

INVITED ARTICLE

## Legal Pluralism's Other: Mythologizing Modern Law

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### Abstract

This article interrogates the *concept* of legal pluralism, as it currently tends to function within contemporary legal and historical scholarship. It argues that the concept of legal pluralism cannot 'liberate' positivist analytical legal theory from monist (municipal, state-centric, etc.) straightjackets, but rather itself presumes the primacy of centralized state-issued law—at the same time as masking that primacy within a pluralist discourse. The concept of legal pluralism should be properly understood—and analyzed—as part of the mythology of modern law, not as an alternative to it. The first two sections develop this argument via a critical tour of legal-pluralist historiography, focusing on 1986 to the present day. The final section then moves on to explore what is at stake for the pre-modern historian when they apply (modern) concept(s) of legal pluralism to try to explain the multiplicity of legal orders that they invariably encounter in their own source material.

Tell me how you think of the world, I will tell you how you think of the Law.<sup>1</sup>

According to John Griffiths, writing in 1986, legal pluralism is best understood as both descriptive concept and critique. It is a descriptive concept, in the sense that legal pluralism—properly conceived—describes “...that state of affairs, for any social field, in which behavior pursuant to more than one legal order occurs.” It is a critique in the sense that drawing attention to the factual existence of plural, non-state, normative orders simultaneously challenges (what Griffiths understood to be) the dominant centralistic, statist,

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<sup>1</sup> “Dis-moi comment tu penses le monde: je te dirai comment tu penses le Droit.” Michel Alliot, “La méditerranée et le droit” (1989), reprinted in Michel Alliot and Camille Kuyu, eds., *Le droit et le service public au miroir de l'anthropologie* (Paris: Éditions Karthala, 2003), 87.

understanding of ‘the’ modern legal order.<sup>2</sup> Griffiths strong—social fact/social scientific—version of legal pluralism, forged in the context of colonial and post-colonial phenomena, was thus intended as much more than an “... analytical device that allowed for thicker descriptions of law in action.”<sup>3</sup> It was effectively a challenge to the mythology of modern law: the “one (nation-)state—one society—one law” myth forensically dissected by Peter Fitzpatrick in his 1992 monograph *The Mythology of Modern Law*.<sup>4</sup> Thirty or so years and “a massive proliferating literature” later, the emancipatory potential of strong legal pluralism is now being situated within mainstream jurisprudence.<sup>5</sup> Roughan and Halpin’s 2017 edited volume *In Pursuit of Pluralist Jurisprudence*, for example, offers a jurisprudential analysis of legal pluralism with the aim of achieving “... a reconciliation between the academic traditions of analytical jurisprudence and legal pluralism.”<sup>6</sup> Griffiths descriptive concept is effectively reclassified by Roughan and Halpin as a jurisprudential concept-in-waiting: hence the *In Pursuit of...* in the volume title. Through the very process of pursuing and tracking it down, “pluralist jurisprudence” is to be put to work in liberating positivist analytical legal theory from its perceived ‘monist’ (municipal, state-centric, etc.) straitjacket.

European legal philosophy has long recognized the plurality of legal orders. In fact, in what follows, I am going to argue that the *concept* of legal pluralism—whether understood descriptively or analytically/‘jurisprudentially’ (as in the 2017 Roughan and Halpin volume)—has always functioned as a shape-shifting other to the “mythology of modern law.”<sup>7</sup> My argument is thus relatively straightforward: if “... the near monopoly of coercive power by a centralized bureaucratic state is a modern exception...” then so too is the concept of legal pluralism, regardless of whether it is deployed descriptively or analytically/‘jurisprudentially.’<sup>8</sup> The concept of legal pluralism should thus be properly understood—and analyzed—as part of the mythology of modern law, not as an alternative to it.

As Croce and Goldini have demonstrated, the Continental jurists Santi Romano (1875–1947), Carl Schmitt (1888–1985), and Costantino Mortati (1891–1985) all questioned “...the—monolithic, self-referential, ‘neutral’—state structures that emerged from the bourgeois revolutions...,” developing a pluralist

<sup>2</sup> John Griffiths, “What is Legal Pluralism?,” *Journal of Legal Pluralism* 24 (1986): 2.

<sup>3</sup> Quotation from Boaventura De Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, 3rd edn (Cambridge: Cambridge University Press, 2020), 102.

<sup>4</sup> In this paper I use “myth” and “mythology” as defined by Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992), building upon his argument that law itself is a site of myth-making.

<sup>5</sup> William Twining, “Normative and Legal Pluralism: A Global Perspective,” in *The Oxford Handbook of Transnational Law*, ed. Peer Zumbansen (Oxford: Oxford University Press, 2021), 42. A lightly revised version of an article first published in 2010 in the *Duke Journal of Comparative and International Law* 20 (2010): 473–517.

<sup>6</sup> Jorge Luis Fabra-Zamora, “The Conceptual Problems Arising from Legal Pluralism,” *Canadian Journal of Law and Society/Revue Canadienne Droit et Société* 37, no. 1 (2022): 155.

<sup>7</sup> On the relevance of myth to modern society and more specifically to law “as an integral category of modern social thought” see Fitzpatrick, *Mythology*.

<sup>8</sup> Quotation from Twining, “Normative and Legal Pluralism,” 43.

classic legal institutionalism which both underpinned and critiqued nineteenth- and early twentieth-century conceptions of the liberal, constitutional, state.<sup>9</sup> Since the early 1980s neoliberal network governance—reinventing government “to steer rather than to row”—has contributed to an existing system of regulatory capitalism, with privatization leading to growth in both state and non-state regulation (what Power terms “the audit society”).<sup>10</sup> Legal centralist and pluralist frameworks have shifted accordingly: “Since the state itself should be conceptualised as a polycentric and internally differentiated arena of social action, its legal embodiment, state law, should be viewed in a similar way. State law can consist of diverse legal institutions and various bodies of legal doctrine which are related to each other in multiple ways, and which may occasionally oppose each other and pull in many different directions.”<sup>11</sup>

As the nineteenth-century idea that law results from processes of societal self-organization took on late twentieth- and early twenty-first-century forms (e.g., ‘systems theory’), legal pluralism has also come to be viewed as a species of normative pluralism: “... the idea that behaviour can be evaluated from the perspectives of a variety of normative orders or normative control systems and thus, importantly, can also be justified from a variety of such perspectives.”<sup>12</sup> Normative pluralism is now invoked as a framework through which international, transnational, and global governance can be conceptualized, alongside a broader idea of “legal pluralism from above” applied to supra-state, global, legal orders and their interactions with state and infra-state legal orders.<sup>13</sup> Whether we frame the concept of legal pluralism as being from above, below, or indeed everywhere all at once, it effectively functions as the plural ‘other’ to “...the official formal centralism of the modern legal order.”<sup>14</sup>

The recent truce drawn between (some) empirical pluralists and (some) analytical positivists might help to advance conceptual uses of legal pluralism in modern and postmodern eras, but it is a false friend to historians of pre-modern law and legal orders. The next section, “Unthinking ‘Modern Law,’” develops the argument—introduced earlier—that legal pluralism is part of the mythology of modern law, rather than an alternative to it. It also (briefly) seeks to reframe the central issue of modern law as ‘juridification,’ rather than

<sup>9</sup> Mariano Croce and Marco Goldoni, *The Legacy of Pluralism: The Continental Jurisprudence of Santi Romano, Carl Schmitt, and Costantino Mortati* (Stanford, CA: Stanford University Press, 2020), 4. See also Conte’s article in this volume.

<sup>10</sup> Michael Power, *The Audit Society: Rituals of Verification* (Oxford: Oxford University Press, 1999).

<sup>11</sup> Ido Shahar, “State, Society and the Relations Between Them: Implications for the Study of Legal Pluralism,” *Theoretical Inquiries in Law* 9 (2008): 434.

<sup>12</sup> Jan Klabbers and Touko Piiparinen, “Normative Pluralism: An Exploration,” in *Normative Pluralism and International Law. Exploring Global Governance*, eds. Jan Klabbers and Touko Piiparinen (Cambridge: Cambridge University Press, 2013), 15, drawing a strong connection between “value pluralism,” legal pluralism, and “constitutional pluralism.”

<sup>13</sup> Hans Lindahl, “Inside and Outside Global Law,” *Sydney Law Review* 41 (2019): 1–34. Mariano Croce and Marco Goldoni, “A Sense of Self-Suspicion: Global Legal Pluralism and the Claim to Legal Authority,” *Ethics and Global Politics* 8, no. 1 (2015): 1–20 offer a strong critique of both the “static, monistic, centralistic understanding of law” and “neo-pluralist theories.”

<sup>14</sup> Quotation from Gunther Teubner, “The Two Faces of Janus: Rethinking Legal Pluralism,” *Carozo Law Review* 13 (1992): 1443.

legal pluralism. The final section, “Before ‘the Modernist Legal Canon?’” turns to the implications of these arguments for historians of law before modernity.

### Unthinking “Modern Law”

Legal pluralism refers to the idea that in any one geographical space defined by the conventional boundaries of a nation state, there is more than one law or legal system.<sup>15</sup>

In its role as ‘the other,’ legal pluralism is both opposed *and* integral to modern legal thought. When the anthropologist Marilyn Strathern, writing in the mid-1980s, encountered twentieth-century jurisprudence she saw a “peculiar western cosmology.”<sup>16</sup> The peculiarity of this western cosmology resided in how law was framed in relation to society: “... law, whilst being intrinsic to social order acts on and controls society. It does this determinatively through official performances which emanate from a vantage point of distinct domination, one necessarily separated from the society that is ordered and controlled.”<sup>17</sup> This idea of law being intrinsic to social order, at the same time as acting upon and controlling society, underpins the concept of legal pluralism in modern thought. Under what Duncan Kennedy refers to as the regimes of “Classical Legal Thought (1850–1930)” and “Social Legal Thought (1890–1968)”, law’s official work was predominately framed as performances of the state—performances that, in turn, were part of a broader liberal constitutional project which linked (nation-state) law with (nation-state) citizenship.<sup>18</sup> This liberal constitutional argument also appears in a historicizing form, neatly summarized in the following claim by Simon Roberts: “Law is a concomitant of centralizing processes, processes that at a certain point resulted in the formation of the nation state.”<sup>19</sup> As I argue later, Roberts’ broader argument should be understood as a response to the rise of regulatory capitalism during the late twentieth and early twenty-first centuries: Roberts, writing in 2005, is effectively warning legal theorists and other scholars that loosening the conceptual bonds between law and nation state government—bonds that were forged through “centralizing processes”—carries real-world, present-day, implications and risks. The crucial point for our purpose here, however, is that if law is seen, by nature, as the technique which accompanies centralizing

<sup>15</sup> Margaret Davies, “Legal Pluralism,” in *The Oxford Handbook of Empirical Legal Research*, eds. Peter Cane and Herbert M. Kritzer (Oxford: Oxford University Press, 2010), 805. Emphasis mine.

<sup>16</sup> Marilyn Strathern, “Discovering ‘Social Control,’” *Journal of Law and Society* 12, no. 2 (1985): 128, quoted from Fitzpatrick, *Mythology*, 169.

<sup>17</sup> Fitzpatrick, *Mythology*, 169.

<sup>18</sup> Duncan Kennedy, “The Hermeneutic of Suspicion in Contemporary American Legal Thought,” *Law Critique* 25 (2014): 91–139, refining the taxonomy presented in Duncan Kennedy, *The Rise and Fall of Classical Legal Thought, 1850–1940* (Washington, DC: Beard Books, 2006). See also the special issue of *Law and Contemporary Problems* 78, nos. 1–2 (2015): “Theorizing Contemporary Legal Thought,” edited by Justin Desautels-Stein and Duncan Kennedy.

<sup>19</sup> Simon Roberts, “After Government? On Representing Law Without the State,” *The Modern Law Review* 68, no. 1 (2005): 13.

processes, then—equally ‘naturally’—it is the centralizing processes that are seen to define the proper legal contexts for the production and reproduction of law. In other words, from within the framework described here, local, on-the-ground, social processes cannot—by definition—define the proper ‘legal’ contexts for the production and reproduction of law.

It is a striking feature that much of the recent legal pluralist literature continues to stick with the idea that it is the center—which they understand as the state—that gets to define the proper ‘legal’ contexts for the production and reproduction of law. It is implicit in Sally Falk Moore’s “semi-autonomous social fields” (1973): a hugely influential concept developed by Moore through fieldwork with the Chagga in Tanzania, but based on Michael G. Smith’s interpretation of Max Weber’s ideas about corporations.<sup>20</sup> It underlies Joseph Raz’s 2017 essay, published in the Roughan and Halpin edited volume referred to earlier, where European Union law, canon law, “sharia law” [sic.], indigenous laws, rules of corporations, voluntary associations, and neighborhood gangs are all referred to as “non-state legal phenomena.”<sup>21</sup> It is explicit from page one of Brian Tamanaha’s monograph *Legal Pluralism Explained: History, Theory, Consequences* published in 2021: “In many societies there are *additional forms of law*, like indigenous law, customary law, religious law, and the law of distinct ethnic or cultural communities.”<sup>22</sup> As Gunther Teubner stated in 1992: “Plural, informal, local quasi-laws are seen as the ‘supplement’ of the official, formal centralism of the modern legal order.”<sup>23</sup> Which again reinforces an idea that “...formal and informal constitute a total (yet pluralist) normative order.”<sup>24</sup> It is in this sense that Franz von Benda Beckmann refers to the field of legal pluralism as “... the reproduction of rules and principles out of context...”<sup>25</sup> All of which creates the appearance of a kind of legal pluralist groundhog day, stretching through Western legal scholarship from the 1970s to the present-day: “...the repeated rediscovery of the other hemisphere of the legal world... [of the fact] that law in modern society is plural rather than monolithic, that it is private as well as public in character and that the national (public, official) legal system is often a secondary rather than a primary locus of regulation.”<sup>26</sup>

<sup>20</sup> Sally Falk Moore, “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study,” *Law & Society Review* 7, no. 4 (1973): 719–46.

<sup>21</sup> Joseph Raz, “Why the State?,” in *In Pursuit of Pluralist Jurisprudence*, eds. Nicole Roughan and Andrew Halpin (Cambridge: Cambridge University Press, 2017), 136–62. See also Ralf Michaels, “What is Non-State Law? A Primer,” in *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism*, ed. Michael A. Helfand (Cambridge: Cambridge University Press, 2015), 41–58.

<sup>22</sup> Brian Z. Tamanaha, *Legal Pluralism Explained: History, Theory, Consequences* (Oxford: Oxford University Press, 2021), 1.

<sup>23</sup> Teubner, “The Two Faces of Janus,” 1443.

<sup>24</sup> David Nelken, “Review: Beyond the Study of ‘Law and Society’? Henry’s ‘Private Justice’ and O’Hagan’s ‘The End of Law?’” *American Bar Foundation Research Journal* 11, no. 2 (1986): 326.

<sup>25</sup> Franz von Benda-Beckmann, “Law Out of Context: A Comment on the Creation of Traditional Law Discussion,” *Journal of African Law* 28, no. 1/2 (1984): 28.

<sup>26</sup> Marc Galanter, “Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law,” *Journal of Legal Pluralism and Unofficial Law* 19 (1981): 20.

Simon Roberts' 2005 article "After Government? On Representing Law Without the State" warns scholars against loosening "the conceptual bonds between law and government," either "under the self-conscious banner of legal pluralism" or via attempts "to delineate a general jurisprudence" (attempts which have recently emerged, states Roberts, "as attention [has] shifted to orderings at regional and global level[s] beyond the nation state").<sup>27</sup> Roberts' argument against both legal pluralism and "general jurisprudence" should, perhaps, be contextualized as a strong reaction against the rise of regulatory capitalism during the late twentieth and early twenty-first centuries, referred to earlier. According to Roberts, law is conceptually linked with state governance *to the exclusion of other kinds of non-state modern regulation*. Yet as numerous forms of legal regulation continue to proliferate from and through markets and communities—themselves universalized by global capitalism—attempts to confine legal pluralism to the role of modern legal thought's 'other' seem increasingly tenuous. Hence, various moves in early twenty-first-century scholarship towards a "general jurisprudence" which seeks to illuminate the relationship between law and society.<sup>28</sup> In contrast to Gordon Woodman's (polemical) definition of legal pluralism as an *ethnographic* field that includes state law,<sup>29</sup> "general jurisprudence" tends to minimize the importance of drawing law/society boundaries: "At least for most purposes of empirical study, nothing much turns on where or even whether one sets boundaries to the legal, provided that one recognizes that phenomena designated as unofficial law or non-state law or law-like normative orders deserve our attention as jurists as an essential part of understanding law."<sup>30</sup> This trend is directly linked, of course, to the current explosion of interest in "entangled legalities," "interlegality," "interstitial law," "pluri-constitutive," "non-constitutive" law, and so on, across the international, transnational, and global legal fields.<sup>31</sup>

As Melissa Demian has argued: "Legal pluralism succeeds at describing multiple moral–normative orders as plural forms of law. But it simultaneously

<sup>27</sup> Roberts, "After Government?," 1.

<sup>28</sup> Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001); William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press, 2009); Keith C. Culver and Michael Giudice, *Legality's Borders: An Essay in General Jurisprudence* (Oxford: Oxford University Press, 2010); Keith C. Culver, *The Unsteady State: General Jurisprudence for Dynamic Social Phenomena* (Cambridge: Cambridge University Press, 2017). For broader debate see *Critica, Revista Hispanoamericana de Filosofía*, Special Issue "On the Status of General Jurisprudence" 49, no. 147 (2017): 11–40.

<sup>29</sup> Gordon R. Woodman, "Ideological Combat and Social Observation," *Journal of Legal Pluralism and Unofficial Law* 42 (1998): 21–59, with a response by Carol J. Greenhouse, "Legal Pluralism and Cultural Difference: What is the Difference? A Response to Professor Woodman," *Journal of Legal Pluralism and Unofficial Law* 42 (1998): 61–72.

<sup>30</sup> Twining, "Normative and Legal Pluralism," 497.

<sup>31</sup> Nico Krisch, ed., *Entangled Legalities Beyond the State* (Cambridge: Cambridge University Press, 2022); Jan Klabbers and Gianluigi Palombella, eds., *The Challenge of Inter-Legality* (Cambridge: Cambridge University Press, 2019); David Roth-Isigkeit, *The Plurality Trilemma: A Geometry of Global Legal Thought* (Cham, Switzerland: Springer International Publishing, 2018).

erases or flattens those same orders under particular conditions.”<sup>32</sup> In this Section, “Unthinking ‘Modern Law,’” I have argued that the particular conditions which simultaneously erase or flatten multiple moral-normative orders should be identified with a peculiar modern legitimation of the categories of ‘state’ and ‘non-state’ law. In fact, as suggested earlier by my brief discussion of the rise of regulatory capitalism, the key issue of modern legal ordering is perhaps not so much ‘formal’ (nation-state) legal centralism versus legal pluralism, but rather “the juridification of social life.”

Although I do not have the space to develop a full argument here, “the juridification of social life” labels a complex phenomenon that is seen to underpin both regulatory capitalism and the “rise of the audit society,” referred to in the first section. In the most basic sense, ‘juridification’ functions as a shorthand for the processes by which the twentieth- and twenty-first-century (nation-) state reproduced itself in the form of “civil society.” Duncan Kennedy, for example, identifies three typical techniques through which this reproduction took place: first, the creation of regulatory regimes, “... typically with inspectorates, through techniques like licensing, enforced by low-level criminal or civil penalties without private rights of action”; second, the “... creation of bureaucracies to administer the regimes of social insurance (accidents, unemployment, health care) and welfare”; and third, the “... ‘move to institutions,’ meaning the development of new organizational forms.”<sup>33</sup> (Kennedy gives some specific examples from “the market,” the “law of custody,” and “international law.”) What is important for my argument here is that legal and political theorists understand these new (“horizontal”) administrative and regulatory regimes as part of a single (post-)modern, heterarchical, “juridified universe.”<sup>34</sup> Hence we return—albeit by a different route—to a peculiarly (post-modern) idea of the plurality of legal ordering(s). The “juridification of the social” is as much part of the mythology of modern law (in Fitzpatrick’s sense) as the concept of legal pluralism itself.

### Before “the Modernist Legal Canon”?<sup>35</sup>

The other side of the overlegalization of society is the oversocialization of law.<sup>36</sup>

As we have seen in the first section and the preceding section “Unthinking ‘Modern Law,’” modern, Western, (neo-)liberal accounts tend to represent law as a human-made creation of society, making it amenable to describing and theorizing in sociological terms:

<sup>32</sup> Melissa Demian, “Dislocating Custom,” *PoLAR: Political and Legal Anthropology Review* 38, no. 1 (2015): 92.

<sup>33</sup> Kennedy, “The Hermeneutic of Suspicion,” 108.

<sup>34</sup> According to Kennedy “The Hermeneutic of Suspicion,” 110–24, from the 1970s onwards the “juridified universe” has been subject to processes of both “judicialization” and “constitutionalization” “... in all relevant countries....”

<sup>35</sup> De Sousa Santos, *Toward a New Legal Common Sense*, 585.

<sup>36</sup> De Sousa Santos, *Toward a New Legal Common Sense*, 64.

Sociology, whether attributing the determination of law to particular human actors or to social structures or everyday norms, views law as exclusively social. Sociological positivism, then... in effect maintains that any so-called law that precedes a given legal positivist system was itself socially powerful in the manner of positive law or was not really law at all. Sociological positivism thus tends toward peculiarly exhaustive and ahistorical accounts of powerful and controlling law that functions as instrument or strategy within a field of social articulable power. The sociological and positivist commitment of our age—to the human determination of guidelines concerning what exists—threatens to discount as law anything that is not positivist and sociological—including past law.<sup>37</sup>

Marianne Constable here refers to a distinct—and pervasive—present-day theoretical lens: “sociological positivism.”<sup>38</sup> According to Constable “... the sociological and positivist commitment of our age...” “...tends toward peculiarly exhaustive and ahistorical accounts of powerful and controlling law that functions as instrument or strategy within a field of social articulable power.”<sup>39</sup> In other words, sociological positivism, to borrow the phrasing of de Sousa Santos in the quotation given earlier, tends to reinforce both “the overlegalization of society” (of which the “juridification of the social” discussed at the end of the section “Unthinking ‘Modern Law’” is but one aspect) and “the oversocialization of law.” As de Sousa Santos implies, the “overlegalisation of society” and “the oversocialisation of law” should be understood as two sides of the same—(post-)modern—coin.

Uncovering what Constable refers to as “law’s nonpositivist possibilities” thus involves thinking before—and beyond—the (post-)modernist socio-legal canon.<sup>40</sup> At the very least, law’s nonpositivist possibilities cannot be uncovered via a simple assertion that “... the nation-state, far from being the exclusive or the natural time-space of law, is only one among others.”<sup>41</sup> Calling attention to sociological positivism’s “peculiarly exhaustive and ahistorical” *modernist* understanding of law creates space for us to begin taking pre-modern forms of law seriously as law—without, for example, feeling the compulsion to classify them as ‘religious.’<sup>42</sup> Let’s take one example to illustrate this point. It is often noted by ancient historians that Romans and Greeks—like (most?) other

<sup>37</sup> Marianne Constable, *Just Silences. The Limits and Possibilities of Modern Law* (Princeton, NJ: Princeton University Press, 2005), 10–11.

<sup>38</sup> It is worth stressing here that “... Constable is not referring to legal positivism *tout court* but to a distinct phenomenon—sociological or sociolegal positivism—that exists at the intersection of positivistic analytical commitments... and a kind of sociological presentism,” as noted by the anonymous reviewer of this paper.

<sup>39</sup> Constable, *Just Silences*, 10–11.

<sup>40</sup> Constable, *Just Silences*, 11. See also Michael Guidice, *Understanding the Nature of Law: A Case for Constructive Conceptual Explanation* (Cheltenham, UK: Edward Elgar Publishing, 2015).

<sup>41</sup> Quotation from De Sousa Santos, *Toward a New Legal Common Sense*, 99.

<sup>42</sup> For comparison, see Tamar Herzog’s argument in this volume on pre-modern law reflecting “...a collective effort to understand what a pre-set divine order mandated and how it could be best protected.”



ancient cultures—claimed that the divine world, as a whole, was responsible for maintaining law and justice in this world. According to the historian Richard Gordon, however: “This construction, based on a generalised notion of *Gerechtigkeit*, has nothing whatever to do with the legal system, but was nevertheless basic to both Greek and Roman religious systems.”<sup>43</sup> Here we see how foreclosing on ancient law’s nonpositivist possibilities has the effect of putting law back in its modernist—seemingly exhaustive and ahistorical—place. Divine law is either defined, as it is here by Richard Gordon, as part of the “religious system” as opposed to the “legal system” (as “properly” understood, in modernist terms); or alternatively, it is framed as one of many possible additional forms of law, supplementary to the official, formal, legal system, as outlined above in the section “Unthinking ‘Modern Law.’”

Creating a category of religious law—or ‘primitive law,’ ‘indigenous law,’ and so on—and then applying it back to pre-modern systems of thought risks missing the extent to which new *legal* ideas are developed within so-called ‘religious’ (‘primitive,’ ‘indigenous’) contexts. As Jean-Louis Halpérin states, law is an invented technology.<sup>44</sup> We thus need to ask who, exactly, is doing the inventing. If we step outside a “sociological positivist” approach to law (as urged by Constable), or beyond the “legal centralist” approaches (as embodied by Roberts, Raz, or even Tamanaha, to different effects) we can uncover a diverse range of actors and groups seeking to define ‘the’ proper legal context(s) for the production and reproduction of law. In other words, ‘religious,’ ‘indigenous,’ and so on actors do not contribute to “semi-autonomous” social fields, or create “supplemental” or “additional” forms of law; they are innovators of—and place-holders for—specifically *legal* norms, practices, and mythologies. If we apply this insight back to Late Antiquity, for example, we can identify a number of individuals and groups as legal innovators: inventors and tradition-bearers of specifically, distinctively, legal technologies.

Our first Late Antique case study is Farroxmard i Wahrāmān, a judge and jurist-theologian who composed a casebook in Pahlavi, probably during the 620s or 630s CE during the reign of the Sasanian King of Kings Khusro II. This casebook, referred to in its preface by the title *A Thousand Judgements* (*Hazār dādestān*), is a “... lengthy compilation of actual and hypothetical case histories collected from court records and transcripts (*saxwan-nāmag*, *pursišn-nāmag*), testaments (*handarz*), various works on jurisprudence (*dādestān-nāmag*), commentaries of jurists (*čāštag*), direct quotations of the foremost experts in the field, and a great number of other long lost documents.”<sup>45</sup> As its most recent modern editor, Maria Macuch, explains: it is “... the only

<sup>43</sup> Richard L. Gordon, “Gods, Guilt and Suffering: Psychological Aspects of Cursing in the North-Western Provinces of The Roman Empire,” *Acta Classica Universitatis Scientiarum Debreceniensis* 49 (2013): 263.

<sup>44</sup> Jean-Louis Halpérin, “Le droit et ses histoires,” *Droit et société* 75 (2010/2): 295–313, <https://www.cairn.info/revue-droit-et-societe1-2010-2-page-295.htm> (accessed March 13, 2022).

<sup>45</sup> Maria Macuch, “Mādayān ī hazār dādestān,” *Encyclopaedia Iranica* online edition ([2005] 2017), <http://www.iranicaonline.org/articles/madayan-i-hazar-dadestan> (accessed March 13, 2022), summarizing Maria Macuch, *Rechtsskizistik und Gerichtspraxis zu Beginn des siebenten Jahrhunderts in Iran: Die Rechtssammlung des Farrohmard i Wahrāmān* (Wiesbaden: Harrassowitz, 1993), 11–15.

exclusively legal work on pre-Islamic Iranian jurisprudence which has survived from the Zoroastrian period, and it is one of the most important fundamental sources for the social and institutional history of Sasanian Iran.” The contents of the casebook are defined by Macuch as being strictly “legal”: “Contrary to all other extant sources on Zoroastrian and Sasanian law, the Law-Book concentrates entirely on legal questions without combining juridical and religious matters, as later Pahlavi texts of the 9th and 10th centuries did.”<sup>46</sup> Yet the surviving, fragmentary, preface to the casebook places the work as a whole within a profoundly “religious” context: “In the name of Ohrmizd, Lord of all (things) spiritual and [material... .. for the prosperity of the Good] Mazda-worshipping! This (book) is called *A Thousand Judgments*, which (examines) only in their very essence the greatness, piety and merits of people, whosoever they be, as a result of (their own) zeal [and also as a consequence of the mercy of the gods]. This book is a weapon of the creator’s power (serving for) the rout of evil through omniscience...”<sup>47</sup>

According to Macuch, the content and style of this religious preface differ “strangely” and “fundamentally” from the legal chapters which make up the rest of the text: “Apart from these admonitions in the preface, the Law-Book is a worldly compilation in which legal problems are presented exclusively from a juridical perspective with no allusions to religious matters whatsoever.”<sup>48</sup> Again, I argue that this framing ignores the “nonpositivist possibilities” of Farroxmard’s law. As the preface to *A Thousand Judgements* goes on to state: “... with the help of knowledge from religion, it is possible to reach perfection through every manifestation of understanding, through every (piece of) knowledge and capacity to discern and through (any) type of activity.”<sup>49</sup> In other words, the activity of studying a casebook which contains actual and hypothetical case histories collected from court records and transcripts, alongside testaments and other documents, together with the works and opinions of experts, leads to the cultivation of ethical discernment: “This book is a weapon of the creator’s power (serving for) the rout of evil through omniscience ...” Moreover, concludes the book’s (extant) preface:

It has been shown beyond question by others that the (man) who through his own striving and zeal has obtained a share of immortality and eternal prosperity, (who) being versed in matters of religion and the gods has made himself invulnerable to claims and judicial investigations through a knowledge of (his) obligations, and who has kept the form of (his) thoughts, speech, and actions pure in accordance with righteousness is to be considered more fortunate (than any other).<sup>50</sup>

<sup>46</sup> Macuch, “*Mādayān ī hazār dādestān*.”

<sup>47</sup> Anahit Perikhanian, *The Book of a Thousand Judgements (A Sasanian Law-Book)* (Mazda: Costa Mesa, 1997), 193.

<sup>48</sup> Perikhanian, *The Book of a Thousand Judgements*, 193.

<sup>49</sup> Perikhanian, *The Book of a Thousand Judgements*, 193.

<sup>50</sup> Perikhanian, *The Book of a Thousand Judgements*, 195.

According to Farroxmard's *A Thousand Judgements*, learning from judicial practice—from the activity of “true” judging—is a divinely ordained form of ethical instruction and a divinely given means for making one's own self invulnerable to “claims and judicial investigations.”<sup>51</sup>

The idea that humans have a divinely ordained obligation to engage in legal interpretation is also found in the writings of my second example of a Late Antique legal innovator: Junillus Africanus. Junillus composed his *Instituta regularia divinae legis* in Constantinople, sometime between ca. 542 and 549 CE, at the same time as he held the position of highest ranking legal official within the Justinianic Roman Empire (responsible for drafting imperial legislation, answering petitions, and dealing with legal cases).<sup>52</sup> In the text's preface, in the form of a letter addressed to “the holy and most blessed bishop Primasius,” Junillus states that he composed his *Institutes* at the express request of Primasius for the purpose of teaching. The dialogue form of Junillus' text offers an interactive, synoptic, overview of how humans acquire knowledge of “divine law,” with *lex divina* standing throughout as a synonym for Sacred (Christian) Scripture. To borrow a phrase originally applied by Chaim Saiman to the Rabbinic idea of law, Junillus Africanus transforms Christian divine law—Christian Scripture—“... into a way of thinking and talking about everything.”<sup>53</sup> In the diagrams below (Figures 1 and 2), I have tried to offer a systematic overview of what Christian Scripture teaches, according to Junillus' text. The structure is complex, but Junillus' argument throughout is that God governs rational creatures through educative divine lawgiving; this divine lawgiving takes place in a variety of different ways, but its single aim is “the discernment of good and evil,” recognized either in teaching or in deeds.<sup>54</sup> Junillus' *Institutes* fuse together legal, ethical, and sapiential instruction to such an extent that to ask where legal instruction ends and ethical/sapiential instruction begins would be to frame a nonsensical question.

Junillus based the method and content of his *Institutes*—as he tells us in his letter to Primasius—on an earlier book of “rules” written by a certain Paul “... a Persian by birth, who was thoroughly taught by a school of the Syrians in the

<sup>51</sup> Richard Payne, “Cosmology and the Expansion of the Iranian Empire 502–628 CE,” *Past and Present* 220, no. 1 (2013): 3–33 surveys a broader context of Sasanian, state-imposed, ideas relating to law, legal ordering, and cosmological (“religious”) principles. My thanks to Noel Lenski for this point.

<sup>52</sup> Wolfgang A. Bienert, “Die ‘Instituta Regularia’ des Junilius (Junillus) Africanus: Ein nestorianisches Kompendium der Biblewissenschaft im Abendland,” in *Syrisches Christentum weltweit. Studien zur syrischen Kirchengeschichte: Festschrift Prof. Hage*, eds. Martin Tamcke, Wolfgang Schwaigert, and Egbert Schlarb, vol. 1 (Münster: LIT, 1995), 307–24; Michael Maas, *Exegesis and Empire in the Early Byzantine Mediterranean: Junillus Africanus and the Instituta Regularia Divinae Legis* (Tübingen: Mohr Siebeck, 2003), 1–6.

<sup>53</sup> Chaim N. Saiman, *Halakhah: The Rabbinic Idea of Law* (Princeton, N.J.: Princeton University Press, 2018). For a broader comparison of Christian (monastic) and Rabbinic corpora see Michal Bar-Asher Siegal, “Law Corpora Compared: Early Collections of Monastic Rules and Rabbinic Literature,” in *Laws and Lawlessness in Early Judaism and Early Christianity*, eds. David Lincicum, Ruth Sheridan, and Charles Stang (Tübingen: Mohr Siebeck, 2019), 157–71.

<sup>54</sup> Junillus, *Institutes* 2.7, “Quae est totius legis latationis intentio? In discretione boni ac mali, quae uel in doctrina, id est in fide, uel in actibus agnoscuntur”.

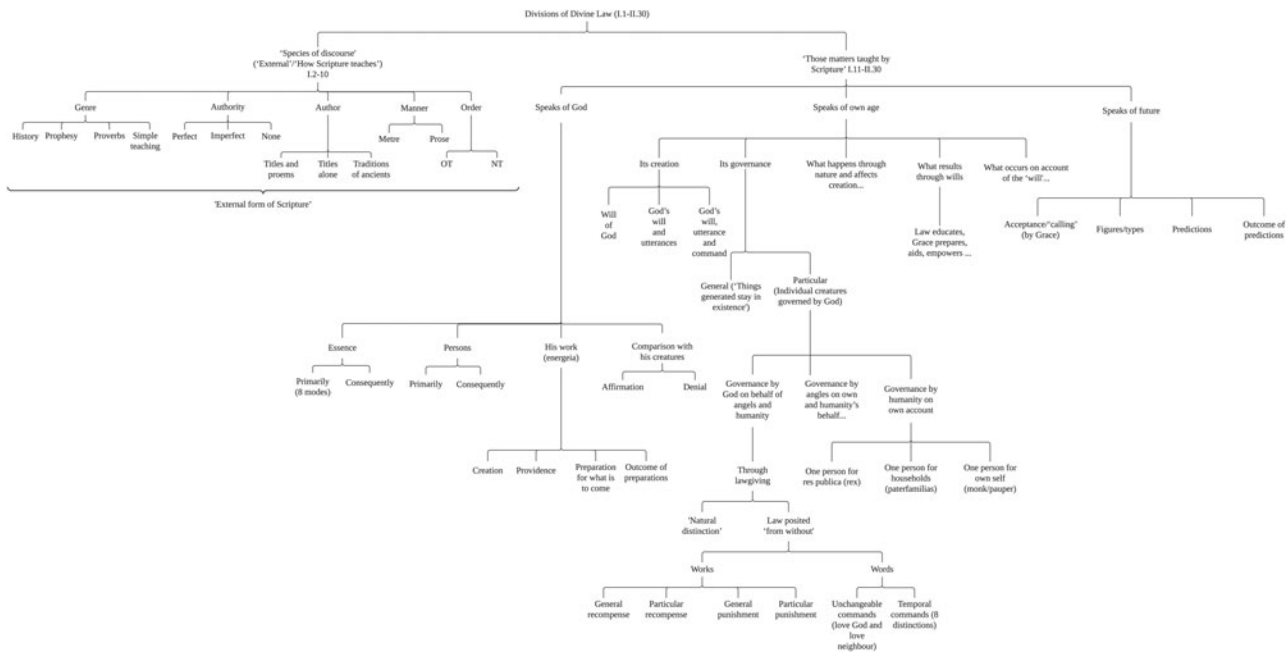
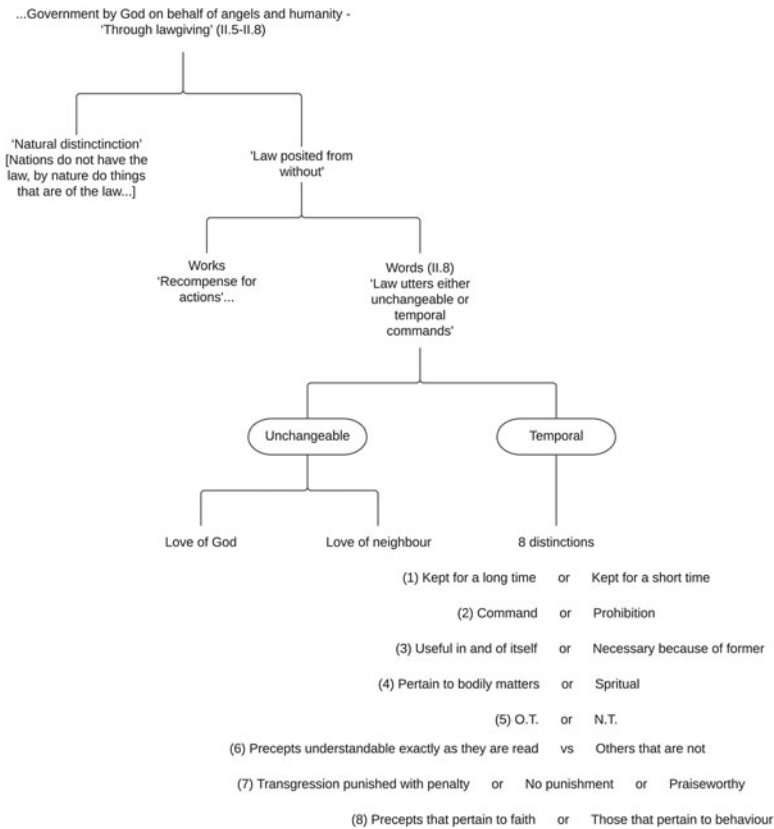


Figure 1. Diagrammatic overview of subject matter, Junillus Africanus' *Instituta regularia divinae legis*.



**Figure 2.** Diagrammatic overview of subject matter of Junillus Africanus' *Instituta regularia divinae legis*, Sections II.5–II.8.

city of Nisibis, where divine law is taught by public teachers in an orderly and regular fashion, just as among us in worldly studies grammar and rhetoric are taught.”<sup>55</sup> For Junillus, as for Paul the Persian, the aim was for students to “... come to understand the purpose and arrangement (*intentionem ordinemque*) of these very principles which operate in Divine Law, so that each detail (*singular*) might be taught not in a haphazard and confused way, but in an orderly manner (*sed regulariter*).”<sup>56</sup> For Junillus, lawgiving was plural in a sense that (still?) lies beyond the modern, Western, mythology of law. Or, as the Quranic legal scholar al-Shāfi‘ī wrote in the second century AH (eighth century CE):

<sup>55</sup> Junillus, *Institutes* Pref.2. “Ad haec ego respondi uidisse me quendam Paulum nomine, Persam genere, qui Syrorum schola in Nisibi urbe est edoctus, ubi diuina lex per magistros publicos, sicut apud nos in mundanis studiis grammatica et rhetorica, ordine ac regulariter traditor.” Translation amended from John F. Collins, trans. *Junilli Instituta regularia divinae legis*, available at <https://faculty.georgetown.edu/jod/texts/junillus.trans.html>.

<sup>56</sup> Junillus, *Institutes* Pref.2 (Collins, amended trans.).

“Whoever understands this book should understand that legislative statements occur in various ways, not in one way only.”<sup>57</sup>

In conclusion, there are many other Late Antique case studies—‘Islamic,’ ‘Zoroastrian,’ ‘Rabbinic,’ ‘Christian,’ ‘Brahmanical,’ and so on—which could be analyzed in order to demonstrate the inadequacy of modern categories of legal thought. I do not have space to develop further examples here. To categorize Late Antique individuals such as Farroxmard (‘Sasanian/Zoroastrian’) or Junillus (‘Roman/Christian’) as scholars of ‘religious law’ might seem natural according to the modern, Western, perspectives sketched in the section “Unthinking ‘Modern Law.’” My aim in deliberately framing them here as legal innovators—inventors and tradition-bearers of specifically, distinctively, *legal technologies*—was precisely to challenge and disrupt this (modern, Western) sense of naturalness. Perhaps paradoxically, it is only by acknowledging ‘legal pluralism’ as part of the mythology of modern law that we can begin to explore “law’s nonpositivist possibilities”—plural.

As Peter Fitzpatrick argued 30 years ago, law is a site of mythology—of which the “modern mythology of law” is but one (time-space specific) incarnation.<sup>58</sup> I have argued that the modern concept of legal pluralism—whether it is deployed descriptively or analytically—should be understood as part of the “modern mythology of law,” and not as an alternative to it. Legal pluralism is the shape-shifting ‘other’ to law’s modern mythologies. The challenge, then, is not to uncover the modern concept of “legal pluralism” in pre-modern settings; but, rather, to interrogate the ways in which pre-modern law was pluralist—without foreclosing on “law’s non-positivist possibilities.” Can we create a conceptual paradigm in which nonpositivist forms of law are understood as law, without the need to label them as ‘other’ (‘religious law,’ ‘indigenous law,’ ‘primitive law,’ ‘non-state legal phenomena,’ etc.), as supplements to what our modern conditioning tells us *really* counts as law? The stakes are high for the legal historian, not least as the juridification of (the West’s) history is itself part of modern law’s myth-making. To answer the question of what law is *now*—after modernity—we need new mythologies.

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<sup>57</sup> Al-Shāfi‘ī, *Risālah* 182, trans. Joseph E. Lowry, *The Epistle on Legal Theory. A Translation of al-Shāfi‘ī’s Risālah by Muḥammad ibn Idrīs al-Shāfi‘ī* (New York: NYU Press, 2015), 68.

<sup>58</sup> Fitzpatrick, *The Mythology of Modern Law*, 1.

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