Law as *Terra Incognita*: Constructing Legal Pluralism

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The social reality of law is neither monist nor pluralist, in and of itself. Jurists, historians, sociologists, anthropologists and legal geographers are not born pluralists; they become pluralists by conscious choice. Seeing or not seeing the social diversity of law, being or not being legal pluralists are theoretical options with their own consequences. The contributions to this special issue illustrate that the pluralist definition is more like a description of types than of tokens. On the one hand, it is an empirical orientation which leads to the study of juridical phenomena in all their variations; on the other hand, it is a theoretical orientation which favours the multidisciplinary study of law.

The first virtue of the work of these authors is its support of the relevance of the idea of legal pluralism to the rediscovery of the social diversity of law in the context of globalization, conflictualization and reinterpretation of legal cultures which vary both in space (Arthurs, Blomley, Merry) and time (Fecteau, Melançon).

The second virtue is its reminder of the lengths to which the scientific study of law has been conditioned by prejudices that are statist (Cotterrell, Coutu), modern (Duncanson, Olgiati) and positivist (Kleinhans and Macdonald). These prejudices are deeply ingrained in our general conceptions of time (the primacy of the Promethean future), space (the national frame of reference) and knowledge (the point of view of neutral observers). They have been so influential that they have imposed upon us a very specific idea of what law is (*i.e.* official state law); any successful challenge of this conception of law requires concomitant confrontation with our conceptions of time, space and knowledge.

The third virtue of the articles in this special issue is their furtherance of the cause of legal pluralism by widening the field of observation of the variations of law and by exposing disciplinary problems and epistemological postures that are still too little explored today. In other words, this special issue limits itself neither to the rediscovery of a legal pluralism denied by the dominant conception of law as state law nor to the remedy of a legal pluralism that has been maimed by this same state law. Instead, these articles contribute to a theoretical construction (a plural construction, of course) of legal pluralism which we require in order to augment our scientific knowledge of law.

The Different Variations of Law

Although we have heretofore lacked a systematic theoretical construction of legal pluralism, we have still managed to measure the breadth of the different variations of law.We understand that law's diversity is evident in modern, state-centered societies, as well as in societies lacking a central state. We have learned to conceive of legal pluralism in the vertical sense of a plurality of *legal levels* [1] as well as in the horizontal sense of a collection of "*semi-autonomous social fields*."[2] We now have at our disposal a theoretical approach in which manifestations of law are measured quantitatively (*i.e.* a normative order is deemed more or less legal according to the degree of its institutional differentiation)[3] and no longer depend on qualitative definitions whose measuring stick appeals to some essential nature of law (*i.e.* a normative order is deemed legal according to the purity of its reflection of a model of *the law*).

In this special issue the reader will discover traces of theoretical approaches prompting us to look for law in the plurality of spaces (*e.g.* in the "communities" of Cotterrell, and even in the "creative subjects" of Kleinhans and Macdonald), of sociological levels (e.g. the national and global levels in Arthurs, to which the local level is added by Blomley and Merry), of juridical intensities (*e.g.* the inclusion of "socially diffuse law" in the theory of Teubner, analyzed and critiqued on this point by Coutu).

We also see a significant consensus amongst the authors in favor of an understanding of law and, hence, of legal pluralism as specifically cultural realities. Law and legal pluralism are no longer matters of regulated behaviour systems, they argue; rather, they reside in the discursive sphere of language and symbolic representation. The dynamic interaction of legal orders has, thus, a role to play in the globalization of the legal mind of national elites (Arthurs); in the confrontation of different communitarian legal cultures (Cotterrell); in the evolution of the dominant legal doctrine upon contact with a colonized culture (Melançon); in the contradictions and ruptures created within the official legal ideology by the autonomous aspirations of individuals and groups (Fecteau); and in the narrative practices of local communities (Blomley), of primary groups (Merry) and of subjects (Kleinhans and Macdonald).

Transposing the enquiry of legal pluralism to the sphere of the social imaginary does not prevent us from noticing how significantly official state law structures representations like space, time, property, community, foreigner,

1. L. Pospisil, "Legal Levels and Multiplicity of Legal Systems in Human Societies" (1967) 11 The Journal of Conflict Resolution 2.
2. S. Falk Moore, "Law and Social Change: The Semi-autonomous Social Field as an Appropriate Subject of Study" (1973) 7 Law and Society Rev. 719.
3. J. Griffiths, "What is Legal Pluralism?" (1986) 24 Journal of Legal Pluralism 1 at 38.

individual, man and woman (Blomley, Merry). Instead, this shift reveals the point to which these cultural representations are both sociopolitical stakes and contested notions. We are encouraged to give light and voice to the decentered social representations that the political, educational and linguistic elites of the state (Duncanson) hold to be inexistent, reactionary, repugnant or dangerous (*i.e.* representations considered to be less real, less dignified and less legal that those of official culture).

The new theoretical framework of legal pluralism urges us to observe the social diversity of law at more in-depth, less formalized levels (*e.g.* those of values, symbols and cognitive categories) and to leave behind the more easily observed levels of organizations, explicit rules and institutional practices of regulation or conflict resolution.[4] Under the pretext of avoiding confusion and not falling into "panjuralism," some theorists maintain that we should hold onto these latter legal manifestations so as not to distance ourselves too much from conventional conceptions of law. But, as Vittorio Olgiati has argued, these stereotypical exhortations are, at best, invitations to improve the understanding of the many complex variations of law through the refinement of our theories of legal pluralism; at worst, they are imperatives which value the comfort of accepted ideas over the further pursuit of scientific knowledge. The response, however, is neither to renounce the study of the diversity of legal cultures, nor to abandon the pluralist point of view. While the adoption of a legal pluralist approach is no more or less unilateral than any other disciplinary point of view, it does offer an advantage: its researchers are predisposed to better rendering the myriad variations of law.[5]

That being said, the extension of legal pluralism to the domain of social representations would take advantage of two types of theoretical improvements which become henceforth indispensable. First, the emphasis upon the diversity of legal cultures requires the elaboration of analytical models which pinpoint the psychosocial process governing cross-cultural understandings of groups and individuals in a given legal culture. The study of this process will proceed from an investigation into the attitudes, mental images and the formal and informal policies which determine how legal pluralism is both conceived and lived.[6]

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4. For the scientific study of law's social reality envisioned as a multiplicity of layers, the framework presented by Gurvitch remains unsurpassed and unjustly neglected. G. Gurvitch, *Éléments de sociologie juridique* (Paris: Aubier, 1940) at 167ff.; G. Gurvitch, *Sociology of Law* (London: Routledge, 1947) at 174ff. For a synthesis, see J.-G. Belley, "Georges Gurvitch et les professionnels de la pensée juridique" (1986) 4 Droit et Société 353.
5. In his *Essais sur la théorie de la science*, Max Weber unabashedly maintained that all scientific knowledge is based upon a "unilateral analysis of the cultural reality." Extracts quoted in P. Bourdieu *et al.*, eds., *Le Métier de sociologue: Préalables épistémologiques* (Paris: Mouton, 1968) 196.
6. For an excellent elaboration of the concepts used, which has been overlooked until recently, see M. Chiba, *Legal Pluralism: Toward a General Theory through Japanese Legal Culture* (Tokyo: Tokai University Press, 1989) at 141ff (the

Second, because of our greater consciousness of the diverse and arbitrary character of each legal culture (including those which dominate at the heart of contemporary Western societies), it becomes necessary to tackle even more explicitly that which, until now, has been the problem of the pluralist researcher's position in regards to the different legal cultures observed. What critical distance should be adopted with regard to the official culture of law? Can one render justice to alternative legal cultures without getting so close as to suscribe to or promote their tenets? Should law and legal experience be considered from the positivist perspective of normative determinism or from the hermeneutic optic of the creative subject of its own morality? It is important to note that these research positions flow from epistemological options which bring the framework of legal pluralism to a crossroads of many theoretical and disciplinary avenues.

The Different Theories of Law

In a 1986 synthesis, I argued that the sociology of formal organizations and the anthropology of conflict resolution had been the two principal sources of the resurging interest in legal pluralism between 1960 and 1980.[7] At that time, the theorizing of legal pluralism was heavily influenced by both the positivist point of view and the empirical research concerns of the social sciences. This special issue reveals two significant evolutions since then. The first is toward a more normative theorizing of legal pluralism (due to its deeper integration into legal theory); the second is toward a more general theorizing (due to the problematization of the concept of legal pluralism by social sciences outside of sociology and anthropology). These two evolutions lend credence to the claim that there is not just one, but several ways to define oneself as a legal pluralist theorist. They also illustrate that the theoretical construction of legal pluralism leads us even further astray from the concept of law which still dominates (provisionally or not) the common sense of citizens, jurists and social science specialists.

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concepts of "identity postulate" of a legal culture and "functional complement to strict law"); F. von Benda-Beckmann, "Comment on Merry" (1988) 22 Law and Society Rev. 897; F. von Benda-Beckmann, "Changing Legal Pluralisms in Indonesia" (Paper presented to the 6th International Symposium Commission on Folk Law and Legal Pluralism, Ottawa, 15–18 August 1990) (legal pluralism as "normative construct," more or less official policy of external relations with other legal orders).

7. J.-G. Belley, "L'État et la régulation juridique des sociétés globales: Pour une problématique du pluralisme juridique" (1986) 18 Sociologie et sociétés 11.

We bear witness today, in this special issue, to the emergence of normative theories of legal pluralism and it is surprising to no one that these theories are proposed principally by jurists. The social diversity of law is no longer universally considered a remnant of antiquated customs or an anomaly of the "rule of law regime." Some legal theorists are working in the vein of their precursors at the beginning of the century (*e.g.* Santi Romano[8]) and they continue these past attempts to construct a new legal theory paradigm whose goal is to place the social diversity of law at the service of order and justice.

Conceiving of the necessary institutional arrangements for the functioning of "legal polycentricity"[9] challenges the legal imagination. Whether the task is one of basing the pluralist production of law upon a foundation of a heterarchical conception of its formal sources rather than a hierarchical one,[10] or one of organizing the application of law under a more reflexive and procedural mode than a substantive one,[11] the theorizing of legal pluralism implies, as antecedent, a frame of reference in which state law no longer appears central, independent or sovereign, but interdependent and open to dialogue with other normative orders. The constructivist notion of "structural coupling" developed by Gunther Teubner (Coutu), the attempt to add a pluralist and dialogical approach to the interpretation of state law (Melançon), the reconceptualization of the legal personality of groups on the basis of a social (Fecteau) or communitarian (Cotterrell) theory of law are all examples of the normative theorizing which seems to be taking a more pronounced place in legal pluralist literature.

While jurists begin to construct their theories of legal pluralism, social science specialists are being carried away on a second wave of theorizing. The break with their first theories of legal pluralism is not yet complete, but it seems to me to be significant. It is, without a doubt, tied to the more general evolution within the social sciences toward the study of actors' strategies, of daily life practices and of innovative aspirations within the context of the disintegration of

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8. S. Romano, *L'Ordre juridique* (Paris: Dalloz, 1975). In legal theory, the work of Santi Romano has been pursued by J. Chevalier, "L'Ordre juridique" in CURAPP, *Le Droit en procès* (Paris: PUF, 1984) 7. See also F. Rigaux, "Le Droit au singulier et au pluriel" (1982) 9 Revue interdisciplinaire d'études juridiques 1. Santi Romano's theory was explored in a sociological optic in G. Rocher, "Pour une sociologie des ordres juridiques" (1988) 29 Cahiers de droit 91. The concept of "legal relevance" guided the empirical research of R. Croteau, *La Programmation musicale à la radio M.F.: La production d'ordres juridiques*, Master's thesis in Sociology, Université de Montréal, 1995.
9. H. Petersen & H. Zahle, eds., *Legal Polycentricity: Consequences of Pluralism in Law* (Aldershot: Dartmouth, 1995).
10. G. Teubner, *Breaking Frames: The Global Interplay of Legal and Social Systems* (London: London School of Economics, 1995) [unpublished].
11. J. De Munck & J. Lenoble, "Droit négocié et procéduralisation" in P. Gérard, F. Ost & M. van de Kerchove, eds., *Droit négocié, droit imposé?* (Brussels: Facultés universitaires Saint-Louis, 1996) 171.

the institutions and values of modernity.[12] But this theoretical rift might be better explained by the acknowledgement of the "law and society" community that "law as a system of sanctions is much less successful than law as a cultural system" (Merry). From this avowal follows a reorientation of the issue of legal pluralism toward the study of the symbolic dimensions of law and away from the instrumental dimensions. This redirection can be ascertained not only in legal anthropology (the disciplinary origin of legal pluralism); it is also manifest in research inspired by pluralist theorizing of law in geography and history, as illustrated in the contributions of Blomley and Fecteau.

Even if they are not explicitly represented in this special issue, legal psychology and political science are bound to join the widening intellectual current in which law is conceived as a plural cultural phenomenon.[13] The theory of "critical legal pluralism" put forward by Kleinhans and Macdonald would find a logical extension within the framework of a pluralist psychology of law guiding the search for a creative legal personality. One could then inquire if this creative subject is authentically postmodern or if it corresponds to the legal subject promulgated by bourgeois ideology (Merry) but brought back to conformity by an historical experience of modernity which has made the logic of regulation prevail over that of emancipation.[14] Similarly, inasmuch as it is impossible to reformulate the conception of law along pluralist lines without modifying existing theories of the state, power and democracy, the reflections of our authors upon the actual transformations of legal cultures (national or local; traditional, modern or postmodern) provide a pluralist challenge to political science.[15]

To construct legal pluralism theories in law or the social sciences (for normative, descriptive or explanatory purposes) is to embark upon a course which necessarily leads to the dissolution of the *idea* of law which was our

12. J. Hage & C. H. Powers, *Post-Industrial Lives: Roles and Relationships in the 21st Century* (Newbury Park: Sage, 1992).
13. A psycho-social pluralist project has been expressly undertaken by M. Chiba, "Legal Pluralism in Mind: A Non-Western View" in Petersen & Zahle, *supra* note 9 at 71. A political sociology of law which suggests the principle of a "multivocal regulation" of contemporary societies has been proposed by J. Commaille, *L'Esprit sociologique des lois: Essai de sociologie politique du droit* (Paris: PUF, 1994).
14. B. de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York: Routledge, 1995) at 477.
15. J.-F. Thuot, "Déclin de l'État et formes postmodernes de la démocratie" (1994) 26 Revue québécoise de science politique 75. For a critique of conventional political theories of federalism from a legal pluralist perspective, see R. A. Macdonald, "Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism" (1997) Arizona Journal of International and Comparative Law [forthcoming].

starting point.[16] The theoretical ambition to better describe, explain or master the variations of law by presenting legal pluralism as hypothesis (or even axiom) leads, sooner or later, to a departure from the conventional domain of law and toward an imagination of modes of knowledge and action which common sense disfavors and tolerates poorly.

Without a doubt, theorists who remain faithful (either doggedly or serenely) to the monist paradigm are right to think of legal pluralism as a Trojan horse which will shatter the conceptual edifice of their discipline. In response, we can only offer them a bit of hope and a small consolation: the hope that the increased sensibility to empirical variations of law and legal experiences will renew the social relevance and the theoretical validity of their own discipline; and the consolation of one day watching legal pluralists complain themselves of the shattering of their own understanding of things by heretics beginning the quest for greater coherence in the realm of thought and action.

Law is once again a *terra incognita* which we explore best when we take our inspiration from a pluralist epistemology. However, the present attempts to further develop legal pluralist theories (especially ones which express constructivist philosophies) provide a glimpse of the boundaries of a new legal domain (one which is more complex but nevertheless unitary) in which explorers attracted by empirical diversity have gradually made room for promoters of theoretical unity. Once the theoretical unification of the legal space has been reconstituted, for instance under the aegis of a theory of global law, the renaissance of the idea of legal pluralism will perhaps come from a more critical consciousness of law's myriad temporalities.[17] In order to promote the

16. This conceptual dissolution is produced not only when one compares state law with other normative phenomena with which it is more or less similar (the issue of legal pluralism), but also when one studies law (state or otherwise) in its relations with other cultural spheres like religion, morality, ethics or science (the issue of internormativity). See, in this regard, J.-G. Belley, ed., *Le Droit soluble: Contributions québécoises à l'étude de l'internormativité* (Paris: LGDJ, 1996).

17. See C. J. Greenhouse, "Dimensions spatio-temporelles du pluralisme juridique" (1989) 13 Anthropologie et sociétés 35; F. Ost, "Temporal Pluralism and Legal Relativism: Contributions to the Study of Delegalisation" in T. Daintith, ed., *Law as an Instrument of Economic Policy: Comparative and Critical Approaches* (Berlin: Walter de Gruyter, 1988) 322; F. Ost, "Les Multiples temps du droit" in *Le Droit et le futur* (Paris: Travaux de recherches de l'Université de droit, d'économie et de sciences sociales de Paris, 1985) 115; F. Ost, "Mémoire et pardon, promesse et remise en question: La déclinaison éthique des temps juridiques" in P.-A. Côté & J. Frémont, eds., *Le Temps et le droit* (Cowansville: Yvon Blais , 1996) 15.

construction of a new framework for legal pluralism, we will then have to appeal to a conception of law as *tempus incognitus*![18]

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