

INVITED ARTICLE

Legal Pluralism as a Category of Analysis

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Abstract

A debate has raged for decades over legal pluralism and its value for the study of law. Much of this back and forth has resolved to a fight over what law “is” and push-and-pull between legal centrists and pluralists. This introductory essay proposes a new framework for thinking about legal pluralism. Turning away from the centrist/pluralist binary, we instead ask what work legal pluralism as a category of analysis can do. The debate, we suggest, is a fundamental methodological disagreement about the normative work that categories of analysis do and the costs that historians should be willing to pay to reap the benefits of theoretically sophisticated frameworks of analysis which are interoperable between times and places. The debate about legal pluralism, we argue, can be productively reframed as a question about the benefits and drawbacks of the legal pluralist framework.

Legal pluralism has been the subject of repeated debates, as a number of the contributions to this forum note. Derogated and celebrated by legal scholars, anthropologists, sociologists, philosophers, and historians alike, conversations about legal pluralism as a category of analysis can give readers a feeling of “*déjà vu*.”¹ Perhaps more damning is the sense that generation after generation of scholars rediscovers legal pluralism with the effect of a perpetual “legal pluralist groundhog day.”² Nevertheless, the essays in this forum collectively propel the conversation about legal pluralism onto new ground, especially for historians of law. Much of the reiterative effect of past debates results from a contest between legal centralism and pluralism. Even if centralists might not self-identify as such, they insist on seeing legal pluralism as an overly capacious approach which risks expanding the category of law to include almost

¹ Lauren Benton and Adam Clulow, “Interpolity Law and Jurisdictional Politics,” 200 in this forum.

² Caroline Humfress, “Legal Pluralism’s Other,” 159 in this forum.

everything, rendering it useless along the way.³ Legal pluralists have long countered that pluralism is nevertheless the reality—past and present, across societies—and that there is no reason that an expansive concept of law cannot be wielded responsibly.⁴

Rather than return to the debate, we hope to leave the ring where centralists and pluralists have battled for some time and with little progress. Instead, we suggest approaching the utility of legal pluralism from a different angle entirely. The following essays ask a distinct set of questions about the historiography of legal pluralism as a concept, and about the promises and perils of legal pluralism as a category of analysis. The standard narrative about the emergence of legal pluralism is astonishingly consistent across North American disciplines. Essays in this forum, however, offer a parallel origin story centered in European legal history. They argue that a full understanding of legal pluralism requires a revision to its historiography on both sides of the Atlantic. Studies comprising an even broader set of comparanda will no doubt yield further necessary refinements; here we have a rather more modest set of aims.

The question of legal pluralism's usefulness as a category of historical analysis is fundamentally one that can be asked of any analytical framework: to what extent does legal pluralism distort the past it is used to examine? In other words, is legal pluralism an appreciably neutral category that simply describes the past as seen from the perspective of a contemporary historian, or does legal pluralism fundamentally redescribe the past and, in so doing, irresponsibly burden historical materials in a way that warps our ability to understand them? Needless to say, all categories of analysis do some amount of violence to the complexity of lived reality. But as historians, we must ask: what are the parameters of acceptable distortion imposed by legal pluralism, and do the benefits of legal pluralism as a category of analysis outweigh its drawbacks?

Historiographies of Legal Pluralism

Anglophone scholars of law—especially those in North America—have undoubtedly encountered some version of the following account: in the 1960s, anthropologists working in colonial and post-colonial societies observed the co-existence of multiple legal orders. Their observation of legal pluralism was associated with the policies of empires seeking to accommodate some sort of customary or indigenous law alongside that of the colonizers. By the 1980s, the concept jumped from anthropology to the world of legal scholarship and, in the hands of law professors, pluralism became a challenge to legal

³ See, e.g., Brian Z. Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism," *Journal of Law and Society* 20, no. 2 (1993): 192–217; Simon Roberts, "Against Legal Pluralism: Some Reflections on the Contemporary Enlargement of the Legal Domain," *Journal of Legal Pluralism* 42 (1998): 95–106.

⁴ See, e.g., Franz von Benda-Beckmann, "Who's Afraid of Legal Pluralism?," *The Journal of Legal Pluralism and Unofficial Law* 34, no. 47 (2002): 37–82; Brian Z. Tamanaha, *Legal Pluralism Explained: History, Theory, Consequences* (Oxford: Oxford University Press, 2021).

centralism, in so far as it offered a critique of modern liberalism's presumed marriage between law and the state.⁵ Though initially perceived as subversive, legal pluralism eventually joined the mainstream; as a former-critic-turned-advocate has put it, "legal pluralism is everywhere."⁶

In this forum, essays by Emanuele Conte, Tamar Herzog, and Caroline Humfress point to a radically different historiography. Rather than locating its beginnings among anthropologists, these essays suggest that a pluralist understanding of law emerged in the late nineteenth century among European legal scholars. In this narrative, legal pluralism should not be understood as a corrective to modern theories of legal centralism, but rather as "part of the mythology of modern law" itself.⁷

Conte's essay spotlights three giants of European legal history, beginning with the work of Otto van Gierke (1841–1921), a prominent German historian of medieval law. Van Gierke celebrated the inherent plurality of law in medieval Germany, in which "every gathering of individuals was a political entity, regardless of state acknowledgment."⁸ Spontaneous groupings of individuals "gained their legal existence by the very fact of being in existence," as opposed to those countries under the Roman legal tradition, where legal existence could only be conferred by the central government.⁹ As early as 1909, Italian legal scholar Santi Romano (1875–1947) saw an antidote to the crisis of the modern state in van Gierke's organic pluralism. Romano rejected a triumphalist historiography that heralded the modern nation-state as both the pinnacle of Western achievement and the only legitimate source of law. He advocated instead a pluralist approach which would recognize the power of autonomous bodies like trade and labor organizations. It fell to Francesco Calasso (1904–65), Romano's political foe but intellectual ally, to reconcile this celebration of pluralism with the Roman legal tradition. Calasso appreciated the importance of Romano and van Gierke's belief in the autonomy of local communities. Rather than associate this organic pluralism exclusively with Germanic law and in opposition to Roman law, Calasso advocated for a "sublime syllogism" by which Roman law explicitly justified pluralism.¹⁰

Their political differences aside, all three of these legal historians—along with many of their contemporaries—agreed that pluralism was an historical fact. All three also made normative claims about the value of pluralism as an antidote to the centralism of the modern state. Importantly, this entire scholarly conversation occurred long before Anglophone anthropologists became interested in African customary law. In this historiography, familiar

⁵ It is impossible to cite all the scholarship that offers some version of this historiography, but see especially Sally Falk Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study," *Law and Society Review* 7, no. 4 (1973): 719–746; John Griffiths, "What is Legal Pluralism," *Journal of Legal Pluralism* 24 (1986): 1–55; Sally Engle Merry, "Legal Pluralism," *Law and Society Review* 22, no. 5 (1988): 869–896.

⁶ Tamanaha, *Legal Pluralism Explained*, 1.

⁷ Humfress, "Legal Pluralism's Other," 156.

⁸ Emanuele Conte, "Legal Pluralism from History to Theory and Back," 173 in this forum.

⁹ Conte, "Legal Pluralism," 173.

¹⁰ Conte, "Legal Pluralism," 178.

on the Continent but largely untold in Anglo-American scholarship, legal pluralism emerged from the heart of European legal history and remained central to European legal theory.¹¹ As Humfress and Herzog argue, this historiography forms part of the foundation for a new critique of legal pluralism.

Legal Pluralism as a Category of Analysis

Just as these divergent historiographies of legal pluralism have led parallel lives, two distinct approaches to legal pluralism emerge in the essays that follow. One group, comprising Shahar and Yefet, Benton, and Ando, argues that legal pluralism, properly understood, can help sensitize scholars to better understand the pluralist past, seeing operative dynamics latent in historical sources that may otherwise remain unrecognized. The other group, comprising Humfress and Herzog, contends that legal pluralism imposes anachronistic frameworks that ultimately distort our historical sources, rendering them recognizable at the cost of fidelity. Underlying these two positions, in our estimation, is a fundamental disagreement about the normative work that legal pluralism as a category of analysis does, and the costs that historians are willing to pay to reap the benefits of theoretically sophisticated frameworks of analysis that are interoperable between times and places. The debate about legal pluralism, we argue, can be productively reframed as a question about the benefits and drawbacks of the legal pluralist framework, and ultimately, a debate over the use and value of history itself.

Despite serious intellectual disagreements over particular categories, frameworks, and taxonomies, historians need analytical tools to make sense of the pasts that we study. Some such categories, like the concept of “family” for instance, are analytically neutral for the most part; we risk relatively little distortion in assuming that past societies which are submitted to historical analysis formed kinship bonds, even when the status, nature, and composition of those bonds differ. More often than not, such neutral categories are descriptive (“emic”): historians employ terms and taxonomies that historical actors used themselves, at least from the historian’s viewpoint. More fraught are redescriptive (“etic”) categories, which constitutes a historian’s “...attempt to take the descriptive information they have already gathered and to organize, systematize, compare—in a word, redescribe—that information in terms of a system of their own making.”¹² Redescriptive categories have a greater capacity for historical flattening. They reduce fundamental incongruities to different instantiations of an underlying, unifying, and often seemingly universal human

¹¹ See, e.g., Antonio Manuel Hespanha, “The Legal Patchwork of Empires,” *Rechtsgeschichte-Legal History* 22 (2014): 303; Pietro Costa, “Il pluralismo politico-giuridico: una mappa storico-concettuale,” *Quaderni Fiorentini per la storia del pensiero giuridico moderno* 50 (2021): 29. For an exception, see Mariano Croce and Marco Goldoni, *The Legacy of Pluralism: The Continental Jurisprudence of Santi Romano, Carl Schmitt, and Costantino Mortati* (Stanford, CA: Stanford University Press, 2020).

¹² The “descriptive/redescriptive” language is common, though see an analysis of its origin in the emic/etic distinction in Russell T. McCutcheon’s “Introduction,” in *The Insider/Outsider Problem in the Study of Religion: A Reader*, ed. Russell T. McCutcheon (London: Continuum, 1999), 15–17.

phenomenon, like “religion,” a redescriptive category that has been almost completely dismantled by specialists; or like “language,” which remains widely in use.¹³ Put briefly: most premodern societies did not have a separate “religious” sphere that can be easily disentangled from others, including from law. This does not mean that we should never use the concept of religion to study the past; in some instances, whatever distortion is imposed on premodern societies by looking for religion might be worthwhile because the framework itself renders latent, yet socially operative, dynamics both visible and analyzable, even when the historical actors under investigation would never have assented to the category of “religion.”

The issue at hand, then, is whether “legal pluralism” is more like “religion,” or more like “language.” To what extent is the framework itself procrustean, and what level of historical distortion is acceptable in order to render disparate legal cultures mutually intelligible, or at least allow historians to analyze them in concert? Social anthropologists may be among those most committed to comparing across societies: they regularly think about categories like kinship, economy, and purity/impurity as abstractions that can be found in nearly any culture. Anthropologists have also long recognized that no category is entirely neutral: as Clifford Geertz put it in *Local Knowledge* (1983), there is a “problematic relationship between rubrics emerging from one culture and practices met in another.”¹⁴ Nonetheless, Geertz contended, the gap between categories like “family,” “government,” or “science” as they operate in the modern West versus in non-Western societies is not so great as to make them useless or, worse, harmful.

Geertz advocated for thinking similarly about law: as a useful category for cross-cultural comparison. Geertz by no means advocated for picking up the modern Western template of what constitutes law and applying it to Muslims in Indonesia or Morocco; he filled many pages explaining that the relationship between the rubric of Western “law” and that of law in Indonesia or Morocco is anything but straightforward. Nonetheless, Geertz asserted that asking questions attendant to the category of law helps us to understand even societies that do not share a Western legal tradition. As we explain later, those in favor of using legal pluralism advocate a similar approach.

The question, as we see it, is whether pluralism is acceptably neutral as a category of analysis. Does legal pluralism do relatively little work to re-order the societies we study, or does it inflect our historical vision so thoroughly that fidelity to our sources, and the actors for whom they stand in, is irretrievably lost? All frameworks for comparison are fundamentally disruptive to historical peculiarity; the question is whether “legal pluralism” is so disruptive

¹³ On the use, abuse, and scholarly rejection of “religion” as a transhistorical category, see Brent Nongbri, *Before Religion: A History of a Modern Concept* (New Haven, CT: Yale University Press, 2013): 1–24.

¹⁴ Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 2000), 168.

as to be irresponsible. Where should we, as historians, draw the boundaries of what is acceptable distortion?

The Promises of Legal Pluralism

Three of the essays in this forum maintain that legal pluralism can fundamentally help historians of law better understand the past. They make the case that like other, more familiar categories of analysis, pluralism offers a rich and productive framework with which to order historical research.

Ido Shahar and Karin Yefet argue that much of the debate about legal pluralism results from misplaced expectations. Scholars have erroneously assumed that legal pluralism can and should provide “propositions, hypotheses, or explanations” about how law works. Shahar and Yefet’s argument is similar to Franz and Keebet von Benda-Beckman’s proposal that legal pluralism is best deployed as a “sensitizing concept.”¹⁵ They suggest that, properly understood, legal pluralism is a “research perspective”—“it has no pretense to predict or explain social actors’ behavior under particular circumstances of legal pluralism, nor to predict or explain the emergence of particular constellations of coexisting legal orders.”¹⁶ When understood as a research perspective rather than an explanatory theory, pluralism provides a useful frame in which scholars can explore their subject matter. It presents “law-and-society researchers with a set of basic premises about how to approach the study of this (omnipresent) reality of multiple legal orders.”¹⁷ These premises are plurality, relationality, power, and agency. Plurality, the basic idea that law is never singular, is hardly controversial anymore. In the words of Clifford Ando, “the historical instances in which one actually approaches a unitary condition of law are the terrifying anomalies. It is they that require explanation.”¹⁸ The last three—the presumption that legal orders are constructed in relation to one another, that the relationships among legal orders involve power differentials, and that the agency of legal actors is paramount—constitute something of a corrective to earlier generations of scholarship on legal pluralism. Shahar and Yefet maintain that legal pluralism got a bad name in part because some scholars tended “to adopt[] essentialist conceptualizations of legal systems or bodies of law (e.g., of customary or indigenous laws) or to disregard power relations and agency.”¹⁹ But such reification is not a problem inherent to legal pluralism if it is understood as a research perspective.

Lauren Benton and Adam Clulow similarly defend the value of legal pluralism, particularly as a way to move the field of global legal history forward. Drawing in part on Benton’s past work, they propose the framework of “jurisdictional politics” as a more useful approach to plurality that avoids the pitfalls

¹⁵ Ido Shahar and Karin Carmit Yefet, “Rethinking the Rethinking of Legal Pluralism,” 226 in this forum; Franz von Benda-Beckmann and Keebet von Benda-Beckmann, “The Dynamics of Change and Continuity in Plural Legal Orders,” *Journal of Legal Pluralism and Unofficial Law* 53, no. 4 (2006): 14.

¹⁶ Shahar and Yefet, “Rethinking,” 229.

¹⁷ Shahar and Yefet, “Rethinking,” 226.

¹⁸ Ando, “The Rise of the Indigenous Jurists,” 182 in this forum.

¹⁹ Shahar and Yefet, “Rethinking,” 234.

of the stale debates over legal pluralism.²⁰ Jurisdictional politics shifts our attention toward “legal authority over bodies, territory, or actions.”²¹ Turning to jurisdiction allows historians to be more specific in their inquiry than simply considering legal pluralism, and it encourages historians to be more attuned to the constant challenging, negotiation, and re-imagination of the boundaries of legal authority. Their study of jurisdictional conflicts among polities, what Benton and Clulow call “interpolity law,” allows them to engage in a form of globalized history which ultimately provincializes early modern Europe: they argue that jurisdiction was a mutually intelligible category across political and cultural divides. “Europeans were...important but not exceptional legal actors of the early modern world.”²² Rather than acceding to a global history of law focused on multiple normativities, Benton and Clulow contend that examining jurisdiction allows historians to follow the archival traces of law as it actually played out on the ground (or on the seas, as was often the case). They contend that distinct legal cultures were in fact far more mutually intelligible in the early modern period than is often assumed. Arguing against the prevailing tendency to stress legal misunderstandings, Benton and Clulow see jurisdiction “as a powerful organizing element of legal interactions across regions and centuries.”²³

Both articles encourage scholars of law to avoid becoming mired in endless attempts to define law, and closely related efforts to pin down its relationship to the state. Drawing on work by Laura Nader, Shahar and Yefet propose a “user theory of law,” which defines law by drawing “on the meanings attributed to these terms by social actors themselves.”²⁴ Benton and Clulow argue that a focus on jurisdictional politics also allows us to sidestep the quicksand of debates over the precise definition and nature of law. By focusing “on the location and scope of legal authority,” legal historians can avoid drawing “sharp differences between state and non-state law,” nor are they in “danger of defining all social behavior as legal.”²⁵ In other words, one can explore pluralistic legal history without first agreeing on some abstract, philosophical definition of what law is. Rather, law is what historical actors understood it to be; this should be more than enough for historians.

Shahar and Yefet and Benton and Clulow defend the use of legal pluralism on the grounds of its redescriptive utility. Ando’s article, on the contrary, suggests that in the period of the Roman Empire, legal pluralism was an emic, actor category across the Mediterranean. As such, it can be used squarely as a descriptive framework. In Ando’s telling, not only did Roman imperial elites acknowledge “that the empire was a unified political space, and that multiple

²⁰ Benton and Clulow, “Interpolity Law and Jurisdictional Politics” in this forum. For Benton’s previous work on jurisdictional politics, see especially Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge: Cambridge University Press, 2002).

²¹ Benton and Clulow, “Interpolity Law,” 199.

²² Benton and Clulow, “Interpolity Law,” 208.

²³ Benton and Clulow, “Interpolity Law,” 199.

²⁴ Shahar and Yefet, “Rethinking,” 228. Theirs is akin to the idea of “folk law” found, for instance, in Tamanaha, *Legal Pluralism Explained*, 169–208.

²⁵ Benton and Clulow, “Interpolity Law,” 208.

systems of norms obtained within that space,” but they celebrated that fact, putting into place accommodations that would aid judges unfamiliar with local laws to know and apply indigenous legal knowledge.²⁶ Data from legal documents and inscriptions suggest that it was precisely in the second century CE—the period *after* the greatest part of Roman imperial expansion—that local elites began to celebrate their own ability to act as go-betweens, proffering indigenous legal knowledge as a way to gain social capital in an explicitly pluralist empire where emperors themselves often held to an ideal of the priority of local customs over those imported from the legal center. Ando suggests that the Roman empire comprises the “political, historical and sociological conditions that compelled local elites to claim expertise in law.”²⁷ In so far as legal pluralism was a political tool, Ando argues that it *results* from the politics of empire, rather than representing a holdover from previous legal regimes slowly but effectively overrun by the rising tide of imperial control. In the case of the Roman empire, at least, legal centralism is the redescriptive concept, not legal pluralism.

The Perils of Legal Pluralism

On the other side of the debate, articles by Tamar Herzog and Caroline Humfress argue that as a category of analysis for the premodern period, legal pluralism does more harm than good. Their basic premise is that legal pluralism has never been merely a sensitizing concept or a research perspective, but that it has always constituted a way of ordering the world that imposes distorting anachronisms onto our understanding of the past. They take aim not against legal centralism—long the purported enemy of pluralists—but rather against the misunderstandings smuggled into historical analysis by legal pluralism.

Caroline Humfress argues that, rather than pluralism as the antidote to legal centralism, it has historically acted as an enabler. Her account relates directly to the origin story of legal pluralism more familiar to continental scholars, elucidated and contextualized by Emanuele Conte’s contribution to the forum. In Humfress’ view, legal pluralism emerged at the same time as modern theories of law; late nineteenth-century jurists like Romano created “a pluralist classic legal institutionalism which both underpinned and critiqued nineteenth- and early twentieth-century conceptions of the liberal, constitutional, state.”²⁸ The idea of legal pluralism evolved not against modern legal theories, but as part of them. More recently, legal pluralism has morphed into a kind of normative pluralism particularly adapted to the globalized capitalism of the twenty-first century. But as Humfress sees it, legal pluralism “is a false friend to historians of pre-modern law and legal orders.”²⁹

Herzog similarly believes that far from elucidating the premodern past, legal pluralism obscures the nature of law as it existed before the eighteenth

²⁶ Ando, “The Rise,” 183.

²⁷ Ando, “The Rise,” 183.

²⁸ Humfress, “Legal Pluralism’s Other,” 156–7.

²⁹ Humfress, “Legal Pluralism’s Other,” 157.

century. Law in premodern Europe was characterized by a staggering multiplicity of sources: “customs, court decisions, jurisprudence, norms of corporations and communities, royal decrees, as well as a wide array of debates that were grouped together during the late Middle Ages and the early modern period under the umbrella(s) of Roman, feudal, canon, and a natural law, as well as the law of nations,” and these multiple sources were interpreted by “a plurality of authorities that were endowed with *iuris-dictio*, that is, with the capacity to ‘say the law.’”³⁰ The idea of a particular jurisdiction applying a particular law to a particular category of person assumes a kind of stability that did not exist in the “cacophonous” law of premodern Europe. The same individual was subject to multiple jurisdictions at the same time, and a single legal authority could draw on multiple sources of law. As the anthropologist Carol Greenhouse put it, “the conceptual equation of legal pluralism and social/cultural pluralism is highly problematic”—to understand overlapping and competing jurisdictions under the rubric of “pluralism” renders law more easily understandable from a modern perspective, but at the cost of accurately reflecting how premodern people approached legal institutions.³¹ They did not think of their world as comprising co-existing, even overlapping legal systems or legal orders. Rather, “law reflected a collective effort to understand what a pre-set divine order mandated and how it could be best protected.”³² Matters that we would categorize as “religious” were inextricably linked with law, a point which Humfress also stresses.

All of this changed with the dawn of modernity, particularly with the French Revolution. Law would no longer be based on a multiplicity of sources, authorities, and statuses: as Wordsworth put it, “the meagre, stale, forbidding ways/Of custom, law and statute” would cede to the “prime Enchantress” of reason.³³ Law was intimately tied to the state, and identical for all citizens—of course in theory though not in practice, as women, colonial subjects, non-whites, and non-Christians remained outside the bounds of full belonging in the polity. The problem with legal pluralism, as Herzog sees it, is that this category of analysis reflects the particular legacy of the modernization of law in the eighteenth and nineteenth centuries. “The plurality of today has very little (or nothing) to do with past plurality.”³⁴ It is the role of historians to stress change over time, not to identify “false continuities” between pluralism past and present. Only in so doing can history “help us de-naturalize the present.”³⁵

Caroline Humfress’ essay offers concrete examples of the danger of drawing artificial distinctions between categories like law and religion in the late ancient world. The basic underpinnings of legal pluralism require scholars to distinguish between law and something that is law-like, but fundamentally

³⁰ Herzog, “The Uses and Abuses of Legal Pluralism,” 215 in this forum.

³¹ Carol J. Greenhouse, “Legal Pluralism and Cultural Difference—What Is the Difference? A Response to Professor Woodman,” *Journal of Legal Pluralism and Unofficial Law* 42 (1998): 65.

³² Herzog, “The Uses and Abuses of Legal Pluralism,” 216.

³³ William Wordsworth, “The French Revolution as It Appeared to Enthusiasts at Its Commencement” (1809).

³⁴ Herzog, “The Uses and Abuses of Legal Pluralism,” 217.

³⁵ Herzog, “The Uses and Abuses of Legal Pluralism,” 218.

different—such as Sally Falk Moore’s idea of the “semi-autonomous social field.”³⁶ The fact that something like religious law is distinguished from law-proper presumes the existence of a state law, and the impulse to distinguish between “real” law and religious law has caused scholars to misread legal texts as “strictly legal”—that is, as distancing themselves from matters that we would consider religious. But Humfress points out that late ancient jurists would hardly have thought of themselves as separated from the religious realm. On the contrary, her examples from the Sassanian and Roman empires demonstrate that thinkers across the late ancient world believed that “humans have a divinely ordained obligation to engage in legal interpretation,” echoing Herzog’s point that people in premodern Europe considered law a quest for divinely ordained justice.³⁷ Doing away with legal pluralism’s implicit distinction between “true” law and law-adjacent categories like religion “creates space for us to begin taking pre-modern forms of law seriously as law—without, for example, feeling the compulsion to classify them as ‘religious.’”³⁸

For Humfress and Herzog, the problem with legal pluralism is that it functions as a tool of interpretation, but masquerades as an object of analysis. As Pietro Costa puts it, “‘Pluralism,’ then, is not just something that ‘stands before us,’ an ‘object’ to trace and decipher...but an instrument of the interpreter.”³⁹ Humfress and Herzog caution us to use this particular instrument sparingly, if at all.

Conclusion

There is a sense in which the debate over legal pluralism is a debate over the nature of historical analysis itself, and our attempts to make the past legible. Is the historian’s craft one of translation, rendering the past understandable within contemporary language and frameworks? Or is the historian engaged in a process of self-knowledge through the explication of unfamiliarity? The question is hermeneutic.⁴⁰ In so far as historical and ethnographic investigations—the dual progenitors of legal pluralism—use perspectival difference to uncover truths about the interpreter’s own positionality and latent frameworks of understanding (what Hans-Georg Gadamer calls the

³⁶ Moore, “Law and Social Change,” 720.

³⁷ Humfress, “Legal Pluralism’s Other,” 165.

³⁸ Humfress, “Legal Pluralism’s Other,” 162. For a similar argument about the impossibility of distinguishing legality from other dimensions of late ancient Jewish texts, see Rachel Rafael Neis, “The Seduction of Law: Rethinking Legal Studies in Jewish Studies,” *The Jewish Quarterly Review* 109, no. 1 (2019): 119–138.

³⁹ Costa, “Il pluralismo politico-giuridico,” 32.

⁴⁰ “Hermeneutic work is based on a polarity of familiarity and strangeness; but this polarity is not to be regarded psychologically, with Schleiermacher, as the range that covers the mystery of individuality, but truly hermeneutically—i.e., in regard to what has been said: the language in which the text addresses us, the story that it tells us. Here too there is a tension. It is in the play between the traditionary text’s strangeness and familiarity to us, between being a historically intended, distanced object and belonging to a tradition. *The true locus of hermeneutics is this in-between.*” Hans-Georg Gadamer, *Truth and Method* (London: Bloomsbury, 2013), 306.

“hermeneutic significance of temporal distance”), it may be that looking to the past and to modern, non-European legal systems was necessary to uncover the contours of a fundamental fact of legal institutions in the contemporary world: the iterative, agonistic push and pull of overlapping judicial orders.⁴¹ In Gadamer’s words, “the prejudices and fore-meanings that occupy the interpreter’s consciousness are not at his free disposal. He cannot separate in advance the productive prejudices that enable understanding from the prejudices that hinder it and lead to misunderstandings.”⁴² It is certainly the case that legal pluralism has become a “prejudice” (*Vorurteil*): a provisional interpretive key that helps a historian make sense of novel information. The question today is when and to what extent legal pluralism is a *productive* prejudice. Is it one that enables careful historians to see what is latent in their sources, even when historical actors would not have understood their own systems as pluralistic in the modern sense? Or is legal pluralism a prejudice that reduces the complexity of historical materials to an order that is understandable, but fundamentally a misunderstanding of the past? According to the essays that follow, these are the questions that we should be asking about legal pluralism. We believe they can transform what many consider a stale debate into an urgent historiographical question.

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⁴¹ Gadamer, *Truth and Method*, 302.

⁴² Gadamer, *Truth and Method*, 306.

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