

# INTERNATIONAL COURSE ON LEGAL PLURALISM

## uOttawa, Canada

### 17-20 August 2018

Meeting location: **Fauteux Hall**, 57 Louis Pasteur, Ottawa, ON, Canada, **Room FTX302**

Course Materials: Required readings, the Course Program and a copy of the course venue map can be found at:  
[https://www.dropbox.com/sh/3cl0nl7a2mwl925/AADDjUup\\_O8vJxCX66Ov85VAa?dl=0](https://www.dropbox.com/sh/3cl0nl7a2mwl925/AADDjUup_O8vJxCX66Ov85VAa?dl=0)

## Friday, August 17, 2018

**08.30 – 09.00** Registration, Welcome and Introduction

*Janine Ubink*

**09.00 – 11.00** Introduction to the Concept of Legal Pluralism

*Keebet von Benda-Beckmann*

The term legal pluralism has acquired a broad array of meanings of both a normative and an analytical kind. In the introduction, we will discuss how the concept was first used in (post)-colonial contexts in order to understand the overlapping and incommensurate kinds of law with which local populations were confronted in diverse social interactions. An important question is how actors deal in various contexts with the problem of incommensurability. Power imbalances thereby affect the options actors have to choose from among the available sets of law. We will look at some of the major dimensions by which legal orders may differ from each other. The concept of legal pluralism also allows for an inquiry into the ways in which legal orders become intertwined and how this generates hybrid legal forms.

Over time it became clear that legal pluralism is a far more general condition and that it can be found all over the world, including western countries. Besides, globalization of the economy has spawned a rise of international and transnational law. Modern communication technologies, and modes of production that span across many countries, require many to deal with various legal orders. Besides, large scale migration has transported national and religious laws across borders. These developments have

generated a transnational dimension to the national and sub-national parts of plural legal orders.

We will see that an analytical concept of legal pluralism allows one to analyze the relative importance of each of the component parts of plural legal orders at particular places and in particular social settings where specific persons draw upon these orders in interaction with each other. Such a perspective also draws attention to the at times surprisingly resilient power of customary laws and the emergence of new, unnamed law. The claims of universality of both secular and religious international law, or of national sovereignty of national laws have to be questioned rather than taken for granted. Paying attention to the spatial and temporal dimensions of law reveals that an increase in overlapping spaces regulated by special legal regimes and the spectacular rise of regulation in general generates very fragmented, flexible and complex legal (sub-)regimes. This may even affect some of the relatively stable parts of plural legal orders. Attempts to coordinate the various legal regimes often paradoxically result in less, rather than more cohesion.

**Required Readings:** Von Benda-Beckmann & Turner (forthcoming)

#### 11.00 – 11.30 Coffee Break

#### 11.30 – 12.30 Indigenous Peoples' Rights in Comparative Perspective

*Melanie Wiber*

*Bradford Morse*

*Armando Guevara Gil*

This section of the course will deal with indigenous peoples' rights with particular attention to access and control over natural resources. We will focus on three aspects: (1) important case law in a number of settler states and addressing a number of different resource types; (2) the issue of Prior Consultation (as derived from ILO 169 the UN Declaration on the Rights of Indigenous Peoples), plus how states and corporations have responded to that when involving the mining sector; and (3) what we can learn from struggles to manage resources once indigenous rights are recognized, with a focus on commercial fisheries. We will work together to illustrate how these three issues are intertwined and build on shared historical experience.

Brad Morse will begin our session by discussing the relevant case law testing indigenous rights in natural resources in several postcolonial settler states. This will be followed by discussion with the instructors and with students, inviting them to reflect on the applicability of evolving case law to their respective situations and nations.

Armando Guevara-Gil will discuss the issue of Prior Consultation (derived from ILO 169 and UNDRIP), and how it has been interpreted in Peru. Prior Consultation has become a significant political issue in many settings, and in particular the reading will illustrate how

states and private corporations are weakening the requirement in the case of mining leases. Again, there will be opportunity for student questions and group discussion. Melanie Wiber will then discuss the Marshall Decision of the Supreme Court of Canada, with particular attention to how gaining access to commercial fish stocks triggered significant conflict between indigenous communities and the state for descendants of the Peace and Friendship Treaties of eastern Canada. A final opportunity to discuss lessons learned and inviting student feedback will follow.

- Required Readings:**
- Guevara Gil & Cabanillas (2017)
  - Wiber & Milley (2007)
  - A handout on the relevant case law will be provided at the outset of this section

**12.30 – 14.00** Lunch Break

**14.00 – 18.00** Indigenous Peoples' Rights in Comparative Perspective **(continued)**

*Melanie Wiber*

*Bradford Morse*

*Armando Guevara Gil*

(Including Coffee Break)

## Saturday, August 18, 2018

### 08.30 – 12.00 Science, Technology and Governance

*Devanathan Parthasarathy*

*Bertram Turner*

(Including Coffee Break)

This course session aims to explore the concept of Legal Pluralism (LP) as an analytical tool in the field of Science and Technology Studies (STS). Currently, the study of law and STS (L-STs) concentrates primarily on the law of the state and institutions of global governance. A more sophisticated look at complex legal configurations is needed. The course session will empirically and theoretically address the ways in which law, science, materiality and technology intersect in plural legal configurations and will explore how they are linked with processes of law production at various scales. The course will elaborate on how the normative power of materiality, of technologies and knowledge regimes interacts with plural legal configurations and increase their complexity. It is also necessary to explore how techno-legal components affect the processes of choice making among various legal registers that are fundamental for legal pluralism.

While science and the law often appear as mutually reinforcing domains, the pace of scientific and technological change is constantly challenging legal orders and legal institutions that are 'lagging behind'. Agencies of global governance and epistemic communities are increasingly involved in legislative processes addressing the transfer of technology and science and monitoring the effects that technological innovation may entail in various settings. At the same time, technological innovation and knowledge production prove to continuously involve normative processes that account for their own inherent logics and combine with the social, the political, the religious, the ecological, and the economic. Meanwhile different legal registers such as customary and religious-spiritual ones are developing different takes on technoscience, even as the state, under neo-liberal imperatives creates new legal-scientific fictions that are contested by activists, communities, and civil society organizations.

To mention one domain: Algorithms, big data, ai and blockchain technology, for instance, produce techno-legal devices such as automated law, smart contracts, digital law, precrime and surveillance software and many more examples that appear as markers of the anthropocene and transform everything we know about plural legal configurations.

The course session is an invitation to collectively reflect on the question what consequences STS, materiality, technologies, and knowledge regimes may have in and for plural legal configurations and the legal universe.

- Required Readings:**
- Jasanoff (2008)
  - Parthasarathy (2017)

**12.00 – 13.30** Lunch Break

**13.30 – 17.00** Gender, Culture and Religion in Law's Plurality

*Waheeda Amien*

*Sindiso Mnisi Weeks*

(Including Coffee Break)

This session will demonstrate how official and unofficial forms of plural legal systems exist in multicultural, multiethnic, multilingual and multireligious societies, the extent to which the legislature and judiciary in those societies have attempted to accommodate the existence of plural legal systems and the human rights implications that arise from their legal plurality, especially the relationship between culture, religion and women's rights. The instructors will lead a discussion that uses South Africa as a case study. They will thereby bring together the experiences and challenges of regulating family and personal law for women who observe customary law and religious laws in South Africa. The Constitution recognizes the individual and associational rights to culture and religion – recognizing customary law as having equal status to common law and enabling the South African government to enact legislation to recognize traditional and religious marriages and/or personal law systems. Consideration will also be given to how the judiciary and legislature are managing the possible tension between culture, religion and women's rights, which will be contrasted and compared with how women attempt to navigate this same tension as it manifests in their day-to-day lives. Participants will be given the opportunity to discuss in small groups the possibilities that exist for developing an amalgamated solution that addresses women's multivaried needs of family and personal law regulation under both customary and religious laws. Based on the readings as well as participants' own experiences, each small group will be asked to develop a proposed outline that could be presented to the South African legislature, which they will then present to the class as a whole.

- Required Readings:**
- Mnisi Weeks (2015)
  - Amien (2010)

- Extra Readings:**
- Civil Union Act (2006); Matrimonial Property Act (2008); Muslim Marriages Bill (2010); RCMA (1998); RCMA (2013); RRMB (2005); SA Constitution (1996)

## Sunday, August 19, 2018

### 08.30 – 12.00 Peace, Conflict, and Development Cooperation

*John Packer*

*Markus Weilenmann*

*Janine Ubink*

#### Including Coffee Break

This session of the course will focus on external interventions in situations of conflict and peace-building in contexts of legal pluralism and the challenge of regulating legal diversity in such a way that it may contribute to conflict prevention, resolution and sustainable peace and development. John Packer first focuses on the challenges of constitution-making or reform in contexts of violent conflict, in countries with majority / minority issues and/or fraught inter-ethnic/community relations and legal diversity. He will show how these issues are typically addressed in international practice with inter-governmental engagements in violent conflict situations. He will show the shortcomings of these approaches, but also possible “entry points” for regulating legal pluralism.

Janine Ubink then focuses on the possible role of traditional elders in peacemaking processes, through a case study of Somalia. This is based on her involvement as consultant for the Somali Ministry of Justice that aimed to study whether it would be a good idea to involve the elders in the reintegration of disengaged combatants and if so, how. This topic not only allows for a discussion of the challenges of external involvement in conflicts and peace processes, and the influence on the local power balance, but also for a reflection on the challenges academics face when they traverse from a role of researcher to a role as consultant and vice versa.

Markus Weilenmann will introduce the concept of project law, using this concept to wrap up the morning sessions by linking this analytical tool to the discussions earlier in the day. The concept of project law provides amongst others insight into the intricate dynamics of the transfer of law from the donor to the recipient countries by means of development cooperation.

**Required Readings:**

- Ubink & Rea (2017)
- Weilenmann (2009)
- Packer (2007)

**Suggested Readings**

- Bruce (2013) – hardcopy provided during course
- Machnyikova (2015) – hardcopy provided during course

12.00 – 13.30 Lunch Break

13.30 – 14.30 Peace, Conflict, and External Involvement (**continued**)

*John Packer*

*Markus Weilenmann*

*Janine Ubink*

14.30 – 15.00 Coffee Break

15.00 – 18.00 Optional: Visit to Museum (self-paid)

## Monday, 20 August, 2018

08.30 – 12.00 Methodology

*Rachel Sieder*

*Marc Simon Thomas*

Including Coffee Break

Law and justice are best understood as decentered, plural phenomena; often these constructions stand in tension with hegemonic forms of law. Research methods typically focus on material and discursive justice practices and on the production of distinctive legal subjectivities by individual and collective actors.

Researching legal pluralism – the concrete practices and subjectivities of law and justice – has involved a variety of methods and approaches, including for example: multi-sited transnational ethnographies (Merry 2006), in-depth analysis of specific cases of jurisdictional conflicts (Simon Thomas 2017), or explorations of indigenous legal practices (Flores and Sieder 2011). Interdisciplinary efforts have analyzed the historical construction of “customary law” and the interplay of different legal orders (see for example, Starr and Collier 1980; Falk Moore 1989), and the elaboration of new legal understanding and subjectivities as part of international processes of legal reform and socio-legal mobilization to claim human rights (see for example Goodale and Merry 2007).

In this session we will take our own field research experiences as a starting point for discussion. Rachel Sieder will discuss her work on indigenous law in Santa Cruz del Quiché in Guatemala, where she has made collaborative films with indigenous authorities and collaborated in special anthropological witness reports for indigenous leaders criminalized by the state for exercising their rights to autonomy. Marc Simon Thomas will

elaborate on his fieldwork in the Andean highlands, where he conducted research on local dispute settlement in an indigenous village, taking the situation of formal legal pluralism in Ecuador into account. We will discuss different qualitative research methods such as interviewing and participant observation, working with local archival material (print and video), and the challenges of researching the spaces of encounter between indigenous law and hegemonic forms of law, including the state legal system and international law.

- Required Readings:**
- Faulk & Brunnegger (2016)
  - Merry (2002)

**12.00 – 13.30** Lunch Break

**13.30 – 17.00** Participants' research forum  
*All*

Including Coffee Break

## Tuesday, 21 August, 2018

**Tuesday** Excursion / Field trip  
*Students and Teachers*

T.b.a.

## Required Readings

Amien, Waheeda. 2010. "A South African case study for the recognition and regulation of Muslim family law in a minority Muslim secular context." *International Journal of Law, Policy and the Family* 24(3):361–396.

Faulk, Karen Ann and Sandra Brunnegger. 2016. "Introduction: Making sense of Justice." Pp. 1-21 in *A Sense of Justice Legal Knowledge and Lived Experience in Latin America*, edited by Sandra Brunnegger and Karen Ann Faulk. Stanford: Stanford University Press.

Guevara Gil, Armando and Carla Cabanillas Linares. 2017. "Mineralizing the Right to Prior Consultation: From Recognition to Disregard of Indigenous and Peasant Rights in Peru."

Jasanoff, Sheila. 2008. "Making Order: Law and Science in Action." Pp. 761-786 in *The Handbook of Science and Technology Studies*, edited by Edward J. Hackett, Olga Amsterdamska, Michael Lynn and Judy Wajcman. Cambridge/London: MIT Press.

Merry, Sally Engle. 2002. "Ethnography in the archives." Pp. 128-142 in *Practicing ethnography in law: New dialogues, enduring methods*, edited by June Starr and Mark Goodale. New York/Houndmills: Palgrave MacMillan.

Mnisi Weeks, Sindiso. 2015. "Customary succession and the development of customary law: The *Bhe* legacy." *Acta Juridica* 1:215-255.

Packer, John. 2007. "Reflections on Implementation Mechanisms of Selected Autonomy, Self-Rule and Similar Arrangements." Pp. 69-85 in: *Implementing negotiated agreements; the real challenge to intrastate peace*, edited by Miek Boltjes. The Hague: T.M.C. Asser Press.

Parthasarathy, D. 2017. "Science and Law to the Rescue of India's Coastal Urbanism? Loss of Imagination and Reimagining a Future." Paper.

Ubink, Janine and Anna Rea. 2017. "Community Justice or Ethnojustice? Engaging with Customary Mechanisms to Reintegrate Ex-Combatants in Somalia." *International Journal of Transitional Justice* 0:1-21.

Von Benda-Beckmann, Keebet and Betram Turner. Forthcoming. "Legal Pluralism, Social Theory, and the State."

Wiber, Melanie and Chris Milley. 2007. "After Marshall: Implementation of Aboriginal Fishing Rights in Atlantic Canada." *The Journal of Legal Pluralism and Unofficial Law* 55:163-186.

Weilenmann, Markus. 2009. "Project Law—a Legal Intermediary between Local and Global Communities: A Case Study from Senegal." *Anthropologica* 51:1-14.

## Suggested Readings

Bruce, W. John with Sally Holt. 2013. "Quick Guide to Land and Conflict Prevention", *Conflict Prevention Handbook Series*. Ottawa: IQd.

Machnyikova, Zdenka. 2015. "Quick Guide to Managing Diversity: Language and Religion", *Conflict Prevention Handbook Series*. Ottawa: IQd.

## Extra Readings

Civil Union Act (2006)

Matrimonial Property Act (2008)

Muslim Marriages Bill (2010)

RCMA (1998)

RCMA (2013)

RRMB (2005)

SA Constitution (1996)

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