

# RETURN TO LEGAL PLURALISM:

## TWENTY YEARS LATER<sup>1</sup>

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In 1969, the Centre for Legal History and Ethnology at Brussels Free University chose legal pluralism as the theme of one of its symposia. It was customary in such circumstances for the Director of the Centre, Professor John Gilissen, to invite one of the participants, a member of the Centre's staff, to be responsible for a tentative synthesis of the meeting's scientific results. In this case, I was the person asked. It was well understood that the synthesizer was free to go beyond the strict framework defined by the documents and talks presented at the symposium. I emphasize this to avoid a possible excuse which a benevolent reader of my essay might be willing to find for its limitations, i.e. that they were the direct result of the views expressed in the symposium, which my synthesis merely reflected. True, I was influenced by those views, but I was also proud to think I had gone beyond them in an attempt to generalize whatever they suggested as potential avenues for thinking. This is how I came to write a first attempt at synthesizing current views on legal pluralism.

My paper was published in 1971 (Vanderlinden 1971a). The concept of legal pluralism was not yet, as John Griffiths would put it some years later (1986: 1), "in its combative infancy". Many people have since then trodden the same path (for an excellent bibliography, see Griffiths 1986: 51ff.). Inevitably, they have contributed to substantial

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RETURN TO LEGAL PLURALISM  
Jacques Vanderlinden

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progress in our appreciation of the phenomenon. My purpose here is not to inflict upon them some kind of retrospective examination. There are those who like to distribute good or bad marks on such theoretical issues. I value pluralism in science too much to be willing to do so to those who followed me (or even to myself). I would simply like, twenty years after my first reflections on legal pluralism, to formulate my current position with respect to what I still consider to be a major development in legal sociology. I do this in the first instance without having reread my original paper.

I assume to begin with that the existence (or survival) of human societies, in the widest sense of the word, implies at least a minimum of regulation of the social networks<sup>2</sup> which constitute them, whether these be territorially or personally defined. This is a postulate in the sense of a primary, undemonstrated (and even undemonstrable) premise upon which the rest of the argument relies. The existence of a society in which no system of some kind (legal or not) regulates the more or less coherent whole which constitutes the society cannot be ruled out *a priori*. Let me simply assert that such regulatory systems exist effectively in those societies which I have observed and to which my argument applies.

Given this postulate, three considerations follow:

1) Among the innumerable societies which exist upon the planet, very few are completely isolated from one another. In that sense complexity rather than simplicity is characteristic of human society. Many are either included in wider social structures or themselves include narrower structures. Such total or exclusive inclusion in a single larger structure is, however, far from being the rule. Social networks are in touch with each other at one or many points without necessarily being fully included one in another. Whether one considers, on the one hand, a very elementary society - that made up by a man and a woman in what one conventionally calls a couple - or, on the other hand, the elaborated society constituted by the European Community, one is forced to conclude that those who

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2 I prefer the word "network" to that of "field", as the latter appears, perhaps unconsciously, as reflecting more the territorial dimension of societies than their personal one. Territory is, in many instances, an essential element of social construction, but, looking at the heart of the latter, connexions between individuals and groups appear to me as even more fundamental.

participate in the one or the other are also likely to be members of many other networks, be they of cultural, economic, political or social nature. As a result one may think, and this will be my first fundamental consideration, that it is not so much the networks which matter, but rather the individual who is the converging point of the multiple regulatory orders which each social network necessarily includes according to my postulate.

2) Regulatory orders are, in every society, multiple and diverse. Grammar, politeness, the measurement of time, morality, fashion, law (and why not law?), all contribute in various ways to the regulation of the functioning of the many networks which can be observed in Western European society. This is not the place to decide upon the universal validity of distinctions between regulatory orders, nor to decide what, exactly, 'law' is. Let us only admit that the distinction between law and non-law in Western European societies can be of some usefulness, but also that the insistence of some people that the legal regulatory order in these societies is either the dominant or even the only one, does not resist serious analysis.

3) The reference to a dominant (or even exclusive) regulatory order raises the problem of possible conflicts between them, conflicts of which the individual will be the battlefield. Behaviour which is tolerated or encouraged by some is discouraged or forbidden by others. Every social network attempts to acquire (in most cases at the expense of others) a maximum of control over those it takes to belong to it. In that sense every network has a natural tendency toward internal totalitarianism and external autonomy from other networks. I emphasize the words 'attempts' and 'tendency'. If the drive to achieve autonomy and totalitarianism realized its aims, this would mean the end of competing social networks and the multiple dependence of the individual upon them. Such a situation is forbidden by our first and second considerations. The inevitable imperfection of all social totalitarianisms and autonomies is furthermore not a stable situation. Regulatory orders, and among them legal orders, are always in a dynamic competitive relationship to each other, although this is often latent and not immediately apparent to the outside observer. Summing up these three considerations, one might say that man, as a member of many social networks, is constantly subjected to a dialectical process in which competing regulatory orders assert their power over him and strive to achieve autonomy from the others. Law is one of these regulatory orders and competes with them in order to assert its supremacy at the same time over the individual and over other regulatory orders. If, among the regulatory orders involved there is more than one 'legal' order, such a dialectical process is

RETURN TO LEGAL PLURALISM  
Jacques Vanderlinden

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what I today call 'legal pluralism'. The concept is thus not centered upon a given legal system but upon the 'sujet de droit' (as one says in French<sup>3</sup>) who can be subjected to many legal orders as a member of many networks. I would contend that an approach to legal pluralism centered upon legal systems is fairly pointless, while one centered upon the 'sujet de droit' can be far more fruitful.

Speaking of a 'legal system', the first thing I must do is to provide the reader with an idea of what I mean by 'system'. I would suggest that the term refers to a coordinated set of practices tending to achieve some result: in the case of law, the regulation of the social network. But however we define the term, if we accept my first and third considerations, to speak of a pluralistic legal system is either self-contradictory or redundant.

If, on the one hand, we consider a totally autonomous network (I underscored in my first consideration that these are, if they exist at all, in practice quite rare), a network completely isolated from other networks, its members not being attached in any sense to any of them, it is impossible to speak of legal pluralism. Its tendency toward totalitarianism has been achieved in the legal field and its members are totally free from the influences of other legal systems developed in other social networks. To speak of such a legal system as being 'pluralistic' would simply be a contradiction in terms.

If, on the other hand, we consider a system characterized by semi-autonomy (I underscored in my third consideration that this is the practically universal state of affairs), we have to admit that such a system is necessarily pluralistic. It can never pretend to reach its ideal, declared or not, to enclose its members in a single regulatory order. It will have to live with competing orders and if, among the latter, legal orders exist which compete with its own, its members will be in a situation of legal pluralism. Hence to speak of a legally pluralistic system as being a system in which many competing legal orders exist is redundant.

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3 For the English-speaking reader, let me only say that the words 'sujet de droit' convey not only the idea that an individual is the holder of rights and duties, but also that he is subjected to a legal system. A nice example of the confusion this concept can lead to is the conflict between its usage by René David in his French draft of art. 1 of the Ethiopian Civil Code ("La personne humaine est sujet de droit...") and the resulting translation of this article into English in the official translation of the Code.

Confusion only arises when one completely neglects observation and adopts a purely theoretical stance. This is the case, for example, when one founds one's approach upon a single and exclusive model of society, such as the State model. In that case one is bound to affirm not only the tendency of the legal order to pursue autonomy and exclusiveness, but the actual existence of such autonomy and totalitarianism. When confronted with the reality of competing social networks and hence with rival legal orders, the State system, in order to conceal the inevitable failure of its totalitarian ideal, pretends to incorporate the other legal orders into an order which it calls 'legal pluralism'. This enables the State system to affirm in principle a monopoly of regulatory order, since it claims that the competing legal orders only exist by virtue of its 'toleration' or 'recognition'. These competing legal orders are thus in principle reduced to the status of 'subordinate' or 'inferior' systems. 'Recognized' legal pluralism is in other words the acknowledgment by the State system of its incapacity to realize to the full its totalitarian ambition and a way to disguise what according to the first consideration should have been evident. If, this being admitted, one still wants to reserve conceptual room for legal pluralism 'in one country' and by reference to a system which one chooses to privilege (for example, but not necessarily, the State system), let us speak of 'relative pluralism'. 'Legal pluralism' in this relative sense can only be understood by reference to a given social network or legal order.

Let us now consider the problem from the standpoint of the individual. He and he alone finds himself in a situation of legal pluralism. It is his behaviour which is governed by multiple and various regulatory orders, be they of a legal or non-legal nature, which issue from the various social networks to which he belongs and which pretend to impose upon him their own regulatory and, possibly, 'legal' orders. It is he who will have to make a choice between these mechanisms in determining his behavior. It is at his level, that which so many political theorists somewhat complacently call the basis, that a possible conflict in socio-legal regulation will acquire its full meaning. Thus instead of looking at the legal pyramid from the top, from the centres of decision, from the standpoint of power, one is brought to contemplate it at the level of ordinary men in their daily activities.

Having said all this, I should be in a position to conclude and propose a definition of the word 'pluralism'. Before re-reading my essay of 1971, I would be tempted to say that pluralism is essentially a condition, thus a way of being, of existing. It is the condition of

RETURN TO LEGAL PLURALISM  
Jacques Vanderlinden

---

the person who, in his daily life, is confronted in his behaviour with various, possibly conflicting, regulatory orders, be they legal or non-legal, emanating from the various social networks of which he is, voluntarily or not, a member. 'Legal pluralism' is pluralism limited to the legal regulatory orders with which the 'sujet de droits' can be confronted. Use of the term assumes that there exists in the social networks to which the individual is subjected one or many regulatory orders which can be identified as 'legal' (the law of the 'State' and/or 'unofficial' law). In that sense, legal pluralism is but a specific case of regulatory pluralism. And I am willing to admit that for one who denies that there is a distinct, identifiable sort of order which can be qualified as 'legal', this entails that there cannot be a distinct state of legal pluralism, only states of regulatory pluralism.

Such an approach would do away with the existing concept of pluralism as applied to legal systems. The more I try to think about it, the more I am convinced that the idea of a pluralistic legal system is impossible. What we (or at least, I) have hitherto considered as 'plural' or 'pluralistic' legal systems are in fact unitary systems which 'recognize' special rules for specific persons and/or purposes, for example for the adherents of a specific religion or the members of a given 'race', in matters of marriage and inheritance. This was the typical colonial situation where 'native' or religious laws were carefully tolerated by the colonial power, but also controlled by the latter through repugnancy clauses and the like. Retaining the idea of a 'pluralistic' system can only be a source of confusion.

It should be clear that I consider any attempt to bring the idea of pluralism to the forefront of the study of law interesting. As I said, I consider it one of the most valuable contributions to the field of legal sociology in recent years. That it took so long for the idea to gain general acceptance is the result of the prevalence of the monistic legal ideology which came to dominate legal discourse in the course of the last century. What I would now like to consider is the extent to which I myself in 1971 manifested a monistic ideological conception of law.

It is always difficult to re-read one's own work after an interval of twenty years and especially to recapture one's state of mind at the time. The 1969 symposium on legal pluralism was to a large degree born out of my connection with Africa, namely Zaire and Ethiopia, during the preceding ten years. In both countries, but especially through fieldwork in Zaire, I had been forced to reconsider the conception of law acquired during my study of law. Taught by my

Belgian legal education to think of law as a set of rules developed into the form of a system, I had progressively abandoned such a rule-oriented approach (Vanderlinden 1971b: especially at 136) and I had substituted for it a mechanism-oriented approach. I had also become convinced that legal mechanisms, as I called them, were not necessarily built up into the well-organized coherent whole which my professors associated with the idea of a system. All this I made clear in the first two pages of my essay. Yet I was then unable to eliminate from my thinking the habit of looking at law from the standpoint of society rather than that of the individual. I constantly referred to 'a specific society', perhaps not making quite clear that this was not necessarily a state-like society. My proposed definition of legal pluralism was constructed in four stages:

- law only exists in the framework of society;
- law consists of mechanisms;
- law does not necessarily appear as a system;
- legal pluralism refers to the existence of different legal mechanisms applied to identical situations within a single social order.

In retrospect one thing seems especially striking: my insistence upon the notion of mechanisms. I fear it contributed to pushing me in the wrong direction. I would indeed still maintain that a legal system cannot be approached exclusively (as a large part of the adherents to contemporary positivist doctrine still believe) in terms of rules. It is not *a priori* apparent that a legal system could not be made up of the juxtaposition of an infinity of *ad hoc* solutions settling, each in a different manner, individual cases of social tension coming within the legal field. Of course a definite need for security and accordingly for predictability induces people to project into the future the solutions of today. Hence a tendency to pass from the individual case to the norm. This is certainly a frequent phenomenon, but it does not allow us to decree that norms and norms alone make up the system.

Such a conviction, which I felt compelled to emphasize at the time, also pushed me into preferring a study of law at the level of the individual having a problem to solve rather than at that of the abstract formulation of an ideal order in conformity with the intentions of a legislator. My experience of the African field - which had led me to consider case law as the best expression, even if a transformed one, of Zande custom - participation for five years in a team of lawyers in Addis Ababa whose education was essentially American and a recent teaching experience as visiting professor in the United States were probably not foreign to such an approach. However, I have the feeling that my insistence in the definition of legal pluralism upon different mechanisms applied to identical

RETURN TO LEGAL PLURALISM  
Jacques Vanderlinden

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situations also reflected my personal background. I was rejecting, consciously or not, the supposed objectivity of the norm and accentuating the spontaneous relativity of the specific instance.

8) This attitude, which I am certainly not abandoning today, carried me further than I now would wish, in the sense that it led me not to distinguish sharply enough between plurality and pluralism and to consider any different mechanism applied to what I called an identical situation as a case of legal pluralism. My conclusion, all things considered, carried too far the wish to 'denormativize' the classical vision of law. The existence, within a single legal order, of different mechanisms applied to similar situations amounts to a plurality of legal mechanisms, not to legal pluralism. I realize today that in order to have pluralism, one must necessarily have many legal orders meeting in the same situation and making the individual not a 'sujet de droit' but a 'sujet de droits'.

Everything considered, my worst error was my constant reference to 'a given (or single) society', thus implicitly favouring the most obvious candidate: the state-model. I did not realize that by doing so I was privileging what I today call 'legal pluralism in one country'. The decisive step toward a more adequate conception was made when I realized that the state legal order has no absolute validity of its own but only a highly relative one, depending exclusively on the discourse of those who construct that order and wish it to be all-inclusive.

It follows that many of my further arguments of 1971 have lost their relevance, while others retain their full validity.

It was quite erroneous to consider the minor or the tradesman - to whom, under contemporary Belgian or French law (and many other legal systems) a specific law applies in accordance with their status - as being in a situation of legal pluralism. Such cases involve nothing more than a single legal order which provides different rules for people who are in different conditions. It was equally wrong to maintain that, during the colonial period, the African who considered himself as potentially bound by many legal systems (e.g., in matters of marriage, that of his pre-colonial society, that of an imported religion to which he has decided to adhere or that of the colonial State) was in a situation of legal pluralism.

Yet I still consider as valid examples of legal pluralism in the strict sense my former examples of resistance fighters facing occupying armies during a war or that of mafiosi opposing police forces in the



contemporary world. In each case the individual is subjected to different legal orders, each with its own set of values and, in these instances, quite antagonistic ones. His acts will be quite differently assessed by each regulatory order he is facing and he will accordingly be categorized by each of them as either a rebel or a hero.

Given such a redefinition of legal pluralism, I find it pointless to retrace step by step my path of 1971. The fundamental alterations in my premisses necessarily modifies the whole construction. The latter only keeps its validity insofar as one accepts the two major correctives introduced in the present paper: on the one hand, the necessity, for legal pluralism to exist, of more than a single legal order meeting at the level of a 'sujet de droits'; on the other the non-existence of pluralism when considered from the point of view of a specific legal system and not from the standpoint of the individual.

## REFERENCES

As indicated in the text, an excellent bibliography on legal pluralism has been assembled by Griffiths in 1986. I accordingly mention here only the articles to which I make reference in the text.

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