Appendix II

Normative and legal pluralism

Note: With growing awareness of 'globalization, the topic of normative and legal pluralism has become a central topic in legal theory, comparative law and several specialized fields of law. Although, strictly speaking, it falls outside the scope of this book, some teachers may choose to devote class time to it. Section 3 of Chapter 1 contains some materials that introduce the topic briefly. This Appendix reproduces some additional materials which can be used as a basis for discussion in connection with William Twining, *General Jurisprudence* (2009), ch. 16 (b).

Case studies*

1 *Sudan Government* v. *El Baleila Balla Baleila and Others* (1958) Sudan Law Journal and Reports 12

One day in 1957 a train ploughed into a herd of cattle crossing the railway track in a plain in the Western Sudan, killing about 80 head of cattle and injuring others. The victims belonged to the family of the Arab herdsmen who were looking after them.[1] Some six or seven herdsmen ran towards the deceased and after arguing with him, some of them speared him to death. The Major Court (trial court) acquitted five of the six accused but convicted one (A1) of murder under the Sudan Penal Code. On appeal he pleaded that he was 'deprived of the power of self-control by grave and sudden provocation' under s 249(1) which defined the offence of culpable homicide not amounting to murder. The Sudan Penal Code was based on the Indian Penal Code which in turn was based on English criminal law. The defence of provocation was rejected at first instance, but on appeal the Chief Justice, Mohammed Abu Rannat, reduced the finding of murder to culpable homicide. He dismissed the suggestion that damage to property can never ground a defence of provocation in homicide.[2] The test was the English test of the

* Adapted from W. Twining, 'Normative and Legal Pluralism', *Duke International and Comparative Law Journal*, forthcoming (2010).

[1] The report does not relate whether they belonged to one of the semi-nomadic pastoralist peoples of the Western Sudan for whom cattle have a symbolic and spiritual value far beyond their utility as wealth and as a source of milk and meat. On the significance of cattle among the Nilotic (non-Arab) Dinka, see F. Deng, 'The Cow and the Thing Called "What"', *Journal of International Affairs*, 52 (1998), 101, reproduced in Twining (ed.), *Human Rights: Southern Voices* (2009), ch. 2.

[2] The Chief Justice gave the accused the benefit of the doubt in respect of a possible cooling-off period and discounted the fact that a relative of his may been injured by the train.

reasonable man – in this instance the question was whether the accused had behaved reasonably according to local community values.[3] He explicitly distinguished the case of the owner of a brand new Cadillac killing the driver of a lorry who accidently destroys it in a collision.[4] The Chief Justice did not invoke customary law, rather he referred to local rural values in applying the imported English concept of the reasonable man to interpreting a Sudan statute.

2 The *Otieno* burial saga

Another, more famous case, illustrates the phenomenon of state legal pluralism, that is the recognition by a state legal system of religious or customary or other law for limited purposes. In 1986–7 the people of Kenya were enthralled, agitated and divided by a dispute over the burial of a well-known local lawyer. The S. M. Otieno case became the Kenya equivalent of the O. J. Simpson case.[5] Again the facts were relatively simple. In December 1986, S. M. Otieno (known as SM), a leading criminal defence advocate, collapsed and died in the garden of his property in Karen, a suburb of Nairobi. His widow had begun to make arrangements for his funeral and burial in Karen, when members of SM's clan intervened claiming that they had the right under Luo customary law to bury their kinsman in his birthplace, Nyalgunga – which they claimed was his real 'home'.[6] They argued that the clan had the right and the responsibility to decide on where and how the body of a clan member should be buried. The body was kept on ice in the mortuary for over six months while the dispute was litigated in three different courts. First, Otieno's widow, Wambui Otieno, obtained an *ex parte* order entitling her to bury the body in Karen. Mr Justice Shields reaffirmed his order, denying that the clan had *locus standi*. His main reason was that the deceased was a metropolitan and cosmopolitan lawyer who had evolved or opted out of Luo customary law. The advocate for the clan appealed to the Court of Appeal, who quashed the order and referred the matter back to the High Court.[7] After a trial lasting sixteen days, involving complex issues of both fact and law, Mr Justice Bosire found in favour of the clan on the basis that the deceased intended to be buried in his ancestral 'home'. After a further three months of

[3] "The reasonable man referred to in the textbooks is the man who normally leads such a life in the locality and is of the same standard as others… The real test is whether an ordinary Arab of the standard of A1 would be'; (*per* Abu Rannat CJ, at 13–14).

[4] Although the report is not explicit on the matter, there is an implicit contrast between an unsophisticated nomadic herdsman, for whom cattle have great cultural significance, and a well-to-do urbanite (perhaps a minister?) 'who knows much about the world', at 14.

[5] The best contemporary source is S. Egan (ed.) *S. M. Otieno: Kenya's Unique Burial Saga* (Nairobi: Nation Newspapers, 1987) (a rich collection of extracts from the contemporaneous reports by the *Daily Nation* newspaper). The case attracted a great deal of public attention at the time and has since generated an extensive literature. See D. Cohen and E. S. Atieno, *Burying S. M.: The Politics of Knowledge and the Sociology of Power in Africa* (1992), and J. Van Doren, 'Death African Style: The Case of S. M. Otieno', *American Journal of Comparative Law*, 36 (1988), 329.

[6] A great deal was made in the case about the meaning of 'home' in this context.

[7] *Virginia Edith Wambui Otieno* v. *Koash Ochieng Ougo and Omolo Siranga* (Court of Appeal at Nairobi, Civil Appeal No. 31 of 1987) (reprinted in E. Cotran, *Casebook on Kenya Customary Law* (1987), pp. 331–45).

legal manoeuvres and argument the Court Appeal found for the clan and dismissed the appeal by a 2–1 majority.

At first sight, this looked like a routine case involving a choice between imported English law and Luo customary law. If the deceased had made a will, it would have been governed by Kenya's Succession Act; but he failed to do so, and there was conflicting evidence about his wishes, which the Court of Appeal ruled were irrelevant. But from the start the case took on a highly emotive political dimension. First, the two judges who ruled for the widow were white, whereas Mr Justice Bosire and the majority in the Court of Appeal were Kenyan Africans. Related to this many perceived this as a clash between local African law and imposed colonial law.[8] However, it also was seen as a tribal conflict, in which a Kikuyu woman was being subjected to patriarchal Luo law. Arguments about whether and how an individual could opt out of customary law were hotly debated. And there was, of course, a feminist dimension. Luo customary law appeared to give the widow no say in her husband's burial (though this is probably too simple) and Wambui's appeal to Kenya's rather weak constitutional protection of gender equality was rejected. There were disagreements about both the substance of common law and Luo law applicable to the case and some of the family undiplomatically went so far as to suggest that some aspects of Luo custom relating to burial and the treatment of widows were repugnant, that is to say contrary to 'justice, equity and good conscience'. Thus the case involved clashes of interest and values not only between imported 'colonial law' and customary law, but between rural and urban values, gender equality and patriarchy, individualism and communitarianism,[9] tradition and modernization, and, perhaps most significant in Kenya, between Kikuyu and Luo. In the aftermath, not only was a quite large literature generated,[10] but inter-tribal engagements were broken off, many more wills were written, and the place of customary law in the national legal system generally became a matter of strong political contention. Shortly after the case, John Khaminwa, counsel for the widow and a well-known critic of government, was awarded an honorary degree by Haverford College for his contribution to civil liberties. The immediate response of President Moi was to take the unprecedented step of appointing counsel for the clan (Richard Kwach) directly to the Court of Appeal, proclaiming in effect: 'Let foreigners reward those who support colonial institutions; Kenya rewards its own'.

The *Otieno* case richly illustrates the dilemmas of a newly independent African country in developing institutions that are suited to local circumstances and conducive to orderly social change and national unity. However, it is also not an example of legal pluralism in the anthropological or socio-legal sense. The national legal system is 'pluralistic' in the sense that it recognizes some religious and customary law, mainly as personal law for quite restricted purposes. The case

[8] The Court of Appeal refused to treat this as a choice between customary law and common law, arguing that both are complementary strands in the national law of a unified Kenya. 'We can, therefore state that in the course of developing a jurisprudence which will ultimately have a Kenya identity, the courts are enjoined to turn to African customary law as well as to the applied common law, to the decisions of the English courts and courts of Commonwealth countries'; Cotran, p. 344.

[9] Van Doren, pp. 346–7 [10] See n. 5.

was litigated in official courts and argued within a framework of a notionally unified municipal legal system. Indeed, the *Otieno* case is a reminder that state legal pluralism is not unimportant or uninteresting as some socio-legal scholars have suggested.

3 'Pasagarda law'

Santos uses the term 'Pasagarda law' to refer to the institutions, processes and norms concerning housing and other matters dealt with by the Residents' Association (RA) in an urban settlement (*favela*) in Rio in the 1970s.[11] The Residents' Association was a community-wide, democratic social action agency founded in 1966 under a quite formal constitution. It is a nice example of 'squatters' law' contrasted with, but sometimes echoing and imitating, 'the asphalt law' of the state system. Ironically, although its members were officially trespassers, the main work of the RA was concerned with property relations, involving housing, such as leases, inheritance and transfer of property.[12] So it might be interpreted as an illegal legal order. It is a relatively clear example of an institutionalized normative order oriented towards ordering internal relations within a community that largely fell outside the reach of the state legal system. The Residents' Association maintained a cautious arm's-length relationship with the police and was, it seems, largely tolerated by state officials. Santos' case study is widely regarded as a classic example of legal pluralism – an institutionalized and stable normative order governing important social relations in a law-like way co-existing with, but separate from, state law.[13]

4 The Common Law Movement

'The Common Law Movement', as described by Susan Koniak and others is the 'legal' arm of the militias in the United States.[14] It fits the category of an institutionalised normative order oriented to ordering relations both within these outlaw communities and with the outside world. 'Common law courts' have been set up in many states, 'freemen' do not recognise federal and state law for most purposes (including tax, social security, driving licences), and their activities (including harassment of officials) have from time from time been a matter of concern for state judges and law enforcement agencies. The Common

[11] B. de Sousa Santos, *Toward a New Common Sense* (1995). The situation has changed significantly since Santos wrote about it in the 1970s.

[12] One of the interesting aspects of Santos' study of the imitation and borrowing of concepts and forms borrowed from state law, but adapted to the special context. For example, the term *benfeitoria* was used in a quite different sense in Pasagarda and the official legal system; (Santos, pp. 176–8).

[13] In order to understand the internal dynamics and external relations of the Residents' Association, it seems to me a matter of no consequence whether the Residents' Association is designated as a 'legal order'.

[14] S. Koniak, 'When Law Risks Madness', *Cardozo Studies in Law and Literature*, 8 (1996), 65 and 'The Chosen People in our Wilderness', *Michigan Law Review*, 95 (1997), 1761. For further references, Google 'Common law movement – militias'.

Law Movement has a developed ideology and body of doctrine much of which is expressed in a legalistic form of discourse derived from traditional common law concepts. More than the Pasagarda Residents' Association it defines itself in opposition to municipal law. It challenges the legitimacy of most American federal and state law – with a few exceptions, including bizarrely the Uniform Commercial Code. It is an interesting example of a not insignificant phenomenon that is largely ignored, indeed almost 'invisible', except to state judges and enforcement officials. Over several years I have not encountered an American law student who had even heard of it, let alone studied it prior to my course.[15] If it warrants the label 'law', it is in the view of some a rare example of 'a crazy legal order'.

5 Pluralist discourses: Kenya and Indonesia

Common lawyers are familiar with the notion of 'normative ambiguity' – the coexistence of two apparently competing sets of norms within a single system: Karl Llewellyn's account of the rules of statutory interpretation in terms of two parallel columns of thrust and parry is perhaps the best known;[16] there are similar accounts by Lasswell and McDougal and the leading English commentator on statutory interpretation, Francis Bennion.[17] On a broader scale the coexistence of law and equity is sometimes presented as an example of the phenomenon.

A well-known anthropological anecdote in East Africa concerned the naive reaction of a researcher observing the dispute processes of a coastal group who regularly invoked two well-established sets of norms: one claimed (not always convincingly) to be rooted in tradition, the other in religion.[18] Typically in group decision-making processes respecting such matters as marriage formation, inheritance, and family disputes, one party (and his supporters) invoked 'traditional' norms, the other invoked Islamic ones. The outcomes bore some connection with the norms, but there was no obvious pattern of lexical priority or choice of norm rules. When asked why the group did not simplify their social life by deciding which body of norms had priority or by integrating the two sets into a single consistent code, the response was amazement: 'How could we possibly proceed if we had only one body of rules?' As one of my students remarked, the observer's question was perceived to be rather like asking: 'Why don't they decide which is the best football team *before* the start of the season?'

[15] On invisible and unnoticed legal orders, see GJP pp. 312–16.

[16] K. Llewellyn *The Common Law Tradition: Deciding Appeals* (1960), Appendix C pp. 522–35, based on *Vanderbilt Law Review*, 3 (1950), 395. On 'normative ambiguity', see , p. 244; see also *KLRM*, pp. 159–61 and *HTDWR* (1999), pp. 278–9, 354 and references there. On a broader scale the coexistence of law and equity is sometimes presented as an example of the phenomenon.

[17] E.g., M. McDougal and M. Reisman, *International Law Essays* (1981), F. Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (2001), chs. 2 and 3; cf. Julius Stone: 'competing versions of a legal category are a normal feature of the authoritative materials of the common law', *Legal System and Lawyers' Reasonings* (1964), p. 254.

[18] I have heard this story several times, but have seen no published version. It possibly relates to the Giriama people of the Coast Province in Kenya, but I am unable to confirm this.

Recently anthropologists have focused on discourse and modes of reasoning that may not be confined to particular arenas. For example, John Bowen has provided some rich illustrations about public reasoning in relation to local disputes in Akeh in Indonesia in both official courts and informal processes. He shows how one can weave into a single argument not only appeals to three distinct bodies of legal rules – *adat*, *shari'a* and state law – but also arguments about the relations between these norms and internal differences of interpretation within these different traditions.[19] Typically the point is not to *choose* a specific norm or *construct* a hybrid one to *apply* to a fact situation, but to reason towards an acceptable, typically negotiated, resolution of the problem.[20] Similarly, to be on the safe side, a careful user of law will try to satisfy several constituencies by conforming to all of them, for instance by going through two or three separate ceremonies of marriage.

6 Religious minorities in Europe

The rapidly expanding legal literature on religious and ethnic minorities in Europe documents the phenomena of Muslims and others sometimes giving priority to their own customs and religious norms, sometimes adjusting to state law, sometimes navigating skilfully between alternative sets of norms and institutions, sometimes using different sets of norms as argumentative resources in internal debates and in different state and non-state arenas. Conversely, the existence of such minorities raises a range of issues for judges, officials and policy makers.[21]

7 Comment

These case studies give the flavour of the mainstream socio-legal literature and illustrate a number of basic concepts and distinctions. Most commentators would probably agree that the *El Baleila Balla Baleila* case is not an example of legal pluralism, but rather of competing interpretations of a criminal statute and perhaps an example of 'a cultural defence' in municipal law. Similarly, the *Otieno* case, as suggested above, is an example of state legal pluralism (what Griffiths called 'weak legal pluralism'). Bowen's account of public reason in Indonesia is on the borderline. It is an excellent example of modern anthropological concern with modes of discursive reasoning, but it refers to reasoning both within and outside a state legal system. Pasagarda law, the Common Law Movement and institutionalized social and religious practices and customs within ethnic and religious minority communities in Europe are conventionally treated as examples of legal pluralism, insofar as they exemplify discrete

[19] J. Bowen, *Islam, Law, and Equality in Indonesia: An Anthropology of Public Reasoning* (2003).
[20] Bowen (2003) esp. pp. 27–35, 253–61.
[21] E.g. P. Shah (ed.), *Law and Ethnic Plurality: Socio-legal Perspectives* (2007); S. Bano, 'Muslim Family Justice and Human Rights: The Experience of British Muslim Women', *Journal of Comparative Law*, 2 (2007), 38.

institutionalized normative orders that are relatively separate from the law of the state. Recent studies of legal pluralism in Western countries (e.g. the Common Law Movement, studies of Muslim minorities in Europe and Ellickson's account of Shastra County in California),[22] underline the point that legal pluralism so conceived is not solely a colonial or postcolonial phenomenon. It exists in all multicultural societies, including our own.

However, legal pluralism studies also tend to interpret its scope quite narrowly. For example, they treat different schools of statutory or constitutional interpretation, choice of law rules in conflict of laws (international and domestic), polycentricity,[23] and forum shopping within a single legal order as not being examples of legal pluralism in a strict sense.

8 A consensus?

Mainstream socio-legal and anthropological studies of legal pluralism have tackled a wide range of phenomena from a variety of perspectives. With one major exception, there seems to be a broad consensus about a number of points. The exception has been a long-running controversy about how to conceptualize the 'legal' in 'legal pluralism'. These concerns are shared by some of the leading theorists in the field. For example, in 1988 Sally Merry argued that 'calling all forms of ordering that are not state law by the term law confounds the analysis'.[24] In 1993 Brian Tamanaha wrote of 'the folly' of a 'social scientific' concept of legal pluralism.[25] I have argued at length elsewhere that the problem of 'the definitional stop' – where to draw the line between legal and non-legal phenomena – is susceptible to workable and sensible solutions in particular contexts.[26] At least for 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 important part of understanding law.

Apart from the long-running and, in my view, largely unnecessary controversy about how to conceptualize law in this context, I suggest that we can construct an ideal type of socio-legal studies of legal pluralism up to about 1990 based on the following points:

[22] On the Common Law Movement see above fn. 21; on Muslim practices in Europe see above fn. 13, on Shastra County, see R. Ellickson, *Order Without Law* (1991).

[23] This refers to the eclectic use of sources in different sectors of one legal system; see H. Petersen and H. Zahle, *Legal Polycentricity: Consequences of Pluralism in Law* (1995).

[24] S. Merry, 'Legal Pluralism', *Law and Society Review*, 22 (1988), 869, at 878.

[25] B. Tamanaha, 'The Folly of the "Social Scientific" Concept of Legal Pluralism', *Journal of Law and Society*, 20 (1993), 192. See also S. Roberts, 'After Government? On Representing Law without the State', *Modern Law Review*, 68 (2005), 1.

[26] Especially *GJP* chs 4 and 12.

1 That if one adopts a broad conception of law, legal pluralism – [meaning the coexistence of two or more legal orders in the same time–space context] – is as much a social fact as normative pluralism. Accordingly, it is quite misleading to talk of 'legal pluralists' as a marginal school or sect or a particular theoretical perspective.[27]
2 It is important to distinguish between state legal pluralism (sometimes called weak legal pluralism), legal polycentricity (the eclectic use of sources within different sectors of one state legal system),[28] and legal pluralism as conventionally defined.
3 That from a global perspective, if one adopts a broad conception of law, legal pluralism is pervasive in all multicultural societies, which in today's world means most societies.
4 That legal pluralism is not new. Indeed, from the perspective of world history, the near monopoly of coercive power by a centralized bureaucratic state is a modern exception, largely confined to the Northern hemisphere for less than 200 years.
5 That acknowledging legal pluralism in this broad sense as a social fact involves no commitment to any of the following:
   a) that state law is unimportant;
   b) that the state is withering away;
   c) that acceptance of legal pluralism as a fact involves a denial or weakening of such ideals as liberal democracy, human rights and the rule of law. Indeed, as Santos warns us, we should not romanticize legal pluralism and non-state law.[29]
6 That it is a distortion to think of interlegality – relations between coexisting legal orders -as being typically one of conflict and competition. How such orders interact and interrelate is an empirical question covering a range of possibilities including symbiosis, subsumption, imitation, convergence, adaptation, partial integration and avoidance as well as subordination, repression or destruction. Interlegality is best viewed as a dynamic process rather than in terms of static structures.

QUESTIONS

1 Some scholars doubt that 'legal pluralism' is a meaningful term. Construct a case arguing that it is both meaningful and useful.
2 Which of the following would you include in a reasonably inclusive map of law in the Americas: (a) Pasagarda law; (b) the Common Law Movement; (c) 'mafia law'; (d) the Office of the Commissioner of [Major League] Baseball; (e) Jackson Memorial Hospital; (f) Rules of Table Tennis as

[27] F. von Benda-Beckmann, 'Who's Afraid of Legal Pluralism?', *Journal of Legal Pluralism*, 47 (2002), 37, 72–4. This is one of the best theoretical articles on legal pluralism and we are in general agreement with its thrust.
[28] See above fn. 23. [29] See D. Galligan, *Law in Modern Society*,(2007), ch. 9.

approved by the International Table Tennis Federation? Give reasons for your answers.

3 'Plural' means 'more than one'. What are the units which are said to be plural in normative and legal pluralism?

4 Comment on the following quotation:

> 'Co-existence' thus can mean many different types of interrelations and social practices. Elements from different systems may be fused in one context, and reproduced as distinct 'pure' systems in the other – theoretically by the same people, in the same village, on the same day … Through any single process contributing to reproduction of one subsystem in view of alternatives, the relationship between the subsystems is reproduced as well. What can be generalised from any such single process, however, is limited. For simultaneously and through time, a multitude of such single processes occurs, in many different contexts, with different outcomes and different further consequences. These complexities defy easy generalisations on the existence and actual configuration of plural legal orders at macro-level, macro understood as a large-scale socio-political space.[30]

5 'Postmodern jurists love legal pluralism … The crucial question of how to reconstruct the postmodern architecture, the connections between the social and legal fields finds a highly vague answer: interpenetrating, intertwined, integral, superposed, mutually constitutive, dialectical … we are left with ambiguity and confusion. After all, this is the very charm of postmodernism' (Gunther Teubner).[31]

Does one have to be a 'postmodernist' to accept that legal pluralism as a phenomenon is interesting and important?

WLT

[30] F. von Benda-Beckman, 'Who's Afraid of Legal Pluralism?', pp. 70–1.

[31] 'The Two Faces of Janus: Rethinking Legal Pluralism', *Cardozo Law Review*, 13 (1992), 1443, 1443–4, discussed at *GLT* 87–8.