



## EXPLICIT – IMPLICIT LEGAL PLURALISM

*Elina N. Moustaira\**

**Sommario** 1. Introductory remarks. – 2. Legal hegemonism and WLT. – 3. Cryptotypes and legal pluralism. – 4. The critical legal pluralistic view – 5. Classics vs new forms of legal pluralism. – 6. A multiscalar legal system? – 7. Taking implicit law into account. – 8 Conclusion.

1. Law, it is stated, is a way through which facts can be represented and, consequently, gain meaning. It is a means of understanding the world, the other ways being science, art, religion, ethics, ideology, history<sup>1</sup>, to mention only a few. Often, if not always, these other ways are mingled together, in an obvious or less obvious manner and they contribute to the forming of the legal expressions of each people. At the same time and in the opposite way, the law of each people, at each place, tries to regulate these other ways (e.g. science, art) or, at least, to explain and use them (e.g. history, religion), in order to change.

During this trajectory, law can be expressed formally, in a form easily recognizable by the people the coexistence of whom it aims to regulate (e.g. written laws, courts' judgments) or can take more subtle appearances, though not less authoritative, not having minor prestige for them<sup>2</sup>. This formal or less formal appearance of the law might depend on the other ways of understanding the world; it might be their explicit or implicit “agent”.

2. Usually and almost traditionally, people whose laws have a formal imprint (obviously – and among others – the so-called Western people) tend to believe that they possess the absolute truth about the best articulated, the most efficient legal rules; that they should be the guides to all those “poor” people who cannot take care of themselves, not having reached such a high level of civilization or legal culture as they believe they have. This arrogance has been expressed in many ways, at many parts of the world, at various time periods. One notorious example of this arrogance is the “export”, the migration of legal rules, consequence of certain countries' legal hegemonism. Versions of this attitude are those that promote a regime of global legal norms, adopting terms such as harmonization – the most lenient one – or transplantation or viral propagation<sup>3</sup>.

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\* Professor of Comparative Law, National and Kapodistrian University of Athens, School of Law.

<sup>1</sup> F. Pirie, *The Anthropology of Law*, Oxford University Press, 2013, pp. 56-57.

<sup>2</sup> Law can live and develop without jurists, that is without having a critically elaborated apparatus of knowledge, according to R. Sacco, *Le droit africain. Anthropologie et droit positif*, Dalloz, Paris 2009, p. 14.

<sup>3</sup> R.A. Macdonald, *Three Metaphors of Norm Migration in International Context*, in 343 *Brooklyn Journal of International Law*, p. 603 (2009).



This [also legal] mentality leads to the refusal of a real legal status to the laws of other peoples, especially when these laws are expressed implicitly.

The former [the Western people], almost as a rule, are not able or do not want to admit that underneath their comportment, seemingly following the legal rules of their countries, there are factors unseen, mostly established in their conscience, having been transformed into a [legal] mentality, factors that have a decisive role in the formation of these legal rules. The latter [the non-Western peoples and especially the indigenous peoples] have conscience of these latent factors, in fact they respect them and steadily try to adapt their behavior to these factors' orders.

3. The cryptotypes that always existed and exist and that Sacco located and gave them a name<sup>4</sup>, could very well make us doubt whether the Western people who insist on ignoring or rejecting them, behave rationally, as they believe.

Beyond that, the real question is why deny to the indigenous peoples the right to apply their chthonic laws in which the cryptotypes seem to be more apparent. Shaping the laws in parts of the world according to a model, often was a political decision influenced by several and various factors of each time. 18<sup>th</sup> and 19<sup>th</sup> codifications in Continental Europe brought in the first line the written law and shove deep underneath the factors leading to decisions about facts' legal solutions. They conscientiously rejected the view that “not all law, and not even all written law, is explicitly enacted”<sup>5</sup>.

This stance was adopted as far as colonies were concerned. Cryptotypes, though, were and are always there.

During the colonization, especially of the 18<sup>th</sup> and the 19<sup>th</sup> century, legal pluralism was almost a self-evidence. Different rules were enforced upon different groups of people, multiple jurisdictions existed, often in conflict between them. That was a way to exert and maintain power<sup>6</sup>.

*Sacco* points out that the Europeans would never have accepted to be ruled by an indigenous non-European law; that they were so intolerant toward legal orders very different from their own, that even in Asian or African countries which were not colonies, they had demanded and obtained not to be ruled by local laws<sup>7</sup>.

That situation was probably the reason for which governors, theoreticians of law, politically oriented explorers, to mention only a few, had not considered as important to conceptualize what was happening. Legal pluralism was *a habitus*, then. Exactly as Bourdieu had claimed, the sense of the social practices was found beyond the explicit norms, the formal rules, it was found in the principles that generated these practices.

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<sup>4</sup> R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, in 39 *American Journal of Comparative Law* (II) p. 343, pp. 384-385; E. Moustaira, *Milestones in the Course of Comparative Law. Thesis and Antithesis* (in Greek), Ant.N. Sakkoulas Publishers, Athens – Komotini 2003, pp. 81-83.

<sup>5</sup> R.A. Macdonald, *The Fridge-Door Statute*, in (2001) 47 *McGill Law Journal* 11, p. 13.

<sup>6</sup> J. Burbank/F. Cooper, *Rules of Law, Politics of Empire*, in L. Benton/R.J. Ross (eds.) *Legal Pluralism and Empires, 1500-1850*, New York University Press, New York and London 2013, p. 279.

<sup>7</sup> R. Sacco, *Antropologia giuridica*, il Mulino, Bologna 2007, p. 75.



4. Legal anthropologists, the one side of the coin, the other being the legal comparatists, insist on the fact that a society functions not only according to the explicit norms, the formal rules, but also according to the habitus. They do not consider as law only the formal rules, but they are aware that the law expresses itself in other ways too, not all of them an evident part of the juridical order<sup>8</sup>.

Legal comparatists, not the ones who favor “orthodox” approaches to comparative law though, are very much interested in critical legal pluralism, in the theory that “rejects the premises of state legal positivism”. According to them, comparative law could not be intercepted without admitting the heterogeneity of persons and peoples, the flux of norms, the dissonance reigning in any “given spatial, temporal, social or affective fields”<sup>9</sup>. As it is stated, “it is not at all clear, . . . , that there is any *conceptual* reason to limit comparative law study to official municipal law”<sup>10</sup>.

Adopting a critical legal pluralistic view, legal comparatists become more able to understand the relationship between the explicit and the implicit legal rules as well as the infrastructure of each group of rules, of each normative system<sup>11</sup>. They can capture that people, as legal subjects, “are not wholly determined” by a law enacted by a certain elite of jurists; that even if this elite has been set up in order to decide, to legislate, the legal knowledge produced by the legal subjects participates implicitly in the structuring of the governing law<sup>12</sup>.

5. In our times, “weak”, or “classic” legal pluralism is often contrasted with the “strong”, “deep”, or “new” form of legal pluralism. The state-centered view of pluralism, where state law defines the prerequisites for a legal pluralism, is contrasted to the social-science approach to law, which argues for a behavior obeying in more

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<sup>8</sup> O. Barrière, *De l'émergence d'un droit africain de l'environnement face au pluralisme juridique*, in C. Eberhard/G. Vernicos (éds.) *La quête anthropologique du droit. Autour de la démarche d'Etienne Le Roy*, Editions Karthala, Paris 2006, p. 147, pp. 152-153 : « Nous rejoignons également Pierre Bourdieu dans la notion de conduites sociales engendrées par l'habitus. En effet, les pratiques sociales ne naissent pas toutes de règles expresses et explicites mais dépendent aussi de logiques culturelles et endogènes aux individus et aux groupes. Là, les conduites d'ordre juridique n'ont pas forcément la régularité de celles qui sont issues du pouvoir législatif et réglementaire. Elles sortent partiellement d'un cartésianisme institutionnel pour obéir davantage à la logique pragmatique de la pratique « qui définit le rapport ordinaire au monde » susceptible de laisser une part de flou et de vague ».

<sup>9</sup> R.A. Macdonald/K. Glover, *Implicit Comparative Law*, (2013) 43 R.D.U.S. 123, 128, 153 & n. 24.

<sup>10</sup> P.S. Berman, *A Brief Note on Legal Pluralism and Comparative Law*, (2013) 31 *Windsor Yearbook of Access to Justice*, p. 219.

<sup>11</sup> R.A. Macdonald, *Custom Made – For a Non-chirographic Critical Legal Pluralism*, in 26 *Canadian Journal of Law and Society* 301, p. 326 (2011).

<sup>12</sup> M.-M. Kleinhaus/R.A. Macdonald, *What is a Critical Legal Pluralism?*, in 12 *Canadian Journal of Law & Society* 25, p. 38 (1997).



than one legal order. According to the latter, law might be an open-ended concept, not necessarily depending on state-recognition for its validity<sup>13</sup>.

Although it is not a matter of comparing them, I believe that it is a huge discrimination if we refer to the indigenous laws as parts of a bigger category of laws, such as the multinationals' "legal orders" or certain professions' "legal orders", etc. Furthermore, these other "legal orders" might very well be considered as parts of the international imperial law, as forms of global domination<sup>14</sup>, something that obviously could not even be suggested for the indigenous laws; rather on the contrary.

Do we need a defined boundary for what constitutes a legal system? Should we speak of "legal system" only when there is a centralized authority vested with the power of creating laws and enforcing them<sup>15</sup>? Could we not speak of "legal system" when – as, for example, in the case of Maoris – the infrastructure of their coexistence is built, constructed not on the basis of rules, but on the basis of values which govern the relationships between all persons and all things and between persons and things<sup>16</sup>?

As it is stated, the literature on legal pluralism generally accepts the idea that the laws of indigenous peoples are "law"; not the states, though<sup>17</sup>. For example, Australia, following the adoption of the UN Declaration on the Rights of Indigenous Peoples stated that indigenous customary law "is not law in the sense that modern democracies used the term; it is based on culture and tradition".

Shouldn't "internal" recognition of indigenous legal traditions within indigenous peoples lead to "external" recognition and affirmation by a[the] wider society?

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<sup>13</sup> A. Griffiths, *Anthropological Perspectives on Legal Pluralism and Governance in a Transnational World*, in M. Freeman F.B.A./D. Napier (eds.) *Law And Anthropology*, Current Legal Issues 2008, Oxford University Press, 2009, p. 164, p. 168.

<sup>14</sup> U. Mattei/L. Nader, *Plunder. When the Rule of Law is Illegal*, Blackwell Publishing, 2008, p. 144: "Just as in early colonial times the private venture capitalists (the East India Company, Hudson Bay Company, etc.) and European colonial sovereigns were connected in an alliance for plunder, legitimized by a powerful intellectual clique, today the global power elite is connected with transnational business in the global pursuit of plunder. In the age of colonialism such struggles for international hegemony were mostly carried on with an open use of force and political violence (in such a way that final extensive conflict between superpowers was unavoidable). Whereas, in the current age, political violence wrapped in the imperial rule of law has been centralized into a monopolistic power, the United States, dominating enemies, allies, and global institutions, but being itself dominated – as every Western-style democracy is – by transnational corporate actors".

<sup>15</sup> G. Christie, *Indigenous Legal Theory: Some Initial Considerations*, in B.J. Richardson/S. Imai/K. McNeil (eds.) *Indigenous Peoples and the Law. Comparative and Critical Perspectives*, Hart Publishing, Oxford and Portland, Oregon 2009, p. 195, p. 198.

<sup>16</sup> J. Ruru, *The Maori Encounter with Aotearoa: New Zealand's Legal System*, in B.J. Richardson/S. Imai/K. McNeil (eds.) *Indigenous Peoples and the Law. Comparative and Critical Perspectives*, Hart Publishing, Oxford and Portland, Oregon 2009, p. 111, p. 113.

<sup>17</sup> S. Wheatley, *Indigenous Peoples and the Right of Political Autonomy in an Age of Global Legal Pluralism*, in M. Freeman F.B.A./D. Napier (eds.) *Law And Anthropology*, in *Current Legal Issues*, 2008, Oxford University Press, 2009, p. 351, p. 358.



6. It seems that things have not changed much from the colonial times, their legacy still exists. In different parts of the world there are various appearances of legal pluralism, none of which is absolutely similar to another. The fact that in some countries (as for example in African countries) this coexistence of a central legal governance and multiple indigenous laws is (commendably) officially recognized, while in other countries it is not, is a challenge worth facing and studying. “Law beyond the law” cannot really disappear, even when the implicit and informal is subordinated to the explicit and authorized.

In different parts of the world, we “discover” varied forms of legal pluralism, some of them giving equal status to all coexisting laws, while others discriminate versus some of them, recognizing a superior status to the central state laws – something that becomes obvious in case of a conflict of jurisdictions. In the latter cases, international law “intervenes”, demanding that indigenous sovereignty<sup>18</sup> obeys to the state sovereignty<sup>19</sup>.

Evidently, this “interlocking web of jurisdictional assertions” really constitutes a “multiscalar legal system”<sup>20</sup>, of different scale in different parts of the world.

I argue that the different treatment of the indigenous laws, in the various countries, *ex colonies*, depends on a certain factor that would be obvious if its admittance were not a delicate (or perhaps “dangerous”) issue. African countries became independent and they are governed by their peoples, the indigenous peoples. They had the experience of the foreign laws of their colonizers and they thought that it would be wiser to adopt them (or something similar to them) in order to become equal players at the world checkers. At the same time, they respect (or are obliged to respect) the rules of their own peoples, and recognize them officially.

In the other countries, *ex colonies*, where indigenous peoples live, on the one hand the independence was achieved much earlier, during the 19<sup>th</sup> century, when the codification of laws had been considered as a great achievement and a necessary tool for the new countries’ governance; on the other hand, in these countries many of the defendants of the independence were either people originated from the colonizing countries (e.g. Australia) or mestizos, participating in both western and indigenous cultures, believing though that western cultures and principles were more “civilized” and that they should be used as tools for the onward trajectory of their own countries. In these cases, official recognition of the indigenous law and parallel validity of this and the central state law, would either be a risk not considered as worth taken, or, worse, would be considered as a preposterous claim.

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<sup>18</sup> The right of the indigenous peoples to apply their own laws, is a crucial expression of the indigenous identity as well as of the indigenous sovereignty. It is an effort to preserve a certain autonomy in the frame of a monolithic state that tries to exercise its powers with typical laws, see R. Perry, *Balancing Rights or Building Rights? Reconciling the Right to Use Customary Systems of Law with Competing Human Rights in Pursuit of Indigenous Sovereignty*, 24 *Harvard Human Rights Journal* 71, p. 72 (2011).

<sup>19</sup> M. Ahrén, *Indigenous People’s Culture, Customs and Traditions and Customary Law – the Saami People’s Perspective*, in 21 *Arizona Journal of International & Comparative Law* 63, pp. 100-101 (2004).

<sup>20</sup> H.M. Osofsky, *Climate Change Litigation as Pluralist Legal Dialogue?*, in 43 *Stanford Journal of International Law* 181, p. 187 n. 19 (2007).



7. Law is not independent from society; it is a “social product”<sup>21</sup>. Legal pluralism was and is everywhere. In the past, even in Europe, customary and religious rules were coexisting with written, emanated by the state rules. Now, even in Europe, but also in USA, especially in USA, customary and religious rules have been hidden behind “innocent”, seemingly neutral written laws or judicial judgments. History has always played its part, the same as various other factors and influences. Various historical phenomena “that people have recognized as law”, and that therefore should be recognized as such, probably function differently at different parts of the world and unavoidably have changed over time. The answer to “what is law” cannot be unitary, “law is not like that”<sup>22</sup>.

“Law is different”, it is stated, noting that although saying that “is stating the obvious, sometimes the obvious needs stating”<sup>23</sup>.

Taking implicit law into account is absolutely necessary for any jurist who is interested in comparative law – theoretical or applied. As already mentioned, legal subjects can always fashion law’s structures. It happens everywhere, in countries where the reign of positive law may not be doubted – and then the fashioning is implicit – as well as in countries where peoples’ communities have their own rules, being or not officially recognized – and then the fashioning is explicit.

8. Critical legal pluralism helps us see that in the cases of explicit law there is an implicit participation in its fashioning by the legal subjects, while in the cases of implicit law this participation of the legal subjects is explicit. One could argue that in the making of explicit law, the influence of cryptotypes is really *κρυφή* (secret), while in the making of the implicit law, the contribution of the cryptotypes is there, in the open!

Difficult for the positivists to accept such an idea, dangerous for the structure that was built during mainly the 2 previous centuries: the state. A relatively novel form, even in the West, as Donlan reasonably claims, it proved “particularly successful at colonizing and dominating its rivals”<sup>24</sup>. But law preceded the state. One would not dare to suggest that before the state-nation of the 19<sup>th</sup> century there were not laws ruling people’s lives nor particular to each place legal institutions. The fact that things

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<sup>21</sup> J. Uimonen, *From Unitary State to Plural Asymmetric State. Indigenous Quest in France, New Zealand and Canada*, University of Lapland/Lapin Yliopisto, Rovaniemi 2014, p. 26.

<sup>22</sup> B.Z. Tamanaha, *What is Law?*, in *Legal Studies Research Paper Series*, Paper No. 15.01.01, January 2015.

<sup>23</sup> F. Schauer, *The Force of Law*, Harvard University Press, Cambridge, Massachusetts/London, England 2015, 154. Speaking about claims of comprehensive jurisdiction, he points out (pp. 162-163) that the rule systems of – among others – “most religious organizations, most indigenous tribes, ... , claim a wide degree of control over the lives of their members”. He concludes: “And thus although it might be true that most of the governmental or quasi-governmental systems we typically call “law” have comprehensive jurisdictional pretension and most of the complex rule-based organizations from which we withhold the label “law” do not, it is a mistake to assume that law-ness and comprehensiveness are congruent. Accordingly, we may again learn more by observing just how much nonstate organizations betake of law, or simply *are* law, than assuming too quickly that they are not”.

<sup>24</sup> S.P. Donlan, *Things Being Various: Normativity, Legality, State Legality*, in M. Adams/D. Heirbaut (eds.), *The Method and Culture of Comparative Law. Essays in Honour of Mark Van Hoecke*, Hart Publishing, Oxford and Portland, Oregon, 2014, p. 161, p. 162.



changed so torridly afterward does not give us the right to deny the status of law to all these regulations that existed before. And the suggestion that “any meaningful understanding of ‘law’ requires comparative and historical analysis” is there to confirm it.

The fact that state law has ever since dominated theory, is not an excuse to deny the status of law to the chthonic laws of the indigenous peoples. Approaches to law may change over time – and this time more than ever before<sup>25</sup> – but they may not nullify the ones that prevailed in the past and that are still followed in some parts of the world by some people, sadly considered as at best marginal.

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<sup>25</sup> F. Ost, *Law as Translation*, in M. Adams/D. Heirbaut (eds.), *The Method and Culture of Comparative Law*. Essays in Honour of Mark Van Hoecke, Hart Publishing, Oxford and Portland, Oregon 2014, 69, 76: “This is the very situation that is changing radically today: the juridical orders are on the move, they are communicating with one another, they are copying each other, they are swapping solutions, they are hybridizing themselves in a thousand and one ways (though we must not ignore the phenomena of dominance which inevitably twist and slant such exchanges), with the result that comparative law has ceased to be the study of the platonic relationships between juridical systems viewing each other from the outside and is becoming, to use the expression of H Patrick Glenn, the study of an ‘integrated law’ – a law which introduces into the heart of the internal juridical mechanisms other, composite matter, hybrid concepts (some would call them bastard concepts), imported solutions that are only ‘more or less’ under control.