

**Customary Law in a Transnational World: Legal Pluralism Revisited**  
**For Conference on**  
**Customary Law in Polynesia, 12<sup>th</sup> October, 2004**

Draft:

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*Customary Law in a Transnational World: Legal Pluralism Revisited.*

The power of law in regulating the social, economic and political life of society is widely acknowledged. For law is embedded in and shaped by processes that have an impact upon political, economic, and social development across the globe. Scholars have observed that law represented the cutting edge of colonialism in its attempts to control and govern its colonial subjects while bringing about their transformation and that of the societies in which they lived. Its role continued to have a powerful presence in the postcolonial period when many newly independent countries turned to law as a form of social-engineering within the nation state. In recent years, attention has focused on globalisation as a phenomenon and local communities' responses to it. This has led to a growing recognition of the importance of transnational forms of law and ordering derived from diverse sources, including the World Bank, the European Convention on Human Rights, the World Trade Organisation, the World Health Organisation, the International Monetary Fund, the African Union, and religious movements. The success or failure of polities and persons' access to, and use of, law raise questions about the power and authority to construct meaning at multiple levels, including, local, regional, national and international domains that intersect with one another in a variety of ways. This raises questions about the manner in which law operates in different places at different levels and at different moments in the historical record – questions that are important for promoting a more informed understanding of the processes that underpin law's continuity, transformation, and change.

Both lawyers and social scientists are concerned with the relationship between law and power – where it is located, how it is constituted and what forms it takes. They address these questions, however, from different perspectives with the result that they provide very different insights into legal analyses and the ways in which law works. Conventional legal theorists limit the scope of their inquiry to an analysis of law-as-text through a rigorous exposition of doctrinal analysis founded on a specific set of sources, institutions and personnel that gain their authority and legitimacy from a formal model of law derived from the nation-state. In contrast, social scientists pursue a broader remit which extends

beyond the study of formal legal institutions to take account of the social basis upon which law operates. In this way both anthropological<sup>1</sup> and feminist<sup>2</sup> approaches to law have challenged conventional legal theory by extending the scope of what constitutes a legitimate focus for legal inquiry and drawn together the threads of ‘public’ and ‘private’ dimensions of social life to reveal what underpins the relationship between power, law, and discourse that governs people’s lives. Such approaches are important because they highlight what is otherwise rendered invisible by conventional legal discourse, namely the social processes central to people’s lives that frame an individual’s access to and use of law. What is made visible is the circumstances under which individuals find themselves silenced or unable to negotiate with others in terms of daily life, the types of

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<sup>1</sup>See K.N. Lewellyn, K.N. and E.A. Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman, University of Oklahoma Press, 1941); M. Gluckman, *The Judicial Process among the Barotse of Northern Rhodesia (Zambia)* 2<sup>nd</sup> ed (Manchester, Manchester University Press, 1955), *Custom and Conflict in Africa* (Glencoe, Ill. And Oxford, Free Press and Blackwell, 1955).; P. Bohannan, *Justice and Judgment among the Tiv* (London, Oxford university Press for the International African institute 1957, 2<sup>nd</sup> ed with new preface 1968); J.Collier and J.Starr (eds) *History and Power in the Study of Law: New Directions in Legal Anthropology* (Ithaca, Cornell University Press, 1989); L. Pospisil, *Kapauku Papuans and Their Law* (New Haven, Yale University Publications in Anthropology n. 54, Yale University Press); Schapera (1938).; S. E. Merry, *Urban Danger: Life in a Neighborhood of Strangers* (Philadelphia, Temple University Press, 1981); S.F.Moore, Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study. 1973 *Law & Society Review* 7:719-746, *Law as Process: An Anthropological Approach*. London (London, Routledge and Kegan Paul, 1978); L. Nader and B. Yngvesson, “On Studying Ethnography of Law and its Consequences” in J.J. Honigman (ed) *Handbook of Social Cultural Anthropology* (Chicago, Rand McNally, 1973) at 9910921; I. Schapera, *A Handbook of Tswana Law and Custom* (London, Oxford University Press for the International African Institute, 1938); J.L.Comaroff and S.A. Roberts, *Rules and Processes: The Cultural Logic of Dispute in an African Context* (Chicago, University of Chicago Press, 1981) and O.Harris (ed), *Inside and Outside the Law: Anthropological Studies of Authority and Ambiguity* ( London and New York: Routledge, 1996) to name but a few of the many who have contributed to the development of anthropology of law.

<sup>2</sup> See A. Bottomley and J. Conaghan, Introduction. In special issue: Feminist Theory and Legal Strategy. 1993 *Journal of Law and Society* 20(1):1-5; C. Delphy and D. Leonard, *Familiar Exploitation: A New Analysis of Marriage in Contemporary Western Societies* (Cambridge, Polity Press, 1992); M.A. Fineman, Implementing Equality: Ideology, Contradiction and Social Change – A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce. 1983 *Wisconsin Law Review* 4:789-886; A. Griffiths, *In the Shadow of Marriage: Gender and Justice in an African Community* (Chicago, University of Chicago Press, 1997, “Gendering culture: towards a plural perspective on Kwena women’s rights” in J.K. Cowan, M. Dembour and R. A. Wilson (eds) *Culture and Rights: Anthropological Perspectives* (Cambridge University Press, Cambridge, 2001) at 102-126, “Doing Ethnography, Living Law, Life Histories and Narratives from Botswana” in *Practicing Ethnography in Law: New Dialogues, Enduring Methods*. J. Starr and M. Goodale (eds) (New York, Palgrave/St. Martin’s Press, 2002) at 160-181; K. MacKinnon , *Feminism, Marxism, Method and Law: An Agenda for Theory*. 1983 *Signs* 8(2):635-658; K. O’Donovan, *Sexual Divisions in Law* (London, Weidenfeld and Nicolson, 1985); S.M. Okin, *Justice, Gender and the Family* (New York, Basic Books, 1989); F. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*. 1983 *Harvard Law Review* 96(7):1497-1578 and C. Smart, *The Ties That Bind: Law, Marriage and Reproduction of Patriarchal Relations* (London and Boston, Routledge and Kegan Paul, 1984) to name but a few of those who have contributed to feminist scholarship on law.

discourse that emerge from these negotiations and the affect they have on facilitating or constraining individuals recourse to law.

Many contemporary commentators and researchers have stressed that we are now living in an era of significant change: a moment in history, a turning point, a time of transition and radical social change; an end of industrial society and the end of the promise of the Enlightenment<sup>3</sup>, the 'end of history' as 'the West' has conceived it<sup>4</sup>(Fukuyama 1989). Such processes of change – whether seen as the latest manifestation of some 'modernist' conception of history and 'progress' or as the beginnings of a 'post-modernist' era – not only affect the so-called 'advanced' or 'developed' societies but also the poorer nations of the world. Indeed commentators stress, how much of what we now witness, is essentially 'global' in scope, entailing the accelerated flows of various commodities, people, capital, technologies, communications, images and knowledge across national frontiers.

Such developments have created challenges for legal theorists with respect to the nature of law and its manifestation both within the nation state and beyond its boundaries. These challenges require a rethinking of the relationship between law, culture and rights which I will be addressing in my talk today

#### *Challenges posed by Globalisation.*

While globalization is not a new phenomenon, it reflects a dynamic process that embraces changing scales of human social organization and the exercise of power so that the current forms it adopts create new constellations of legal complexity that need to be addressed. This raises questions about how to perceive of customary law and its relationship with national and transnational entities, raising questions about the plurality of law and legal pluralism. The term legal pluralism and the concepts it encompasses cover diverse and often contested perspectives,<sup>5</sup> ranging from the recognition of differing

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<sup>3</sup> A. Touraine, Is Sociology still the study of society? 1984 *Thesis 11*, no. 23 and The waning sociological image of social life 1989 *International Journal of Comparative Sociology* 25 (1 and 2).

<sup>4</sup> F. Fukuyama., The end of history 1989 *The National Interest* No.16 (Summer).

<sup>5</sup> For an overview of the field see J. Vanderlinden, "Le pluralisme juridique: Essai de Synthèse" in J.

legal orders within the nation-state, to a more far reaching and open-ended concept of law that does not necessarily depend on state recognition for its validity. This latter concept of law may come into being wherever two or more legal systems exist in the same social field. The two perspectives range along a continuum, which varies according to the degree of centrality that is accorded to state law. On the one hand, state law defines the conditions under which legal pluralism is said to exist, including the recognition of customary law. On the other hand, the centrality of state law is displaced by recognition that it may be only one of a number of elements that give rise to a situation of legal pluralism, giving rise to the possibility that customary law is not dependent on state law for its validity. These two perspectives give rise to different strategies for dealing with customary law in a transnational world, namely whether to work for recognition of customary law within the state national legal system, or whether to claim recognition for it outside this system. For example, the strategy behind the Mabo case<sup>6</sup> in Australia was to make the national legal system recognize native title, demonstrating that indigenous laws, customs and traditions, could be accommodated within the Common law paradigm. While native title could be extinguished in a number of ways, the decision opened up the

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Gilissen ed. *Le pluralisme juridique* (l'Université Bruxelles, Bruxelles, 1970), "Return to Legal Pluralism: Twenty Years Later" (1989) 28 *Journal of Legal Pluralism and Unofficial Law* at 149-157; M. Galanter, "Justice in Many Rooms: Courts, Private Ordering and Indigenous Law (1981) 19 *Journal of Legal Pluralism and Unofficial Law* at 1-47; J. Griffiths, "What is Legal Pluralism?" (1986) 24 *Journal of Legal Pluralism and Unofficial Law* at 1-55; A. Griffiths, *In The Shadow of Marriage: Gender and Justice in an African Community* at 28-38 and 211-240 (Chicago: Chicago University Press, 1997); S.E. Merry, "Legal Pluralism" (1988) 22(5) *Law & Society Review* at 869-896; F. von Benda-Beckmann, "Comment on Merry" (1988) 22(5) *Law & Society Review* at 897-901; K. von Benda-Beckmann and F. Strijbosch eds, *Anthropology of Law in the Netherlands* (Foris Publications, Holland and Cinnaminson, 1986); A. Allott and G. Woodman eds, *People's Law and State Law: The Bellagio Papers* (Foris Publications, Holland and Cinnaminson, 1985); C. Greenhouse, "Legal Pluralism and Cultural Difference What Is the Difference? A Response to Professor Woodman" (1998) 42 *Journal of Legal Pluralism and Unofficial Law* at 61-71; C. Greenhouse and F. Strijbosch eds, "Legal Pluralism in Industrialized Societies", (1993) 33 *Journal of Legal Pluralism and Unofficial Law*; G. Woodman, "Customary law, State courts, and the Notion of Institutionalization of Norms in Ghana and Nigeria" in A. Allott and G. Woodman eds. *People's Law and State Law: The Bellagio Papers* (Foris Publications, Holland and Cinnaminson, 1985), "Ideological Combat and Social Observations: Recent Debate about Legal Pluralism" (1998) 42 *Journal of Legal Pluralism and Unofficial Law* at 21-59; N. Roulard, *Legal Anthropology* (trans. Phippe G. Planel London: Athlone Press, 1994); J. Belley "Pluralisme juridique" in A. Arnaud dir. *Dictionnaire encyclopédique de théorie et de sociologie du droit* 2<sup>nd</sup> ed (Paris, Librairie Générale de Droit et de Jurisprudence, 1993); W. Tie, *Legal Pluralism: Toward a multicultural conception of law* (Aldershot and Brookfield: Dartmouth and Ashgate, 1999); L. Sheleff, *The Future of Tradition: Customary Law, Common Law and Legal Pluralism* (London and Portland: Frank Cass, 2000)

<sup>6</sup> 1992 66 *A.L.J.R* 408. See also Justice R. Sackville, 'The Legal Protection of Indigenous Culture in Australia' 2003 11 *Cardozo J. Int'l & Comp. L.* 711.

way for indigenous groups to claim interest in large segments of their traditional lands if they could demonstrate the required continuing connection with those lands.

In contrast, the WAI 262 proceedings in New Zealand<sup>7</sup> dealing with the issue of folk lore protection alleged, amongst other things, that the Crown, by entering into a number of key intellectual property law instruments without proper consultation with the Maori, breached its obligations under the treaty of Waitangi. The claimants starting point in these proceedings was not the traditional taxonomy of intellectual property rights and a demonstration of how the concerns of the Maori Iwi could be accommodated within the traditional heuristic structure of intellectual property law, but rather the treaty of Waitangi and its guarantee of the right to sovereignty which they claimed the Crown had breached.

The term, legal pluralism, is of relatively recent origin, generally attributed to a collection of papers published by Gilissen in 1971 titled *Le Pluralisme Juridique*. Since then J. Griffiths<sup>8</sup> has mobilized debate around what he views as two different approaches to legal pluralism, one engaging with “weak”, “juristic” or “classic” pluralism (that he associates with a lawyers view of legal pluralism), and the other with a form of “strong”, “deep” or “new” legal pluralism, (associated with a social science view of law). For J. Griffiths, whose interest lies in establishing “a descriptive conception of legal pluralism”<sup>9</sup> for comparative purposes, it is the social science perspective that embraces law as an empirical state of affairs that is key. This leads him to define legal pluralism as “that state of affairs, for any social field, in which behaviour pursuant to more than one legal order occurs”.<sup>10</sup>

#### *Weak, Juristic or Classic Legal Pluralism*

Much of the earlier work associated with the weak, juristic or classic legal pluralism deals with indigenous or customary law represented as a counterpoint to European or

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<sup>7</sup> See G.W. Austin, ‘Re-Treating Intellectual Property? The WAI 262 Proceeding and the Heuristics of Intellectual Property Law’, 2003 11 *Cardozo J. Int’l & Comp. L.* 333.

<sup>8</sup> J. Griffiths, *supra* n.5.

<sup>9</sup> J. Griffiths, *supra* n.5 at 1.

<sup>10</sup> J. Griffiths, *supra* n.5 at 2.

western-style law. What to call law, other than state law, has generated a great deal of discussion. Terms such as customary, local, folk, informal, people's law and indigenous law have all been mooted, but the point has been made that there is no characterization which consistently follows any supposed distinction between state and folk law. Notwithstanding, the terms have been used mainly to characterize this law as being something "other" and "distinct from" state law.<sup>11</sup>

An interest in customary or indigenous law developed historically out of a combination of intellectual and pragmatic pursuits. Out of that period referred to as the Enlightenment came an interest in tracing the evolution of human development in which law played a key role because it was viewed as representing rationality over other forms of order, created, for example, out of self-interest or force. Thus, law became the index of a "civilized" society, marking a transition for humanity and society from an irrational to a rational state of being. In charting this progress, which was conceived in universal terms, law became key because it provided the predominant feature which would distinguish so-called primitive from more civilized societies. Given the evolutionary and universal hypotheses underlying such an account of human development, it was necessary to engage in comparative research, to look at law in other societies. Both lawyers and anthropologists rose to the challenge – none more so than Sir Henry Maine,<sup>12</sup> credited as the key exemplar and impetus behind this search for universal law.

At the same time the development and growth of nation-states in Europe was reaching its zenith, marked by the acquisition of colonies and colonial subjects that required to be governed. Whether under direct or indirect rule, regulation took the form of law which, as Channock,<sup>13</sup> among others has noted, was the cutting edge of colonialism in its attempt to control and govern its subjects while bringing about their transformation and that of the societies in which they lived. In this context, while European or western law was

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<sup>11</sup> For discussion of this issue refer to A. Allott and G. Woodman eds, *supra* n.5 at 13-20.

<sup>12</sup> Sir H. Maine, *Ancient law: Its Connections with the Early History of Society and Its Relations to Modern Ideas* (1<sup>st</sup> ed London, J. Murray, Reprinted as no. 734 in Everyman's Library, London, J.M. Dent and Sons, 1965).

<sup>13</sup> M. Channock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge: Cambridge University Press, 1985) at 4.

imposed on colonial subjects, it was also recognized that such law was inappropriate in certain cases, for example, in governing the family life of subrogated persons and that regulation of such matters should be left to the local, customary, or indigenous law of that group. It therefore became necessary to make a study of these forms of law to provide for its incorporation within the framework of the colonial state. In this way local, customary, or indigenous law was viewed as something “other” than western law, as a separate and distinct form of law. As noted earlier, under this model of legal pluralism, the state defines the parameters that mark the territories of legal systems within its domain, such as customary and Islamic law, in ways that depict them as separate and autonomous spheres. A prime example of this type of pluralism is provided by Hooker<sup>14</sup> who surveys plural legal systems in Asia, Africa, and the Middle East and who defines legal pluralism as circumstances “in the contemporary world which have resulted from the transfer of whole legal systems across cultural boundaries”.<sup>15</sup>

### *Critiques of this model*

This model of legal pluralism has been heavily criticized on the basis that it reflects a legal centralist or formalist model of law. It is perceived as being too statist in its conception of law, which has consequences for the ways in which we conceive of law. Under this model authority became centralized in the form of the state, represented through government, the most visible manifestation of which is the legislature. Law formed part of this process of government but was set apart from other government agencies, having its own specific institutions, such as courts and legal personnel who required specialist training. Law was conceived as gaining its authority from the state, and, as part of the process of government became authoritative. This authority, at its most basic level, was upheld through the power to impose or enforce sanctions.

To sum up, briefly, the characteristics of this model are that it promotes a uniform view of law and its relationship to the state,<sup>16</sup> one which places law at the center of the social

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<sup>14</sup> M. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford: University Press, 1975).

<sup>15</sup> M. Hooker, *supra* n.14 at 1.

<sup>16</sup> J. Griffiths, *supra* n.5 at 3.

universe and which endorses normative prescriptions for interpreting society. In this model legal norms are set apart from, and privileged over, social norms<sup>17</sup> and used to determine outcomes where conflict arises.<sup>18</sup> Thus "law" is confined to a particular framework, one that sets it apart from social life and which promotes an image of autonomy that is used to maintain its power and authority over social relations in general, thereby sustaining a notion of hierarchy while at the same time maintaining an image of neutrality and equality within its own domain. The pervasive power of this legal centralist or formalist model of law is such that it may be said that all legal studies stand in its shadow.<sup>19</sup>

Nonetheless this model of law has been highly contested. I do not have time to do more than highlight three critical flaws. The first involves the concept of law as a universal across time and space. The second concerns its monopolistic claim to state power over the recognition, legitimacy and validity of law. The third involves state law's claims to integrity, coherence and uniformity.

Turning to the first flaw.

#### *Law as universal across time and space*

Under this model law is decontextualised in that it is presented as universal across time and space. Thus, it not only purports to account for law through the course of history but also to mark its presence across the globe at particular moments in history. Such an approach is essentialist or reductionist in nature for it elevates a particular model of law that developed out of a particular period in history to the status of the governing paradigm that provides the framework for locating law at all times and in all places. Subject to critique within its own domain (see discussion of strong legal pluralism below), it becomes more problematic when used for comparative purposes for it exercises the authority to determine what counts as law to the exclusion of those accounts that fail to meet its criteria.

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<sup>17</sup> S.A. Roberts, *Order and Dispute* (New York, St Martin's Press, 1979) at 25; M.Galanter, *supra* n.5 at 20.

<sup>18</sup> S.A. Roberts, *supra* n.17 at 20; J.L. Comaroff and S.A. Roberts, *supra*, n.1. at 5.

<sup>19</sup> M. Galanter, *supra* n.5 at 1; J. Griffiths, *supra* n.5.

Turning to the second flaw.

*State power over the recognition, legitimacy, and validity of law*

This exclusionary power of classification led Evans-Pritchard,<sup>20</sup> who worked among the Nuer in southern Sudan, to observe that judged in these terms the Nuer did not have law. Dissatisfaction with branding those societies that did not conform to the centralist model, as primitive or lawless, prompted many scholars including Gluckman,<sup>21</sup> Bohannan,<sup>22</sup> and Pospisil<sup>23</sup> to shift their focus to the study of disputes. The advantage in making this shift was that it immediately expanded the field of inquiry, for, by focusing on disputes, scholars no longer had to locate their legal studies in particular sources and institutions. What became important was to define law, not in terms of form, but of substance, which represented the means by which order is established and maintained within society. This was reflected through a society's handling of conflict in disputes. Concerns over trying to define law cross-culturally also led a number of scholars at a later stage<sup>24</sup> to make the case for rejecting use of the term law, because of its parochial and ethnocentric connotations, in favour of using disputing and processes of order as the frame for comparative analysis. Many of these studies adopted a methodological approach based on ethnography, involving intensive fieldwork, which focused on local, specific, micro-studies in order to provide, what Clifford Geertz<sup>25</sup> has referred to as the "thick description" of analysis. As such they provided a counterpoint to analyses of law based on abstract legal theory and gave voice to the multiple ways in which people dealt with positions of dominance and subordination, exclusion from formal legal arenas, or negotiations surrounding their access to, and use of, law. They also marked a move away more generally, in the study of law, from the study of rules and institutional frameworks to more actor-oriented perspectives and the study of dynamic processes.<sup>26</sup>

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<sup>20</sup> Sir E. E. Pritchard, *The Nuer: A Description of the Modes of Livelihood and Political Institutions of Nilotic People* (Oxford, Oxford University Press, 1940) at 162.

<sup>21</sup> M. Gluckman, *supra*, n.1.

<sup>22</sup> P. Bohannan, *supra*, n.1.

<sup>23</sup> L. Pospisil, *supra*, n.1.

<sup>24</sup> R.L. Abel, "A Comparative Theory of Dispute Institutions in Society" (1973) 8 *Law & Society Review* at 217-347; S.A. Roberts, *supra* n.17; J.L. Comaroff and S.A. Roberts, *supra* n. 18.

<sup>25</sup> C. Geertz, *The Interpretation of Culture: Selected Essays* (New York, Basic Books, 1973).

<sup>26</sup> L. Nader and B. Yngvesson, *supra*, n.1; J.L. Comaroff and S.A. Roberts, *supra* n.1; A. Griffiths, *supra* n.5.

One reason for adopting an ethnographic approach to law was to provide a counterpoint to analyses of law based on abstract legal theory by engaging in the study of people's specific, concrete, lived-experiences of law. But while ethnography may provide another perspective on law which differs from those that are based on abstract legal theory it has also been subjected to critique about its claims to knowledge and representation. Clifford and Marcus<sup>27</sup> and Marcus and Fischer<sup>28</sup> among others, have challenged the ways in which anthropologists have constructed anthropological texts to establish 'ethnographic authority'. Wilmsen<sup>29</sup> has criticized the practice of ethnography as removing selected parts of social context from its social formation resulting too often in a form of cultural essentialism. Feminist scholars have challenged what they perceive of as the dominance of male authority in the construction of knowledge, including a critique of Marcus and Fisher for their failure to take account of or acknowledge the contributions made by feminist anthropology to the field, while feminist legal scholars<sup>30</sup> have long been critical of the ways in which mainstream legal discourse fails to take adequate, if any, account of women's voices, practices, and experiences in its analysis of law.

All the problems associated with the weak, juristic or classic form of legal pluralism come back to the question of power, that is, power to define law, to apply it and to use it. In other words, to accord authority, legitimacy, and validity to the claims made by the members of a society (or the converse). Collier and Starr<sup>31</sup> reject the concept of legal pluralism because, in their eyes, it fails to take adequate account of the power relations that pertain to legal systems and their relationships with one another, treating them as

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<sup>27</sup> J. Clifford and G. Marcus, *Writing Culture* (Berkeley: University of California Press, 1986).

<sup>28</sup> G. Marcus and M. Fisher eds, *Anthropology as Cultural Critique* (University of Chicago Press, Chicago 1989).

<sup>29</sup> E.N. Wilmsen, *Land Filled with Flies: A Political Economy of the Kalahari* (Chicago and London: University of Chicago Press).

<sup>30</sup> N. Lacey, "From Individual to Group?" in B. Hepple and E. Szyszczak eds. *Discrimination: The Limits of Law* (Mansell, London, 1992); C. Smart, *Feminism and the Power of Law* (London, Routledge, 1989), "The Woman of Legal Discourse" (1992) 1(1) *Social & Legal Studies* at 29-44, *Law, Crime and Sexuality: Essays in Feminism* (London, Sage, 1995); K. MacKinnon, *supra*, n.2., *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass., Harvard University Press, 1987); M.A. Finemann, *supra*, n.2., "Introduction" in M.A. Finemann and N. S. Thomsadsen eds. *At the Boundaries of Law: Feminism and Legal Theory* (Routledge, London, 1991) at xi-xvi; L. E. White, "Subordination, Rhetorical Survival Skills, and Sunday Shies: Notes on the Hearing of Mrs G" in M.A. Finemann and N.S. Thomadsen eds. *At the Boundaries of Law: Feminism and Legal Theory* (Routledge, London, 1991) at 40-58; M. Minnow, "Consider the Consequences" (1986) 84 *Michigan Law Review* at 900-918.

<sup>31</sup> J.F. Collier and J. Starr (eds), *supra*, n.1.

having equal weight when in reality this is rarely the case. While this charge may be laid against the weak, juristic or classic form of legal pluralism, it is not necessarily valid for the strong, deep or new legal pluralism that I will address in a minute.

Turning to the third flaw

*State law's claims to integrity, coherence, and uniformity*

In promoting the view that only state law is law and excluding other forms of normative ordering from falling within the definition of law, the legal centralist/formalist model makes assertions about the integrity, coherence, and uniformity of state law. While legal pluralists have challenged its ideological assertions as to the exclusivity of state law this has mainly been achieved, as Woodman<sup>32</sup> points out, by references to the existence and characteristics of non-state law. He argues that by focusing on the challenges raised by non-state law scholars have tended to accept implicitly the integrity of state law and the claims made for it (other than that of exclusivity). Yet he argues that “There is strong evidence that state laws are (a) not internally self-consistent, logical systems, and (b) not clearly bounded and distinct from other social normative orders”.<sup>33</sup> Nonetheless he underlines Merry’s observation that the ways in which other normative orders shape state law are “particularly unstudied”.<sup>34</sup> In the case of customary law, this requires an investigation into how it may vary in its content and application according to whether it is applied by local people, as part of their “living” law, as distinguished from what is recognized as customary law by lawyers and courts,<sup>35</sup> or is perceived of as international customary law.

*Reconceiving Law: Transnational and Global Perspectives*

Tracing the specific, concrete conditions under which customary law is brought into being and mobilized by various actors is important because it opens up spaces for recognition that are not dependent upon the state for its validity. In an age where law and legal institutions now cross local, regional and national boundaries doing so

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<sup>32</sup> G. Woodman, “Ideological Combat”, *supra* n.5 at 51.

<sup>33</sup> G. Woodman, “Ideological Combat”, *supra* n.5 at 51.

<sup>34</sup> S.E. Merry, *supra* n.5 at 884.

<sup>35</sup> G. Woodman, “Customary Law”, *supra* n.5.

acknowledges the fact that 'local domains' are embedded in and shaped by regional, national, and international networks of power and information. These intersecting, cross-cutting and dialectical relationships may be seen as the product of globalisation, defined by Twining<sup>36</sup> as "those processes which tend to create and consolidate a unified world economy, a single ecological system, and a complex network of communications that covers the whole globe, even if it does not penetrate to every part of it".

This perspective provides scope for examining the different ways in which transnationalised legal forms and principles are 'glocalised' through social practices in different socio-political spaces and contexts..

### *Reconfiguring Law in a Transnational World*

Such reconfiguration has implications for law. The very idea of a single site of legal sovereignty embodied in the state is destabilized by patterns of global legal interaction which erode the boundaries between domestic and international law, foreign and domestic legal systems and practices, and internal and external juridical authorities<sup>37</sup> (McGrew 1998:336). For, as Dezalay<sup>38</sup> observes, in the legal domain globalization "throws new light onto the old questions of autonomy, or if one prefers, the singularity of, national juridical cultures".

Such questions raise issues about the authority and legitimacy of law that require another way of conceiving of law. Teubner,<sup>39</sup> for example, concludes that the emergence of global law that has no legislation, no political constitution and no politically ordered hierarchy of norms has made it necessary to rethink the traditional doctrine of sources of law. This can be an emancipatory project while at the same time giving rise to serious concerns

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<sup>36</sup> W. Twining, *Globalisation and legal theory* (London, Edinburgh, Dublin, Butterworths, 2000) at 4.

<sup>37</sup> A.G. McGrew. 'Global Legal Interaction and Present-Day Patterns of Globalization', in Gessner, V. and A. C. Budak (eds), *Emerging Legal Certainty: Empirical Studies on the Globalization of Law* (Aldershot and Brookfield, Ashgate and Dartmouth, 1998) at 325-345.

<sup>38</sup> Y. Dezalay, Dezalay, Y. (1990), 'The Big Bang and the Law: The Internationalization and Restructuration of the Legal Field', in Featherstone, M. (ed.), *Global Culture: Nationalism, Globalization and Modernity* ( London: Sage Publications, 1990) 279-293 at 281.

<sup>39</sup> G. Teubner.(ed.), *Global Law without a State* (Aldershot: Dartmouth, 1997).

about the authority and legitimacy of law that emerges under these conditions. Koh <sup>40</sup> notes that given the rise of genuinely global problems and the emergence of non-state actors the role of international law alters so that it can no longer “simply co-ordinate state interests, but rather must facilitate state and non-state cooperation in such areas as humanitarian intervention, promotion of democracy and the rule of law, and transnational accountability.”

In this way transnational law becomes a subject in its own right, as its own category, as “in time the domestic and the international will become so integrated that we will no longer know whether to characterise certain concepts as quintessentially local or global in nature”. The positive aspects of this development are marked, for example, by attempts to develop a transnational private law catering to ordinary persons that would transcend the obstacles posed by current tort law which, for example, led to inadequate compensation being awarded to the victims of the Bhopal disaster.<sup>41</sup>

The negative aspects derive from concerns about the legitimacy of what ensues. As Banakar<sup>42</sup> points out, in modern legal theory the concept of law has been predicated on the concept of legitimacy, which in turn implies the acceptance of legal rules by citizens of the nation-states. Notions of "citizenship" and "national-state" do not have their parallels at a global level with the result that the legitimacy of international law making and law enforcement (established by the state actors or by the support structures created by business actors) becomes problematic. This is because traditional structures promoting accountability may be bypassed. McBarnet <sup>43</sup> demonstrates the dangers that may arise where professionals draw selectively on the laws of multiple jurisdictions to create

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<sup>40</sup> H. H. Koh, Koh, H. H. (2002), ‘Opening Remarks: Transnational Legal Process Illuminated’, in Likosky, M. (ed.), *Transnational Legal Processes: Globalization and Power Disparities* ( London: Butterworths, 2002) 327-332 at 328.

<sup>41</sup> M. Galanter, ‘Law’s Elusive Promise: Learning from Bhopal’, in Likosky, M. (ed.), *Transnational Legal Processes: Globalization and Power Disparities* (London: Butterworths, 2002) 172-185.

<sup>42</sup> R. Banakar, ‘Reflexive Legitimacy in International Arbitration’, in Gessner, V. and A. C. Budak (eds), *Emerging Legal Certainty: Empirical Studies on the Globalization of Law* ( Aldershot and Brookfield: Ashgate and Dartmouth, 1998) 347-398.

<sup>43</sup> D. McBarnet, ‘Transnational Transactions: Legal Work, Cross Border Commerce and Global Regulation’, in Likosky, M. (ed.), *Transnational Legal Processes: Globalization and Power Disparities*, (London, Butterworths, 2002) 98-113.

transnational legal constructs to meet their business clients' needs in ways that may subvert national regulations designed to serve the public interest.

### *Strong, Deep or New Legal Pluralism*

This legal pluralism recognises that there are multiple forms of ordering that pertain to members of a society that are not necessarily dependant upon the state for recognition of their authority. This form of pluralism allows for an analysis of law that avoids the kind of critiques leveled against the weak, juristic or classic legal pluralism discussed earlier. It acknowledges (as the other pluralism does not) what Santos has termed “porous legality” or “legal porosity” that is “the conception of different legal spaces superimposed, interpenetrated, and mixed in our minds, as much as in our actions [that constitutes] interlegality”.<sup>44</sup>

This strong, deep or new legal pluralism, that counteracts the predisposition to think of all legal ordering as rooted in state law, has been developed by scholars to take account of the dynamics of change and transformation in society. For example, Merry<sup>45</sup> articulates the ways in which studies embracing the new, strong or deep legal pluralism have reoriented, or may in the future reorient legal analysis away from the ideology of legal centralism and from essential definitions of law to an historical understanding, embracing an examination of the cultural or ideological nature of law and legal systems, and towards a dialectical analysis of the relationship among normative orders that provides a framework for understanding the dynamics of the imposition of law and resistance to it.

In dealing with these issues it is crucial to have an understanding of how these processes work. The uneven nature of globalization and of its differential reach and impact requires analysis that is based on empirical studies which document how states, communities, groups and households are enmeshed in global networks and flows in a whole variety of ways that highlight the enormous variation in control over, as well as the impact of the process within societies, as well as among them.

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<sup>44</sup> B. de Sousa Santos, “A Map of Misreading-Toward a Postmodern Conception of Law” (1987) 14(3) *Journal of Law & Society* at 279-302.

<sup>45</sup> S. E. Merry, *supra* n.5 at 889-890.

### *Globalisation and Law*

One arena where complex networks of communication have had an impact on the recognition of customary law and its relationship with state law is in the field of human rights. As Merry observes “indigenous groups often define themselves in terms being developed by the global movement of indigenous peoples’ human rights and the provisions of state law”.<sup>46</sup> Such groups, in making claims to retain their land and/or water rights, are forced by law to assert their cultural distinctiveness (regardless of whether that is a dominant feature for the group itself) if such claims are to be successful. In this way “the legal provisions of the nation in which an indigenous community lives as well as those of the international order affect how a particular indigenous community presents itself and the kinds of identities it assumes”.<sup>47</sup> This perspective is important, for it belies one that would simply treat such groups as “traditional”, in favour of acknowledging “recent accommodations to the shifting global and national frameworks of power and meaning in which the community lives”.<sup>48</sup> Biodiversity?

The speed with which human rights discourse has had an impact at both a global and a local level – as manifested through international conventions and instruments, an ever proliferating range of supra-national institutions dealing with “rights”, and through the local mobilization of rights by individuals, associations and “indigenous” groups, calls for a reinterpretation of the relationship between culture, rights and law.

Anthropologists have long been critical of human rights discourse where it presents such rights as universal and uncontested across the globe, drawing attention to their ethnocentric character, derived from “an idealist European political philosophy” (Wilson 1997:4), and the dangers of imposing this paradigm of rights, uncritically, on all societies. In questioning the provenance of such rights anthropologists made a link between rights and culture, just as the proponents of such rights did, with the

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<sup>46</sup> S.E. Merry, “Crossing Boundaries: Ethnography in the Twenty-First Century” (2000) 23(2) *PoLAR* 127-133 at 127.

<sup>47</sup> S.E. Merry, *supra* n.46 at 127.

<sup>48</sup> S.E. Merry, *supra* n.46 at 127.

consequence that the debate became polarized in terms of a universalist versus a relativist conception of rights.

Both positions, however, depended on linking rights to a particular construction of culture. As anthropological perceptions of culture have shifted to embrace it as a “network of perspectives” (Hannerz: 1992:265-266) or as a “sociological fiction, a shorthand referring to the disordered social field of connected practices and beliefs which are produced out of social action” (Cowan, Dembour and Wilson 2001:14), so the relationship between rights and culture has become redefined. Thus another perspective is acquired on the relationship between local, regional, national, and global domains and their relationship with law, one, which moves beyond an “ossified notion of culture and the binaries that it underwrites”.<sup>49</sup>

In reconceptualising culture, in analytical terms which stress process, fluidity, and contestation, anthropologists provide a link between law and social action that undermines any determinist or prescriptive view of the relationship between the two. This approach has the advantage of negating the identification of “*legal orders* and on-the-ground schema of *cultural identity*--as if cultural identity had some axiomatic corollary in territory and legality” (Greenhouse 1998:65). This approach which is premised on the "idea that law and cultural identity are each other's corollary" is as she points out "fundamental to the cultural self-legitimation of the nation-state".

### *Working with gender*

One arena where this type of analysis has proved emancipatory is in discussions concerning the gendered nature of law. As noted earlier, feminist scholars have long been critical of the ways in which mainstream legal discourse fails to take account of gender in its analysis of law. A legal pluralist perspective provides a means of giving recognition to those normative orders that impinge on women's lives and so factor them into analyses which can take account of the conditions under which women and men find themselves

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<sup>49</sup> L. Abu-Lughod, “Introduction: Feminist Longing and Postcolonial Conditions” in L. Abu-Lughod ed. *Remaking women: feminism and modernity in the Middle East* (Princeton University Press, Princeton, 1998) 3-31 at 17.

silenced or unable to negotiate with others in terms of day-to-day social life, or the converse, and how this shapes their perceptions, access to and, use of law. My own Kwena ethnography<sup>50</sup> drawn from detailed life histories and extended case studies highlights the gendered world in which women and men live and how this affects women's differential access to law, empowering women in some contexts while constraining them in others. In her study of how Swahili women pursue marital disputes in local Kadhi's (Islamic) courts, Hirsch<sup>51</sup> offers a nuanced analysis of the ways in which women acquire power or are deprived of it in a setting where customary law, religious law, Western law, and social norms concerning male and female speech intersect and interact. Hellum's work in Zimbabwe,<sup>52</sup> which draws on the concept of the semi-autonomous social field in the framing of her research, reveals the ways in which norms regulating kinship, marriage and gender were upheld or generated in the process of resolving procreative problems.

This type of analysis is especially pertinent for postcolonial societies where there is a tendency to analyse pluralism in terms of the weak, juristic, or classic model. The problem lies in the fact that, as Stewart observes

Postcolonial legal doctrine has a centralist orientation – the task of contemporary legal scholars is seen as interpreting the customary law which evolved in the colonial state courts in the light of contemporary legislation and supreme court practice. It is not concerned with understanding the contemporary social contexts despite the fact that the people's customs and practices are constantly evolving outside of the framework of court decisions and interpretations.<sup>53</sup>

Such an approach ignores the dynamics of social change and transformation. For those engaged in women's law in Africa

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<sup>50</sup> A. Griffiths, *supra* n.5

<sup>51</sup> S. Hirsch, *Pronouncing and Persevering: Gender and the Discourses of Disputing in an African Islamic Court* (Chicago: University of Chicago Press, 1998).

<sup>52</sup> A. Hellum, *Women's Human Rights and Legal Pluralism in Africa: Mixed Norms and Identities in Infertility Management in Zimbabwe* (Oslo and Harare: Tano Aschehoug and Mond Books, 1999).

<sup>53</sup> A. Stewart "The contribution of feminist legal scholarship" in A. Stewart ed. *Gender Law & Social Justice* (Blackstone Press, London, 2000) 3-18 at 11.

Concepts such as [the strong] legal pluralism and the associated tool of the semi-autonomous social field open up new and crucial ways within which the interaction of law and life can be explored, thereby making it possible to obtain a more holistic picture of the factors that affect women's lived realities and the choices they make, or the decisions and directions that are forced upon them.<sup>54</sup>

In this struggle women's groups within nation states have also managed to mobilize around international conventions, such as the UN Convention on the Elimination of All Forms of Discrimination Against Women, in order to challenge state laws that have had an adverse impact on them and their children. For example, the case of Unity Dow in Botswana who raised a constitutional challenge to the state's citizenship laws which prevented children born to Tswana women married to foreigners from acquiring citizenship, while at the same time granting citizenship to the children of Tswana men married to foreigners, and those of unmarried Tswana women whose fathers were non-citizens. In bringing this case Unity Dow had strong support from certain feminist groups within the country, such as Emang Basadi (Stand Up Women), as well as from other international human rights networks, such as the Urban Morgan Institute for Human Rights, University of Cincinnati College of Law, that lodged an Amicus Brief with the High Court in Botswana on her behalf.<sup>55</sup>

It is interesting to note that in this case the government of Botswana sought to justify discriminatory treatment between men and women on the basis of customary law. It argued, unsuccessfully, that when the Constitution was enacted the section dealing with discrimination expressly declined to cover sex on the basis that if such discrimination were to be outlawed then customary law itself would cease to exist. Thus the government invoked a 'right to culture' argument – that is, to the continued existence of Tswana

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<sup>54</sup> A.S. Bentzon, A.Hellum, J. Stewart, W. Nucube and T. Agersnap , *Pursuing Grounded Theory in Law: South-North Experiences in Developing Women's Law* (Norway and Zimbabwe, Tano Aschehoug and Mond Books, 1998) at 46.

<sup>55</sup> For details see A. Griffiths, "Gendering culture: towards a plural perspective on Kwena women's rights" in J.K. Cowan, M. Dembour and R. A. Wilson eds. *Culture and Rights: Anthropological Perspectives* (Cambridge University Press, Cambridge, 2001) 102-126 at 117-119.

customary law which is patriarchal in nature – in order to deflect an individual human rights claim.

In its judgment the High Court held that it ‘would be offensive to modern thought and the spirit of the Constitution to find that the Constitution was deliberately framed to permit discrimination on the grounds of sex’ (page 17 of transcript). It was heavily influenced by the provisions of the Women’s Convention, although Botswana was not a signatory to it at that time. On appeal, the Court of Appeal reaffirmed the High Court’s judgment, once again relying on provisions of international human rights instruments upholding non-discrimination, equal protection of the law, and the elimination of discrimination against women.

#### *Working with NGO’s*

Another arena where complex networks have had an impact on law involves economic development and international aid, where there has been a shift in policy from providing direct aid to governments on the part of multilateral agencies and donor states and a corresponding redirection of investment and development funds to private sector organizations. An important consequence of this policy has been the proliferation of non-governmental organizations (NGO’s) that provide an array of services including education, healthcare, voter literacy, small business development, resource management, and monitoring of human rights. These NGO’s represent a diverse array of organizations from multimillion-dollar organizations that operate on several continents to agencies that represent commercial interests, grass roots alliances, or village based religious or cultural groups. While they vary greatly in terms of size, organizational components, sources of funding, and their relationship with the state, it is clear that whatever their particular composition, “Local and transnational NGO’s may also operate on a global level, forming alliances with private companies or other NGO’s to facilitate the exchange of ideas and information, mediation between commercial interests and humanitarian concerns, and lobbying organizations like the UN on issues such as women’s empowerment and environmental preservation”.<sup>56</sup>

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<sup>56</sup> L. Leve and L. Karim, “Introduction Privatizing the State: Ethnography of Development, Transnational

### *Legal Pluralism in a Transnational World*

Given the uneven and diverse effects of globalisation Long<sup>57</sup> stresses the need to study the processes of ‘internalization’ and ‘relocalization’ of global conditions in order to uncover “the emergence of new identities, alliances and struggles for space and power within specific populations.” Strong legal pluralism provides a lens through which to analyse the operation and effects of legal plurality and local domains within a transnational world. In this enterprise actor-oriented perspectives are essential because they refuse to permit an analysis of local domains, such as customary law, as spheres that are simply acted upon through the imposition of external institutions, interests, or market forces deriving from national, regional or international agencies brought to bear on them. Instead, these perspectives provide for an analysis that not only examines how the global shapes local domains but how local domains respond. Such an analysis promotes a more finely tuned account of the effects of transnational forces and its interventions, one that acknowledges that these phenomena represent socially constructed and continually negotiated processes. This viewpoint not only allows for local agency but provides insights into local actors’ strategies for dealing with such phenomena, involving their manipulation, appropriation or, even, subversion of such phenomena, in particular contexts. This in turn promotes an understanding of how these “external” interventions become endowed with diverse and localized sets of meaning and practices.

In this way, social actors not only interact with transnational forces in terms of their own existing experiences and understandings of culture, but also acquire new experiences and understandings which are generated in the course of this encounter, so that, as Long observes, these processes provide “insights into the processes of social transformation”.<sup>58</sup> Thus a study of the concrete ways in which social actors negotiate their universe serves as an alternative form of analysis to that based on abstract and theoretical forms of discourse seeking to account for both continuity and change in social relations. The value of this type of analysis lies in the fact that actors’ actions “can in no way be seen as

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Capital, and NGO’s” (2001) 24(1) *PoLAR* 53-58 at 53.

<sup>57</sup> N. Long, “Gloablization and localization: new challenges to rural research” in H.L. Moore ed. *The Future of Anthropological Knowledge* (Routledge, London and New York, 1996) 37-59 at 43.

<sup>58</sup> N. Long, *supra* n.57 at 50.

simply determined by planned intervention or by the exigencies of culture”.<sup>59</sup> It also, as Long has argued, provides “new insights into the interpretation and analysis of neo-liberal policies, theories and practices that go beyond the common tendency to explore them solely from a macro-economic or macro-political angle”.<sup>60</sup>

### *Moving Forward: Developing a Legal Research Agenda*

These debates highlight the extent to which approaches to customary law and legal pluralism are dependant upon the ways in which law is constructed as a concept. Such construction marks ongoing processes of identification, negotiation, and contestation reflecting a project that is always in the making as scholars search for continuity and transformation in their analyses of law over time. Three ways in which an actor-oriented, ethnographic study of law in the strong legal pluralist vein could make a contribution to these debates and to the development of a research agenda that more adequately takes account of the global and local dimensions of law would be to explore the following.

#### *Law as a system of representation and meaning*

It would analyse law in terms of a system of representation, one that creates meaning within a system of state power. Such an analysis would examine how law creates, produces and enforces meanings and relationships about civilization, rationality, equality, and due process. It would attend to the cultural significance of law through examining discourses concerned, for example, with development, democratization, and the rule of law. However, it would also focus on the processes by which law comes to be a sign of cultural identity, and the implications this has for claims to citizenship and for the rights of various ethnic or minority groups which would not be solely dependant upon states assertions as to territory or territoriality. Such research would provide a more detailed comprehension of the ways in which ethnonationalist movements work, as well as a more comprehensive understanding of the factors underlying religious movements which cut across national boundaries and which, in some cases, form part of the opposition to the government of the day.

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<sup>59</sup> N. Long, *supra* n.57 at 52.

<sup>60</sup> N. Long, *supra* n.57 at 52.

### *Mobilisation of law at a local, national and international level*

It would examine the ways in which indigenous or local people seek to mobilize the support of the international community by engaging with a human rights discourse of self-determination and cultural rights. Such research would look at what sources these actors draw on in the construction of their claims and the ways in which they utilize international or global networks to construct their cultural identity. It would also explore the extent to which their claims are constrained by state law, while at the same time rendering state law open to challenge. It would investigate what are the shifting global, national and local frameworks of power that make such claims possible. Such research would directly examine the ways law, power, and solidarities cross-cut each other and would take account of the circulation and materializations of power in the local construction of authority, identities, norms and strategies. Natural resource management and environmental protection presents one pressing area for research, where indigenous groups and their representatives are trying to develop “indigenous” forms of management of forests, land, and water by calling for recognition of local communal rights. The ways in which they formulate their claims, in terms of participation, self government, “good governance” and sustainability, derived from the language of administration and international law, would make for a fruitful area of study.

### *State law as shaped by other normative orders*

It would explore the ways in which other normative orders shape state law that would provide for detailed analyses of its plurality and diversity within legal fields. This would allow for a more systematic account of the conditions which give rise to variation in state law, including the degrees of its institutionalization and mandatoriness. Such an analysis would provide a more fully informed understanding of the ways in which state law works, one which allows for differing degrees of compatibility and/or incompatibility, thus empirically subjecting state law’s claims to homogeneity to investigation. It would also examine the varying ways in which bureaucratic government agencies seek to administer the lives of those individuals and collectivities that are subject to them while at the same time taking account of the ways in which such persons and groups respond. Thus it would explore the multifarious ways in which the state, through its various

development programmes and organizational structures, attempts to control territory and people, and how this relates to non-state modes of control and regulation at both local and supranational levels. Part of this research would explore the ways in which state legal systems manage the differing ideological charters of its constituent populations and negotiate cultural meanings of difference. Such an approach would ensure that, in analysing difference, legal pluralism and cultural pluralism do not simply become equated with one another in ways that map the cultural self-legitimations of nation-states.