exercised by the same individuals in a given location. The various heterogeneous forms of law described earlier were gradually absorbed or eliminated. As medievalist Marc Bloch observed, ‘The consolidation of societies into great states or principalities favoured not only the revival of legislation but also the extension of a unifying jurisprudence over vast territories.’¹⁴ Sovereigns and city merchants shared an affinity for the revived Roman law, which envisioned a powerful law-making role for rulers and was more amenable to the needs of commerce than canon law and the uncertain mix of customary law.¹⁵

During the slow course of the construction of the state legal system with its monopoly over law, customary law, which was a substantial bulk of the law during the medieval period, underwent a subtle but fateful transition that had begun much earlier. In the process of being incorporated within the state legal system, customary law was taken over by legal professionals. Historian Donald Kelley explained the significance of this takeover:

With the advent of written forms... even with the proviso of popular “approval” and “tacit consent,” custom lost its primary ties with its social base and came under the control of legal and political authorities. The classical formula designating *consuetudo* as the “best interpreter of the law” was intended by jurists to enhance their own power, as suggested by the gloss of Azo, who defined custom as the founder and abrogator as well as the interpreter of law.... Another, less authoritative maxim... suggests the true significance of the transition from “custom” to “customary law,” which is that once again the legal experts have begun to take over. This indeed is the import of the twelfth-century revival of “legal science,” in which custom joins civil and canon law in the arsenal of the “language of power” which jurists come in large part to monopolize.¹⁶

Kelley emphasises in this passage that, once legal professionals control the pronouncement and development of customary law, what is called ‘customary law’ by legal officials does not necessarily correspond to actual customs. Officially recognised ‘customary law’ develops in accordance with the modes, mechanisms, requirements, and interests of legal officials and the legal system (and those it serves), whereas social customs and norms are produced through a variety of processes and mechanisms apart from the official legal system.

In the 17th and 18th centuries, a sharper distinction emerged between the public and private realms.¹⁷ State law became the pre-eminent form of law; international

14 Marc Bloch, ‘The Feudal World’ in Norman Cantor & Michael Wertham (eds), *Medieval Society: 400–1500* (1967) at 43.

15 See Spruyt, above n11 at 102–05.

16 Donald Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* (1990) at 106.

17 In earlier periods the public/private distinction was not sharply drawn. See van Creveld, above n10 at 23–24.

law and natural law were also recognised, but mainly in virtue of and on the terms set by state law. Customary norms and religious law were, in effect, banished to the private realm. They did not disappear, but a transformation in their status came about. Some of these norms and institutions continued to obtain recognition and sanction from state legal systems; other norms continued to be observed and enforced in strictly social or religious contexts. The key characteristic they lost over time was their former, equal standing and autonomous *legal* status. Once considered independently applicable bodies of *law*, owing to the takeover of state law they rather became *norms*, still socially influential, but now carrying a different status from that of official state law. Customary and religious norms, it must be emphasised, often were more efficacious than state law in governing every day social affairs, but the loss of legal status had significant implications that would bear fruit over time.

An equally important development that followed the establishment of the state system was a shift in views of the role of the government and of law — in effect altering the dominant character and orientation of law. No longer was law thought to merely reflect an enduring order of custom or natural principle. Government and law instead came to be seen and utilised as instruments to achieve social objectives. This is an altogether different role and function, one based upon the capacity legal systems have as institutionalised apparatuses of power. With this change, the bulk of the law became less about enforcing social norms than about achieving collective purposes, and about structuring and ordering the government and its affairs.

The monopolisation of law by states in Western Europe reduced legal pluralism at home just as a new wave of legal pluralism was being produced elsewhere through colonisation. Before moving to that discussion, it is pertinent to note that, while the focus herein has been on legal pluralism within medieval Europe, the phenomena just described were by no means limited to that context. Wherever there were movements of people, wherever there were empires, wherever religions spanned different language and cultural groups, wherever there was trade between different groups, or different groups lived side by side, it was inevitable that different bodies of law would operate or overlap within the same social field. Since these were common conditions, the kinds of legal pluralism that existed in medieval Europe no doubt existed elsewhere.

B. Colonisation and the Resultant Legal Pluralism

European colonisation of the non-western world commenced in the late 15th century, peaked in the late 19th century, and for the most part ended by the 1970s. The shape and form of colonisation and its consequences depended upon the period in which the colonisation took place, the circumstances of the areas colonised, and the motivations of the colonising powers. For example, when initially encountered, North America and Australia were large land masses with relatively sparse and politically decentralised populations; this was different from the more centralised and populous societies that existed in Central America, parts of Africa, and Asia; and different from densely populated heterogeneous India

under the Mughal rule, with its complex mixture of Muslim and Hindu laws and institutions; and different from the Cape of Africa, where two colonising powers, the Dutch and British, encountered one another as well as a large native population.

These contrasting situations and purposes led to variations in legal approach. Spanish colonisation of the Americas, for example, took place relatively early when the authority of the Catholic Church in Spain was still strong. The Spanish mission was not just to extract raw material using native and slave labour, but also to gain converts to Christianity, which led to intrusive involvement with the indigenous population. By contrast, British and Dutch colonisation of densely populated India and Indonesia, respectively, was organised initially through royally chartered private corporations, their East India companies, which exercised the power to establish laws and courts. Their aim was economic rather than territorial or religious expansion, which dictated a minimal legal presence, focused mainly on protecting their economic interests and governing the expatriate populations in the coastal trading cities.

‘On the whole there was a striking reluctance to accept jurisdiction over subject people. Up to the late eighteenth century there was no serious European endeavour to develop jurisdiction over an indigenous population according to their own law. Nor were there attempts on a large scale to extend European law to the subject population.’¹⁸ In most cases it was not necessary for colonial interests, nor practicable, nor economically efficient to extend legal rule over indigenous populations. ‘Accordingly, indigenous legal institutions were mostly left alone, unless they directly affected the status of the European traders, missionaries, settlers, or officials.’¹⁹ Jurisdiction was determined mainly by the personal principle, under which indigenous law was applied to indigenous people and colonial law to the colonisers (and to mixed cases).

When colonising powers began to exert greater legal authority, as occurred in various areas from the late 18th century through the late 19th century, it was typically accomplished through ‘indirect rule’, which relied upon pre-existing sources of political authority — using indigenous leaders — or involved the creation of so-called ‘native courts’ that enforced customary or religious laws. The result was, as in medieval Europe, a hodgepodge of coexisting legal institutions and norms operating side by side, with various points of overlap, conflict and mutual influence. In her superb historical account of the role law in colonisation, Lauren Benton describes one doomed British attempt to organise the unruly situation in India:

The relationship of indigenous and British forums, and indigenous and British legal practitioners, was specified in the 1772 reforms. A plan drawn up by Warren Hastings created two courts for each of the districts. One court, the Diwani

18 Jörg Fisch, ‘Law as a Means to an End: Some Remarks on the Function of European Law and Non-European Law in the Process of European Expansion’ in Wolfgang Mommsen & Jaap de Moor (eds), *European Expansion and Law: the Encounter of European and Indigenous Law in 19th and 20th Century Africa and Asia* (1992) at 23.

19 Wolfgang Mommsen, ‘Introduction’ in Mommsen & Moor, above n18 at 4.

Adalat, was to handle civil cases, while a second court, the Foujdari Adalat, was to oversee trials for crimes and misdemeanors. The revenue collectors of each district were to preside over the civil courts, thus consolidating in British hands control over revenue and property disputes. The civil courts would apply Muslim law to Muslims, and Hindu law to Hindus. The criminal courts would apply Muslim law universally. An appellate structure was also created, with one of two courts at Calcutta to hear appeals from inferior civil courts.... Though British (Company) officials would preside in civil courts, the system built in formal and informal roles for Mughal officials. In a move that was purely pragmatic, zamindars were allowed to maintain jurisdiction over local, petty disputes. They had no formal rights to such jurisdiction, but the system simply would not function effectively without their playing a role they had assumed in the Mughal system. The criminal country courts continued to be operated entirely by Mughal officers, and in the civil courts, Muslim and Hindu legal experts were given monthly salaries as Company employees for their work in advising on local and religious law.²⁰

This arrangement allowed matters of interest to the East India Company to be controlled by legal rules issued by the Company, with Muslim and Hindu law to govern local populations in their own affairs. Later, following concern in Britain about the unseemly way in which a private, profit-oriented company was allowed to control the legal arrangements governing a subject population, the British government created its own independent court with authority over British subjects and company employees, overlapping with the authority of other courts.

It is not possible to summarise here all the various shapes and forms that law took in the context of colonisation.²¹ Instead, I will merely highlight a few common approaches and their consequences, especially in the relationship between transplanted colonial law and local customary law. The initial approach, as indicated above, was to leave indigenous institutions to function as they would, especially in the hinterlands, where colonisers had limited interests and little power. When colonising powers undertook to expand the reach of law, three basic strategies were applied to incorporate customary or religious law: the codification of customary or religious law; the application by state courts of unwritten customary or religious law in a fashion analogous to the common law; and the creation or recognitions of informal or ‘customary’ courts run by local leaders.²² The customary law officially recognised by the system was often limited to family law issues, minor crimes, issues unique to the customary or religious law, and minor disputes. Often repugnancy or supremacy clauses were enacted that

20 Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (2002) at 134.

21 An extraordinary book that covers a range of colonial contexts is Lauren Benton, *id*; another excellent source is Mommsen & de Moor (eds), above n18. This account draws heavily from both.

22 See summary in Brian Z Tamanaha, ‘A Proposal For the Development of a System of Indigenous Jurisprudence in the Federated States of Micronesia’ (1989–1990) 13 *Hastings International and Comparative Law Review* 71 at 102–107.

invalidated particularly offensive (by the coloniser's standard) local laws or practices; and often the official state court often would have final authority over indigenous courts.

All of these strategies suffered from various defects, and none were entirely successful in replicating customary or religious law.²³ The basic problem is that local norms and processes could not be removed from their original medium without losing their integrity. In many indigenous contexts, rules were not treated as binding dictates, but rather as flexible rules that could be negotiated in the course of resolving disputes. 'The essence of the customary systems may be said to have lain in their processes, but these were displaced, and the flexible principles which had guided them were now fed into a rule-honing and using machine operating in new political circumstances.'²⁴

Recent scholarship, moreover, has shown that some of what was identified as customary law was not in fact customary or traditional at all, but instead were inventions or selective interpretations by colonial powers or sophisticated indigenous elites who created customary law to advance their interests or agendas.²⁵ A more innocent explanation applicable to many situations is that colonisers began to affirmatively incorporate customary law into the state legal system after a lengthy period of contact, by which time customary law and practices had been transformed or forgotten. The essential point is that, despite the label 'customary law,' it should not be assumed that the laws faithfully matched prevailing customs or social norms (as also indicated in the earlier discussion of the medieval period).

In many locations, what resulted was a dual legal system with various complex mixtures and combinations, and mutual influences. Coexisting within the ambit of an overarching legal system were state court processes and norms instituted by the colonising power that applied mainly to economic activities and government affairs, while officially recognised customary or religious institutions enforced local norms. Jurisdictional rules (often based on the personal principle) and conflicts of law rules addressed the relations between these systems. Although less formal by design, customary and religious courts sometimes adopted the forms and styles of state courts. Both sides of this dual system influenced one another in various ways, including exchanging or recognising the other's norms. Often the official law was markedly distant from the local law, set forth in the language of the coloniser which many indigenous people did not speak, its effective reach limited to urban areas where the institutionalised presence of the state legal system was strongest.

23 An overview of the problems can be found in Sally Engle Merry, 'Law and Colonialism' (1991) 25 *Law & Society Review* 889.

24 See Martin Chanock, *Law, Custom, and Social Order: the Colonial Experience in Malawi and Zambia* (1985) at 62.

25 Martin Chanock, 'The Law Market: The Legal Encounter in British East and Central Asia' in Mommsen & de Moor (eds), above n18; Francis Snyder, 'Colonialism and Legal Form: The Creation of "Customary Law" in Senegal' (1981) 19 *Journal of Legal Pluralism and Unofficial Law* 49.

Following decolonisation, in many locations customary law enjoyed an official boost in status, and in many Muslim countries the Sharia was given greater official recognition; in some instances customary law or Sharia were accorded a position of supremacy within and above official state law. But in most situations not much changed. A large bulk of the law was controlled by legal professionals, had transplanted origins, and covered economic or government affairs or other instrumental uses of law. As before, customary and religious law controlled selected areas, usually marriage, inheritance, familial property rights, and customary or religious offences.

It is essential to recognise that the priority officially accorded to state law in these situations says nothing about the power of law in social life. In many locations during and after colonisation, state legal institutions were relatively weak by comparison to other normative systems; they were poorly developed, underfunded and under-staffed, and their presence was limited to the larger towns or cities. Since the bulk of state legal norms were transplanted from elsewhere, they almost inevitably did not match the norms that prevailed in social life.²⁶ Thus, while the transplanted law held the upper hand on its own turf within the context of the legal system, matters were reversed in social life, where the state legal system frequently was unable to dictate its terms.

To offer additional generalisations about these extraordinarily varied situations would be hazardous, but one further observation can be made, as it turns up repeatedly in close studies of these situations. Although it is correct to say that colonisers used law to establish their rule and advance their interests, this is not the whole story. As Benton detailed, indigenous people demonstrated a remarkable awareness of the differences in norms and processes between the various coexisting legal systems and showed a strategic understanding of how to exploit these differences, invoking whichever system serves their particular purposes, pitting one system against the other when the need arose. From the standpoint of a legal authority trying to consolidate its rule, legal pluralism is a flaw to be rectified. From the standpoint of individuals or groups subject to legal pluralism, it can be a source of uncertainty, but it also creates the possibility of resort to alternative legal regimes.

By the outset of the 20th century, the project of state-building using law extended around the world with mixed and varied results. In Western Europe, the pre-existing legal pluralism of the Middle Ages had been subsumed within a unified legal system, though cultural and religious plurality continued to exist outside the ambit of the legal system, usually without official legal status or sanction. Beyond Europe, especially in colonial and post-colonial situations, an overarching legal system was in place which internalised and explicitly recognised a plurality of norms and institutions. Old multinational empires, like the Ottoman, Hapsburg, Russian, and Chinese, also had unified systems that recognised internal plurality. Although states routinely claimed a monopoly over law and the enforcement of social order, the capacity of states to live up to this claim varied widely. In many

26 See Brian Z Tamanaha, *A General Jurisprudence of Law and Society* (2001) Chapter 5.

areas of the world, ranging from pockets in densely populated urban areas, to rural areas or dense jungle, state law was impotent, capable only of episodic or specific interventions. In all situations, norms and institutions that rivalled the state in controlling and influencing the behaviour of people continued to thrive.

C. *Late 20th Century Legal Pluralism*

At the close of the 20th century, the various modes and manifestations of what has been labelled 'globalisation' have given rise to yet another wave of legal pluralism.²⁷ Globalisation refers to a cluster of characteristics that reflect an increasingly interconnected world:²⁸ the migration of people across national borders; the creation of global networks of communication (mass media and the internet), global transportation systems, and global financial markets; the building of global or transnational political organisations or regulatory regimes (European Union ('EU'), World Trade Organization ('WTO'), North American Free Trade Agreement ('NAFTA'), Association of Southeast Asian Nations ('ASEAN')); the consolidation of a global commercial system comprised of transnational corporations with production and sales networks that span countries around the world; the presence of non-governmental organisations that carry on activities around the world; the infliction of global or transnational environmental damage (damage to the ozone, global warming, Chernobyl nuclear fallout, depletion of fish stocks, acid rain and chemical pollution of rivers that cross several countries, etc), and terrorism with a global reach.

Connected to globalisation, observers have noted that states are losing power in various ways.²⁹ As in the example of the EU, states have given up some of their sovereign power to control their own affairs in certain economic, political and legal respects, subjecting themselves to a higher authority. States also have broken up internally into smaller units more closely tied to communities of shared identity, as occurred with the former Soviet Union and Yugoslavia; a similar process short of complete separation can be seen in the movements for greater autonomy in Scotland, Quebec, Kurdistan, the Basque regions of France and Spain, and other places. In addition to these political developments, states have lost their capacities to guide or protect their economies, as virtually every state is now deeply enmeshed in and subject to the vagaries of hyper-competitive, free-wheeling global markets.

Furthermore, and more immediately relevant, there are evident signs of a diminishment of the state's traditional legal functions. Private security forces now patrol and maintain order in gated communities, universities, places of public entertainment (theme parks, concerts, sporting events), public facilities (libraries,

27 The most extensive and sophisticated writings on the subject are by Paul Schiff Berman. See Paul Schiff Berman, 'Global Legal Pluralism' (2006–2007) *Southern California Law Review* 1155.

28 For an exploration of the jurisprudential aspects of this, see Catherine Dauvergne (ed), *Jurisprudence for an Interconnected Globe* (2003).

29 See Jürgen Habermas, *The Postnational Constellation: Political Essays* (2001) Chapter 4; van Creveld, above n10 at Chapter 6.

schools), shopping malls, corporate headquarters, many small businesses, and even public streets (neighbourhood watch). Privately owned and run (for profit) penitentiaries are handling an increasing number of prisoners. Many private organisations and institutions promulgate rules that apply to their own activities and to others within their purview. In situations of dispute, many parties choose (or are required) to bypass state court systems seen as inefficient, unreliable, too costly or too public, resorting instead to arbitration or private courts. Many of the massive slums that are ubiquitous in large cities around the world function with little or no official legal presence, beyond the purview of law and courts, often without legally recognised rights; order is maintained and intercourse conducted in these areas through other social norms, institutions or mechanisms.

Observers have identified or described legal aspects of these developments in terms of legal pluralism. One theme, called 'International Legal Pluralism,' is that the international legal system is internally pluralistic, with a sprawling multitude of separate tribunals (over 125 by one count) and functionally distinct bodies of legal norms tied to specific areas of regulation (for example, trade, human rights, intellectual property, law of the sea, crimes against humanity, pollution) that are not coordinated with one another and can overlap or conflict.³⁰ A dispute over whether a country can make available for its population generic drugs for the treatment of Acquired Immune Deficiency Syndrome, for example, simultaneously raises issues that fall with the jurisdiction of the WTO and under the purview of the World Health Organization, each of which has different norms and purposes.³¹ Not only is the international system fragmented, additional complications arise because domestic or national courts incorporate international law in different ways and to different extents. The same kind of fragmentation and lack of coordination also takes place on the regional level. Within the EU, for example, the legal regimes of member states vary in certain respects from one another, and also come into conflict with overarching EU laws and institutions.

A second theme prominent in the literature highlights the invocation of human rights norms, often by non-governmental organisations ('NGOs'), to challenge state laws or actions or customary laws or cultural practices.³² Suits are being brought in supranational human rights courts, like the European Court of Human Rights or the Inter-American Court of Human Rights, by citizens seeking redress against their own state. In these situations the norms and institutions of one legal system are being pitted against another.

A third theme of the global legal pluralist literature is the growth of 'self-creating', 'private', or 'unofficial' legal orders. A leading theorist, Gunther Teubner, suggests that functionally differentiated systems have developed with a

30 William W Burke-White, 'International Legal Pluralism' (2003-2004) 25 *Michigan Journal of International Law* 963.

31 See Andreas Fischer-Lescano & Gunther Teubner, 'Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2003-2004) 25 *Michigan Journal of International Law* 999.

32 See Sally Engle Merry, 'Global Human Rights and Local Social Movements in a Legally Plural World' (1997) 12 *Canadian Journal of Law and Society* 247.

global or transnational reach — commercial transactions, the internet, and sports organisations, for example — generating their own legal orders. What observers have dubbed the new *lex mercatoria* is the example most often mentioned.³³ Transnational commercial transactions are increasingly conducted in connection with a body of rules and institutions that are not entirely tethered to the international legal system or to any particular nation state. Binding rules derive from several international conventions on commercial contracts, from standard terms utilised in model contracts, and from business customs or usages. Disputes between contracting parties are resolved through private arbitration. What makes the *lex mercatoria* noteworthy is that its norms, practices, and institutions are self-generated by the parties and their lawyers, although it intersects at various points with international law norms and national courts (when parties seek recourse from arbitration decisions). A different version of privately created rules in the economic sphere focuses on the efforts of NGOs to pressure corporations to adopt better practices, for example, by adopting corporate codes of conduct that address labour conditions for employees.³⁴ The primary actors in these contexts are transnational corporations, NGOs (Amnesty International, Greenpeace, etc), trade associations, various subject-based international agencies, and lawyers who serve them; their collective activities are creating a multiplicity of regulatory orders with global reach.³⁵

A fourth theme relates to the creation of ‘trans-governmental networks’ that have regulatory powers and implications. ‘For example, the 1990s saw the creation of the Financial Stability Forum, a network composed of three trans-governmental organisations — The Basel Committee on Banking Supervision, the International Organization of Securities Commissions, and the International Association of Insurance Supervisors — along with other national and international officials responsible for financial stability around the world.’³⁶ Active networks have also been created among judges, NGOs, and development organisations, among others. The multiplication of these networks beyond the direct control of any national or international agency, according to observers, constitutes another form of legal pluralism.

A fifth theme relates to the global movement of people. Within nations, people are moving in droves from the countryside to burgeoning cities in search of jobs and a better life. People are also moving in large numbers from one nation to another for the same reasons, often settling in immigrant communities in the new land. They bring their own cultural and religious norms, which may conflict with the official legal rules of the new land. A study of Muslims in England, for

33 Tamanaha, above n26 at 125–127.

34 See Adelle Blackett, ‘Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct’ (2000-2001) 8 *Indiana Journal of Global Legal Studies* 401.

35 See Francis Snyder, ‘Governing Economic Globalisation: Global Legal Pluralism and European Law’ (1999) 5 *European Law Journal* 334.

36 Paul Schiff Berman, ‘From International Law to Law and Globalization’ (2004-2005) 43 *Columbia Journal of Transnational Law* 485 at 502.

example, showed that many Muslims continue to practice polygamy, consistent with their religious law but contrary to English law. The author observed that 'Muslim law is still superior and dominant over English law in the Muslim mind and in the eyes of the Muslim community'.³⁷

A final observation about global legal pluralism will help introduce the next part. Although the phenomena just described are real, the focus on global legal pluralism as such is not solely the product of changes in the world, but is also the consequence of two particular changes in the way the situation is perceived. Two shifts in perspective have, in a sense, 'created' global legal pluralism.

The first alteration involves positing the global or transnational level as the starting point of the analysis, then concentrating attention on internal divergences or conflicts. This shift in frame of reference and orientation immediately 'produces' legal pluralism. If one envisions matters from the standpoint of a global or transnational legal system, that legal system is immediately pluralistic because it contains and interacts with a multitude of coexisting, competing and overlapping legal systems at many levels and in many contexts. Or to put the point another way, all of the phenomena just identified as characteristic of globalisation also were present 50 years ago, albeit in less intensified forms; several of them, including international law, have been present since the Middle Ages. Conflicts of law regimes and jurisdictional rules have existed for centuries to deal with these situations. Forum shopping is a familiar legal phenomenon. Until recently, however, no one thought to describe these ubiquitous situations as a matter of legal pluralism.

As an illustration of this point, consider the EU. When the overarching union came into existence through a series of agreements and institutional manifestations, it was legally plural in the double sense that the member nations had their own legal systems, and these systems interacted with the broader EU legal system and norms. Note, however, that such combinations or federations with internal diversity and conflict with the national level are common, yet heretofore the term 'legal pluralism' has rarely been applied. Even hierarchically organised and unified legal systems — the United States, for example — have internal conflicts between different bodies of law or institutions that must be rationalised (from the 50 states to quasi-sovereign American Indian tribes), but few people think of this as a matter of legal pluralism. Rather, they were seen as complicated arrangements to be solved or managed, but not a dominant characteristic of the system. Legal pluralists, in contrast, construe them as fundamental, ineradicable, and important characteristics central to the operation and functioning of these systems. The very label 'legal pluralism' connotes this different orientation. Global legal pluralism, when viewed in this light, in a sense is 'produced' when one takes seriously the global or transnational legal order, while keeping an eye on the evident and inevitable divergences and conflicts.

37 Ihsan Yilmaz, 'The Challenge of Post-Modern Legality and Muslim Legal Pluralism in England' (2002) 28 *Journal of Ethnic and Migration Studies* 343 at 343.

The second alteration in perspective relates to what one considers ‘law’ for the purposes of legal pluralism. As indicated, discussions of legal pluralism on the global level routinely include various forms of private regulation, private dispute resolution bodies, and the activities of private entities like NGOs or trade associations.³⁸ This is considered legal pluralism because it counts as ‘law’ a range of private norms and regulatory institutions. Adherents of this approach, for example, assert that an international sports league and the internet give rise to their own ‘legal’ orders. Scholars who take this approach tend to be social scientists interested in law as a social phenomenon,³⁹ although a few international lawyers do so as well.⁴⁰ The mere fact of framing law in these inclusive terms ‘produces’ a profusion of legal orders, and hence produces legal pluralism, as will be explored in greater detail in the following part.

3. *The Troubled Concept of Legal Pluralism*

Legal pluralism first began to garner attention within academia in legal anthropology in the 1970s through studies of law in colonial and post-colonial situations. The label ‘legal pluralism’ in that context referred primarily to the incorporation or recognition of customary law norms or institutions within state law,⁴¹ or to the independent coexistence of indigenous norms and institutions alongside state law (whether or not officially recognised).⁴² In the late 1980s, legal pluralism moved to centre stage in socio-legal studies, when prominent scholars labelled it ‘a central theme in the re-conceptualisation of the law/society relation,’⁴³ and the ‘key concept in a post-modern view of law.’⁴⁴ Since then, its popularity has steadily spread, penetrating comparative law, political science, international law, and legal philosophy (in a limited way).⁴⁵

Despite this apparent success, the notion of legal pluralism has been marked by deep conceptual confusion and unusually heated disagreement. One factor that contributes to the continuing disagreement is that participants come from several disciplines bring different concepts and orientations to the subject. An international lawyer who invokes legal pluralism has something very different in

38 See Blackett, above n34; Oren Perez, ‘Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law’ (2003) 10(2) *Indiana Journal of Global Legal Studies* 25; Merry, above n32.

39 See, for example, Gunther Teubner, ‘The Two Faces of Janus: Rethinking Legal Pluralism’ (1991-1992) 13 *Cardozo Law Review* 1443; Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science, and Politics in Paradigmatic Transition* (1995).

40 Paul Schiff Berman is an international lawyer who draws from the social scientific approach in his work. See Paul Schiff Berman, ‘The Globalization of Jurisdiction’ (2002-2003) 151 *University of Pennsylvania Law Review* 311.

41 See MB Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (1979).

42 See Leopold Pospisil, *The Anthropology of Law: A Comparative Theory* (1971).

43 Sally Engle Merry, ‘Legal Pluralism’ (1988) 22 *Law & Society Review* 869 at 869.

44 Boaventura de Sousa Santos, ‘Law: A Map of Misreading. Toward a Postmodern Conception of Law’ (1987) 14 *Journal of Law and Society* 279.

45 See Margaret Davies, ‘The Ethos of Pluralism’ (2005) 27 *Sydney Law Review* 87; Emmanuel Melissaris, ‘The More the Merrier? A New Take on Legal Pluralism’ (2004) 13 *Social & Legal Studies* 57.

mind from a legal anthropologist who talks about legal pluralism. People using the concept also have different motivations and purposes. Some are socio-legal theorists interested in developing a sophisticated analytical approach to contemporary legal forms, some are avowed social scientists dedicated to working out a social scientific approach to law, some are critical theorists who invoke the notion as a means to delegitimise or decentre state law, and some are seeking a useful way of framing complicated situations for their own political purposes. The literature invoking the notion of legal pluralism covers a broad spectrum, from postmodernism, to autopoiesis, to human rights, to feminist approaches to customary law, to international trade, and much more. Under these circumstances, miscommunication and confusion over the notion is inevitable.

No purpose would be served by rehashing the full debate over legal pluralism,⁴⁶ which has been written about elsewhere in detail.⁴⁷ Instead I will summarily identify the core problem it suffers from. Social scientists who tout the concept of legal pluralism emphatically proclaim that law is not limited to official state legal institutions. To the contrary, they insist, law is found in the ordering of social groups of all kinds. Taking this position necessarily requires that legal pluralists provide some basis by which to determine or delimit what is and what isn't law. The question 'what is law?', however, has never been resolved, despite innumerable efforts by legal theorists and social scientists.

Attempts to define law for social scientific purposes fall into two basic categories.⁴⁸ One approach defines law in terms of the maintenance of normative order within a social group. Since every social group has normative regulation, every social group has 'law', in this understanding, regardless of the presence or absence of state legal institutions. The pioneer of this approach was Bronislaw Malinowski, whose *Crime and Custom in Savage Society* is a classic of anthropology. Law among the Trobriand of Melanesia, according to Malinowski, was not to be found in 'central authority, codes, courts, and constables,'⁴⁹ but rather in social relations. As he put it, 'The binding forces of Melanesian civil law are to be found in the concatenation of the obligations, in the fact that they are

46 An excellent overview of the debate can be found in Gordon R Woodman, 'Ideological Combat and Social Observation: Recent Debate About Legal Pluralism' (1998) 42 *Journal of Legal Pluralism* 21.

47 Brian Z Tamanaha, 'An Non-Essentialist Version of Legal Pluralism' (2000) 27 *Journal of Law and Society* 296; Brian Z Tamanaha, 'The Folly of the 'Social Scientific' Concept of Legal Pluralism' (1993) 20 *Journal of Law and Society* 192. A few readers have suggested that my second article repudiates the analysis of the first article. That is not correct, as the second article makes clear. They have different targets and differing emphases, but the analysis is consistent. The early article criticised a specific position as misconceived: that there is (or can be) a single, objective social scientific understanding of law, upon which to build legal pluralism. The later article incorporates this conclusion to develop a different approach to legal pluralism that does not resort to any single concept of law. There is one clear difference between the articles, however. The initial article had a regrettably strident tone that was not conducive to a sober academic discussion of the issues. For this I apologise.

48 See Brian Z Tamanaha, 'An Analytical Map of Social Scientific Approaches to the Concept of Law' (1995) 15 *Oxford Journal of Legal Studies* 501.

49 Bronislaw Malinowski, *Crime and Custom in Savage Society* (1926) at 14.

arranged into chains of mutual services, a give and take extending over long periods of time and covering wide aspects of interests and activity.⁵⁰ The problem with this approach was noted by legal anthropologist Sally Falk Moore: ‘the conception of law that Malinowski propounded was so broad that it was virtually indistinguishable from the study of the obligatory aspect of all social relationships.’⁵¹

A second approach, found in the work of Max Weber and Adamson Hoebel, defines law in terms of public institutionalised enforcement of norms.⁵² Perhaps the most widely invoked version of this approach is legal theorist H L A Hart’s notion of law as the combination of primary and secondary rules (a primary set of rules that apply to conduct, and a secondary set of rules that determine which primary rules are valid, and how rules are created and applied).⁵³ Although this approach is not explicitly tied to state law, it was derived by Weber, Hoebel and Hart by stripping the state law model to its core elements. There are two basic problems with this approach. First, many institutions enforce norms, and there is no uncontroversial way to distinguish which are ‘public’ and which are not, which runs the danger of swallowing all forms of institutionalised norm enforcement under the label law. Second, some societies, at least historically, lacked institutionalised norm enforcement. According to this definition, such societies do not have law — as Hart asserted about primitive societies⁵⁴ — which is unacceptable to scholars who insist that all societies have law.

Although each approach has adherents, each also has flaws that lead some to reject it. Thus legal pluralists cannot agree on the fundamental issue: ‘What is law?’ This issue, it should be noted, has never been resolved in legal philosophy, and there are compelling reasons to think that it is incapable of resolution,⁵⁵ so legal pluralists cannot be blamed for this failure. Nonetheless, having this unresolved issue at its very core places the notion of legal pluralism on a tenuous footing. The problem is not just that there is a plurality of legal pluralisms because accounts of legal pluralism adopt different definitions of law; a further difficulty is that the definitions adopted in legal pluralist studies almost uniformly suffer from the same problem Malinowski did — they are unable to distinguish ‘law’ from other forms of normative order.

John Griffiths, whose 1986 article ‘What is Legal Pluralism?’ is *the* seminal piece in the field, set forth the concept of law that is adopted by most legal pluralists (at least among anthropologists and sociologists). After considering and dismissing several alternatives as inadequate, Griffiths argued that Sally Falk Moore’s concept of the ‘semi-autonomous social field’ — social fields that have

50 Id at 76.

51 Sally Falk Moore, *Law as Process: an Anthropological Approach* (1978) at 220.

52 See Tamanaha, above n48 at 506–508 (describing Weber’s and Hoebel’s approaches).

53 H L A Hart, *The Concept of Law* (1961) at 89–96.

54 Id at 89–91.

55 For an explanation of why this issue cannot be resolved, see Brian Z Tamanaha, ‘Law’ in Stanley Katz, (ed), *Oxford International Encyclopedia of Legal History* (forthcoming, 2008); Tamanaha, above n48.

the capacity to produce and enforce rules⁵⁶ — is the best way to identify and delimit law for the purposes of legal pluralism.⁵⁷ There are many rule generating fields in society, hence there are many legal orders in society, including the family, corporations, factories, sports leagues, and indeed just about any social arena with social regulation. In another important and often cited early theoretical exploration of legal pluralism, published in 1983, Marc Galanter asserted: ‘By indigenous law I refer not to some diffuse folk consciousness, but to concrete patterns of social ordering to be found in a variety of institutional settings — in universities, sports leagues, housing developments, hospitals.’⁵⁸

The problem with this approach, as Sally Engle Merry noted almost 20 years ago, is that ‘calling all forms of ordering that are not state law by the term law confounds the analysis.’⁵⁹ Merry asked: ‘Where do we stop speaking of law and find ourselves simply describing social life?’⁶⁰ Galanter was aware of this difficulty at the very outset: ‘Social life is full of regulation. Indeed it is a vast web of overlapping and reinforcing regulation. How then can we distinguish “indigenous law” from social life generally?’⁶¹ Legal pluralists have struggled valiantly but unsuccessfully to overcome this problem. In an article canvassing almost 20 years of debate over the conceptual underpinnings of legal pluralism, Gordon Woodman, the long time co-editor of the *Journal of Legal Pluralism*, conceded that legal pluralists are unable to identify a clear line to separate legal from non-legal normative orders. ‘The conclusion,’ Woodman observed, ‘must be that law covers a continuum which runs from the clearest form of state law through to the vaguest forms of informal social control.’⁶² Similarly, Johns Griffiths asserted that ‘all social control is *more* or *less* legal.’⁶³ Consistent with this view, a recent theorist on legal pluralism suggested that law can be found in ‘day-to-day human encounters such as interacting with strangers on a public street, waiting in lines, and communicating with subordinates or superiors.’⁶⁴

Nothing prohibits legal pluralists from viewing law in this extraordinarily expansive, idiosyncratic way, although common sense protests against it. When understood in these terms, just about every form of norm governed social interaction is law. Hence, we are swimming, or drowning, in legal pluralism.

One might argue against this approach to legal pluralism that law is just one type of normative or regulatory ordering, whereas this approach reverses the relationship to hold that all normative or regulatory orders are types of ‘law.’⁶⁵

56 Sally Falk Moore, ‘Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study’ (1973) 7 *Law & Society Review* 719.

57 John Griffiths, ‘What is Legal Pluralism?’ (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1 at 38.

58 Marc Galanter, ‘Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law’ (1981) 19 *Journal of Legal Pluralism* 1 at 17–18.

59 Merry, above n43 at 878.

60 Ibid.

61 Galanter, above n58 at 18.

62 Woodman, above n46 at 45.

63 Griffiths, above n57 at 39 (emphasis in original).

64 Berman, above n40 at 505.

This observation raises the suspicion that the recent discovery of ‘legal pluralism’ mainly involves putting a new label on the old idea that society is filled with a multiplicity of normative orders or regulatory orders. Indeed, why should we call this *legal* pluralism rather than, what seems to be more fitting, *normative* pluralism or *regulatory* pluralism? Prominent legal pluralist Boaventura de Sousa Santos posed this question, then bluntly and without further elaboration responded: ‘Why not?’⁶⁶ The short answer is that to view law in this manner is confusing, counter-intuitive, and hinders a more acute analysis of the many different forms of social regulation involved.

Although there are additional complexities to the concept of legal pluralism, those are the fundamental issues, and they have been known for decades. Rather than continue with the debate, I will briefly return to John Griffiths, for his intellectual progress over the years is instructive. A sophisticated theorist, Griffiths was for more than two decades the most strident champion of legal pluralism. In ‘What is Legal Pluralism?’, the most frequently cited article in legal pluralist literature, Griffiths flatly declared that ‘Legal pluralism is the fact.’ “‘Legal pluralism’ is the name of a social state of affairs and it is a characteristic which can be predicated of a social group. It is not the name of a doctrine or a theory or an ideology.”⁶⁷

Yet from the very outset Griffiths was faced with an inconvenient thorn in the heart of his theory. Sally Falk Moore, who created the notion of the semi-autonomous social field (‘SASF’) that Griffiths adopted to identify law,⁶⁸ refused to apply the label ‘law’ to her own concept. Instead she proposed the unwieldy term ‘reglementation’, which, understandably, did not catch on. In a 2001 essay reflecting upon the past ‘Fifty Turbulent Years’ in legal anthropology, Moore laid out Griffiths’s account of legal pluralism without mentioning that he adopted her influential idea at the core of his approach. She then issued this criticism:

Following Griffiths, some writers now take legal pluralism to refer to the whole aggregate of governmental and non-governmental norms of social control, without any distinction drawn as to their source. However, for many purposes this agglomeration has to be disaggregated. For reasons of both analysis and policy, distinctions must be made that identify the provenance of rules and controls (Moore 1973, 1978, 1998, 1999, 2000).⁶⁹

This criticism matches Moore’s objection to Malinowski’s conception of law, quoted earlier, for failing to distinguish among different forms of social regulation.

65 See Tamanaha, ‘The Folly of Social Scientific Approaches to the Concept of Legal Pluralism’, above n47.

66 de Sousa Santos, above n39 at 115.

67 Griffiths, above n57 at 4 and 12.

68 Id at 38 (‘The self-regulation of a semi-autonomous social field can be regarded as more or less “legal” according to the degree to which it is differentiated... But differentiated or not, ‘law’ is present in every “semi-autonomous social field,” and since every society contains many such fields, legal pluralism is a universal feature of social organization’).

69 Sally Falk Moore, ‘Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949–1999’ in Sally Falk Moore (ed), *Law and Anthropology: A Reader* (2005) at 357 (this chapter was reprinted from an article of the same name published in 2001).

Ironically, Griffiths invoked her SASF in legal pluralism in a manner that led to the same problematic result.

In support of her criticism of Griffiths's approach to legal pluralism, the first publication (1973) Moore cites is the very article that sets out her SASF,⁷⁰ and the second publication (1978) she cites is her important book, *Law as Process*,⁷¹ which elaborates on and applies the SASF in various contexts (and which contains her criticism of Malinowski). Although politely and obliquely delivered, her implicit message repudiating Griffiths's use of her concept to identify 'law' is unmistakable. In case anyone missed the point, in the next paragraph Moore identified several social phenomena highlighted by legal pluralism, including this: 'the way in which the state is interdigitated (internally and externally) with non-governmental, semi-autonomous social fields which generate their own (*non-legal*) obligatory norms to which they can induce or coerce compliance'.⁷² Recall that under Griffiths's account, the norms of the semi-autonomous social field *are law*. By pointedly injecting the qualifier 'non-legal' in this passage, Moore firmly demurs.

The story of the troubled concept of legal pluralism does not end there. In a 2005 article discussing legal pluralism, John Griffiths made a stunning series of assertions:

In the intervening years, further reflection on the concept of law has led me to the conclusion that the word 'law' could better be abandoned altogether for purposes of theory formation in sociology of law.... It also follows from the above considerations that the expression "legal pluralism" can and should be reconceptualized as "normative pluralism" or "pluralism in social control."⁷³

What makes these statements stunning is Griffiths's pre-eminent role in developing and promoting the concept of legal pluralism, often with an air of absolute confidence. In an article 10 years ago, for example, Griffiths wrote that law everywhere 'is fundamentally pluralist in character,' and 'anyone who does not [accept this] is simply out of date and can safely be ignored.'⁷⁴ Today Griffiths admits — to his credit as an intellectual — that his conception of legal pluralism was a mistake. He finally became convinced that it is impossible to adequately conceptualise law for social scientific purposes.⁷⁵ Griffiths now agrees with critics that what he previously identified as 'legal pluralism' is better conceptualised as 'normative pluralism'.

70 Moore, above n56.

71 Moore, above n51.

72 Moore, above n69 at 358 (emphasis added). Moore follows this statement with a footnote that makes an oblique reference to Griffiths's use of her concept.

73 John Griffiths, 'The Idea of Sociology of Law and its Relation to Law and to Sociology' (2005) 8 *Current Legal Issues* 49 at 63–64.

74 John Griffiths, 'Legal Pluralism and the Theory of Legislation — With Special Reference to the Regulation of Euthanasia' in Hanne Petersen & Henrik Zahle, *Legal Polycentricity: Consequences of Pluralism in Law* (1995) at 201.

75 For helping him come to this conclusion, Griffiths cites an article written in Dutch by G van den Bergh, and two of my articles, 'An Analytical Map of Social Scientific Approaches to the Concept of Law', above n48, and 'The Folly of the Social Scientific Concept of Legal Pluralism', above n47.

In light of these developments, the concept of legal pluralism stands in a peculiar state. The originator of the concept most widely adopted by legal pluralists to identify law, Sally Falk Moore, rejects this application of her idea. The most ardent promoter of the concept of legal pluralism for more than two decades, John Griffiths, now renounces legal pluralism. Nonetheless, the notion of legal pluralism continues to spread. Legal pluralist scholars continue to incorporate Moore's SASF to identify law, and continue to rely upon Griffiths's analysis, notwithstanding their explicit objections.

What makes the notion of legal pluralism so irresistible, despite its irresolvable conceptual problems, is the fact that diverse, competing and overlapping legal orders in different types and forms appear to be everywhere and multiplying. Griffiths was right that legal pluralism is a fact. Where Griffiths went wrong, he now recognises,⁷⁶ was in thinking that law could be formulated as a scientific category. Law is a 'folk concept', that is, law is what people within social groups have come to see and label as 'law'.⁷⁷ It could not be formulated in terms of a single scientific category because over time and in different places people have seen law in different terms. State law is currently the paradigm example of law, but at various times and places, including today, people have considered as law: international law; customary law; versions of religious law; the *lex mercatoria*; the *ius commune*; natural law and more.⁷⁸ These various manifestations of law do not all share the same basic characteristics — beyond the claim to represent legitimate normative authority — which means they cannot be reduced to a single set of elements for social scientific purposes.

Fortunately, it is not necessary to construct a social scientific conception of law in order to frame and study legal pluralism. As proof of this point, notice that the first part of this paper extensively elaborated on situations of legal pluralism in the medieval period and during colonisation without positing a definition of law. The exploration in the first part avoided the conceptual problem by accepting as 'legal' whatever was identified as legal by the social actors, as just described. Legal pluralism exists whenever social actors identify more than one source of 'law' within a social arena. The final part of this paper will demonstrate the utility of this simple approach by laying out a framework that highlights many of the important and interesting features of situations of contemporary legal pluralism while avoiding the aforementioned conceptual problems.

4. A Framework for Legal Pluralism

Six systems of normative ordering will be sketched, followed by comments on a series of issues relating to these systems and their interaction. The discussion will focus on matters highlighted in legal pluralist studies.

76 Griffiths, above n73 at 62.

77 This idea is extensively developed in Tamanaha, above n26.

78 For a more developed argument to this effect, see Tamanaha, above n47.

A. *Six Systems of Normative Ordering in Social Arenas*⁷⁹

When the notion of legal pluralism is invoked, it is almost invariably the case that the social arena at issue has multiple active sources of normative ordering. The forms of normative ordering commonly discussed in studies of legal pluralism can be roughly separated in the following six categories: (i) official legal systems; (ii) customary/cultural normative systems; (iii) religious/cultural normative systems; (iv) economic/capitalist normative systems; (v) functional normative systems; (vi) community/cultural normative systems.

Official or positive legal systems characteristically are linked to an institutionalised legal apparatus of some kind; they are manifested in legislatures, enforcement agencies, tribunals; they give rise to powers, rights, agreements, criminal sanctions, and remedies. This category encompasses the entire panoply of whatever is typically regarded as law-related or legal, ranging from traffic laws to human rights. The modern period is marked by a vast expansion, proliferation, penetration, and multiplication of official legal systems, which social theorists (prominently Jürgen Habermas) have labelled the ‘juridification’ of the life world. Official legal systems can coexist in an uncoordinated fashion in a given social arena with different sources and institutions that can conflict with one another. Citizens in the EU, for example, are subject to laws and regulations generated locally (municipality or township), at district or state levels, at national levels, at the level of the EU, and internationally. These versions of official law are not completely reconciled with one another, and many are based upon separate institutional structures with potentially conflicting jurisdictions and norms.

The other five categories — customary/cultural, religious/cultural, economic/capitalist, functional, and community/cultural — are systems of normative ordering that are distinct from the official legal systems.

Customary normative systems include shared social rules and customs, as well as social institutions and mechanisms, from reciprocity, to dispute resolution tribunals, to councils of traditional leaders. In some locations the terms ‘indigenous law’ or ‘traditional law’ are also utilised. These terms (and their local translations) are labels usually invoked in post-colonial societies, and have limited application to other contexts. The very notions of ‘customary’ or ‘traditional’ or ‘indigenous’ were creations of and reactions to colonisation and post-colonisation, in which the norms and institutions of indigenous societies were marked (for various purposes) as distinct from the transplanted norms and systems of the colonisers. In my use of the terms, these are *not sociological notions*, but rather constructed labels and categories created for specific purposes in the circumstances of colonisation and its aftermath. Once created, these labels have been carried over and continue to the present in some form of coexistence with (or within) official legal systems.

79 I use a deliberately bland term ‘social arena’ for the purpose of identifying a given area of study. It is an empty framing device that can be defined in any way, according to any criteria, that a particular researcher desires. An entire nation can constitute a social arena, as can a local community, or a transnational network of business people.

Religious normative systems are in some societies an aspect of and inseparable from customary normative systems, and both can be considered aspects of culture (hence they share the term ‘cultural’); yet religion merits separate mention for the reason that it is often seen by people within a social arena as a special and distinct aspect of their existence. Religions typically are oriented toward the metaphysical realm, and religious precepts usually carry great weight and significance for believers within a social arena. Certain bodies of norms are seen as specifically religious in origin and orientation, often set out in written texts (Bible, Koran, Torah), commentaries, and edicts; formal religious institutions as well as informal mechanisms exist with norm enforcing (as well as other) functions.

Although customary and religious sources of normative ordering are usually seen in terms distinct from and broader than official legal systems, they also can contain a subset of norms that have specifically ‘legal’ status, in two different senses: (1) through recognition by the official legal system; or (2) on their own terms. In the first sense, many official legal systems explicitly recognise and incorporate customary norms and institutions, and religious norms and institutions. Many post-colonial state legal systems, for example, acknowledge and enforce customary rules and practices in connection with marriage, divorce, inheritance, and other family related issues. A number of countries create or recognise the jurisdiction of Islamic Courts on various subjects, and a number officially recognise the Sharia as binding law. At the extreme, in full blown theocracies the official legal system will be inseparable from religious law (they are one and the same system in many respects). In the second sense, viewed as ‘legal’ on their own terms, certain customary systems have bodies of what the members consider ‘customary law,’ entirely apart from whether the norms and institutions so identified are recognised as such by the official legal order. Similarly, certain religious norms and institutions are recognised by believers as having independent ‘legal’ status. ‘Natural law principles’ in the Catholic tradition are an example.

Economic/capitalist normative systems consist of the range of norms and institutions that constitute and relate to capitalist production and market transactions within social arenas. This ranges from informal norms that govern continuing relations in business communities (including reciprocity, and norms that discourage resort to official legal institutions in situations of dispute), to norms governing instrumental relations, to standard contractual norms and practices, to private law-making in the form of codes of conduct, shared transnational commercial norms, arbitration institutions, and so forth, including shared beliefs about capitalism (like ‘market imperatives’). Contemporary processes of economic globalisation carry along, and are carried by, these normative systems. Similar to customary and religious normative systems, many of these norms are not seen as ‘legal’ norms; a subset of these economic/capitalist norms and institutions are recognised and incorporated by official legal systems; while others are independently recognised as having ‘legal’ status. The so-called ‘new *lex mercatoria*’ — the body of law and institutions relating to transnational commercial transactions — is an example of this category.

Functional normative systems are organised and arranged in connection with the pursuit of a particular function, purpose or activity that goes beyond purely commercial pursuits. Universities, school systems, hospitals, museums, sports leagues, and the internet (as a network) are examples of functionally oriented normative systems, some operating locally, some nationally, and some transnational in reach. All possess some degree of autonomy and self-governance aimed at achieving the purpose for which they are constituted, all have regulatory capacities, all have internal ordering mechanisms, and all interact with official legal systems at various junctures. Often they have commercial aspects, and they can give rise to communities, but their particular functional orientation makes them distinctive and shapes their nature.

Community/cultural normative systems is the vaguest category of the five specified here. In general terms, it is an imagined identification by a group of a common way of life, usually tied to a common language and history and contained within geographical boundaries of some kind, but there can be 'communities' of interaction which exist purely on the internet comprised of people from around the world. At the local level, communities consist of thick, shared norms of interaction that constitute and characterise a way of life — including customs, habits, mores, and so forth — but at the broader level of the nation (or beyond) the bonds that constitute a community can be much thinner and mainly defined by a perceived identity. In its thinnest manifestation (which can nonetheless exert a powerful influence), the norms that bind and define the community may not be definite or reiterated enough to be considered a 'system' in the same sense that that applies to the other categories. Although the processes of globalisation have erased former boundaries in many ways, the very same globalising factors — by stimulating angst in populations about imminent threats to identity, self-governance, and economic opportunities — have also heightened the strength of group and individual identifications with communities. For example, the encroachment of regulations and rulings by the EU — the bureaucracy in Brussels and elsewhere — and the presence of large immigrant communities and populations within the cities with their own religions, languages, customs, moral views, lifestyles and food, have given new salience to local or national identities, to being English or Scottish, or French, or German or Dutch. The typical claim of community is to have some special connection (descriptive and prescriptive) to or entitlement to support by official state legal systems. Moreover, under certain circumstances communities can coincide with and be defined in religious or customary terms (or a combination of all three).

In many studies, the term 'legal pluralism' is used to characterise the interaction between competing and conflicting official legal systems or between an official legal system and one or more of the other normative systems. The interplay is complex and multisided. Once again, to forestall confusion and objections, it must be emphasised that these six groupings are rough labels used to mark off subjects and situations that repeatedly arise works about legal pluralism. No fundamental sociological or theoretical assertions are made about any of these categories. They overlap, there are borderline cases, different lines could have

been drawn, and different categories could have been created. The value of this framework depends upon whether it offers a useful way to approach, study, and understand situations of legal pluralism. That is what the following will attempt to demonstrate.

B. Clashes among Normative Systems, and What Fuels Them

The six sources of normative ordering identified above typically make one or more of the following claims: they possess binding authority; they are legitimate; they have normative supremacy; and they have (or should have) control over matters within their scope. Owing to the dominant tenor of their claims to authority, these coexisting sources of normative ordering are poised to clash, particularly when their underlying norms and processes are inconsistent. These clashes can be magnified because people are often genuinely committed to the norms, purposes, or identity of the system. Such clashes are among the most dynamic aspects of legal pluralism. Some of these systems anticipate that they potentially interact with other systems, and sometimes try to account for this with provisions like conflict rules or choice of law rules; but also often they are silent about interaction with other normative systems.

Clashes can exist *within* competing versions of each type of normative ordering — as when recognised human rights norms (one body of official law) are inconsistent with the norms of the state law system (another body of official law); and clashes can exist *between* coexisting normative systems — as when the norms of the official legal system conflict with customary or religious or community norms (whether labelled ‘legal’ or not). Various mechanisms exist to manage these clashes, which will be taken up shortly, but clashes often remain unresolved, manifested as latent or overt sources of conflict within the social arena.

These conflicts are commonly fuelled from two different sources. Groups or actors who benefit from, have a stake in, represent, or give rise to, the institutional structures of competing normative systems (ie state officials and legal professionals, tribal leaders, clergy, business people) will defend and exert the power of their particular system in situations of a clash, not only because of their genuine commitment to and belief in the system, but also because their interests, identities, status, and livelihoods are linked to it. Efforts to defend the power and integrity of each system *vis-a-vis* the others provide one source of conflict.

Individuals and groups within a social arena also drive conflict by strategic resort to sources of normative ordering in an effort to advance their individual or collective goals or vision. For example, women (and supportive NGOs) have sought redress or protection from official legal norms as a way to escape or combat oppressive customary normative systems (ie female circumcision, bride burning). Business people create or resort to their own dispute resolution institutions (private arbitration) when they view the official legal institutions as untrustworthy, too slow, too adversarial, or too expensive for their purposes.

Many people within these social arenas are aware of three essential aspects that drive the dynamic: they are aware that the coexisting normative systems make competing claims to authority; they are aware that each has some capacity to exert power within a social arena; and they are aware of the inconsistency of their

respective substantive norms and processes. These factors provide reasons for social actors to actively exploit situations of legal pluralism in the furtherance of group and individual aims. People who are truly committed to one set of norms or institutions, moreover, may undertake to defend or expand their system against others. In these ways, the presence of legal pluralism can promote or generate clashes over and through law.

Given the above factors, a useful way to observe clashes and their implications is to maintain a dual focus: on the systems themselves (including institutional actors), observing how they interact with one another in situations of plurality; and on strategic actors in social arenas characterised by plurality, observing how they invoke and respond to the presence of multiple normative systems.

C. Power Differentials between Normative Systems

Situations involving a clash between normative systems bring to the surface the fact that they have different capacities to exert influence that vary depending upon subject matters, regions, and situations. In the absence of such clashes, limited efficacy or power can be concealed or pass unnoticed. Official state legal systems, for example, typically *claim* to possess a monopoly of legitimate coercion within the territory of the state. Only when the edicts of this system are ignored or openly defied by actors following an alternative normative system is the limited power of the state legal system exposed. In some instances this can break out into actual combat, as when the Islamic Courts in Mogadishu mounted an armed challenge (and initially routed) the official governmental system. More common are situations in which official legal norms that are contrary to prevailing customary or community norms remain dead letters without effect. In the absence of a sustained effort by official legal systems, which may lack the resources necessary to accomplish the desired change, the lived norms will continue to govern social action.

A broad generalisation can be made about the relative power of the official state legal systems in developed and developing countries. In developed countries, the official state legal system is highly differentiated (legislatures, police, prosecutors, judges), with entrenched legal institutions supported by a well-trained legal profession and a long-standing legal tradition. Moreover, a legal culture exists in which government officials and the public feel some obligation — out of normative commitment, or owing to a fear of sanction — to abide by the dictates of the official state legal system. These factors enhance the power of official legal systems to achieve their objectives. The official state legal systems in many developing countries, by contrast, are less differentiated, with less entrenched legal institutions and a less well-trained legal profession and a shallower official legal tradition. The populace can be wary of the official legal system, often transplanted from elsewhere through colonisation (often kept in the coloniser's language), or voluntarily borrowed, and sometimes identified with the elite or with a particular subgroup in society. The power of the official legal system is commensurably weaker. In these latter situations, customary, religious and community systems may be more entrenched, have deeper roots, and have a greater role in day-to-day social life.

Power differentials also exist amongst official legal systems, for example, as between state legal institutions and international or transnational legal institutions. Their relative strengths depend upon the circumstances. International legal dictates can be resisted or ignored by well developed state legal systems as well as by less developed state legal systems, although the latter might be more susceptible to coercive attempts to achieve compliance. A more powerful nation would be less concerned about the imposition of economic or other sanctions than would a less powerful nation, for example.

Whatever the particular mix, official legal institutions seldom are able to dictate their terms or entirely have their way in a clash with other systems. Customary norms, religious norms, functional norms, and community norms can be powerful and resilient to change. And competing normative systems can align with others (combining their respective powers) in situations of conflict. Coexisting normative systems form a part of one another's environment, which must be taken account of, anticipated, responded to, and dealt with.

D. Two Basic Forms of Socio-Political Heterogeneity (Group and Individual)

Social-political heterogeneity, which usually accompanies legal pluralism, takes two basic forms: group based and individual based. A *group-based* heterogeneity occurs when a social arena consists of a number of discrete groups, often differentiated by language, religion, ethnicity, and culture, or sometimes by clans, factors which can exist in various combinations. Often these groups make up distinct communities (as identified by members and outsiders). Sometimes there is a majority group and one or more minority groups; sometimes a number of groups coexist with no single group having a majority. Often they are physically segregated (occupying distinct regions or distinct neighbourhoods in urban areas); sometimes they are also segregated by occupation. A major source of this is the movement of people within nations and across borders, a constant of human history, though accelerating in the raw number of people involved in recent decades (especially in the movement from rural to urban areas).

A crucial factor in situations of group-based heterogeneity is whether one (or more) group disproportionately controls or influences the government and/or the official legal systems within a given social arena. Groups may have differential opportunities to occupy positions in government and in official legal systems. Where this is the case, there will be differences among the various groups and their members in their resort to and identification with the government and the official state law. In these situations, the government and official law can be seen not as the law of everyone, but as co-opted by and representing the interests of whichever group(s) controls it.

An *individual based* heterogeneity exists in social arenas that contain individuals oriented to Western liberal norms coexisting with individuals oriented to non-Western customary or religious normative systems. This combination is typical of large urban areas both in the West and in non-Western countries.

Many social arenas combine both kinds of heterogeneity, with rural areas having group-based heterogeneity, and urban areas having one or both types. In Western cities with large immigrant populations, immigrants tend to live in segregated neighbourhoods; within these communities, some hold on to the language, values and religions of their land of origin, while others prefer the Western values of the surrounding society. In large non-Western cities, there are immigrants from the West who live scattered about or in expatriate enclaves (creating a group), as well as locals who have been exposed to and prefer Western ways, and there are large groups that maintain their customary or religious or community norms and orientations.

The spread of capitalist economic normative systems and imperatives, as will be indicated in greater detail shortly, is reshaping broad swaths of the world, particularly urban areas. Its effect is to (on different axes) increase, and simultaneously lessen, heterogeneity. The increase in heterogeneity is the result of work opportunities that prompt people to emigrate abroad or to migrate internally to cities in ever larger numbers, where they settle with familiar groups and bring along their cultural and religious norms, which differ from those of neighbouring groups or communities. The decrease in heterogeneity takes place because engaging in these economic activities, and living in large cities, exposes immigrants and migrants to a new set of workplace (capitalist) norms and living arrangements that they must conform to. These new situations disrupt former family and community ties and norms, often completely altering the rhythm and organisation of social life (both for the new migrants and for the places left behind). Immigrants and migrants living in large urban centres are also directly exposed to and bombarded with Western norms carried by the media and commercial enterprises. They are also exposed to the ways of life of other immigrant communities who live in adjoining communities or in the broader society.

Both kinds of heterogeneity play out in various ways in legal pluralism (they are sources of pluralism), which require attention. It is also important to recognise another dominant characteristic of these areas: the *hybridity* and *fluidity* of groups and individuals. In a manner of speaking, they absorb aspects of their environment into their respective identities. The fact that groups and individuals interact in heterogeneous environments inevitably affects both the groups and the individuals, building something new in group and individual identities even as the old identities remain recognisable. Although it is useful to distinguish forms of heterogeneity, group and individual identities are not static or discrete wholes, but are internally diverse and in a constant state of change.

E. Relations and Strategies between and among Systems in Situations of Clash

In each situation of legal pluralism, tensions arise among coexisting normative systems that create the potential for uneasy coexistence, supportive alignments or clashes. The main focus here will be on clashes in connection with the official state legal system. A common arrangement, when coexisting communities exist, is for the

official state legal system to assume a stance (or posture) of neutrality with respect to the various communities (and religions), allowing a degree of autonomy to each. This is typical in liberal societies. Another common alignment (including in liberal societies) is for there to be an identity of some kind between the dominant community and the state legal system. Working from these baselines, clashes and accommodations are made between and among other competing normative systems. Sometimes state legal systems are oblivious to or purposely ignore the competing normative systems — and are taken by surprise when legal initiatives fail. When they are aware of the clash and aim to deal with it in some way, official state legal systems utilise a number of strategies, ranging from permissive to prohibitive.

It is not unusual for a state legal system to explicitly condemn or disallow a contrary customary or religious or community norm or institution, but take no action to repress it. This may be because the legal officials recognise that they lack the power to combat it, or because they are sympathetic to it, yet are pressured by some group inside or outside the social arena to officially (or symbolically) condemn it. In the latter case, the officials will make a show of support while subtly resisting efforts to invoke the state legal system against it (foot dragging by officials, or erecting barriers to actors who wish to invoke the official legal apparatus against the conflicting system). A similarly ambivalent strategy, coming from the opposite direction, is for the official legal system to formally ‘endorse’ the competing system (for political reasons), yet do nothing to support it, or even affirmatively (though not openly) work to undermine it.

Another common strategy is for the state legal system to absorb competing systems in some way. A common method is to explicitly incorporate or recognise customary, religious, economic or community norms, or to explicitly recognise and lend some support (financial or coercive) to existing customary, religious, economic or community institutions. An example of this in the economic context is when legal systems recognise the validity of private arbitration decisions, or even encourage (or compel) parties to resort to private arbitration. Official legal systems recognise or absorb other norms and systems for a variety of reasons. The private alternative may provide a useful function or service, legal officials may genuinely believe in the validity and legitimacy of the alternative norms and institutions, or political benefits may follow from embracing it, or it may simply be too powerful for the official legal system to supplant. Absorbing the competing system is also a way to control or neutralise or influence its activities — by paying the participants, providing them incentives to conform, or by situating the absorbed institution in a hierarchy that accords the official legal system final say.

A third alternative in situations of clash is for the state legal system is to make aggressive efforts to suppress the contrary norms and institutions — declaring the latter to be illegal, then working to eliminate them. These situations raise a direct test of the relative power of the competing systems. When the competing system is longstanding or deeply entrenched, the state legal system is confronted with a formidable task, which it often falls short of achieving. The barriers against success by the state legal system are also heightened when financial incentives and consequences are tied to the conflicting system, as occurs with economic normative systems.

A clash between or among coexisting official legal systems within a given social arena can also take place, as indicated earlier, and plays out in a variety of ways. An increasingly common example of this kind of conflict is when individuals or groups file complaints in a human rights court in an effort to invalidate or alter state law norms or practices. Official conflict of law rules can be utilised to mediate these clashes. Clashes can be resolved through political compromises arranged by their respective institutional authorities. In some situations the competing official legal authorities will ignore one another, or explicitly refuse to honour their determinations (as when states refuse to honour rulings of the World Court). One official legal system may acknowledge the contrary official legal system and accept its findings (begrudgingly or enthusiastically). Sometimes they will face off in a direct clash which continues unresolved. Sometimes the more powerful official legal system simply imposes its will on the other through superior raw economic or military or political power.

Although the primary focus of this discussion has been on clashes between state legal systems and other normative systems or between competing official legal systems, clashes also take place between and among coexisting, conflicting customary systems, religious systems, functional systems, economic systems, or community systems. There can be, in a given social field, more than one official legal system, more than one customary system, more than one religious system, more than one economic system, more than one functional system, and more than one community system, all of which can overlap, coincide and clash, as the case may be. Moreover, market imperatives — economic/capitalist normative systems — may penetrate the social arena along a variety of axes, consistent with or contrary to the norms of customary, religious, functional, and community systems. The potential combinations, mixes and matches, are limitless.

To avoid a misunderstanding, a corrective reminder must be injected at this point. The above discussion emphasises potential *clashes* owing to the presence of overlapping inconsistent norms and processes. As several of the points made above indicate, however, inconsistency does not necessarily lead to a clash. In some situations the inconsistent legal and/or normative systems may exist side-by-side without overt conflict; people within the systems and the social arena may be aware of the inconsistencies but prefer to avoid or suppress potential conflicts. In some situations, despite potential inconsistencies, the coexisting systems may actually support or bolster one another. The private arbitration tribunals of the *lex mercatoria*, for example, constitute an avoidance of state legal systems, yet state legal systems bolster this putative rival every time judges pay deference to or enforce arbitration decisions. Despite their many differences in norms and orientation, to offer another example, customary law regimes receive essential support from state legal systems that recognise them, and the state legal systems that do so in turn benefit by enhancing their legitimacy in the eyes of the populace as well as by demonstrating their superior power through the very act of granting recognition to customary law. Thus, while the emphasis in this discussion focuses on clashes, what results may also be a complementary coexistence, both from the standpoint of the coexisting systems and from the standpoint of strategic actors within situations of legal pluralism.

Owing to the complexity and variety of these situations, few generalisations beyond the above statements can be offered about interactions and strategies that arise in clashes between coexisting normative systems. Four tentative assertions will be offered, the first one relating to the interaction among the systems, and the final three relating to the choices made by strategic actors to invoke the systems.

The first assertion is that, riding on the tidal wave of economic globalisation, the most powerful contemporary impetus, momentum, and penetration of new norms is taking place through the economic/capitalist normative system. Capitalism and markets — in conjunction with the massive transfers of population worldwide from non-Western countries to Western countries and from rural to urban areas — are remaking broad areas of social life, often with the support of official legal systems (state and others).

The second assertion is that when a clash between normative systems takes place, strategic actors within that arena will seek to enlist the endorsement or support of existing *official legal systems*, to, if possible, lend legitimacy, resources, and coercion to their cause. In many situations, official legal systems possess enhanced institutionalised support and symbolic authority. Where there are coexisting official legal systems, those engaged in the conflict will resort to the official legal system that aligns with their cause. Women's rights advocacy groups may, for example, invoke human rights claims against customary or religious norms; in response, customary or religious advocates will invoke official legal norms that recognise the validity or worth of customary or religious norms. The main exception to this generalisation is that parties might not resort to a particular official legal system when they protest against its claim to authority in that arena; situations of this sort range from traditional leaders who dispute the authority of state law over certain matters, to organised separatist movements that are fighting the state politically and militarily.

The third assertion is that important factors that affect individuals and groups in the strategic choices they make in situations of legal pluralism are the 'distance' (geographical and cultural) and other barriers (information, expense and delay) that exist in connection with each system. To invoke official legal systems often requires information and access to legal professionals; possible barriers include high cost, lengthy delay, great distance from the official legal apparatus (requiring travel), and other forms of inaccessibility. Sometimes these can be overcome with the aid of other interested parties (supportive NGOs), but without this aid or intervention one may be effectively denied the ability to invoke an official legal system. Even individuals and groups who possess the necessary resources may nonetheless choose to bypass the official legal system (opting for private arbitration or informal resolution, for example) because the official legal system is too costly, unreliable, or unfair (inefficient, corrupt, or biased). Strategic choices are also influenced by the social or cultural proximity (or distance) of a given system: the more alien or inscrutable a legal or normative system appears, the less understandable and predictable it is, the less supportive it might appear, and consequently the less likely an individual or group is to invoke it. When the

advantages offered by a particular system create a sufficient incentive to strategic actors, they may forge ahead notwithstanding the barriers.

The final assertion is that one must not assume that strategic actors pursuing their aims in situations of legal pluralism will consistently invoke or support the same official legal system or normative system over time. Long-term and short-term calculations are involved, especially for repeat players (like NGOs). Depending on the circumstances, for example: the same party may in one situation support customs in a contest with state law, while in another situation invoke state law against customs; a business entity may routinely utilise private arbitration to handle disputes, but after a painful arbitration loss it may seek recourse to a state legal system, contesting the legitimacy of that particular decision or the entire arbitration system. Repeat players often choose not to challenge adverse decisions, however. Purely strategic actors will be consistent in legally and normatively plural situations only when behaving in that fashion advances their overall interests, otherwise the course of action in each instance is decided based upon that particular configuration.

In closing, to correct against a misimpression created by the above emphasis, it must be reiterated that many actors in these situations are not driven only by strategic calculations. Considerations of loyalty, principle, familiarity, consistency, institution building, identity, tradition and other such factors also influence the decisions and conduct of individuals and groups in situations of legal pluralism.

F. Common Types of Fundamental Orientation Clashes

The preceding section addressed clashes between coexisting legal and normative systems, and the conduct of actors within these situations. This section elaborates on clashes at a higher level of abstraction: on clashes in fundamental normative or value orientation, rather than as specific systems. Only four major orientation clashes will be identified (not an exhaustive list).

(i) Liberal (Individualist) versus Non-Liberal (Non-Individualist) Cultural Norms

This is one of the most fecund sources of legal pluralist clashes around the world. Many official legal systems, especially those derived through transplantation from the West, enact liberal norms that protect individual autonomy, privacy, conscience, bodily integrity, liberty, formal equality, legal protections against state power and so forth. Most human rights norms fall into this category (though not all are exclusively liberal). Cultural and religious norms and practices that have non-liberal orientations are, almost by definition, different from liberal norms. While difference does not necessarily mean they conflict, often a clash exists. The most commonly cited clashes surround the position and treatment of women, family related issues, and caste related issues — including child marriages, arranged marriages, divorce rights, inheritance rights, property rights, treatment of low caste and religious imposed punishments. A clash also shows up in the criminal law context: official legal systems with liberal orientations affix criminal

responsibility (in determinations of guilt, as well as imposing punishment) on individuals, whereas many customary systems do so in more collective terms, taking into consideration broader contexts when evaluating actions, as well as family ties and responsibility. Broadly speaking, in liberal terms an individual commits a crime against society, whereas in non-liberal terms the wrongful action is sometimes seen as a disruption of relations within the community or between families or clans.

(ii) *Capitalist/Market Norms and Requirements versus Customary, Religious, or Community Norms*

Economic norms relating to contract, property and credit can be inconsistent with prevailing customary and religious norms. A well-known conflict of this sort arises from religious prohibitions against usury, which is inconsistent with modern banking practices of charging interests, although this has largely been reconciled through creative structuring of transactions (as occurs in Islamic societies to comply with the Sharia). Another problematic situation occurs in connection with property ownership. Many customary normative systems characterise property in collective terms (not held by a single person or set of people), they divide up rights over property in a variety of ways (use of the resources, rather than ownership of the land itself), and they do not buy and sell land; in many places, moreover, the identity of families, clans, and villages is integrally tied to the land. Capitalist economic practices, in contrast, require the ability to buy and sell real property, which is a valuable economic asset, especially for the purpose of serving as collateral for loans. Western banking requirements often do not readily recognise collective ownership or community use rights. In the course of economic development, owing to the clash between these two normative systems, cultural normative systems are increasingly giving way to economic requirements, with a multitude of direct and indirect social consequences.

(iii) *Systems That Recognise or Draw a Sharp Separation between Public and Private Realms versus Those that Do Not*

This difference is as an aspect of liberal systems, but it bears separate mention owing to its significance. Government and law in liberal societies are constructed upon sharp differentiations between the public and private realms. The government and law are, in some sense (at least in theory and aspiration), neutral presences within society which work for and represent the good of the whole. Occupants of government or legal positions recognise that public power is to be held and exercised for public purposes, and that public purposes are distinct from the private purposes and the interests of government officials and their particular families or groups, as well as distinct from specific customary or religious purposes. One may not, for example, exercise public power for private gain (solicit bribes, favour family and friends, advance private interests). Societies in which the government and law are seen as instruments of power available for personal or groups uses, or as an extension of the community, or are seen in terms inseparable from religion (as in theocracies), do not recognise a sharp public/private divide. The consequences of this difference in orientation are myriad.

(iv) *Rule-Based Systems with Winners and Losers versus Consensual Systems Oriented toward Satisfactory Resolution*

Both types of approaches involve the application of norms in situations or disruption or dispute — and they exist on a continuum rather than as antinomies — but the overarching orientation of each is different. This contrast typically arises between official legal systems and local customary systems, but it also shows up between official legal systems and business communities with repeat players who wish to maintain good relations. Official legal systems may also differ amongst themselves in the degree to which they are oriented toward applying rules in a manner that leads to winners or losers, versus finding a consensual resolution.

The orientation clashes identified in this section largely have their origins in the contrast between Western and traditional non-Western societies, which has been the focus of the legal pluralist literature produced by legal anthropologists. However, as indicated earlier, capitalism driven globalisation and a massive shift around the world of population from non-Western countries to Western countries and from rural to urban areas are remaking contemporary societies and cultures in innumerable ways. These changes will affect the frequency, significance, and reach of the clashes identified above. The consensual dispute resolution systems studied by legal anthropologists, for example, have often come from small communities with face to face interaction (though parallels exist in modern business networks); similarly, customary normative systems continue to exert the strongest influence in places (steadily diminishing in number) that have undergone limited penetration from modern economic systems, mass media, government institutions, and public education. The massive urban areas that serve as magnets to population around world, with populations in the millions, have pockets with survivals of customary normative systems, but increasingly the dominant normative organisation is economic and modern (though not necessarily liberal). Heterogeneity and hybridity, described earlier, are becoming normal. As these developments continue, the frequency, mix, and relative proportion of the above clashes will change, and new kinds of clashes may well emerge. Nothing is standing still.

5. *Closing Observations*

The longstanding vision of a uniform and monopolistic law that governs a community is plainly obsolete. The situations of normative and legal pluralism described in this article are not passing phenomena. The expansion of capitalism and the movement of people and ideas — within countries and between countries — is accelerating, increasing heterogeneity along multiple axes (while bringing homogeneity in the spheres of capitalist development). Barring an unforeseen calamity, the further spread and penetration of capitalism seems inexorable, bringing many transformative consequences for law, society, politics, and culture in its wake. Existing normative systems — the people who believe in them, the people who hold positions in them, and the interests that benefit from them — will fight to maintain their power and positions. People and groups in social arenas with coexisting, conflicting normative systems will, in the pursuit of their objectives,

play these competing systems against one another. Sometimes these clashes can be reconciled. Sometimes they can be ignored. Sometimes they operate in a complementary fashion. But very often they will remain in conflict, with serious social and political ramifications. To acquire a complex understanding of these situations, one must always keep an eye on two foci: on the normative systems themselves (including the people who staff them) and how they exist and interact with one another, and on how strategic actors relate to, deal with, or respond to legally plural situations. That was the underlying approach followed in this article.

As in the medieval period, today there are coexisting, discrete legal orders that can overlap and clash, ranging from various official legal orders to the *lex mercatoria* and the Sharia. As in the colonial period, some legal orders within states are internally plural and diverse with complex combinations of transplanted and indigenous norms and systems. And globalisation is bringing another layer of supranational and international legal regimes, with the potential for directly affecting people no matter where they live.

When placed in historical context, it is apparent that the texture of legal pluralism is intimately connected to the activities and fate of state legal systems. Legal pluralism was a normal condition during the medieval period; after law was consolidated within state structures, legal pluralism was reduced in Western Europe just as it was being increased elsewhere through colonisation; now legal pluralism is multiplying once again as certain powers held by states are devolving on to other entities or morphing into different political or legal configurations.

Seeing contemporary legal pluralism in historical context, moreover, offers the potential to produce general insights about the growth over time of official legal systems (of various types) in terms of social and institutional differentiation and expansion; to produce insights about how these official legal systems interact with other normative systems circulating within society; and to produce insights about how strategic actors negotiate these complexes of coexisting normative systems. A point of general significance, for example, is suggested by the fact that scholars of the medieval period and scholars of law and colonisation independently made the same observation: that 'customary law' recognised by official legal systems does not necessarily match actual lived customs. To offer another example, in colonial Latin American people concerned about the treatment of native Indians invoked Catholic norms and institutions to challenge their treatment by local government in the much same way that advocates for women's rights today invoke human rights norms to challenge the legal rights of women in post-colonial countries. Patterns that emerge from such disparate contexts (in time and circumstances) promise to shed light on fundamental issues with respect to coexisting regulatory systems.

For those that study legal pluralism as a social phenomenon, a useful caution is in order. One must avoid falling into either of two opposite errors: the first error is to think that state law matters above all else (as legal scholars sometimes assume); the second error is to think that other legal or normative systems are parallel to state law (as sociologists and anthropologists sometimes assume). In each social arena, particular official legal systems and normative systems must be

examined on their own terms to see what their relations with other normative systems are, to observe their respective capacities to exert power, and to see how they are being utilised or responded to by individuals and groups. Sometimes state law is very powerful, sometimes it is weak, but rarely is it completely irrelevant or lacking in features that distinguish it from other competing official legal or normative systems. State law is in a unique symbolic and institutional position that derives from the fact that it is *state* law — the state holds a unique (domestic and international) position in the contemporary political order. Furthermore, official state legal systems, at least those that function effectively, have a distinctive instrumental capacity that enables them to be utilised to engage in a broad (potentially unlimited) range of possible activities, and to pursue a broad range of possible goals or projects, which extends far beyond normative regulation.

The forgoing framework brings on the same canvass much of what is discussed by scholars interested in legal pluralism, including legal anthropologists and sociologists, legal comparativists, socio-legal theorists, and international lawyers. It accomplishes this without stumbling over the conceptual problems that have incessantly plagued the subject. The conceptual debates that have marked legal pluralism for decades have been structured around issues that could not be resolved, especially the issue ‘What is law?’ The primary theoretical lesson of this article is that it is unnecessary to resolve these debates to come to grips with legal pluralism. For those interested in studying law and society, what matters most is framing situations in ways that facilitate the observation and analysis of what appears to be interesting and important.