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Waiting for Mendeleev: The Tangle of Indigenous Law

Marc Galanter* & Manuel A. Gómez**

[On learning about Mendeleev's table] "For the first time I saw a medley of haphazard facts fall into line and order. All the jumbles and recipes and hotchpotch of the inorganic chemistry of my boyhood seemed to fit themselves into the scheme before my eyes – as though one were standing beside a jungle and it suddenly transformed itself into a Dutch garden."

–C.P. Snow¹

It has been more than a century since Dimitri Mendeleev discovered the complex regularities and relations of the elements of matter. During that time socio-legal scholarship has become acutely aware of plurality, both within the acknowledged legal institutions of the state and, among the many sorts of rule-making and rule-applying institutions that are not part of the structure of the state. Increasing appreciation of the multiplicity, inter-relation, and variance among co-existing systems of rule and regulation has frequently been marked by resort to the term "legal pluralism."

In an effort to bring order and coherence to this complex landscape, scholars have attempted to formulate a clear distinction between the legal and the so-called non-legal dimensions. Others have distinguished between what has variously been called the law in the books, higher law, or official law on the one hand, and the law in action, working law, everyday law, or simply unofficial law on the other. These categories offer convenient starting points, but none succeed in capturing the true complexity or the subtle nuances of the landscape. In short, they are an oversimplification of a multilayered and intricate reality that resists easy depiction.

There is a conventional picture of law as an orderly pyramid of official institutions arrayed in a clearly defined hierarchy that regulates and controls social life. In this view, the state as the organizer and mobilizer of law has the capacity to reshape the bottom, to bring it into conformity with the prescriptions of "higher" law. This symbolic representation does not capture the richness and complexity of the worlds described in the papers collected in this volume, which demonstrate that the pyramid is just a

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¹ C.P. SNOW, THE SEARCH 25 (1934).

mirage, a convenient metaphor, that blurrily sketches a small corner of a vast and complex territory.

The collection of articles presented here is by no means the first attempt to challenge the traditional and restrictive view of law as an orderly hierarchy of officially sanctioned rules and institutions. There is a wealth of scholarship that highlights the presence, tenacity, and even the virtue of systematic departure from the official law. Some accounts romanticize that departure; others demonize it; and still others simply ignore such departures as unworthy of serious scholarly consideration.

The articles in this issue, derived from presentations at a symposium held on October 24, 2014, at Florida International University College of Law on “Layers of Law and Social Order,” defy many of the well-established notions about the hierarchical relationship between the official and the unofficial law. The reference to “layers,” which was intended to signal awareness of the tangle of multiple normative and regulatory systems in contemporary societies, may suggest more symmetry and regularity than we can actually discern. The most common and fashionable way of referring to this multiplicity is the invocation of the term “legal pluralism.”

In her keynote address, Sally Falk Moore observes, “it was a major advance in legal sociology to give full emphasis to the fact that there are many non-state normative systems.” However, the ubiquitous and elastic term legal pluralism “has come to refer to both official and unofficial legal order, to refer to any multiplicity of normative orders in a given social setting, and also to their interaction.” Moore points to the challenge of searching for regularities that may often be elusive and temporary and creating a typology for this swarm of legal phenomena because each “is a process, taking place over time.”

The ubiquity and persistence of the divergence of legal prescription from prevailing social norms is the focus of several contributors. Mark Edwards proposes a typology of the patterns of continuing divergence and suggests a theory of the mechanisms that generate and dispel such divergence. Lawrence M. Friedman describes several enduring patterns of tolerance for deviation from the formal law and proposes an explanation for the persistence of such legal dualism. Marc Galanter examines the interaction between the top echelon of the official Indian legal system and the unacknowledged but resilient regulatory regimes that persist alongside the official one. His paper points to the perplexities of judicial initiatives designed to control and displace these obdurate and tenacious institutions. James Jaffe describes the romance of British colonial rulers with the indigenous Indian panchayat and the difficulties and disappointments of harnessing this cluster of institutions to the task of governance.

These varied contributions underscore the existence of a spectrum

along which we can appreciate the complex interplay between formal and informal law. Eric Feldman's article on the efforts to impose a set of formal legal controls on e-cigarettes highlights the ubiquity of official law, but it also accepts "that almost every aspect of modern life that is subject to regulation has a variety of legal interfaces, and is thus shaped by multiple 'layers of law.'" Feldman points out that "social control—the effort to create and maintain social order by the state and private parties—depends upon a complex brew of coercion and persuasion, hard laws and soft nudges, far-reaching pronouncements and narrowly tailored rules," and describes how such phenomena play out in the fast-growing arena of e-cigarettes.

Eden Sarid's paper on the enforcement of intellectual property rights among drag queens in Israel turns our attention to the rise of unofficial remedies—in the form of what he calls "intra-social norms" and "correlated social norms"—because "copyright law fails to offer drag queens an effective way to protect their intellectual creations." This solution, Sarid argues, prevents the creative domain of drag performances from becoming "a creativity wasteland, since creators would not be able to recoup adequate rewards for their creation and, thus, refrain from investing time and effort in the first place."

The article by Pedro Fortes reveals yet another instance of the rise of the unofficial, and the subordination of the official to it. In his study about the interplay of formal and informal normative arrangements at Ipanema beach, Fortes uses examples drawn from the informal food market, the beach chair rental system, and the parking arrangements to illustrate how beachgoers have regulated the use of space, adopted anti-competition strategies, and even handled antisocial behavior in order to preserve the social equilibrium without resorting to the official authorities. In other words, the social order at Ipanema does not result from rigid compliance with official laws, but instead from the "informal social norms [that] are negotiated under the shadow of beach tents at Ipanema."

Finally, Manuel Gómez brings our attention to a setting where "the factors that promote social order and foster law-abiding behavior . . . emerge outside—or even against—the state and its legal institutions." Gómez's study of the so-called Tower of David (TOD), a community of squatters in Caracas, serves as a good example of how illegal occupation can give rise to a viable functioning community regulated by indigenous norms created by its own members. By highlighting the efficiencies of the indigenous normative regime in place at the TOD, which mimics the larger society and even relies on it to exist, Gómez helps debunk "the negative perception of TOD as an environment where societal values are subverted and illegality is the norm."

As the articles collected here show, we have moved away from the orderly pyramid in which the top guides, inspires, and disciplines the lower layers. But as we see the inadequacy of this model, what do we have to put in its place?