

PURSUING LEGAL PLURALISM: THE POWER OF PARADIGMS IN A GLOBAL WORLD

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Introduction

The Jubilee Congress of the Commission on Legal Pluralism, that took place at the University of Cape Town in September 2011, celebrated thirty years of the Commission's role in promoting an understanding of, and commitment to, the study of legal pluralism worldwide. During its existence its members have engaged in many debates over the subject of what constitutes legal pluralism and how it is to be perceived. From its very inception, at the First symposium of the Commission on Folk Law and Legal Pluralism in Bellagio, Italy, in 1981 there was heated discussion about what to call law other than state law and how to identify its characteristics.¹ Such debates continue today, and my paper seeks to highlight some arenas in which contestations over law and legal pluralism have particular salience. Thus my paper will not provide an historical account of the development of legal pluralism that is addressed elsewhere.² Nor will it provide

¹ Terms such as local, folk, customary, informal, people's law and indigenous law were all proposed, but the point was made that there is no characterization that consistently follows any supposed distinction between state and folk law. For details of this discussion refer to Allott and Woodman (1985: 13-20).

² For discussion of some key texts see Vanderlinden (1970, 1989); J. Griffiths (1986); Merry (1988); F. von Benda-Beckmann (1998); Woodman (1998); Tamanaha (1993) and A. Griffiths (2002).

comprehensive coverage of what legal pluralism entails.³ Instead, it seeks to highlight a number of domains in which the highly mobile and contingent nature of law is revealed, through the ways in which law is spatialized, representing multi-faceted dimensions of legal pluralism that are constantly in the making. Such a vision is at odds with the more traditional views of legal pluralism that are framed in terms of a state centred paradigm.

In recent years the power of law in all its dimensions has come under scrutiny in attempts to comprehend the forms that it adopts in processes of globalization. The growing recognition of the importance of transnational forms of law and ordering, derived from diverse sources (F. von Benda-Beckmann et al. 2009a, 2009b; Hellum et al. 2010),⁴ has focused attention on the plurality of law and promoted a new, or renewed interest in legal pluralism in an age where law and legal institutions cross local, regional and national boundaries. This interest is one in which the ‘local’ is embedded in and shaped by regional, national and international networks of power and information that have increasingly engaged with discourses on international human rights. As a concept, legal pluralism has generated great controversy over the years⁵, as different actors have used it for different purposes in attempts to promote their diverse interests.⁶ It has been invoked to uphold notions of authority and legitimacy, to favour or promote one set of legal claims over another, or to validate and acknowledge the existence of alternative or co-existing forms of legal ordering within a particular domain.

³ For examples of what the field may encompass see Greenhouse (1998); Rouland (1994); Tie (1999); K. von Benda-Beckmann (2001); Roberts (2005); Michaels (2005); Berman (2007); A. Griffiths (2009a); Tamanaha (2008) and Twining (2009-2010).

⁴ Such sources include the World Bank, the European Convention on Human Rights, the World Trade Organisation, the World Health Organisation, the International Monetary Fund, the African Union as well as religious movements.

⁵ For discussion of these debates see A. Griffiths (2002, 2009a).

⁶ Such interests have been represented and debated in terms of the weak and strong legal models that have historically dominated discussions on pluralism, representing “the product of differing historical, economic and political factors that have conjoined to create different sites for study over time and space” (A. Griffiths 2002: 289).

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Such pursuits raise questions about who has the power to make or remake law in all its various manifestations and for whose benefit. For how law is perceived depends upon the models or paradigms that are applied to its recognition that may vary according to the differing methodological and epistemological approaches that underpin them. These play a crucial role in formulating matters of jurisdiction, creating and ascribing authority and legitimacy that have an impact upon the success or failure of claims that people and institutions pursue. At whatever level they occur, the fate of these claims depends upon the extent to which they concur or are congruent with dominant legal models that are being applied. For if they fail to meet the standards that these models promote, these claims will be ignored or excluded from the arena in which they seek to operate. In the past, with the rise of the nation-state a particular paradigm of law became predominant, one in which state law acquired jurisdiction and took precedence over other forms of ordering within a territorially, bounded, geographic space.⁷

Always subject to contestation, this state law model requires reformulation in the light of what Sassen has termed “the epochal transformation we call globalization” (Sassen 2008: 2), reflected today in the trans-nationalisation of personal, economic, communicative and religious relations that give rise to conditions of legal flux. Such processes, in which local, national and international regulatory domains are enmeshed, reconfigure law both within the nation-state and beyond its boundaries. While law has always been mobile and globalization of law is not a new phenomenon (F. von Benda-Beckmann et al. 2005), there is intensification and increasing density in the flows and patterns of interactions and inter-connectedness between states and societies that constitute the modern world community. These incorporate global and regional networks of activity, institutions, and regimes of governance, as well as transnational social movements and other kinds of transnational association. The actors engaged in these concerns not only include national states acting as sovereign law makers or in concert with other states in the construction of international law, but also national or transnational nongovernmental organizations, ‘law merchants,’⁸ epistemic

⁷ This model of law is often referred to as a positivist or legal centralist paradigm. For more detail on its characteristics see A. Griffiths (1997: 29-38).

⁸ These are lawyers who travel the world, usually on behalf of governments, development organizations or multinational law firms, to introduce their law to countries that are in the process of legal reform; see Dezalay and Garth (1996). For the implications that such activities have for the development of transnational justice see Dezalay and Garth (2012).

communities,⁹ self-regulatory networks, traditional and religious authorities and local communities.

Their activities range widely; from negotiating border disputes, entry to the EU, sponsoring aid for development, to participants in anti globalization protests, activists promoting the interests and human rights of indigenous or ethnic minorities, experts creating blueprints for governance of industries such as fisheries, as well as the work of religious and traditional leaders dealing with disputes among their followers, or local actors engaged in regulating pursuits within their neighbourhoods. What is clear is that all the claims being invoked involve space – physical, territorial, imagined, symbolic - and that the spaces they inhabit are multi layered. Pursuing legal pluralism in these contexts raises questions of scale and projection concerning the range and scope of the investigation, that are in turn dependent upon the standpoint from which legal pluralism is being addressed. For what you look for defines what you see.¹⁰ Thus, any analysis of legal pluralism requires to be explicit about a) who the actors are; b) the purposes for which legal pluralism is being invoked; and c) the sources and methodological approaches that inform the legal inquiry that is at stake.¹¹

⁹ See Wiber (2005), who uses this term to refer to a network of persons spread across the globe who share and promote a particular form of knowledge. See also Haas (1992); Maher (2002).

¹⁰ The work of Drummond (2006) discussed later in this paper challenges, for example, the grand narratives of comparative law by exploring perceptions of locality and community that are discursively and historically constructed through a study of marriage practices in Gitano communities. What she renders visible would be rendered invisible under a conventional paradigm of comparative law.

¹¹ For as the 2009 report of the International Council for Human Rights Policy makes clear, given the complex constellation of factors that are at work, there can be no single paradigm of law that is applicable to the regulation of human rights, as there are no straight forward prescriptions that can be employed on a universal basis (ICHRP 2009). For a discussion of human rights that rejects a holistic or universalist stance in favour of a perception of culture that reflects a “sociological fiction, a shorthand referring to the disordered social field of connected practices and beliefs which are produced out of social action”, see Cowan et al. (2001:14). See also Goodale who observes that given the diversity and multiple meanings of human rights it is important to pay attention “to different discursive spaces in which transnational human rights networks are constituted” (Goodale 2007: 24).

Repositioning Governance: Multi Spatial Contextualizations of Law

One consequence of the processes outlined above is a recharacterization of international law that has arisen through the rise of global problems and the emergence of non-state actors.¹² As a result international law can no longer “simply coordinate state interests, but rather must facilitate state and non-state cooperation in such areas as humanitarian intervention, promotion of democracy and the rule of law, and transnational accountability” (Koh 2002: 328). Thus international law becomes a form of transnational law that is a subject in its own right as “in time the domestic and the international will become so integrated that we will no longer know whether to characterize certain concepts as quintessentially local or global in nature” (Koh 2002: 328). This is because in contexts where patterns of global legal interactions erode the boundaries between domestic and international law, foreign and domestic legal systems and practices, as well as internal and external juridical authorities (F. von Benda-Beckmann et al. 2005: 2009a; 2009b; Hellum et al. 2010), the idea of a single site of sovereignty embodied in the nation-state cannot be sustained, although states seek to lay claim to this power not only at a rhetorical or ideological level, but also in practice.¹³

Multi-Sited Ethnography

Acknowledging these intersections requires exploring chains of interaction connecting transnational and local actors in multi-sited arenas. Such an approach is

¹² This has repercussion where professionals, for example, draw selectively on the laws of multiple jurisdictions to create transnational legal constructs to meet their business clients’ needs in ways that may subvert national regulations designed to thwart the public interests (McBarnet 2002). It raises questions about the ethics and viability of corporate social responsibility (McBarnet et al. 2007). It also has implications for the delivery of aid through international development agencies and NGOs that acquire ‘quasi-state status’, and that may undermine the prevailing legal and political orders in recipient countries (Weilenmann 2009).

¹³ For an examples of the way in which a state may claim the opposite, and disclaim sovereignty to excuse itself from its failure to carry out its obligations to its citizens see Randeria (2003) on the ‘cunning’ state of India and its claims to powerlessness in the case of conditions imposed on development aid by the World Bank.

in keeping with anthropological and social scientific perspectives on law that engage with ethnography and have expanded its scope to become ‘multi-sited’ (Marcus 1995) or deterritorialized (Gupta and Ferguson 1992; Lefebvre 1991; Appadurai 1996, 2003; Merry 2006). This has opened up new horizons for study (A. Griffiths 2009b). The kind of multi-sited research that is called for today involves a broad landscape, one that encompasses not only diverse spaces unconfined by conventional territorial or geographic markers (Drummond 2006), but also such areas as ‘information flows’ encompassing the internet and global conferences (Merry 2000: 131) or world media (Eide 2010) in its diaspora.

A Perspective on Migrants

One area where multi-sited ethnography is especially pertinent is in addressing research on migration and in following the trajectories of migrants’ multi-sited lives. For the transnationalisation of law across national boundaries is not the exclusive domain of powerful inter- and trans-national actors, but also pertains to ordinary migrants, businessmen and traders who do not belong to the political and intellectual elite that feature so prominently in discussions on globalization of law. The literature on migration usually describes one aspect of these processes: migrants taking their law to the new country of domicile. This involves the customary or religious law of their place of origin, as well as (to some extent) their national law that does not lose its relevance for migrants after they have arrived in their new domicile. This law is usually seen as opposing the law of the receiving national state, creating a host of problems for politicians, lawyers and for the migrants (Foblets 2005).

In these processes migrants are important actors in the dynamic reconfigurations of law at the different localities with which they are involved. What happens in one of the localities may have important implications for the way law develops in the other localities. However, the changes may occur at different paces and have different results depending on the specifics of the various localities involved. Nuijten (2005), for example focuses on the experience of migrants who move back and forth between La Canoa, a rural village in Western Mexico, and the USA. She explores contrasting normative values that migrants are confronted with in their transnational existence and which, in the process of confrontation and reflection, transform their identities. As Rabo observes in her study of Syrian transnational families and family law, exploring intersections cannot only be understood in terms of differing legal systems or laws that collide, but requires an understanding

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of how “people actually practise family relations across national borders” (Rabo 2010: 31).¹⁴ From another perspective, that of ethnographic research carried out in Germany, the USA and Haiti, Glick Schiller (2005) makes the case for a new category of citizenship for migrants, that of ‘transborder citizenship’ that explicitly takes account of their multi-sited lives.

Polycentric Relations

What has emerged from adopting these approaches to legal pluralism is a less clear cut ‘top down’, or ‘bottom up’ perspective - that is linear and mono-causal or centric in its orientation - in favour of one that is multi-dimensional and polycentric in nature and that encompasses networks or webs of relations. In exploring these dimensions, that some scholars refer to as pathways (A. Griffiths 2009b) or trails (Greenhouse 2009), there is a recognition that what constitutes knowledge or understanding of these domains is not a given but is always partial and contingent. This standpoint is consonant with an interpretive and reflexive form of anthropology that explores how knowledge is produced and represented (Clifford and Marcus 1986; Clifford 1988; Haraway 1991; Hastrup 1992; Marcus and Fisher 1989; Okely 1992; Ong 1996; Wolf 1996; Yang 1996). For knowledge “is not transcendental, but is situated, negotiated and part of an on-going process...[that] spans personal, professional and cultural domains” (Narayan 1997: 37). Such reflexivity in relation to the construction of knowledge and its application may be contrasted with law’s claims, under models of legal positivism or centralism, to authenticity and exclusivity.

The Contingency of Knowledge: Deciphering Law

An example of how such an approach challenges state centred perspectives on law is provided by Drummond (2006). In her investigation of family law in the city of Jerez in Spain, she refers to her research as a “voyage” that forms part of an “itinerary” (Drummond 2006: 4). This represents a conscious strategy on her part to provide the reader with different points of orientation to the material, bringing different perspectives to bear on a set of interrelated themes dealing with state,

¹⁴ This is in tune with Drummond (2006) in critiquing approaches to comparative law that promote grand narratives that operate to exclude other visions of law.

culture and marriage that form the three chapters of the book. By presenting several perspectives from which law might be viewed the author aims to bring “various projections of law” more clearly into view thus allowing for “some of law’s itineraries (in the sense of both agenda and trajectory)” to “emerge in a place-neutralizing world “(Drummond 2006: 6). As a result of this type of analysis Drummond challenges the grand narratives of comparative law that adopt a linear overview of legal development in Europe emphasising “the convergence and harmonisation of legal traditions” (Drummond 2006: 18). This has involved interpreting the spread of secular family law across Europe with no-fault divorce regimes as representing “the apex of a modernising homogeneity” (Drummond 2006: 86) in which the “culture and practice of family law in Spain” is seen to be “in conformity with a single, Western, globally disseminated ‘modern’ model” (Drummond 2006: 47). Yet, as Drummond points out, “such a rendering of the history of marriage in Western Europe is one that has been written as though there is one Western family about which a single history can be written” (Drummond 2006: 188). As a consequence, what is represented as universal in fact represents “an exclusive and extraordinarily narrow band of the European population” (Drummond 2006:188).

By focusing on space and place in the form of the city of Jerez de la Frontera Drummond explores what constitutes the ‘local’ or ‘locale’ through an analysis of perceptions of locality and community that are discursively and historically constructed, rather than treating it as a given. This perception is one that is not bounded by state notions of territoriality or jurisdiction. This approach is also in keeping with a shift in anthropological perceptions of space in physical or material terms to an interest in the spatial dimensions of culture (Gupta and Ferguson 1997) through the recognition “that all behaviour is located in and constructed of space” (Low and Zuniga 2003:1). The locale that forms the subject matter of Drummond’s study is not just a place where things happen but represents “a specific site in which social relations are bounded and locally constituted, while the sense of place relates to the experiences and representational map constructed of a specific place by its occupants” (Blomley 1994: 112). Thus for her the concept of ‘place’ is “the central analytical problematic of the book”, which encompasses the actual city as well as the “metaphorical city of the book’s theoretical musings” (Drummond 2006: 4). Such musings are in keeping with Lefebvre’s observations that “space is not a scientific object removed from ideology or politics, it has always been political and strategic” (Lefebvre 1991: 31). In this way Drummond’s study, although located in a place that is a physical space, nonetheless represents a form of deterritorialized ethnography

Remapping Legal Pluralism

Delineating place and space in this way has implications for the ways in which law and legal pluralism may be perceived. Through scholars' ethnographic approaches to the study of law, based on specific, concrete and lived-experiences, other narratives emerge that provide a counterpoint to the analyses of law based on abstract legal theory. While there has been a recognition of the need to rethink the traditional doctrine of the sources of law (Teubner 1997) such reappraisal does not mark a new development, as such challenges to doctrine have long been articulated by scholars who view state law as representing only one form of political organisation that exists alongside other local, territorial, tribal, political or religious organizations with their own forms of law. In many cases these challenges to 'traditional doctrine' involve a study of law from below that explores specific responses to globalization from local perspectives. They explore spatial and temporal dimensions of the globalization of law, tracing the emergence, flow and influence of transnational legal forms into small-scale social fields. These may be lower levels of state administration, or villages, or social fields and arenas interconnecting actors at different levels of political organization. Such studies contribute to a growing body of research on the globalization of law in social fields or levels of state administration that exist below the national arena.¹⁵

Reconfiguring States: Citizenship

One area where state centred views of law have been heavily contested is that of citizenship. Over the years it has been the focus of much attention, given transnational migration discussed earlier and the displacement of persons from countries of origin due to wars or conflicts that have forced individuals to become refugees or asylum seekers. In dealing with the classification of persons, citizenship raises questions about defining who is to be included as a citizen within a state and who is to be excluded from this status. The scope of the concept of citizen is limited by policies implemented in formal laws, leading to a set of criteria applied in making this decision,¹⁶ along with bureaucratic regulatory

¹⁵ See Stewart (2011) on plural governance chains molding constructions of gender in ways that lead to the unequal distribution of the benefits of globalization.

¹⁶ For the complexities involved in determining formal choice of law questions and dual citizenship see Foblets (2005).

institutions that implement them (Morgan 2003). Those that fail to meet the criteria and who remain in the state acquire an “illegal” status in law rendering them liable to deportation and expulsion (De Genova 2002). The formal criteria for citizenship tend to be somewhat narrow, based on country of birth, marriage, official residence and so on, and have been subject to critique (Coutin 2000).

Attempts have been made to displace the status quo by framing a category of “social citizenship” as a step towards challenging and broadening formal, legal definitions of citizenship when it comes to dealing with undocumented persons within a nation state. Such new criteria include, period of de facto residence, contributions to and engagement with the local community, birth of children within the country, among other factors (Coutin 2000). It comes as no surprise that many of those constructing categories of social citizenship tend to be anthropologists, sociologists and socio-legal scholars who have a more social-scientific perspective on law and its relationship with society and who seek to apply this perspective to create more inclusive definitions of law.

Other examples include regulatory frameworks that are not formally recognised by state law but that have legitimacy and authority in the eyes of those communities that apply them. This, for example, includes the favellas in Brazil or the barrios of Columbia, which were viewed until recently as illegal, squatter settlements by state law. In recent years attempts have been made in Columbia to recognise and regularise some of these settlements under certain conditions. Another example is that of People’s Courts in South Africa that sprang up under the old apartheid regime with no formal legal status but used by local groups to control and regulate life in the townships.

Indigenous Peoples: Strategies for Recognition

Another arena of contestation in recent years has been the recognition of indigenous peoples and their laws and rights to self-governance. It has provided an ongoing focus for legal pluralism research and has had ramifications through inquiries into how the concept of indigeneity is constructed within local, national and transnational domains. Merry has long observed that “indigenous groups often define themselves in terms being developed by the global movement of indigenous peoples human rights and the provision of state law” (Merry 2000: 127). This is important because “the legal provision of the nation in which an indigenous community lives as well as those of the international order affect how a particular

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indigenous community presents itself and the kinds of identities it assumes” (Merry 2000: 127). These represent in part “accommodations to the shifting global and national frameworks of power and meaning in which the community lives” (Merry 2000: 127).

Early strategies for recognition adopted different means. The strategy behind the Mabo case¹⁷ in Australia, for example, was to make the national legal system recognize native title, demonstrating that indigenous laws, customs and traditions, could be accommodated within the Common Law paradigm. While native title could be extinguished in a number of ways, the decision opened up the way for indigenous groups to claim interest in large segments of their traditional lands if they could demonstrate the required continuing connection with those lands. In contrast, the WAI 262 proceedings in New Zealand¹⁸ dealing with the issue of folklore protection alleged, amongst other things, that the Crown, by entering into a number of key intellectual property law instruments without proper consultation with the Maori, breached its obligations under the treaty of Waitangi. The claimants starting point in these proceedings was not the traditional taxonomy of intellectual property rights and a demonstration of how the concerns of the Maori Iwi could be accommodated within the traditional heuristic structure of intellectual property law, but rather the treaty of Waitangi and its guarantee of the right to sovereignty which they claimed the Crown had breached.

Tribal Constitutionalism: Towards a New Form of Pluralism

In responding to claims and rights asserted by indigenous peoples, states such as Australia, New Zealand, Canada and the United States have required such peoples to adopt a written constitution on membership rules. Such rules operate as a condition of official recognition. This requirement has given rise to ‘tribal constitutionalism’ that generates a new legal and political distinction between indigeneity and tribal membership (Gover 2010). This creates “a jurisdictional split between the category of indigenous persons identified by the state, and the category of tribal members identified by officially recognized tribes” (Gover 2010: 1). This is problematic because these classifications create a situation where some

¹⁷ *Mabo v Queensland [No 2]* (1992) 175 CLR 1. For discussion see Sackville (2003).

¹⁸ For discussion see Austin (2003).

“legally indigenous persons are not tribal members” while “some tribal members would not qualify as indigenous under public law definitions” (Gover 2010: 1). In the settler states she deals with, Gover observes that one of two models are applied to recognition based on race or the nation (Gover 2010:10). The first model, based on race, prioritises indigenous ancestry, while the second, based on the nation, prioritises tribal membership. They operate in opposition to one another with the effect that “either tribal self-governance is undermined by the State’s dealing with non-tribal indigenous people, or a large and growing number of indigenous people are shut out of the State-indigenous relationship by the mediating institutions of tribes” (Gover 2010: 10).

Yet, Gover argues, the concept of indigeneity extends beyond that of a narrowly construed emphasis on tribal membership, for many non-tribal persons are recognized by tribes and by other indigenous communities. This is something of which neither model of recognition takes account because “neither acknowledges the role played by indigenous communities in the construction of indigeneity” (Gover 2010: 10). In accommodating this excluded perspective, Gover advocates adopting a concept of ‘inter-indigenous’ recognition. This would extend the legal category of ‘public indigeneity’ beyond members of officially recognized tribes to include “the cultural concept [of indigeneity] as it emerges from indigenous practices of recognition” (Gover 2010: 10).

Moving Beyond the State: Appeals to Transnational Regulation

Defining concepts of indigeneity, involving recognition of membership within social groups and of rights ascribed to their status, entails configuring relations between indigenous peoples and states. This not only involves internal processes of negotiation located within the geographic territories of states but may also involve appeals to transnational forms of governance that may be used to reshape negotiations within these arenas. For example, UN Declaration on the Rights of Indigenous Peoples (UNDRIP)¹⁹ provides an international instrument that may be utilized by indigenous peoples in the quest for recognition and implementation of international human rights standards to legitimate their claims on states. Framed in terms of international law, UNDRIP refers to international law norms, human

¹⁹ This was passed by a resolution of the General Assembly, GA Res 61/295, adopted on 13th September 2007.

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rights law, treaties between states and indigenous peoples, state law, and without distinction, to indigenous 'laws, traditions [and] customs'. As such, it marks a significant advance in the recognition of indigenous peoples as subjects of international law, with recognition of their collective rights that may be viewed as separate and distinct from the body of international human rights law (geared to individual rights) and the related rights of minorities. As a resolution, UNDRIP is not a treaty establishing international obligations for those states that consented to its adoption. Nonetheless, it has provided an important mechanism for developing a system of global governance and international human rights law. As Wheatley observes "applications from indigenous groups have been important in developing the 'case law' of the Human Rights Committee on Article 27, International Covenant on Civil and Political Rights (the minority right to a distinctive 'way of life')" (Wheatley 2009: 383).

What UNDRIP creates is space for "political participation in legal regimes outside of the state" that "allows the possibility of regime capture (or at least influence) with the authority of the international law system then seen to conflict with the state law system" (Wheatley 2009: 383). In appealing to norms developed outside state legal systems, indigenous peoples may challenge legal norms within their own domestic legal systems. This gives rise to a legal pluralism that requires a "shift in the thinking of public international lawyers." They must make sense of the "new complexities" and take account of "global governance, and the relevance of democracy and democratic legitimacy in the exercise of political authority", including a recognition of the social, economic and political life of indigenous peoples (Wheatley 2009: 384).

Outside of states, bodies that may be used to push the implementation of human rights within states include the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights that regulate the Inter-American Human Rights System. A recent case, *La Oroya Community v Peru*, pursues the relationship between environmental health and human rights. It seeks to extend the responsibility of a state for the violation of human rights of a non-indigenous community through contamination of the environment. As Spieler observes the case is significant because it "has the potential to expand the concept that environmental protection is closely related to human rights promotion and effectiveness" (Spieler 2010: 27). If the IACHR issues a report in favour of the petitioners, the people of La Oroya, and the state of Peru fails to address the concerns of the IACHR it could remit the case to the Inter-American Court. While the Court has issued judgments dealing with environmental degradation, these

have, to date, been confined to dealing with indigenous communities and the protection of their rights and territories. In opening up the scope for recognition of the interrelationship between environmental health and human rights in general, the case has the potential for holding a state accountable for human rights violations in a broader arena. This could include violations of the right to health, life or personal integrity of a community, caused by environmental contamination in a whole range of circumstances, such as pesticide contamination, or air pollution in cities (Spieler 2010: 23).

Mobilizing Legal Change: Social Movements and Constitutional Reform

Mobilizing for change within states is not confined to the struggles of indigenous peoples. It can involve widespread political mobilization for radical legal reform as in the case of several Latin American countries (Houtzager 2005; Restrepo Amariles 2010). In his study, Houtzager examines the impact of social movements in challenging systemic and durable forms of exclusion. In his case, in the context of the struggle for land engaged in by the Movement of the Landless (MST) in Brazil. He analyses the success of the MST, that has made access to land more equitable in parts of Brazil by redefining property rights in practice, in terms of juridical mobilization through the juridical field. This field is constituted through a wide range of actors and institutions including judges and judicial institutions, private lawyers and law firms, public prosecutors, law school professors, NGOs and professional legal associations. Such mobilization takes places across multiple fields that “integrate juridical action into broader political mobilization, politicizing struggles before they become juridified, and mobilizing sophisticated legal skills from diverse actors” (Houtzager 2005: 219). In addition, support was also garnered from other sources that were “religious (through the progressive wing of the Catholic Church and pastoral organizations), political (through the Workers’ Party in particular), labor (through the labor organization *Central Unica dos Trabalhadores*), academic, and within international advocacy groups and NGOs” (Houtzager 2005: 225). Such support was set in motion because of the transition to democracy.

What Houtzager demonstrates is how substantial legal change may be generated “when dynamics in the movement field and the political arena converged to alter that of the juridical field” (Houtzager 2005: 220). Even where this does not occur he shows how change on a smaller and more incremental scale can be brought about through mobilization across multiple fields. In these processes the modalities

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of legal change may vary. Drawing on the case of land occupation Pontal do Paranapanema, he demonstrates how the movement's land occupation strategy and juridical mobilization can combine to set in motion different types of modalities of legal change. In Pontal do Paranapanema three modalities were visible, these were "[1] state enforcement of a *de jure* legality that was ignored in practice, [2] a significant procedural innovation that speeded up the judicial clock, and [3] a shift in the sources of law and reinterpretation of substantive legal norms" (Houtzager 2005: 225).

Underpinning these developments is recognition that ever since the 1990's the efforts to constitutionalise law have played a critical role in facilitating judicial modalities of legal change. Such efforts have been strengthened through networks of progressive lawyers, especially the National Network of Popular Lawyers, formally constituted in 1996. Their commitment to the constitutionalisation process within the juridical field "played an important role in synchronizing the juridical and movement fields" (Houtzager 2005: 237). It has "played a substantial role in altering a highly exclusionary legality by compelling public authorities to implement existing agrarian reform legislation, by helping to create and institutionalize novel interpretations of the social function of property and an expanded notion of civil disobedience" (Houtzager 2005: 238). What is key in this process is an understanding of the dialectical relationship existing between the movement and juridical fields that illuminates how "relations between fields can alter their respective internal logics" to mobilize new perspectives on law (Houtzager 2005: 223).

Turning to other parts of Latin America, Restrepo Amariles draws attention to constitutional change in Columbia (1991), Venezuela (1999) and Bolivia (2009), focused on popular sovereignty as a means of refounding the state (Restrepo Amariles 2010). Promoted by the Latin American neo-constitutional movement and its radical wing, constitutional reforms in these countries aim at institutionalising popular sovereignty – based on legitimacy – over legal sovereignty – founded on legality, in the foundation, structure and functioning of the state. What this entails is establishing "original constituent powers" derived from the people, the promotion of active political participation and a focus on the justiciability of constitutional rights. To this end, and in order to include minorities and historically excluded groups in the process of constitutional reform, Columbia established a constitutional assembly. This was derived out of a national consensus "that claimed for itself the original constituent power" and thus "the legitimate constitutional power of the Columbian State" (Restrepo Amariles 2010: 89).

According to Restrepo Amariles the constitutional assembly was characterised by its legitimacy rather than by its legality because it was “a constituent power and not a constituted power”. It was “a source of law because it was built upon popular sovereignty” (Restrepo Amariles 2010: 89).

Venezuela went further than Columbia in its mechanisms for participation by holding a referendum on whether or not to establish a constitutional assembly, and by presenting the final draft of the constitution prepared by it to the people for approbation in another referendum. The Venezuelan Constitution “established by the sovereign people – in exercise of their constituent power” (Restrepo Amariles 2010: 95) constructed an institutional arrangement of that state that allows for permanent popular participation through creating a new public electoral power. This independent electoral power was established to enable citizens to control state abuses. It does so by guaranteeing the expression of the people’s sovereignty “through vote, referendum, consultation of public opinion, mandate revocation” and other mechanisms as well as “open forums and meetings of citizens whose decisions are binding” (Restrepo Amariles 2010: 98). What is key here is the potential for strengthening civil society organisations and social networks of co-operation without the intermediation of political parties. The electoral power promotes a direct link among citizens and between citizens and the state.

To strengthen this type of participation the Colombian Constitution provides another mechanism for assuring popular legitimacy in the functioning of the state. This is through provision for the justiciability of constitutional fundamental rights that allow for “actualizing rather than merely protecting these constitutional rights” (Restrepo Amariles 2010: 104).²⁰ In this process the Constitutional Court “has used judicial review not only to decide particular cases, but to advance the social agenda of the constitution and promote structural changes that eliminate permanent threats to fundamental rights” (Restrepo Amariles 2010: 110). Restrepo Amariles argues further that with the introduction of constitutional actions for the actualisation of fundamental rights “constitutional review becomes more than an instrument of legality; it becomes a means of achieving popular legitimacy for the state” (Restrepo Amariles 2010: 113). This is especially the case given that it is not only negative liberty rights that are protected by the constitutional judges but also positive rights, such as housing, work and social security that increase “the

²⁰ This is done through four different types of constitutional actions, the fulfillment action (Art 87); the popular action (Art 88); the group action (Art 88) and the Tutela action (Art 86). For details see Restrepo Amariles (2010: 104-112).

legitimizing potential of constitutional review” (Restrepo Amariles 2010: 113).

These processes underpin broader notions of legitimacy with regard to state policies and actions, as well as providing for greater popular participation in the affairs of state through the development of a concept of popular sovereignty.²¹ As such these developments represent radical changes in the interpretive legal process as well as in the accountability of the state that is expanded through constitutional reform. To be successful they require concerted political action and convergence of interests, as well as the mobilisation of forces that cut across multiple social fields.

Virtual Worlds and Ephemeral Domains: New Horizons on Law

Rethinking questions of authority and legitimacy with regard to law also arise in spaces that elude conventional approaches to doctrinal analysis. One such arena concerns the internet. Given its global reach there has been much discussion over the years as to whom should regulate it, what form this regulation should take and for what purposes. Such deliberations give rise to competing approaches to perceptions of what the ‘global commons’ entails in a virtual world (Bernstorff 2004; Dizon 2010; Paliwala 2010). Much of the discussion centres on the potential for democratic governance and the ways in which this may be ordered. For Dizon the flaws in popular theories of democracy and Information and Communications Technology (ICT), be they utopian, dystopian or reinforcement, derive from the fact that “they have a very limited and singular view of what democracy is, where to look for it, and who are involved in its constitution” (Dizon 2010: 7). For this reason he advocates the need to “deconstruct and re-imagine the conception of democracy itself beyond the traditionalist state-centred and legal centralist assumptions” (Dizon 2010: 7). He proposes to do this by expanding the concept “beyond governmental regulation and political activity” which allows for “a

²¹ Restrepo Amariles however challenges the view put forward by the radical wing of the neo constitutionalist movement, that popular sovereignty has replaced legal sovereignty underlying the modern political project by producing an alternative refoundation project. He argues that the latter is in fact “essentially a way of recovering the faith in modern ideals...[by creating] a new ideological artifact of modern thought aiming to recover faith in itself” (Restrepo Amariles 2010: 124-125).

broader yet more socially-intimate and fine grained experience of democracy” to be comprehended (Dizon 2010: 9).

Another approach is adopted by Paliwala who explores the way cyberspace’s construction of new internet cultures also transforms economic and regulatory cultures that compete with one another (Paliwala 2010). On the one hand, he draw attention to cyberspace’s potential for creating a new space for collaborative, non-capitalist, democratic engagement that is emancipatory for its constituents or the ‘multitude’. However, he also highlights a competing approach that seeks to defend state and property interests by harnessing the power of capital to develop and control new modes of regulation and production with their inclusionary and exclusionary powers. What emerges are contradictory interpretations of what virtual space embodies. Thus Baxi and others such as Klein and Rajan stress that far from being emancipatory the internet represents new techno-scientific modes of production that stand for new modes of domination (Baxi 2006; Klein 2005; Rajan 2006).

From yet another perspective, Ali examines the discourse of internet *fatwa* and how this affects women and gender relations in a transnational sphere (Ali 2010). In exploring selected *fatwas* from three internet sites she asks the question “whether this burgeoning field of communication reflects emerging discursive sites for Muslim women within a counter-hegemonic transnational and global ‘virtual’ space” (Ali 2011: 118). In addressing this issue her study reveals how these new cyber space regulation mechanisms serve global Muslim space. As such, they generate an international discourse encompassing a wide spectrum of interacting norms that highlight “the ‘irrepressible’ plurality of the Islamic tradition” (Ali 2011: 118). She demonstrates how these sites have enabled Muslim women to raise questions about their lives that “they would not have been able to frame in a ‘face to face’ encounter due to the sensitive, private and at time challenging nature of the enquiry” (Ali 2011: 118). Thus she highlights the transformative potential of internet *fatwas* and the implications that this has for transnational and international family law norms within plural Islamic legal traditions. Her approach challenges existing hegemonies within an Islamic tradition that is predicated upon ethnicity, schools of juristic thought and territorial locations.

Moving in and out of engagements with multi-sited, transnational arenas poses problems about how to study a world in which all “is in flux, order is transient, nothing is independent, everything relates to everything else, and no one subsystem is necessarily continuously in charge” (Martin 1994: 250). It is a

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problem at the other end of the scale from deriving law and order from the territorial and sovereign claims of nation-states. While anthropological and/or social-scientific approaches to law have provided alternative visions of legal pluralism from those based on state centred frameworks, this has generally been accomplished through ethnographic and empirical studies derived from a focus on the “field” as a locus of study. What this entails has been subject to change over time, from earlier studies of village life to multi-sited or deterritorialised ethnography discussed earlier. It is constantly undergoing reconceptualisation and adapting to new challenges, as for example, how to conduct research where there is no easily discernible ‘social field’. This is most evident in, but not confined to, moments of political reconstruction and instability (Greenhouse, Mertz and Warren 2002).

An example of the challenges this poses is provided by Zabusky’s study of space-science mission development in Europe (Zabusky 2002). In examining the worlds of big science and European integration Zabusky elected to study the Space Science Department (SSD), within the European Space Research and Technology Centre located in the Netherlands, where most of the technical and scientific work is carried out. Zabusky identified what she considered to be a manageable social field for study, one where staff scientists are responsible for co-ordinating the efforts of other scientists, engineers and technicians from across Europe in designing, developing and manufacturing European Space Agency space-science missions. However, it soon became clear that the SSD “was not a relevant ...even genuine, social field for European scientists” (Zabusky 2002: 125), so she reoriented her focus away from the SSD itself to space-science missions. But this also presented difficulties because there was no central locus of decision-making that could be grasped, or tangible space that presented itself for study.

Instead, she encountered ephemeral virtual networks, such as international review boards that “did not exist anywhere but appeared only at the moment when called into being by a set of rules and regulations and by ongoing practices of participants” (Zabusky 2002: 129). For staff participating in mission development this gave rise to a sense of vulnerability and uncertainty in a world where “networks of people in different locations” working “toward a common goal” were continually being made and unmade “in decision-making processes that were constantly taking on different forms, subject to shifting centres of power that in turn dissolved and became reconstituted elsewhere” (Zabusky 2002:125). The problem for Zabusky was that these processes “seemed more defined by constant change than by definitive structures; at every moment, political, economic, and

organizational realities shifted”; this challenged Zabusky’s ability “to hone in on a place I could call the field” (Zabusky 2002: 115). These experiences raised questions about where was “Europe (as opposed to its constituent nation-states)?”, along with the problems of identifying “the international scientific community” since it was, by definition, everywhere?” (Zabusky 2002: 121). Nonetheless, she continued to grapple with these processes that she viewed as “widening gyres” where no-one is in control of this ongoing “gyration” that involves “the making and unmaking of centres” (Zabusky 2002: 113).

In exposing and exploring these dimensions Zabusky reveals how productivity in space-science mission development, far from being the product of political stability, in fact results from “participants experiences of instability and uncertainty as they improvise moments of clarity in which work can get done” (Zabusky 2002: 114). For participants working at the intersection of two powerful transnational processes, European integration and big science, this is an uphill struggle, as they are faced with constructing missions in the light of forces that are often at odds with one another. They must “meet their professional or intellectual needs” that are required for their projects “in the face of constant shifts in political priorities, organisational policies, and economic real-locations over which they have little or no control” (Zabusky 2002: 114). Under such circumstances what becomes apparent is the contingent and highly mobile nature of the world in which space-science missions come into being.²²

Shifting Paradigms: Legal Pluralism and the Mobilization of Power

This paper has explored forms of legal pluralism that highlight the multi-spatial contextualization of law. It provides a perspective on legal pluralism that highlights the mobile and contingent nature of law that reflects an ongoing process. Thus it challenges conventional analyses of law that are centred on and derive from a state centred perspective. It demonstrates the multiple ways in which international, transnational, national and local domains intersect with one another in a whole variety of ways that undermine any grand narrative of globalization and concomitant vision of law. It displaces the latter, that underpins discussions of a uniform tendency towards homogenization, or alternatively, to fragmentation in

²² See Brumann (2012) on the importance of engaging in a discursive ethnography of interaction in studying the World Heritage arena.

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the globalization literature, by highlighting the ways in which the effects of globalization reveal themselves to be highly different in specific contexts. This is accomplished through an analysis that sets out the complex relationships derived from intersections between transnational forms of law, such as human rights and religious law, and local legal orders, such as customary or traditional law, emanating from a plurality of sources within and beyond the state.

The importance of this perspective on law is that it reconstitutes spaces for action and the redrawing of boundaries within an environment in which state sources of law represent only one of a number of elements that may be at work. It also reveals the multi-stranded composition of state legal pluralism that discloses more shifting alliances and transitory bases for action.²³ In addition, it makes visible the transformative potential for law that derives from the new kinds of political and legal spaces that are in the making, that elude the boundaries of the territorial state and traditional legal scholarship. Such an approach reframes the discussion of institutions and specific practices – both public and private- “away from historically shaped national logics” (Sassen 2008: 2). Such visibility is critical for acquiring a proper understanding of processes of globalization that, among other things, are “taking place inside the national to a far larger extent than is usually recognized” (Sassen 2008: 1).

In pursuing this form of analysis an understanding of the ways in which law is spatialized becomes apparent. It demonstrates how legal representation of space must be seen “as constituted by – and in turn, constituted of – complex, normatively charged and often competing vision of social and political life under law” (Blomley 1994: xi). In struggling to make sense of the complexity and ambiguity of social life “legal agents – whether judges, legal theorists, administrative officers or ordinary people – represent and evaluate space in different ways” (Blomley 1994: xi). What is foregrounded under plural legal conditions are the diverse and often contradictory notions of spaces and boundaries or borderlands that come to exist. In acknowledging these diverse legal constructions that come into being, what becomes visible the “multiple arenas for

²³ Merry and Woodman have long called for the need for a more serious investigation into what state legal pluralism involves, to examine the nation-state’s ideological claims to legal uniformity and coherence that are used to construct a meta narrative that challenges “other” forms of ordering (Merry 1988; Woodman 1998). Studies on governance and governmentality have contributed to dismantling this image (Griffiths 2009a; Zips and Weilenmann 2011).

the exercise of political authority, the localization of rights and obligations, as well as the creation of social relationships and institutions that are characterized by different degrees of abstractions, different temporalities and moral connotations” (F. von Benda-Beckmann et al. 2009b: 4).

What emerges from these more broadly construed perspectives on law are the different actors who are engaged in contestations over who has the power and authority to generate law and construct its meaning. This is especially pertinent in plural legal constellations where there may be contestation over what is the ‘correct’ law in particular contexts. The power struggles that emerge under these circumstances often reflect asymmetrical power relations among parties and among legal orders. This affects the ways in which law’s legitimacy is constituted and reconstructed. For law plays an important part in creating, producing and enforcing meanings of concepts such as ‘justice’, ‘authority’ and ‘rights’, and in instantiating notions of ‘legality’ that may be invoked by different social actors in their construction of hegemonic and counter-hegemonic discourses. Such discourses not only operate on a rhetorical or ideological level but may also serve to underpin the actual use of force or violence to achieve their ends.²⁴

The recognition and prioritizing of legal orders today continues to create dilemmas and opportunities for contestation. These are ongoing because of a lack of consensus on how relationships between competing legal orders are to be determined. This involves questions about the extent to which such orders can co-exist, or the conditions under which one law takes precedence over another. In these negotiations legal pluralism provides a repertoire on which social actors can draw in constructing discourses of legitimacy that may be used to promote and justify multiple forms of intervention, action and policy-making in many different arenas. This is so, whether it is utilized to provide a form of higher legitimacy derived from rhetorical claims or whether it is mobilized for more concrete and instrumental purposes. Comprehending what these dimensions entail engages with the multifaceted nature of law that constitutes legal pluralism. It also underlines the extent to which legal spaces are embedded in broader social and political claims that involve complex negotiations over power²⁵ that cannot be ignored.

²⁴ See Baxi (2009), Greenhouse (2009) and Nader (2009) on the power of legal discourse in the ‘war on terror’.

²⁵ For discussion of the multiple dimensions that power embodies see F. von Benda-Beckmann et al. (2009a: 2-6).

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