

INVITED ARTICLE

The Uses and Abuses of Legal Pluralism: A View from the Sideline

Tamar Herzog

Harvard University, Cambridge, MA, USA
Email: therzog@fas.harvard.edu

Abstract

This text takes issue with how present day debates regarding legal pluralism affect our vision of the past, as well as limit the horizons of possibilities in the future. It suggests that the genealogy of these debates determined what would be seen, and what ignored, and that, as a result, it has privileged some aspects, while forgetting the importance of others.

In recent years, legal pluralism has invaded our imagination. A quick search on the internet testifies that there was legal pluralism in Christian, Jewish, and Muslim societies, in ancient, medieval, early modern, and contemporary polities, in colonies and postcolonial states, in Europe and elsewhere around the globe. Pointing to legal pluralism are anthropologists, sociologists, political scientists, jurists, and historians (please excuse if I am forgetting someone). Legal pluralism serves to depict both an analytical category and concrete situations. It can exist in subnational, transnational, and supranational arenas.

This incredible proliferation explains the frequent inquiries as to the genealogy of this label, the attempts to distinguish between different types of pluralism, and the constant changes in meaning that the term itself endured. Legal pluralism, having once portrayed the coexistence of various separate legal orders, now often depicts situations in which these orders are superimposed, interpenetrate, and mix.¹ In other words, legal pluralism has become everything and, according to some, nothing.² How and why legal pluralism received so much attention and why it was adopted by such a great variety of scholars to do so many different things, is an intriguing question. In what follows I will not

¹ Andrea Bianchi, *International Law Theories: An Enquiry into Different Ways of Thinking* (Oxford: Oxford University Press, 2016), 227.

² Paul D. Halliday, "Law's Histories. Pluralisms, Pluralities, Diversity," in *Legal Pluralism and Empires, 1500–1850*, eds. Richard J. Ross and Lauren Benton (New York: NYU Press, 2013), 273.

answer it. Instead, I will ask what this popularity had done to our image of the past and suggest what it can and cannot do for us in the present and the future.

Narratives of Origin

Scholars have long discussed when legal pluralism was born and who were its progenitors. Two radically different genealogies had been proposed. The first, continental, beautifully described in an essay by Emanuele Conte in this volume, locates its origins in late nineteenth-century debates that sought to institute a sharp distinction between Roman and Germanic legal traditions.³ These debates stereotyped the former as incarnating a state centered, jurist made, formalist (artificial) law, and the latter as embodying a legality that spontaneously sprang within the community and expressed its true nature. Linked to deliberations centered on German unification and disagreements regarding the character that German law and the German state had or must have, those proposing these distinctions interpreted the Germanic system as plural because, though all Germanic communities shared a common Germanic spirit, each had its own legality and modes of self-organization.

While the Continental narrative of origins focused on debates regarding how law was created and which processes of creation were superior, or at least better fit to Germany, an Anglo-centered narrative was instead initially linked to mid-twentieth century debates among legal anthropologists who wished to describe post-colonial societies. These anthropologists argued that, despite the imposition of colonial (and later state) law, indigenous law (or some version thereof) nonetheless survived.⁴ They termed this reality plural not because they believed in spontaneous self-organization—as in the previous case—but because they argued that the persistence of indigenous law alongside colonial (or post-colonial) law created systems where a plurality of normative orders existed in parallel.

While this first generation of anthropologists was mostly interested in a legal pluralism tied to the survival of indigenous law, by the 1970s, a second generation began arguing that all societies—including those that never suffered colonialism—were plural in the sense that they all admitted the coexistence of various legal systems.⁵ According to this understanding, modern states never

³ On these issues also see Tamar Herzog, “Germanic or Roman? Western European Narratives of Legal Origins,” *Rechtsgeschichte/Legal History* 28 (2020), 1–13.

⁴ Sally Engle Merry, “Legal Pluralism,” *Law and Society Review* 22, no. 5 (1988): 869–96. Under this guise, legal pluralism became the “corollary of colonialism” as, according to some, “the concept’s origin dates back to the colonial period when Western law appeared to be opposed to, or at least be identified against, indigenous law.” Marie Seong-Hak Kim, “Legal Pluralism and Colonial Customary Law,” *Perspectives* 6 (2012): 4 and Jaap Timmer, “Legal Pluralism,” in *International Encyclopedia of Anthropology*, ed. Hilary Callan (Hoboken, NJ: John Wiley and Sons, 2018), 1. Also see: M. B. Hooker, *Legal Pluralism, and Introduction to Colonial and Neo-Colonial Laws* (Oxford: Clarendon Press, 1975). On the comparative aspects of legal pluralism see, e.g., Kaius Tuori, “The Disputed Roots of Legal Pluralism,” *Law, Culture and the Humanities* 9, no. 2 (2011): 330–51.

⁵ John Griffiths, “The Idea of Sociology of Law and Its Relations to Law and to Sociology,” in *Law and Sociology*, ed. Michael Freeman (Oxford: Oxford University Press, 2006), 60–62 and William

gained the monopoly over the creation and application of norms to which they aspired. Whether formally acknowledged or not, other prescriptive normative systems, for example customary practices or religious laws, continued to exist and were incredibly important.

Pushing back, scholars of empire and post-colonial societies asserted that, although all societies had different sub-groups with different norms and enforcement mechanisms, there was a fundamental difference between this “natural” state and a colonial (or post-colonial) situation, in which legal systems imposed by European powers coexisted side by side with indigenous legal spheres. These indigenous legal spheres reflected historically embedded values that pre-dated colonialism and therefore could challenge state law in a particularly effective manner.

By the late twentieth century, a third generation of scholars added to the discussion new scenarios. One was current-day Europe, where society is said to have taken on a multicultural turn.⁶ Should European states recognize the validity of norms originating in immigrant groups and, if such were the case, would this not be a new form of legal pluralism? Another scenario that was considered was the penetration of non-state law to the national territory in the form of regulations by international bodies, or other transnational entities. In Europe, the most pervasive intervention came from European Union law, but there as elsewhere, other non-state-made norms also mattered, such as those coined by global commercial actors, or by international law. Eventually, a third scenario of legal pluralism would also be invoked, depicting the fragmentation of global law making, which no longer depends on interstate agreements and instead is often at the hand of multiple instances and actors.⁷

Though radically distinct, all these depictions, whether continental or Anglo-centered, shared the project of de-centering state-law. Whether this was required because of the conviction that law sprang spontaneously inside the community thus not requiring institutional buildup (as in Germany), the persistence of indigenous legalities (as anthropologists insisted), because states never achieved the desired hegemony, or because external laws constantly modified their legal structures, all authors coincided in questioning the monopoly of states over the legal system, insisting on the contrary on the various ways by which a great variety of actors and groups also created norms which either made the state unnecessary, or ran parallel to it.⁸ Most suggested that state monopoly was but a project that eighteenth-century monarchs and

Twining, “Normative and Legal Pluralism: A Global Perspective,” *Duke Journal of Comparative and International Law* 20 (2010): 473–517. Combining interest in both colonial and non-colonial domains is John Glissen, ed., *Le pluralism juridique* (Brussels: Université de Bruxelles, 1972).

⁶ André J. Hoekema, “European Legal Encounters between Minority and Majority Cultures; Cases of Interlegality,” *The Journal of Legal Pluralism and Unofficial Law* 37, no. 51 (2005): 1–28.

⁷ Paul Schiff Berman, “The New Legal Pluralism,” *Annual Review of Law and Social Science* 5 (2009): 225–42 and Baldassare Pastore, “Pluralismi giuridici e trasformazioni del diritto contemporaneo,” *Quaderni fiorentini* 50, no. 1 (2021): 399–432.

⁸ John Griffiths, “What is Legal Pluralism,” *Journal of Legal Pluralism and Unofficial Law* 24 (1986): 1–55.

nineteenth-century state makers proposed, but which either did not represent correctly the historical experience of law, or never came to fruition. According to others, this project was inadequate to begin with, and/or was no longer viable or suitable in the present. Among other things, this was the case because law should not be state centered or because legal equality (the imposition of a single law equally on all) failed to materialize and/or it no longer necessarily embodied a desired result, many now believing that if people were different, they should be allowed to live under a different law. Rather than isolated individuals who should be treated evenly, according to this emerging vision, society was made of multiple communities, and group membership mattered.

This shared criticism pushed legal pluralists in certain directions. Except for rare exceptions, most centered their attention on secular law, mostly forgetting the role of religion, which was fundamental to the emergence of normativity in most—if not all—societies (on this issue also see the paper by Caroline Humfress in this volume).⁹ Frequently, legal pluralism became a vehicle allowing to celebrate both exceptionality and diversity, where the right to have a different legal culture would be applauded. For some this impulse was accompanied by the desire for restorative justice, which would contemplate the negative impact of states and state law, most particularly on those in less advantageous positions.¹⁰ Several authors also questioned the paradigm that law reproduced the will of the sovereign nation as expressed by its representatives in parliament, and as guided by reason and natural law. For those taking this route, the state was never a neutral actor and there was never a single common good that perfectly considered the plurality of interests and desires of all members. Often expressing disillusion with the state for failing to stand up to its promises, others expressed fascination not with sameness and certitude, but with plurality and informality. In various authors one can even detect a nostalgia for Old Regime hierarchies, and/or a belief in the ability of groups to autoregulate themselves without external intervention.¹¹

Regardless of where they stood on these issues, scholars belonging to the various currents coincided in concluding that the legal orders of the past were plural.¹² They constantly observed (though often in passing) that prior

⁹ One early exception is “El pluralismo jurídico en la América española, 1492–1824,” in *Los orígenes españoles de las instituciones americanas. Estudios de derecho indiano*, ed. Alfonso García Gallo (Madrid: Real academia de jurisprudencia y legislación, 1987), 299–310. This text was originally published in 1975. García Gallo identifies Spanish secular law, canon law, and native law as the three elements making colonial Spanish American legal pluralism.

¹⁰ David S. Clark, “Legal Pluralism in Latin America,” *Arizona Journal of International and Comparative Law* 1 (1982): 29–31.

¹¹ On some of these issues see, e.g., Pietro Costa, “Il ‘pluralismo politico-giuridico: una mappa storico-concettuale,” *Quaderni fiorentini* 50, no. 1 (2021): 44–70 and 87–99. Here, both genealogies of legal pluralism coincide.

¹² E.g., Bianchi, *International Law Theories*, 227 and Séan Patrick Donlan, “Histories of Hybridity: A Problem, A Primer, A please and a Plan (of Sorts),” in *Comparative Law and Hybrid Legal Traditions*, eds. Eleanor Cashin-Ritaine, Séan Patrick Donlan and Martin Sychold (Zurich: Schulthess, 2010), 1–2.

to the emergence of the Leviathan, lawmaking took place in multiple autonomous corporations, with legal pluralism being “the obvious norm, not something that needed to be ‘unearthed.’”¹³ Yet, even if there is some truth to these observations, the conclusion that the legal orders of the past were in some way reminiscent of present-day pluralities, is extremely anachronistic. It constructs a false continuity between a past that allegedly had been displaced by the imposition of state law, and a present (and, in some cases, a future), in which we would admit that either pluralism survived and/or it was more beneficial. These false assumptions allow some to mistakenly argue that “historical research represents our richest vein of information” regarding how legal pluralism acts even in the present.¹⁴ This narrative, which presents legal modernity as a Middle Ages of sorts—that is, as a period that mediated between one plurality and another—is deeply faulted. Many features of this narrative are questionable, but in what follows I concentrate on those I consider most relevant because they greatly condition how we imagine the past and how we seek to draw lessons from it. I ask what law was before modernity erupted (and interrupted) and how our fascination with multiculturalism affects what we observe, and what we silence.

Law before the Modernity Erupted (and Interrupted)

Before modernity, law was not driven by states, nor did states exist as we imagine them presently.¹⁵ In Europe, for example, law depended on a multiplicity of sources that today we would identify as including customs, court decisions, jurisprudence, norms of corporations and communities, and royal decrees, as well as a wide array of debates that were grouped together during the late Middle Ages and the early modern period under the umbrella(s) of Roman, feudal, canon, and natural law, as well as the law of nations. This plurality of sources was accompanied by a plurality of authorities that were endowed with *iuris-dictio*, that is, with the capacity to “say the law.” The capacity to say the law conceptually included what today we would characterize as legislative, judicial, and executive powers. The aim of the law and the authorities that pronounced it was to indicate which was the right way to proceed (*directum*, the predecessor of *direito*, *derecho*, *diritto*, *droit*) to ensure a just solution. Despite agreement on the final goal, the task of identifying the right solution nonetheless produced a multiplicity of diverse indications that could easily be contradictory. The result was a law that was profoundly cacophonous, where a variety of authorities and actors spoke at the same time and invoked a

¹³ Berman, “The New Legal Pluralism,” 227.

¹⁴ Lauren Benton, “Historical Perspectives on Legal Pluralism,” *Hague Journal on the Rule of Law* 3 (2011): 57. Jane Burbank and Frederick Cooper, “Rules of Law, Politics of Empire,” in Ross and Benton, *Legal Pluralism and Empires*, 279–93 equally suggest that pluralism was so normal in the past that it required no explanation, no concept, no debate.

¹⁵ Paolo Grossi, *L'ordine giuridico medievale* (Rome-Bari: Laterza, 1996), António Manuel Hespanha, “A historiografia jurídico-institucional e a morte do estado,” *Anuario de Filosofía del Derecho* 3 (1986): 191–227, and Carlos Garriga, “Orden jurídico y poder político en el antiguo regimen,” *ISTOR, Revista de Historia Internacional* 16 (2004): 1–21.

diversity of sources. Polyphonic and polycentric, this complexity, nonetheless, had very little to do with legal pluralism the way it is characterized today.

First, the different sources and debates and the different authorities endowed with jurisdiction often affected the same individuals, not members of diverse groups. For example, an individual could be subjected concurrently to a *pater familias*, a municipality, and a guild. This jurisdictional plurality, however, did not necessarily indicate a legal plurality; though autonomous, the various authorities mostly applied an equivalent, rather than a distinct, law. Meanwhile, different sources and debates could be imposed by the same authorities. To take but a famous colonial example, both Spanish and indigenous judges could apply both Spanish and indigenous legal sources.¹⁶

Second, contemporaries who were aware of this complexity never considered that it represented a plurality of legal systems.¹⁷ From the perspective of these Europeans, law reflected a collective effort to understand what a pre-set divine order mandated and how it could be best protected. The task of the various authorities was not to make the law, but to declare and apply it to concrete situations.¹⁸ Rather than offering alternative solutions, or running in parallel because made by distinct authorities or inspired by distinct sources, law was singular, even as it assigned each person and thing a distinct place (and therefore distinct rights and duties) within the order. The law, in other words, was the same, individuals were not. Rather than a plurality of systems, what existed was a plurality of statuses, with each person (and thing) deserving justice according to who they were, considering differences in estate, gender, religion, place of birth, residence, and so forth. Contemporaries navigated this complex legal universe and the multiple entities charged with declaring the law believing that they constituted a cohesive whole, indeed a *ius commune*. In that universe, pluralism as we understand it today (the existence of various legal systems that interact) did not exist.

Modernity introduced a project that required the production of a new polity and a new legality.¹⁹ The new polity was to be made of citizens who would be directly tied to a central authority rather than to intermediate, relatively autonomous bodies endowed with jurisdiction. There would also be a single,

¹⁶ Tamar Herzog, "Colonial Law and 'Native Customs': Indigenous Land Rights in Colonial Spanish America," *The Americas* 63, no. 3 (2013): 303–21, Yanna Yannakakis and Martina Schrader-Kniffki, "Between the 'Old Law' and the New: Christian Translation, Indian Jurisdiction, and Criminal Justice in Colonial Oaxaca," *Hispanic American Historical Review* 96, no. 3 (2016): 517–48, and Thomas Duve, "Indigenous Rights: Latin America," in *The Oxford Handbook of Legal History*, eds. Markus D. Dubber and Christopher Tomlins (Oxford: Oxford University Press, 2018), 833–34.

¹⁷ Costa, "Il 'pluralismo politico-giuridico,'" 35–41 and 71–87. Costa observes that colonial domains were equally plural but not pluralistic. If anything, they were less pluralistic precisely because of the aims and methods of colonialism. Also see Jesús Vallejo, "El cáliz de plata. Articulación de órdenes jurídicos en la jurisprudencia del *ius commune*," *Revista de historia del derecho* 38 (2009): 1–13 and António Manuel Hespanha, *Como os juristas viam o mundo. 1550–1750. Direitos, estados, coisas, contratos, ações e crimes* (CreateSpace Independent Publishing Platform, 2015), 6–30, 167–84, and 231–32.

¹⁸ The authorities had *jurisdictio*, that is, the ability to declare, not make, the law: Pietro Costa, *Jurisdictio. Semantica del potere politico nella iuspublicistica medievale (1100–1433)* (Milan: Giuffrè, 1969).

¹⁹ Tamar Herzog, *A Short History of European Law: The Last Two and a Half Millennia* (Cambridge: Harvard University Press, 2018), 183–93 and Costa, "Il 'pluralismo politico-giuridico,'" 41–44.

undivided sovereignty that would no longer tolerate other powers but instead declare itself both exclusive and monopolistic. One consequence would be that the law would no longer depend on a plurality of sources which reflected a given, divine order. Instead, it would be created in a deliberate act by a group of reasonable individuals who would agree on the best policy to adopt. Thereafter, reasonable and responsible legislators would create norms that would be applied by an executive branch with the help of a judiciary. These norms would not uphold the existing order; they would improve it with the aim of ensuring the greatest happiness. A regime based on justice would be replaced by a regime centered on legality, and arbitrary decisions meant to ensure a just result would give way to a new focus on certitude, clarity, and predictability.

If these changes were important, no less crucial was the creation of a new legal subject, equal to all others. Abandoning the existing axiom according to which all humans were dissimilar and therefore deserved a differential treatment, modernity proposed that we imagine an abstract and decontextualized individual, identical to all others and deserving the same treatment by the same authorities. Put together, in Europe these ideas proposed to abandon the old system that bestowed rights and privileges to individuals according to who they were by a wide range of authorities and constitute instead a new polity, which would no longer acknowledge the plurality of persons and the appropriateness of distinctions by estate, profession, ethnicity, or place of birth or residence (these were the ones abolished; others persisted, such as distinctions by religion, gender, and civic status). This polity would only recognize a single authority that would oversee the affairs of everyone equally. It would be conceptually divided into three branches: a legislature that would create norms, an executive that would apply them, and a judiciary that would solve conflicts regarding the interpretation and application of the norms.

Though we may question the legacies of these measures, or their success, most of their basic assumptions still guide us. There is no longer a general matrix that upholds the existence of a pre-given legal order that humans cannot modify, that does not link law to human decision making, that prefers arbitrary decisions to certitude and clarity, or which rejects equality. This radical discontinuity, as well as the radically different nature of the European pre-modern legal universe, justifies the conclusion that the plurality of today has very little (or nothing) to do with past plurality. Not only does it function in radically different ways, but also the basic postulates on which it is based and the contexts in which it operates are radically distinct.²⁰ Any claims for continuity are therefore false: they ignore the obvious fact that all systems depend not only on how they are configured but also what they mean, which are their basic assumptions, and the contexts in which they operate.

²⁰ The differences between past and present are also studied in Brian Tamanah, "Understanding Legal Pluralism: Past to Present, Local to Global," *Sydney Law Review* 30 (2008): 376, Kaius Tuori, "The Disputed Roots of Legal Pluralism," *Law, Culture, and the Humanities* 9, no. 2 (2011): 336 and 349–50, and Giovanni Cazzetta, "Pagina introduttiva (unità e pluralità: spazi e tempi del pluralismo giuridico moderno). Cinquant'anni di *Quaderni fiorentini*," *Quaderni fiorentini* 50, no. 1 (2021): 18–25.

Rather than making the past a precedent for the present, or assuming differences only in intensity and frequency (as many do), it is time to conclude that, if the past has lessons to offer, it is not by observing fake continuities, but by stressing change. The past's most important contribution should be to help us de-naturalize the present. I will return later to this point.

A Multicultural Past?

If false continuities affected the way we imagined and used the past by making it a precedent to present-day structures, among other things by converting what was different into familiar, then the genealogy of legal pluralism also limited what we saw and what we ignored. Born as an instrument to revindicate the particularities of an allegedly autochthonous law—whether Germanic or indigenous—it had us focus on certain groups but not others. It celebrated a new type of equality whereby a plethora of distinct communities would be recognized as equally legitimate and their members as profoundly (yet legitimately) dissimilar to one another. Looking to the past to justify these developments, those who supported these moves argued that before states imposed an artificial legal homogeneity, different communities were allowed to pursue their own legal regime.²¹ This surely transpired in Europe, where Jews and Muslims for example had autonomy to handle their own affairs, and the different Germanic communities developed their own law, but it became particularly powerful in colonial territories where legal differentiation became a routine for organizing cultural differences.²²

The primacy of this type of “cross cultural legal pluralism” became particularly impactful in some areas such as Latin America where, by the end of the twentieth century, most states allowed the organs of (mostly) indigenous communities to impose a distinct legality on their members.²³ Though presented there (as elsewhere) as a return to the Old Regime, the insistence on cultural or ethnic differences as justifying legal pluralism is a relatively new phenomenon. Before the late eighteenth century, legal differences were anchored in a multiplicity of reasons, ethnicity and religion being one, but others being as important, including the place of residence, vassalage, occupation, estate, family membership, and gender, to mention but a few examples.²⁴ In that universe,

²¹ Simone Rodríguez Pinto and Carlos Federico Domínguez Ávila, “Sociedades plurales, multiculturalismo y derechos indígenas en América Latina,” *Política y cultura* 35 (2011): 49–66.

²² Lauren Benton, *Law and Colonial Cultures. Legal Regimes in World History, 1400–1900* (Cambridge: Cambridge University Press, 2002), 2 and 9, and Lauren Benton and Richard J. Ross, “Jurisdiction, Sovereignty and Political Imagination in the Early Modern World,” in *Legal Pluralism and Empires*, eds. Ross and Benton, 1, and Benton, “Historical Perspectives,” 58.

²³ This expression is taken from Dominic Birth, “Legal Pluralism in Early Modern England and Colonial Virginia,” *Journal of Institutional Studies* 5, no. 2 (2019): 717. On Latin American legal pluralism see Tamar Herzog, “Latin American Legal Pluralism: The Old and the New,” *Quaderni fiorentini* 50, no. 2 (2021): 705–36.

²⁴ Beatriz Rojas, ed, *Cuerpo político y pluralidad de derechos. Los privilegios de las corporaciones novohispanas* (Mexico: Instituto Mora, 2007) and Richard Ross and Philip J. Stern, “Reconstructing Early Modern Notions of Legal Pluralism,” in *Legal Pluralism and Empires*, eds. Ross and Benton, 109–41.

cultural and ethnic dissimilarities were not necessarily the most salient differences, nor—to paraphrase the words of Peter Burke—did those classified as members of a family, or the military, think about their belonging, rights, and authorities in ways substantially different (and by implication less important) than those forming part of ethnic or cultural groups.²⁵

In other words, if “different sorts of people have different sorts of law,” the issue would be deciding which “sorts” mattered.²⁶ There is absolutely no reason to assume that, in the past, “different sorts of people” necessarily sent us to differences in ethnicity or culture as they tend to do today, as in many past societies cultural distinctions were often the least important of possible distinctions. Somewhat similarly, there is no reason to assume that “sorts of law” would send us necessarily to a single law that would be typical to a group, as several types of laws could easily coincide within the same community. Europeans, for example, may be credited (or criticized) for developing the fiction that gave states monopoly over legal creation, yet European customary law was no less historically embedded or authentic than was indigenous law in the colonies, nor its marginalization by the growing hegemony of states was less conflictual or less painful than developments overseas.²⁷ If the questioning of state sovereignty, state law, and the advisability of a unique equal citizen was tied to the politics of the present, so were histories that insisted on a multicultural past. Yet, past pluralism had very little (or nothing) to do with acknowledging cultural differences, and certainly nothing to do with present-day conclusion that all cultures and religions are equally valid and equally deserve legal recognition. Almost no medieval or early modern individual would believe that such was the case.

Why This Matters

Anachronistic readings of the past hinder awareness to what has remained the same and what has changed. For example, the new insistence on equating pluralism with cultural and ethnic identities, because of its invocation of a supposed continuity with the past, tends to fossilize groups and their practices. It often suggests that cultural identities were “ancestral entities reproduced by processes that are endogenous to minorities” and, “in the name of protecting differences [it] imagines the possibility of creating barriers among

²⁵ Peter Burke, “Foundation Myths and Collective Identities in Early Modern Europe,” in *Europe and the Other and Europe as the Other*, ed. Bo Strath (Brussels: Peter Lang, 2000), 113–22.

²⁶ Halliday, “Law’s Histories,” 263.

²⁷ On what it took to control European customary law see, e.g., John P. Dawson, “The Codification of the French Customs,” *Michigan Law Review* 38, no. 6 (1940): 765–800, Gerald Strauss, *Law, Resistance, and the State: The Opposition to Roman Law in Reformation Germany* (Princeton: Princeton University Press, 1986), Martine Grinberg, “La rédaction des coutumes et les droits seigneuriaux,” *Annales HSS* 52, no. 5 (1997): 1017–38, and Simon Teuscher, *Lords’ Rights and Peasant Stories. The Writing and the Formation of Tradition in the Later Middle Ages*, trans. Philip Grace (Philadelphia: University of Pennsylvania Press, 2013). On customary law as a form of legal pluralism see Ralf Seinecke, “Rechtspluralismus in der Rechtsgeschichte,” *Rechtsgeschichte/Legal History* 25 (2017): 215–28.

groups so that autochthonous identities can be reproduced without being assimilated or marginalized.”²⁸ Yet, scholars have showed that the articulation of differences is an ongoing process that involves negotiations, contact with others, pressures from within and from outside, and constant transformations. They also demonstrated that measures intended to protect cultural minorities greatly modify group membership and group identities, as they provide powerful motives to privilege certain characteristics over all others. Rather than guaranteeing preservation, this type of pluralism guarantees change.²⁹

While pretending to fossilize groups and their legality, imagining a multicultural past also leads to other types of pluralisms being ignored. The literature on Afro-Latin Americans often points to these shortcomings.³⁰ It concludes that, while pluralism targeted both the right to be different, as well as the desire to amend historic and present injustices and inequalities, it has largely failed to adapt to the needs of all groups. Mainly centered on the validation of indigenous law, Latin American legal pluralism has been much more hesitant to recognize the persistence of a distinct legality among Afro-Latin Americans. According to researchers this was the consequence of the tendency to concentrate on ethnic groups, who in these narratives are presented as the only natural bearers of a distinct culture, including law, that merits recognition. As a result, conferral of communal rights, including legal rights, to Afro-Latin Americans usually took place only after members of these groups (or their advocates) adopted the language of ethnicity.³¹ This tendency to demand (and give) rights mainly by reference to ethnic but not racial classifications, for example, led in the Latin American case to important processes of ethnogenesis that had blackness “look increasingly like Indigeness.”³²

²⁸ Sérgio Costa, “Freezing Differences: Politics, Law, and the Invention of Cultural Diversity in Latin America,” in *Legitimization in World Society*, eds. Aldo Mascareño and Kathya Araujo (London: Routledge, 2012), 139. Also see 140–43 and 152. These questions are also treated in Chris Thornhill, Carina Calabria, Rodrigo Cespedes, Dominic Dagbanja, and Elizabeth O’Loughlin, “Legal Pluralism? Indigenous Rights as Legal Constructs,” *University of Toronto Law Journal* 68, no. 3 (2018): 441–45.

²⁹ Marcela Velasco, “Multiculturalism, Legal Pluralism, and Local Government in Colombia: Indigenous Autonomy and Institutional Embeddedness in Karmata Rúa, Antioquia,” *Journal of Latin American Studies* 50 (2017): 517–47, Rachel Sieder and Anna Barrera, “Women and Legal Pluralism: Lessons from Indigenous Governance Systems in the Andes,” *Journal of Latin American Studies* 49 (2017): 633–58, and Marc Simon Thomas, *The Challenge of Legal Pluralism: Local Dispute Settlement and the Indian-State Relationship in Ecuador* (New York: Routledge, 2017).

³⁰ Juliet Hooker, “Indigenous Inclusion/Black Exclusion: Race, Ethnicity and Multicultural Citizenship in Latin America,” *Journal of Latin American Studies* 37 (2005): 285–310 and Odile Hoffmann, ed. *Política e identidad afrodescendientes en México y América Central* (Mexico: UNAM, 2010).

³¹ Mark Anderson, “When Afro Becomes (like) Indigenous: Garifuna and Afro-Indigenous Politics in Honduras,” *The Journal of Latin American and Caribbean Anthropology* 12, no. 2 (2007): 385–86, and Eduardo Restrepo, *Etnización de la negritud: La invención de las “comunidades negras” como grupo étnico en Colombia* (Popayán: Editorial Universidad de Cauca, 2013).

³² Peter Wade, *Race and Ethnicity in Latin America* (Chicago: Pluto Press, 1997), 37.

What Pluralism Fails to Consider

Because contemporary pluralism has in its core the project of de-centering the state and rescuing the law-making powers of other authorities and groups, most narratives of legal pluralism pay very little attention to how members of groups that are said to display a distinct legality participate in the making and legitimization of state law. Rather than restricting themselves to legally posturing or adopting their strategies and rhetoric to suit state law, these actors also create, modify, and impose this law. Historians of colonial Latin America have long described their contributions, demonstrating not only how indigenous instrumentalized colonial law, but also how they modified and legitimized it.³³ Scholars of present-day Latin America equally showed that rights are usually not demanded by generically distinct subjects who wish to exercise them because of their embeddedness or because they would challenge state law.³⁴ Instead, most actors may not know or recognize that several legal systems exist, or that they could choose between them. Meanwhile, the assertion of indigenous rights often intensifies the power and reach of state-law by inserting rather than isolating indigenous actors. The result, in practice, is that present-day legal pluralism usually involves recognizing a plurality of legal subjects and legal rights, not a plurality of legal orders.

The lack of attention to the contribution of those who are said to exercise a different legal tradition to state law can partly be explained by most legal pluralists focusing on alternative legal systems and their capacity to create norms. Yet, paradoxically, almost none of these authors pays attention to the question how norms are produced: which are the processes and practices that create the knowledge that achieves normative status, where it is created, and who intervenes. Imagining law as a given, or centering on actors' wishes, rather than on the contexts that gives their choices certain meanings and significance, these authors fail to uncover the larger picture, or to interrogate how law—state or indigenous—comes into being.

Where Pluralism Contributes

Discussions of legal pluralism could be helpful in a variety of ways. They can raise awareness to the shortcomings of a legal history that centers on law as the product of states, which wrongly equates law with legislation, and which seeks to naturalize the emergence of national legal systems.³⁵ Yet, to achieve these goals, we must remember that the past was different. Acknowledging

³³ Yanna Yannakakis, "Beyond Jurisdictions: Native Agency in the Making of Colonial Legal Cultures: A Review Essay," *Comparative Studies in Society and History* 57, no. 4 (2015): 1070–82 and Alcira Dueñas, "Indian Colonial Actors in the Lawmaking of the Spanish Empire in Peru," *Ethnohistory* 65, no. 1 (2018): 51–73.

³⁴ Thornhill, Calabria, Cespedes, Dagbanja, and O'Loughlin, "Legal Pluralism?" and Thomas, *The Challenge of Legal Pluralism*, 2–4.

³⁵ António Manuel Hespanha, *Pluralismo jurídico e direito democrático. Prospetivas do direito no século XXI* (Brasil: Annablume Editora, 2013) and Patrícia André, "O direito nas dinâmicas paradigmáticas: a leitura realista e pluralista de António Manuel Hespanha," *Themis* 20, no. 35 (2019), 221–59.

these differences can help us question current-day structures by no longer intuitively suggesting that they were inherited and are therefore either necessary or foretold. Acknowledging differences also has the potential of stimulating scholars to focus on the challenges that recent developments pose: for example, how to manage a plurality of claims and recognize differences while maintaining a sufficient degree of consensus and integration. Alternatively, they could assist us in imagining consensus despite differences, equality despite dissimilarities. They can also help us envision the legal instruments that are necessary for such a complex system to coalesce, and how they could continue to develop as society changes.

Seen from this perspective, the greatest promise of legal pluralism would involve a move from describing fragmentation to finding new frameworks that would accept plurality with its ensuing inconsistencies and contradictions, yet also suggest ways to manage it effectively, creating bridges rather than building barriers.³⁶ There is nothing fundamentally progressive or emancipatory about legal pluralism. Legal pluralism could become a generative element, but to allow it to function in this way, among other things, we must free it from a false dependence on the past.

Tamar Herzog is Monroe Gutman professor of Latin American Affairs at Harvard University <therzog@fas.harvard.edu>.

³⁶ Bianchi, *International Law Theories*, 231. Also see Paul Schiff Berman, “From Legal Pluralism to Global Legal Pluralism,” in *Law, Society and Community. Socio-Legal Essay in Honour of Roger Cotterrell*, eds. Richard Nobles and David Schiff (Farnham: Routledge, 2014), 256–57 and Berman, “The New Legal Pluralism,” 236.

Cite this article: Tamar Herzog, “The Uses and Abuses of Legal Pluralism: A View from the Sideline,” *Law and History Review* (2023): 1–12. <https://doi.org/10.1017/S0738248023000160>