

Commentary

PLURALISM, DISAGREEMENT, AND GLOBALIZATION: A COMMENT ON WEBBER'S "LEGAL PLURALISM AND HUMAN AGENCY"[©]

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Legal pluralist scholarship, a body of literature to which Harry Arthurs has made a singular contribution, aims to uncover instances of norm generation beyond those usually associated with official law. State law, legal pluralists maintain, is not the sole or most important site of norm generation. Jeremy Webber's forceful, but friendly, critique¹ aims to repair perceived flaws in the pluralist enterprise. He claims that legal pluralists fail to attend to the element of normative disagreement within their field of study. That is, in the course of documenting the parameters of pluralist law-making communities and institutions, "legal pluralist theories ... treat as matters of fact normative claims that are contested within the very circumstances in which they are presumed to operate."² There is, relatedly, prevalent confusion between descriptive and active modes assessment—between describing normative parameters and actively constructing them in the course of description. In blurring these lines, legal pluralist scholarship, perhaps inadvertently, takes sides in normative disputes within communities that might be understood as more contingent than final. Webber aims to rehabilitate pluralist work by pulling on four central pluralist themes that are worth holding on to. These themes also make space for reconsideration of the normative

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¹ Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44 Osgoode Hall L.J. 167.

² *Ibid.* at 169.

importance of state law, which Webber views as emptied of significance in pluralist work. By situating official law in the centre of the normative universe, Webber maintains that the legal order's desire for certainty, at least in the interim, is secured. The imperative of certainty demands that disagreement, even within pluralist accounts, must give way to agreement, at least until the next occasion for disagreement arises.

In the first part of this comment, I address the role of disagreement, the blurring of normative and descriptive accounts, and the ambivalent role of the state. I aim to bring into question Webber's empirical assessments of pluralist scholarship. In the second part, I take up the idea of "interim finality" despite the fact of disagreement within and between plural legal orders. I argue that Webber is right to insist upon interim finality, for both analytical and strategic reasons. By way of illustration, I look to some of the rules and institutions we associate with economic globalization, namely, international commercial and investment arbitration. This also provides an opportunity to engage with matters that have been of concern to Arthurs in his more recent work.

I. PLURALISM AND DISAGREEMENT

Webber has identified a central paradox for legal scholars doing pluralist work: how to outline the parameters of non-state jurigenerative communities—the everyday work of legal pluralist scholarship—without also marginalizing sub-communities with alternative and contestable normative accounts; how, then, to avoid displacing the legal pluralism that may be sidelined by legal pluralist scholars?

This is a characteristic, undoubtedly, one finds in some legal pluralist work. Webber, however, makes little mention of those scholars guilty of the charge. Arthurs, whose career we honour in this volume, is mentioned only in passing and seems an unlikely target for this purpose. After all, one of the central objects in Arthurs' *Without the Law*³ is to decentre the authority of official law in the face of an emergent administrative legal order.⁴ This sort of enterprise is about identifying

³ H.W. Arthurs, *"Without the Law": Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985).

⁴ For a description of this sort of work, see Sally Merry, "Legal Pluralism" (1988) 22 *Law & Soc'y Rev.* 869 at 874.

new forms of legal regulation emerging outside of courts and official state law; it is not so much about cataloguing a detailed legal regime of the workplace. We could say the same thing about Sally Falk Moore, who is named in Webber's critique. Moore's field work with the Chagga of Mount Kilimanjaro describes interactions between official state law and local forms of social regulation. This sort of ethnographic work, according to Webber, is unconcerned with the origins of norms—"norms tend to be given—as much a matter of historical accident as of anything else."⁵ In the course of describing local law, legal pluralists like Moore take for granted the obligatory nature of norms without taking account of the "often deep disagreement over matters of obligation."⁶ Moore and others thereby impose an "artificial commonality" over matters that are "eminently contestable, obscuring and minimizing the presence of dissent."⁷

These charges against Moore seem misdirected. In her book, *Law as Process*,⁸ and her oft-cited paper, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study,"⁹ Moore attends repeatedly to the phenomena of disagreement, uncertainty, and indeterminacy. The Chagga work, which explores relationships between official and unofficial legal fields, describes "ongoing competitions, collaborations, and exchanges."¹⁰ There is no presumed consensus, but multiple conceptions of norms that give rise to a "symbolic consensus."¹¹ Moore describes her methodology as resting on the assumption that "in some underlying and basic sense social reality is fluid and indeterminate, and that it is transformed into something more fixed through regularizing processes, yet can never entirely or completely lose all of its indeterminacy."¹² Boaventura de Sousa Santos' field work on Pasagarda law (mentioned in a footnote) is also attentive to disagreement, even to silence as a "positive expression

⁵ *Supra* note 1 at 172.

⁶ *Ibid.* at 173.

⁷ *Ibid.* at 174.

⁸ Sally Falk Moore, *Law as Process: An Anthropological Approach* (Hamburg: LIT Verlag & James Curry, 2000).

⁹ (1973) 7 *Law & Soc'y Rev.* 719.

¹⁰ *Supra* note 8 at 80.

¹¹ *Ibid.* at 210.

¹² *Ibid.* at 52.

of meaning.”¹³ His careful analysis of dispute resolution in a Brazilian *favela* attends precisely to the questions of power and dissensus that animate Webber.

Moore and Santos accept that there is an artificial commonality imposed on contestable legal orders. They well appreciate that the antidote to the question posed by Webber is to act more like social scientists. “It is because we are implicated in the world that there is implicit content in what we think and say about it,”¹⁴ writes Pierre Bourdieu. And so, membership in the social sciences requires reflexivity—that researchers turn the methods of “knowledge onto themselves”¹⁵ in order to detect self-interested social and economic interests that are inscribed in orthodox methods of knowledge production.

Even if legal pluralist orders are contestable creatures of scholarly production, Webber insists that even these normative orders strive for some certainty. In the face of complexity and disagreement, any order of associates in law will aspire to smooth over disagreement and maintain consensus and order until the next opportunity for norm reconsideration arises. There has to be some form of interim finality, understood as partial and contingent. Order is preserved to the extent that dissenters have the opportunity to impose their will on the legal order on some future date. Along these lines, political theorist Adam Przeworski advocates a democratic regime of “rule open-endedness, or organized uncertainty” where no one political force predetermines political outcomes.¹⁶ But even this model of political pluralist contestation does not capture what Webber maintains normative legal orders require in practice—what is at “the very heart of law”—a “single normative position to govern relations within a given social milieu, despite the continuing existence of normative disagreement.”¹⁷

¹³ Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, 2d ed. (London: Butterworths Lexis Nexis, 2002) at 109.

¹⁴ Pierre Bourdieu, *Pascalian Meditations*, trans. by Richard Nice (Stanford: Stanford University Press, 1997) at 9.

¹⁵ Loïc Wacquant, “Pointers on Pierre Bourdieu and Democratic Politics” (2004) 11 *Constellations* 1 at 11.

¹⁶ Adam Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (Cambridge: Cambridge University Press, 1991) at 13.

¹⁷ *Supra* note 1 at 169.

This seems to resemble more the legal positivist enterprise at the heart of the “rule of law” than the project associated with legal pluralist scholarship. Robert M. Cover, like the legal pluralists, describes as “legal DNA” the “proliferation of legal meaning”; the multiplicity of interpretive communities engaging in law making and interpreting is inevitable for Cover and impossible to suppress.¹⁸ For this reason, Webber’s conception of law might be considered more decisionist than pluralist. An insistence on partial and interim closure, however, is congenial with the notion of “symbolic consensus” developed by Moore. As reconceived by pluralist thought, this calls for a “highly reflexive conception of democracy”¹⁹ where polities swing between the twin exigencies of closure and openness. Alan Keenan, though not writing as legal pluralist, best articulates the democratic conception of self-rule at work here. Openness to the other through democratic deliberation, he writes, paradoxically requires moments of closure, in which the polity constitutes itself in order to carry on its deliberative project of self-rule.²⁰ Or, as Chantal Mouffe has put it, exclusivity is constitutive of collective identity—in the constitution of “us,” we almost always will exclude “them.”²¹ But acts of closure do not preclude a return to openness to the other, to the transformative possibilities engendered by encounters with those who are excluded, not accounted for, or otherwise outside of our sphere of concern. Rather, a polity can re-engage with the possibilities of inclusion and attend to the potential of collective self-revisability.²²

The advantage of insisting on this sort of interim finality, Webber adds, is that it allows us to “gain a renewed appreciation for formal institutions, including the institutions of the state.”²³ By taking the likelihood of disagreement seriously, the state re-emerges as an important structure for settling inter-normative disputes. There must be some way to “overcome the radical pluralism of our normative

¹⁸ Robert M. Cover, “Foreword: *Nomos* and Narrative” in “The Supreme Court 1982 Term” (1983) 97 Harv. L. Rev. 4 at 46.

¹⁹ Neil Walker, “The Idea of Constitutional Pluralism” (2002) 65 Mod. L. Rev. 317 at 336.

²⁰ Alan Keenan, *Democracy in Question: Democratic Openness in a Time of Political Closure* (Stanford: Stanford University Press, 2003) at 11.

²¹ See Chantal Mouffe, *The Return of the Political* (London: Verso, 1993) at 141.

²² See Keenan, *supra* note 20 at 11.

²³ *Supra* note 1 at 180.

assertions”²⁴ and the institutions of the state aid in providing the conditions in which normative disagreement may continue to carry on.

Some pluralist scholarship admittedly denigrates state law—John Neville Figgis in the early twentieth²⁵ and Leopold Pospisil in the late twentieth century,²⁶ for instance. Yet much pluralist thinking has accommodated itself to the fact of state law as an “inescapable framework” for the practice of legal pluralism.²⁷ Sally Merry observed that research since the 1980s “has increasingly emphasized the dialectic, mutually constitutive relation between state law and other normative orders.”²⁸ Indeed, this precisely is the finding of the ethnographic work undertaken by Moore and Santos. Their interventions, despite Webber’s claim, do not mix normative with descriptive accounts, nor do they normatively assess the value of state law in shaping plural legal orders.

Webber’s conceptual reformulation, in which state law lies at the centre, is reminiscent of Ernest Barker’s intervention in the early twentieth century.²⁹ If Barker was sympathetic to the pluralist critique articulated by Otto Gierke, Federic William Maitland, Harold Laski, and Figgis,³⁰ he also believed they went too far in displacing state law. Like Webber, Barker viewed the state as unique in its law-making capacity. This imposed certain obligations on the state whenever it acted in ways that had an impact on associational life. The state had the capacity to regulate associational life only, he wrote, “by rules designed to secure the minimum of friction between its members and the maximum of development.”³¹ The state’s steering capacity, then, played a special role in regulating pluralist legal life which very much resembles

²⁴ *Ibid.* at 182.

²⁵ John Neville Figgis, *Churches in the Modern State*, 2d ed. (London: Longmans, Green and Co., 1913).

²⁶ Leopold Pospisil, “The Structure of Society and its Multiple Legal Systems” in Philip H. Gulliver, ed., *Cross-Examinations: Essays in Memory of Max Gluckman* (Leiden: E.J. Brill, 1978) 96.

²⁷ *Supra* note 4 at 879.

²⁸ *Ibid.* at 880.

²⁹ On Barker’s engagement with the pluralists, see David Runciman, *Pluralism and the Personality of the State* (Cambridge: Cambridge University Press, 1997).

³⁰ I discuss this early legal pluralist movement in “Harold Laski, Viscount Haldane and the Law of the Canadian Constitution in the Early Twentieth Century” (1998) 48 U.T.L.J. 521.

³¹ Ernest Barker, “Introduction” in Otto Gierke, *Natural Law and Theory of Society 1500 to 1800*, trans. by Ernest Barker (Cambridge: Cambridge University Press, 1934) at lxx.

the re-justification of the state, but “on more plural foundations,” as Webber urges in his article. This ongoing tension—whether to treat state law as one among other plural legal orders or as distinctively different—likely will remain unsettled within the normative stream of legal pluralist scholarship.³² Its flourishing ethnographic stream, however, will continue to catalogue the interplay within and between legal orders.

II. DISAGREEMENT AND GLOBALIZATION

It is reasonable to assume, as Webber does, that disagreement is endemic to jurisgenerative groupings. But not all plural legal orders are as unstable as Webber suggests. The transition to what I call “interim finality” is easier for some than for others. Even for those groups in which disagreement is accommodated within the very structure of decision making, as within idealized deliberative democracies, it still is possible to locate dominant conceptions of rules that frame and constrain decision making. Usually these will be determined by those operating within elite circles, by the “organizers of society.”³³ Exercising a form of cultural leadership, these elites usually can be relied upon to articulate shared, but dominant, values and understandings. This leadership will have been successful in representing society back to itself—it will have gained legitimacy—only if it has, as Arthurs has observed, generated its own “justificatory rhetoric, its own symbols and myths.”³⁴ This will limit the range of possibilities within the universe of policy options.

So while we should be attentive, as Webber reminds us, to the sources of norm-generating consensus within particular communities—

³² See Emmanuel Melissaris, “The More the Merrier? A New Take on Legal Pluralism” (2004) 13 Soc. & Legal Stud. 57; Anne Griffiths, “Legal Pluralism” in Reza Banakar & Max Travers, eds., *An Introduction to Law and Social Theory* (Oxford: Hart Publishing, 2002) 289 at 296-97; and Gordon R. Woodman, “Ideological Combat and Social Observation: Recent Debate About Legal Pluralism” (1998) 42 J. Legal Pluralism 21.

³³ Antonio Gramsci, *Selections from the Prison Notebooks*, ed. and trans. by Q. Hoare & G. Nowell Smith (New York: International, 1971) at 5.

³⁴ Harry Arthurs, “Notes” (Presented to the Colloquium on the Constitutionalization of Labour Rights at the University of Cape Town, 23 February 2004) [unpublished] at 13.

to those who presume to speak for those who cannot be heard³⁵ (and so have the sort of agency Webber describes)—we also should understand that these dominant conceptions play key functional roles within society and important analytical ones for researchers when it comes to understanding individual and collective action. The field of international commercial and investment arbitration might be understood in precisely this way. The body of law called *lex mercatoria* or the law merchant—a body of rules developed from within the field of commercial arbitration—is a commonly-cited instance of legal pluralism in the modern world. Arthurs devotes a chapter in *Without the Law* to this legal system generated by businessmen to facilitate commercial transactions. Gunther Teubner goes so far as to describe *lex mercatoria* as a “strong candidate” for a non-state legal order that is virtually global in scope. This global law is being developed by economic subsystems “in relative insulation from politics,” he writes, outside the usual sources for legal development, namely, the institutions of the state.³⁶ Its normative content, for this reason in part, is “extremely indeterminate.”³⁷

Surely, there are many points of disagreement within the field of international arbitration that render its rules contestable and unstable.³⁸ The field is not entirely open to contestation from without, yet there also are disagreements between international economic lawyers and, say, environmentalists or trade unionists. There are countervailing narratives about the implications of investment rules that are both immanent and external critiques of the field, precisely the sort of disagreement generated by Arthurs with the field of commercial arbitration. In my own work, I have departed from standard accounts of investment rules (rules found in the *North American Free Trade Agreement* [NAFTA] and over 2,000 bilateral investment treaties) and the implications of arbitral rulings like *Metalclad*, which concerned the shutting down of a hazardous waste facility site in Guadalupe,

³⁵ See Giyatri Chakravorty Spivak, “Can the Subaltern Speak?” in Cary Nelson & Lawrence Grossberg, eds., *Marxism and the Interpretation of Culture* (Urbana: University of Illinois Press, 1988) 271.

³⁶ Gunther Teubner, “Global Bukowina: Legal Pluralism in the World Society” in Gunther Teubner, ed., *Global Law Without a State* (Aldershot: Dartmouth, 1997) 3 at 4-6.

³⁷ *Ibid.* at 21.

³⁸ Compare, for instance, Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press, 2001) with M. Sornarajah, *The International Law on Foreign Investment*, 2d ed. (Cambridge: Cambridge University Press, 2004).

Mexico.³⁹ Compensation was required to be paid to investors under NAFTA, the arbitration panel ruled, because the municipal government took measures tantamount to expropriation. International economic lawyers resist the characterization of the case as concerning the taking of measures to protect the environment and the health of local *campesinos*—a story I have told elsewhere.⁴⁰ Relying upon the egregious findings of an arbitration panel, they prefer to tell a story about corruption, protectionism, and self-dealing. International economic lawyers understand that there are high stakes involved in the characterization of these investment disputes. They would prefer that these sorts of contests be depoliticized and insulated from public scrutiny⁴¹ and therefore characterize these disputes as being in the nature of the private and the contractual.⁴²

Admitting to these and other types of disagreements, the logic of international arbitration still admits to only a limited range of acceptable answers to trade and investment law questions. There are, in other words, dominant understandings within the field that are widely shared and not much in dispute. For instance, it is the imperative of international investment arbitration to tilt interpretation against state intervention and in favour of removing impediments to the movement of goods, persons, and services across national boundaries.⁴³ This structural tilt reveals how, whatever disagreement within the field over particular outcomes, international economic law makes material those things we ordinarily associate with economic globalization.

There is a further advantage to be gained by aiming at this level of consensus within a particular field associated with legal pluralism: it is that the field, despite Teubner's claim, is deeply implicated with official state law. This precisely is a point admitted in much other pluralist work,

³⁹ *Metalclad Corporation v. United Mexican States* (2000), ARB(AF)/97/1 (Ch. 11 Panel), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx>.

⁴⁰ See David Schneiderman, "Property Rights and Regulatory Innovation: Comparing Constitutional Cultures" (2006) 4 *Int'l J. Const. L.* 371 [forthcoming].

⁴¹ The argument for repoliticization is made in Peer Zumbansen, "Piercing the Legal Veil: Commercial Arbitration and Transnational Law" (2002) 8 *Eur. L.J.* 400.

⁴² I discuss this disagreement further in "Constitution or Model Treaty?: Struggling Over the Interpretive Authority of NAFTA" in Sujit Choudhry, ed., *The Migration of Constitutional Ideas* (Cambridge University Press) [forthcoming].

⁴³ M. Sornarajah, *The Settlement of Foreign Investment Disputes* (The Hague: Kluwer Law International, 2000).

as mentioned above. This is not to say merely that states themselves author the rules and disciplines of economic globalization.⁴⁴ Rather, the point is that the field, particularly as it concerns investment disciplines, appropriates central tenets of official state law, including principles of constitutional law. Consider the disciplines of non-discrimination or property rights of the sort ordinarily found in national constitutional systems—the sorts of things Upendra Baxi labels “market-friendly human rights.”⁴⁵ This connection to state law is most clearly evident in U.S. investment treaty practice which, since 2002, incorporates language drawn directly from U.S. Supreme Court jurisprudence (the *Penn Central* case⁴⁶) in determining whether there has been a compensable taking of an investment interest.⁴⁷ The point is that these rules come from somewhere, not just from anywhere.⁴⁸

Not only does this purported field of legal pluralism appropriate principles of official state law, it also seeks to supplant the official law of other states. The investment rules regime seeks to commit states to a narrow range of policy outcomes, narrower than those available under ordinary politics operating under national legal systems. These disciplines serve, as Arthurs and others have argued, constitution-like functions.⁴⁹ Moreover, as these disciplines are suitable for all states in the contemporary world, international commercial law has pretensions of universality. Which brings us back to the directive of Webber’s paper: that we be alive to false claims of universality; that claims to universality

⁴⁴ See e.g. Leo Panitch, “Rethinking the Role of the State” in James Mittelman, ed., *Globalization: Critical Reflections*, vol. 9 (Boulder: Lynne Reiner Publishers, 1996) 83.

⁴⁵ Upendra Baxi, *The Future of Human Rights* (New Delhi: Oxford University Press, 2002) at 144.

⁴⁶ *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1977).

⁴⁷ Language which the Government of Canada has embraced in almost identical terms.

⁴⁸ See Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001) at 204, following Santos, *supra* note 13 at 210, who describes the new *lex mercatoria* as a “globalized localism.”

⁴⁹ H.W. Arthurs, “The Administrative State Goes to Market: (and cries ‘wee, wee, wee’ all the way home)” (2005) 55 U.T.L.J. 797; Harry W. Arthurs, “Governing the Canadian State: the Constitution in an Era of Globalization, Neo-liberalism, Populism, Decentralization and Judicial Activism” (2003) 13 Const. Forum 16; and H.W. Arthurs, “Globalization of the Mind: Canadian Elites and the Restructuring of Legal Fields” (1997) 12 C.J.L.S. 219. For an analysis of the politics around defining the constitutional, see Gavin W. Anderson, “Legal Pluralism and the Politics of Constitutional Definition” in *Constitutional Rights After Globalization* (Oxford: Hart Publishing, 2005) 99.

often represent dominant particularisms that also “repress,” in Bourdieu’s words, “the conditions of access” that give rise to the universal.⁵⁰ Empirical work, Webber reminds us, must avoid representations of particularistic values as universal truths and that scholars be attentive to the fact that access to the “universal” is available only to the privileged few.

⁵⁰ *Supra* note 14 at 65. See also Pierre Bourdieu, “The Scholastic Point of View” in Pierre Bourdieu, *Practical Reason: On a Theory of Action* (Stanford: Stanford University Press, 1998) 127 at 135.