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Legal Pluralism 101

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I. INTRODUCTION

The purpose of this chapter is to try to demystify the mainstream literature on legal pluralism for foreign consultants or activists concerned with poverty reduction in the global South. The chapter proceeds on the working assumption that such interventions are legitimate, welcome, and well informed.

My standpoint is that of a British jurist interested in jurisprudence, legal anthropology, "Law and Development," and the implications of "globalization" for the discipline and practice of law.[1]

The mainstream literature on legal pluralism draws on several disciplines and does not belong to a single intellectual tradition. It is accordingly difficult to generalize about it. However, I suggest that a high proportion of the anthropological and sociolegal literature up to the mid-1990s approximates to a single ideal type, here characterized as *social fact legal pluralism* (sflp). In the past fifteen years, the idea of *global legal pluralism* (glp) has become fashionable, but I argue that this is in many respects based on a qualitatively different lot of concerns and that, if there is a single subject or field encompassed by this idea, it needs to be relabeled.

The mainstream literature contains a rich heritage of particular studies and some rather less satisfactory theorizing. One of the problems is that it has been bedeviled by an obsession with perennial jurisprudential problems surrounding the concept of law and legal positivism. It has rather neglected other theoretical issues about both pluralism and general normative theory. Part of the problem is that there is almost systematic ambiguity with regard to some of the central concepts. Thus, we need to start with some conceptual clarification.

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[1] My main relevant experience has been in East Africa: Sudan, Tanzania, Uganda, Kenya, and to a lesser extent Rwanda and Ethiopia, mainly in the period from 1958 to 1965 and in the mid-1990s. My main relevant writings are Twining (2009a, 2009b, 2010). This chapter draws heavily on all of these. I am grateful to the participants in the World Bank workshop on legal pluralism in April 2010, and especially to Doug Porter and Brian Tamanaha for helpful comments.

II. SOME BASIC CONCEPTS

Pluralism

Plural, usually contrasted with singular, means more than one and is applied to persons or objects. It assumes that these units are discrete or individuated. The primary meaning of *pluralist* is "the state of being plural."[2] *Pluralistic* can mean diverse or varied. Pluralism is used as both a normative and a descriptive concept. For example, in ethics, pluralism, typically contrasted with monism, refers to "[a] theory or system of thought that recognizes more than one ultimate principle." Alternatively, *belief pluralism* refers to a situation in which different cosmologies or belief systems coexist, a social fact of considerable significance in the current context of "globalization," not least in relation to claims about the universality of human rights or natural law principles (Twining 2009a, 131 passim).

A related usage equates pluralism with multiculturalism. For example, Webster gives as a second meaning of *pluralist*: "the nature of a society within which diverse ethnic, social, and cultural interests exist and develop together" (Webster 1981). However, in some contexts the term *multiculturalism*, contrasted with assimilation, has been extended from referring to a social fact about a society to a normative concept referring to strategies and policies in such a society directed at respecting and maintaining cultural diversity in various ways.[3]

Here it is worth noting three points. First, to talk of objects in the plural presupposes that they can be individuated. Second, there is a general tendency in some contexts to move from an empirical to a normative usage, as illustrated by the two primary usages of *multiculturalism*. Third, it is always important to ask: plurality of what precisely?

Individuation

Plural means more than one. This presupposes that one can identify some discrete objects or units. In jurisprudence there has been much discussion of questions such as: What counts as one law or rule? What is a complete rule (Raz 1980)? There is widespread agreement among jurists that nearly all rules, norms, or laws belong to some larger agglomeration such as a system, order, or code. This is helpful, but it merely pushes the problem of individuation to a more abstract level. For

[2] There are certain special applications that we can set on one side: for example, "a pluralist" can refer to "one who holds two or more offices, especially ecclesiastical benefices, at the same time" (Webster 1981). The *Oxford English Dictionary* (OED) suggests that this was the original usage and that other meanings are extensions. The *OED* recognizes a special meaning of "pluralism" in ontology as "the theory that the knowable world is made up of a plurality of interacting things."

[3] More directly related to legal pluralism is the special meaning of "pluralism" in political science, rendered by the *OED* as "[a] theory which opposes monolithic state power and advocates instead increased devolution and autonomy for the main organizations that represent man's involvement in society."

example, legal pluralism is often taken to refer to the coexistence of two or more legal orders in the same time-space context. But what constitutes an order can be very vague; not all normative and legal orders have precise boundaries; and there are plenty of warnings in the literature about the dangers of "reifying" or "essentializing" such units or treating them as more homogeneous or monolithic than they really are.[4] The same applies to concepts such as culture and community. Talk of "pluralism" presupposes individuation. We need concepts such as order, system, code, community, and culture, and we talk about them as if they are discrete units (Twining 2009a, chap. 15). But we also need to be aware of the pitfalls.

Normative Pluralism[5]

We all encounter normative pluralism every day of our lives. When I ask my students to list all the sets of norms that they have encountered in the past week, very few do not get to a hundred. We accept this situation as a social fact; we navigate these complexities daily without undue difficulty, and we rarely puzzle about the phenomenon. Despite this, many lawyers are puzzled about "legal pluralism"; some even deny the concept, and there has been much theoretical debate about it. There has been much less theorizing about normative pluralism, which raises some profound philosophical problems in the general theory of norms (Twining 2010, 479–85).

Non-state law. How to conceptualize law is a central problem of jurisprudence. Although still contested, it is increasingly accepted that a conception of law confined to state law (or to municipal law and classical public international law) leaves out too many significant phenomena deserving sustained juristic attention, including religious law, customary law, and certain other kinds of transnational and supranational normative orders. Nearly all studies of legal pluralism assume or assert some conception of non-state law. This is presupposed by the very idea of legal pluralism and opposed by one version of state-centrism – namely, that state law is the only real law. Accepting the idea of non-state law leads almost inevitably to the view that legal pluralism is an important, pervasive, and complex phenomenon. How to distinguish between "legal" and other social phenomena has been an almost obsessive concern of lp studies. In my view, this concern has been largely unnecessary, because in most contexts not much turns on where, or even whether, the line is drawn.

Legal pluralism. I have for many years found it helpful to treat legal pluralism as a species of normative pluralism. If normative pluralism refers to a situation in which different sets of norms or two or more institutionalized normative orders coexist in the

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[4] An extreme example of the dangers is the creation of the categories of Hutu and Tutsi in Rwanda, which reportedly contributed significantly to the genocide of 1994 (e.g., Prunier 1995). Recent literature on religious minorities in Europe repeatedly warns against ignoring internal diversity within such "communities" or "groups" (e.g., Bano 2007).

[5] In this context, *normative pluralism* refers to the existence of a plurality of norms (i.e., rules or prescriptions) or of normative orders as a social fact. This is narrower than the ordinary usage of *normative*, contrasted with empirical, meaning evaluative or prescriptive.

same time-space context, then legal pluralism is the species that includes those kinds of sets of norms or normative orders that merit the appellation *legal* in a given context (Twining 2009a, chap. 4).[6] This move does not solve the problem of the definitional stop – how to have a broad concept of law without including all social phenomena – but it domesticates the problem in a number of ways. First, it decenters the state (on which more is discussed in the next part). Second, it raises the issue of how to classify normative phenomena: normative theory tells us that depends on context and the purpose of the inquiry (Twining 2010). Third, it brings out the point that in many contexts, the scheme of classification and which borderline cases are subsumed or excluded from "the legal" are of little or no practical importance. I argue later that in the present context the main relevant point is that law reformers, policy makers, and importers of foreign laws and ideas need to be aware of the existence and nature of significant normative orders, whether or not they are recognized locally to be "legal" or to have some theoretical claim to that status. Of course, whether a particular order or set of norms is *recognized* by the state as "legal" or legally relevant occasionally may have practical consequences, but such issues are nearly always resolved in specific contexts.

Recently, several scholars of legal pluralism have moved toward treating legal pluralism as a species of normative pluralism or abandoning the term altogether. They have made this move for different reasons. Simon Roberts has written "against legal pluralism" mainly because he thinks that talk of legal pluralism obscures the distinctiveness of state law and governance as specific forms (Roberts 1998, 2005).[7] John Griffiths is prepared to drop the concept of law as part of constructing a general theory of social norms (Griffiths 2003, 2006). Brian Tamanaha (2008), alternatively, sees this move as a way of rescuing "legal pluralism" as a worthwhile field of inquiry or focus of attention. Like me, he thinks this will help shift attention away from the debilitating problems of conceptualizing law. The move does not solve the problem but contextualizes the concern and makes it less important.

State Centralism (or Centrism)

In 1986, John Griffiths launched a sharp attack on legal centralism, which he treated as an "ideology" (Griffiths 1986, 3). In this view, "law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a

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6 On the need in this context to work with two conceptions of law (law as ideas – as in legal traditions – and law as institutionalized normative orders or practices) and the conceptual framework this entails, see Twining (2009a, chaps. 1, 3, and 4). This chapter concentrates on social fact legal pluralism (sflp) that treats institutionalized normative orders (and to a lesser extent sets of norms) as the main units; another strand, following in the footsteps of Geertz, treats cultures (and related concepts) as the main units (see Sally Merry's chapter this volume).

7 Discussed in Twining (2009a, 371–75). In my view, most of Roberts's concerns can be met by using terms such as *state law* or *municipal law* instead of *law* and not making law do too much work as an analytical concept.

single set of state institutions." This ideology is a mixture of assertions about how the world ought to be and a priori assumptions about how the world actually and even necessarily is. In Griffiths's view, legal centralism was "the major obstacle to the development of a descriptive theory of law" (1986, 3).

Attacks on "legal centralism" and "state centralism" have continued, but the grounds have been diverse. In light of subsequent discussions, the idea of state centralism needs to be disaggregated into a series of distinct but related propositions of different kinds:

(a) At the level of description, the state is the only institution that contributes to social order.
(b) The empirical claim that, at least in modern societies, state law is in practice the most important form of law: it is dominant, technically superior, and more powerful than other forms of institutionalized ordering (e.g., Galligan 2007, chap. 10).
(c) The normative claim that the state has sole and supreme authority in a given territory or space, and it has a monopoly of the legitimate use of force.
(d) The ideological claim that the state is the political form that offers the best or only hope for the realization of liberal democratic values, such as democracy, equality, human rights, and the rule of law.

Most people who have thought about it would contest (a) as an empirical statement about nearly all societies. Conversely, asserting that legal pluralism is a social fact involves no general claims about the de facto importance, technical sophistication, and power of modern bureaucratic states (b). Such claims are difficult to test empirically. The issue is central to discussions about the decline of the state, not least in the context of globalization, but inquiries about its relative power and importance are extraordinarily elusive. (c) and (d) are both generally contested in political theory.

The idea of legal pluralism, and the importance of the phenomenon, are widely recognized in recent scholarly literature. Legal pluralism mainly challenges (a). However, it would be wrong to assume that state-centrism is dead.[8] Most Western academic law and legal practice is focused almost entirely on domestic municipal law of sovereign states and is likely to remain so.[9] Even in circles in which the idea

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[8] An interesting example of a moderate form of state-centrism is provided by the leading sociolegal scholar, Denis Galligan: he recognizes that there are forms of non-state law that coexist and intersect with state legal orders; he acknowledges that many claims made for the state's social role are extravagant, that it can be ineffective or worse, and that non-state normative orders, whether recognized as legal or not, often have social utility. However, he concludes that the modern democratic state provides the best hope for achieving some social goods, including human rights, the rule of law, and democracy (Galligan 2007, chap. 10). In respect of the subordination of non-state law, he recognizes that there can be semi-independence or semiautonomy but denies claims to complete autonomy (2007, 176–77).

[9] Underlying most regimes of legal education and training is a concern about the practical relevance of what is being studied. The maxim "lawyers don't practice non-state law" is sometimes true. It is also

of legal pluralism is accepted, a milder form of state centralism prevails. In much of the literature, the focus is still largely on the interactions between state and non-state law: how the state does and should respond, where it should hold the line, how minority communities should adjust, and how they can make their voices heard in policy formation. Typically, foreign development agencies and consultants have to work through governments with the result that, even if they are sensitive to the phenomenon of legal pluralism, it is difficult for them to avoid being state-centric in this weaker sense.

There are also fundamental ideological questions about the desirability of many forms of legal pluralism. This raises a range of both normative and empirical issues that extend far beyond the topic of "legal pluralism." Some of these issues concern broad questions of general political theory about the role of the state, its claims to a monopoly of legitimate force, and claims to independence or autonomy by or on behalf of non-state legal orders. Some believe that the bureaucratic state offers the best, perhaps the only, hope for maintaining democracy, human rights, and the rule of law. These are important and complex political issues with wide ramifications. Sociolegal research on legal pluralism can inform debates about them, as it has done recently with regard to ethnic and religious minorities in Europe,[10] but on its own it cannot purport to resolve such fundamental issues of political and democratic theory. In this context, it is important to remember Boaventura Santos's admonition against romanticizing legal pluralism, as some scholars have tended to do: "[T]here is nothing inherently good, progressive or emancipatory about legal pluralism" (Santos 1995, 114–15).

In development circles, especially at higher levels, state-centrism may be due to ignorance, deliberate policy, indifference, or downright hostility. A strong, but not untypical, example of hostility to customary law is a speech in 2006 by the secretary-general of the Commonwealth Secretariat:[11]

> The drawbacks of customary law are manifold. For a start, just take its perceived failure to adapt to the expectations created by modern statehood, education, new technology, and global development. It lacks a contemporary comprehensiveness. It fails to address the emerging issues and needs of children, women and the disadvantaged. (McKinnon 2006, 651)

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self-confirming, but it is being eroded in multicultural societies and, for example, in international arbitration.

[10] For example, Shah and Menski (2006), Bano (2007).

[11] The Rt. Hon. Don McKinnon was addressing a legal conference on "Courting Justice: Rule of Law Reform in Africa" in London in April 2006. After listing a series of "deep-seated and harmful social values and practices" (including female genital mutilation, enforced female servitude, prolonged mourning rites, and so forth), he concluded: "From these examples, it is clear that the greatest single damage done by the persistence of customary law is to women, children and the poor. How far this has been a bar to our achievement of the Millennium Development Goals – particularly the 2nd to achieve universal primary education; the 3rd, to promote gender equality and empower women; and the 5th, to promote maternal health – remains a matter for concern" (McKinnon 2006, 651).

A significant example of indifference, bordering on hostility, is that of Jeffrey Sachs, the director of the Millennium Project. His powerful book *The End of Poverty* does not mention customary law or religion, but tellingly has a significant heading in the index for "cultural barriers" (Sachs 2005, index).[12] This is not atypical of writing about development by economists, though there are some exceptions. Not all discussions of customary law, culture, and tradition are so sweeping. Frontline development practitioners may be more sensitive to local complexities. There is, of course, a body of literature, much of it based on detailed empirical research, that presents a more complex and balanced view.[13] This kind of negativity, illustrated by McKinnon and Sachs, tends to be based on a number of dubious assumptions: that women are always at a disadvantage under customary law, that customary law is static rather than dynamic, that it is rigid rather than flexible, that it is incompatible with sustainable development, that it is always economically inefficient, that it is not concerned to conserve resources, and that values involved in economic development strategies (including the Millennium Development Goals) are intrinsically morally superior to customary values.[14]

"*Coexistence* in the same time-space context" refers to phenomena that in principle can be studied empirically, for example, human behavior, attitudes, institutions, processes, even beliefs. This fits law conceived in terms of social practices, institutions, and processes. But law is also conceived in terms of concepts, norms, traditions, and cultures independently of their institutionalization on the ground (and which may never have been so institutionalized, or about which we have no data).[15] The idea of "coexistence" in time and space in relation to these is problematic. Where is justice? Where are rights? are puzzling questions. As Franz von Benda-Beckmann (2002) suggests, whether we can make sense of the idea of coexistence depends on the context and purpose of the inquiry (cf. Walker 2009).

Interlegality. Santos's useful concept refers to relations and interactions between legal orders and sets of norms. Interlegality is best viewed as a dynamic process rather

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[12] The longest passage reads: "Even when governments are trying to advance their countries, the cultural environment may be an obstacle to development. Cultural or religious norms in the society may block the role of women, for example, leaving half of the population without economic or political rights and without education, thereby undermining half of the population in its contribution to overall development. Denying women their rights and education results in cascading problems. Most important, perhaps, the demographic transition from high fertility to low fertility is delayed or blocked altogether" (Sachs 2005, 60–61; see also 36–37, 72).

[13] For example, Örebach et al. (2005). A central theme of the book is: "[E]ach customary law system needs to be evaluated on its merits" (Bosselman, id. at p. 441). See also Perreau-Saussine and Murphy (2007) and Rajagopal (2007, 276–82).

[14] Counterexamples to most of these overgeneralizations can be found in Örebech et al. (2005). On "chthonic law" and the environment, see Glenn (2007, 72–76). Because generalized hostility to customary law tends to be ignorantly ethnocentric, it does not follow that there are no problems (discussed in Twining 2009a, 11.6 ["Non-state law; the forgotten factor"]).

[15] For example, there is a rich, largely unempirical literature about Shari'a as ideas, but relatively few empirical studies of Muslim institutionalized social/legal practices.

than in terms of static structures. It is an empirical concept that draws attention to the dynamism and diversity of such relations, but it is generally acknowledged that interlegality does not necessarily involve conflict or competition. How normative and legal orders interact and interrelate is an empirical and interpretive question covering a range of possibilities, including symbiosis, subsumption, imitation, convergence, adaptation, partial integration, and avoidance as well as subordination, repression, or destruction.[16] Any attempt to classify these elusive relations in the abstract is likely to fail.

Recognition[17]

The idea of recognition (of states, foreign laws, and so forth) has a long history in public and private international law. In legal pluralism studies, the term mainly arises in connection with the relationship between the state and non-state legal orders. There are no consistent uses of the term. In this context, it is important to distinguish between a state *according* recognition and communities, groups, or even individuals *claiming, demanding, or asking* for recognition by the state. These are not coextensive and have different variants. For example, a state may *acknowledge* the existence of a non-state order without giving it any legal status, or it may or may not *take into account* the existence of norms or practices in the exercise of judicial or administrative discretion – for example, in sentencing or provocation, or in framing specific policies or legislation. It may undertake to *enforce* such norms; it may *incorporate* some as part of the official legal system, with or without modification, or subject to certain conditions or limitations. It may *integrate* to a greater or lesser degree certain institutions, practices, or tribunals into the state legal system.[18] It may *defer* to private ordering, as with certain kinds of arbitration or other forms of self-regulation, or it can *outlaw* certain practices, thereby acknowledging that they exist, and so forth.

In considering demands or claims for recognition, it is important to clarify what precisely is being asked for. It is also important to realize that (a) what the state accords or imposes may not be what a given group wants and that (b) such demands or claims may be contested within a given population. For example, in the debate in Britain following the archbishop of Canterbury's speech advocating recognition of some decisions of Islamic Councils with respect to family law, there was not only a (largely Islamophobic) outcry against this suggestion, but British Muslims were

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[16] Tamanaha (2008) emphasizes conflict as being the most problematic aspect but recognizes that there are other kinds of relations between normative orders; I am inclined to use the concept of interlegality as an open-ended concept that refers to all kinds of relations – what these are in any given context is an empirical and interpretative question.

[17] This section is indebted to Ghai and Cottrell (2009).

[18] For example, on the Basoga in Uganda in the colonial period, see Fallers (1969).

split on the issues (Bano 2007, 2010). There is no agreed terminology with respect to recognition, but there is widespread agreement that it is a highly political matter.

This sample of problematic concepts could be extended to include several others that have been extensively discussed in other contexts, including religion (and religious law), custom (and customary law), tradition, culture, and authority.

II. SOCIAL FACT LEGAL PLURALISM

Social Fact Conceptions of Legal Pluralism: An Ideal Type

The mainstream legal pluralism literature has quite diverse intellectual roots. Generalization is dangerous, except that the very idea of legal pluralism typically presupposes a conception of non-state law. However, one can construct a fairly robust ideal type of social fact (legal) pluralism (sflp) to which most anthropological and sociolegal studies up to the mid-1990s approximated, based on the following points:

1. If one adopts a broad, positivist conception of law, legal pluralism is as much a social fact as normative pluralism.[19]
2. It is important to distinguish between state legal pluralism (sometimes called weak legal pluralism), legal polycentricity (the eclectic use of sources within different sectors of one state legal system) (Petersen and Zahle 1995), and legal pluralism conceived as the coexistence of two or more autonomous or semiautonomous legal orders or sets of norms in the same time-space context.[20]
3. Legal pluralism is pervasive in all multicultural societies, which in today's world means most societies.
4. Legal pluralism is not new. Indeed, from the perspective of world history, the near monopoly of coercive power by a centralized bureaucratic state is a modern exception, largely confined to the Northern Hemisphere for less than two hundred years.

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[19] Accordingly, it is quite misleading to talk of "legal pluralists" as a marginal school or sect or a particular theoretical perspective (Benda-Beckmann 2002, 72–74). This is one of the best general articles on legal pluralism, and I am in general agreement with its thrust.

[20] Twining (2010) uses a series of case studies to illustrate some standard distinctions in sflp: ordinary statutory interpretation, not interpreted as "pluralism": *Sudan Govt. El Baleila Balla Baleila* (1958) *Sudan Law Journal and Reports* 12 (interpretation of the Sudan Penal Code invoking English concept of "the reasonable man" and Baggara values relating to cattle in relation to provocation in homicide); state ("weak") legal pluralism: the S. M. Otieno burial case (Kenya) (Egan 1987) (customary law as an integral part of state law); "genuine" legal pluralism: Santos's Pasagarda Residents' Association (Brazil) (Santos 1995, 2002), the Common Law Movement (United States) (Koniak 1996, 1997); Romani law (transnational) (Weyrauch and Bell, 1993; Weyrauch 1997); pluralism of discourse: Bowen's studies in Indonesia where argumentation in state, Islamic, and customary tribunals regularly involves weaving together state, Islamic, and traditional norms and concepts (Bowen 2003). Some of these distinctions are now challenged in the context of globalization (Michaels 2009).

5. Legal pluralism is here to stay. *Custom* and *tradition* may be more dynamic and flexible than these labels suggest, but insofar as institutionalized normative orders are grounded in settled ways and beliefs and a sense of identity, they are intransigent and resistant to change from the outside. For aspiring "social engineers" who perceive them as obstacles, they are more like mountains than molehills.

6. From the standpoint of subjects, users, and victims, situations of legal pluralism sometimes, but not always, provide opportunities for "shopping" for advice, norms, or fora.

7. Acknowledging legal pluralism as a social fact involves no necessary commitment to any of the following propositions:
   a. State law is unimportant.
   b. The state is withering away.
   c. Acceptance of legal pluralism as a fact involves a denial or weakening of such ideals as liberal democracy, human rights; and the rule of law.

8. It is a distortion to think of interlegality – relations and interactions between coexisting legal orders – as typically entailing conflict and competition.

9. Sflp studies were empirically oriented and focused mainly on institutionalized normative orders, as opposed to state centrism. It was generally not much concerned with normative questions about legitimacy, authority, justification, obligatoriness, and official policies toward non-state normative orders and laws.

Normativity

We have noted in relation to the concept of pluralism that there is a tendency in the literature to slide from the descriptive to the prescriptive. But sflp studies tell us almost nothing about the internal or external legitimacy, obligatoriness, or legality of non-state legal orders. Their existence as a social fact, their nature, and their internal and external relations have been their main concern. But questions arise at all levels of legal ordering about how coexisting orders should view each other.

In recent years, legal philosophers have devoted a great deal of attention to the topic of "the normativity of law." The central question is whether (state) law is by its nature obligatory, binding, and authoritative or whether obligations to obey, observe, and respect the law are based on contingencies external to the law itself.[21] Three aspects of this trend stand in sharp contrast to the mainstream literature on legal pluralism: first, the focus is on the domestic law of a given society; second, the idea of law is confined to state law; and, third, the standpoint is that of participants in or subjects

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[21] For example, in a stimulating book, Sylvie Delacroix argues that laws are human creations that are obligatory for judges, lawmakers, and citizens "if law is deemed to promote a set of moral and prudential concerns essential to a 'good' way of living together" (Delacroix 2006, xiv, 206). In other words, the normative force of law is itself a creation of the moral aspirations and sense of responsibility of its subjects as members of a community. See also Simmonds (2009).

of that legal system. The question for them is: what is my responsibility toward *my/our* legal system? This differs from sflp, which (typically) (a) is not confined to nation-states, countries, or societies conceived of as units; (b) extends the concept of law to include at least some kinds of non-state law; and (c) adopts the standpoint of an observer of legal orders who is external to them but takes account of the internal point of view of citizens, lawmakers, judges, and other participants.

Such differences look like a rerun of juristic debates between positivists and non-positivists resurfacing in the context of discussions of legal pluralism. However, the situation is more complicated than that for two main reasons: First, some supporters of the idea of legal pluralism are non-positivists.[22] Second, many writers about legal pluralism have normative concerns, both at the level of ideology (opposing "state-centrism") and in relation to practical problems facing policy makers, judges, legislators, and other participants in legal processes. However, as just noted, most classical social fact accounts of legal pluralism, like legal positivism, provide little or no guidance on normative issues, other than suggesting that the phenomena are too empirically important to be ignored.

III. GLOBAL LEGAL PLURALISM – A NEW "PARADIGM"?

A radically ambiguous idea introduced largely in response to "globalization" – that is, since the mid-1990s – is that of global legal pluralism (glp). Each of its elements is problematic. We have already noted the ambiguities of "pluralism" and "legal." "Global" is almost as ambiguous and is currently overused and misused (Twining 2009a, chap. 1.4). It can mean (a) genuinely worldwide, (b) widespread geographically, (c) anything transnational or supranational, or (d) anything related to increased interdependence.[23] A crucial point is that most so-called global legal phenomena and patterns are sub-global, related to empires, diasporas, alliances, trading blocs, languages, and legal traditions. But "g-talk" is prone to exaggeration and hyperbole.[24] For example, there is a tendency in anglophone discussions

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[22] An interesting example of the first group is Emmanuel Melissaris (2009), who constructs a sustained argument that ideas of legal pluralism and non-state law can be accommodated within nonpositivist legal theory on the basis of people's shared experiences and sense of law that are to some degree universal. Philip Selznick is perhaps the most substantial sociolegal theorist who seeks to transcend the is/ought divide. His concepts of incipient law and responsive law may be of particular relevance to development activists confronting non-state law (Kagan, Krygier, and Winston 2002; Krygier, forthcoming).

[23] For example, see the attitude of René David to custom as symptomatic of French attitudes (discussed in Twining 2010).

[24] The oversimplification of loose "g-talk" is illustrated by the claim that "English is the global language." That English is important and powerful in many countries and contexts is undeniably true. But how many people count as "English speakers," and how are they distributed? In about seventy countries, English is the official or dominant language, but in many of these only a small percentage of the population have it as their first or second language or have a working knowledge of it. For example, in "Anglophone" Uganda, the best, but purely speculative, estimate was that in 1994 perhaps 11 percent of

of legal pluralism and "law and development" to extrapolate from the practices and hangovers of the British Empire (itself a sub-global phenomenon) to generalize about the whole postcolonial situation. Anglo-American discourse in this area often understates the differences between the practices, attitudes, and postindependence legacies of different traditions of imperialism and colonialism – for example, in relation to conscious policies of indirect rule or attitudes to customary law.[25]

Despite the confused terminology, the concerns are real, but the answers to the question "plurality of what?" are different from those of sflp: for example, fragmentation of public international law, multiple geographical levels of ordering,[26] proliferation of supranational tribunals and of significant legal actors, proliferation of human rights, and so forth. Associating glp with "postmodernism" – itself an ambiguous concept – further muddies the waters. A major question is: is glp an extension of lp or sflp or a new "paradigm" (Michaels 2009, 243–44)? My view is skeptical. *Pluralism* may not be a good focus or label for these concerns, many of which are normative – relating to institutional design, state and supra-state policy, rights-based approaches to development, and so forth.[27]

"Globalization" is challenging some of the settled assumptions of Western traditions of academic law.[28] Legal pluralism studies, especially sflp, are perhaps less wedded to some of these assumptions: they oppose state centrism, they accept some idea of "non-state law," they take religion seriously, and they have more of an empirical orientation than doctrinal legal studies.[29]

However, several factors challenge any strong claims to continuity.

First, sflp grew out of a tradition that focused largely on small, face-to-face local communities at a subnational level; the range of subject matters and actors was a far cry from questions about international terrorism, the fragmentation of international

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the population claimed English as their second language. That is to say that almost 90 percent of the population could not understand the language of the laws, courts (including magistrates' courts), or most official business (Crystal 1995). On the complexities of assessing such claims, see Crystal (2003).

[25] I have argued elsewhere that *law and development* is an American term, adopted in due course by some British scholars, but virtually unknown in the discourse of French, Dutch, and Portuguese colonial and postcolonial literature (Twining 2009a, 327, 330–31). Almost all of the papers in this volume are by anglophone scholars, and in some papers one can detect an American bias toward emphasis on pathological aspects of law – disputes, litigation, courts, and cases – in contrast to codes, principles, structures, and routines. Lauren Benton has plausibly suggested that different colonial strategies may mask more common patterns and problems than appear on the surface.

[26] See Appendix B.

[27] Of course, a multiplicity of normative and legal orders can be perceived at transnational, regional, and global levels; they interact with each other horizontally, vertically, and in more complex ways; they are as much a social fact worthy of attention as legal and normative pluralism at national and more local levels. But this is only one facet of the variety of phenomena that tend to get lumped together under "glp."

[28] See Appendix A.

[29] This is developed in Twining (2010).

law, regulation of transnational finance and commerce, regional integration, and trafficking of drugs or humans.

Second, sflp was mainly concerned with plurality of coexisting institutionalized normative orders. So-called global legal pluralism gives a much more varied answer to the question: plurality of what? Here, the term *pluralism* has been applied indiscriminately to almost any kind of complexity or diversity. Moving the central legacy of insights onto a world stage involves significant changes in scale, subject matters, and central concerns. The idea of glp applied to actors, courts, schools of thought, centers of power, sources of norms, levels of relations and ordering, authority, culture, or even the proliferation of human rights means little more than diversity. Postmodern enthusiasm for fragmentation, diversification, and indeterminacy further threatens to reduce the value of "pluralism" as an analytic concept. We are swamped with a not very illuminating plurality of pluralisms. It is not clear how helpful the heritage of sflp studies can be in interpreting these very varied topics.

Third, and equally significant, insofar as sflp studies have been largely descriptive rather than normative, one should not expect much practical normative guidance about such issues as institutional design, state policy, or rights-based approaches to development.

Fourth, as borders become more porous and state sovereignty is challenged, are sharp distinctions between the internal and external aspects of state legal systems still tenable? From a global perspective, state (weak) legal pluralism, conflicts of laws, and the politics of recognition transcend distinctions between state and non-state law (Michaels 2009).

Fifth, mainstream lp studies have bequeathed us a rich heritage of particular studies and a rather less impressive body of theorizing. Moving the central legacy of insights onto a world stage involves significant changes in scale, subject matters, and central concerns.

IV. CONCLUSION

From the point of view of development practitioners, the central lesson of sflp is that local knowledge is important. The phenomena of legal pluralism are so varied and complex that a general World Bank strategy toward non-state legal orders would almost certainly be unwise, even dangerous. Douglas Porter, in commenting on this chapter, suggested that many frontline development practitioners are well aware of the existence and intransigence of plural normative orders and bodies of rules. They realize that they are ubiquitous, elusive, likely to persist, and difficult to change. What they want is guidance on how to deal with such situations. From that point of view, this chapter is rather negative in that it suggests that the literature of sflp can be used to back up such perceptions, but it does not provide much general guidance beyond the following, rather anodyne conclusions.

Sflp literature, by emphasizing the fact of the coexistence of significant institu-
tionalized bodies of social norms and practices, is helpful in at least five ways:

(a) in drawing attention to the existence of non-state orders, practices, and norms
    that are often ignored, overlooked, arcane, or even invisible;
(b) in the context of diffusion/transplantation, it provides a reminder that norms
    based on foreign models are rarely introduced into a vacuum (the blank slate
    fallacy) but will inevitably have to interact with preexisting local arrangements,
    which will often include significant institutionalized normative orders;
(c) it warns that many claims to convergence, harmonization, or unification may
    refer mainly or only to surface law (Twining 2009a, chap. 10);
(d) it focuses attention on interlegality – the many different and complex ways
    in which multiple legal and normative orders can relate to one another and
    interact; and
(e) it focuses attention on issues of state policy concerning relations between the
    state and different communities and belief systems in a multicultural society.
    But insofar as one adopts a social fact view of normative pluralism, this will on
    its own provide little direct guidance on normative questions about legitimacy,
    justification, toleration, and recognition of non-state legal orders.

APPENDIX

A. *Western Traditions of Academic Law: Some Simplistic Assumptions*[30]

(a) law consists of two principal kinds of ordering: municipal state law and public
    international law (classically conceived as ordering the relations between
    states) ("the Westphalian duo");
(b) nation-states, societies, and legal systems are very largely closed, self-contained
    entities that can be studied in isolation;
(c) modern law and modern jurisprudence are secular, now largely independent
    of their historical-cultural roots in the Judeo-Christian traditions;
(d) modern state law is primarily rational-bureaucratic and instrumental, perform-
    ing certain functions and serving as a means for achieving particular social
    ends;
(e) law is best understood through "top-down" perspectives of rulers, officials,
    legislators, and elites, with the points of view of users, consumers, victims, and
    other subjects being at best marginal;
(f) the main subject matters of the discipline of law are ideas and norms rather
    than the empirical study of social facts;

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[30] Adapted from Twining (2009a, 5–7).

(g) modern state law is almost exclusively a Northern (European/Anglo-American) creation, diffused through most of the world via colonialism, imperialism, trade, and latter-day postcolonial influences;

(h) the study of non-Western legal traditions is a marginal and unimportant part of Western academic law; and

(i) the fundamental values underlying modern law are universal, although the philosophical foundations are diverse.

B. *Levels of Law*[31]

Law is concerned with relations between subjects or persons (human, legal, unincorporated, and otherwise) at a variety of levels, not just with relations within a single nation-state or society. One way of characterizing such levels is essentially geographical:

- global (as with some environmental issues, a possible *ius humanitatis* and, by extension, intergalactic or space law) – for example, mineral rights on the moon;
- international (in the classic sense of relations between sovereign states and, more broadly, relations governed, for example, by human rights or refugee law);
- regional (for example, the European Union, the European Convention on Human Rights, and the African Union);
- transnational (for example, Islamic, Hindu, Jewish, and Romani ["gypsy"] law; transnational arbitration; a putative *lex mercatoria*; Internet law; and, more controversially, the internal governance of multinational corporations; the Catholic Church; or institutions of organized crime);
- intercommunal (as in relations between religious communities, Christian churches, or different ethnic groups);
- territorial state (including the legal systems of nation-states, and subnational jurisdictions, such as Florida, Greenland, Quebec, and Northern Ireland);
- sub-state (e.g., subordinate legislation, such as bylaws of the borough of Camden) or religious law officially recognized for limited purposes in a plural legal system; and
- non-state (including laws of subordinated peoples, such as native North Americans, Maoris, or gypsies or illegal legal orders, such as Santos's Pasagarda law, the Southern People's Liberation Army's legal regime in Southern Sudan,[32] and the "common law movement" of militias in the United States). Which of

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[31] Adapted from Twining (2009a, 69–74).
[32] The Southern Peoples' Liberation Army operated a system of courts dealing with both civil and criminal cases in areas they occupied in the civil war in the southern Sudan (Kuol 1997).

these should be classified as "law" or "legal" is essentially contested within legal theory and also depends on the context and purposes of the discourse.

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