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# Legal Pluralism as Omnium Gatherum

*Sally Falk Moore*<sup>\*</sup>

I will divide the roughly fifty-year history of legal pluralism into two periods: the beginning starting in the 1960s as I experienced it, and the rest from the 1970s to the present. My objective is to try to present a large range of situations that have come my way in the literature, and that have been called “legal pluralism.” My emphasis will be on the variety of types and some of their historical pasts. I am contending that some of these instances are so unlike each other that while they have been classified together as “legal pluralism,” they are not really examples of the same social phenomenon. I am by no means trying to review the whole literature. This is a very selective and somewhat accidental account. A more systematic survey of the literature is found in Banakar and Travers’s edited book on *Law and Social Theory*.<sup>1</sup>

What I want to argue by describing these diverse examples is that it is time to reconfigure the way “legal pluralism” is used as a concept. My contention is that “legal pluralism” has become too general a category to be analytically useful.

## THE 1960S

I was a guest scholar at U.C.L.A. in the 1960s where there was a very active and well-funded African Studies Center. In the Africanist anthropology of the period, there was a great burst of excitement because in many countries this was the decade of the end of colonial government. African countries were going to be free, at last!

In 1966, the African Studies Center ran a major colloquium for faculty and graduate students. Its topic was Africa’s future. There was generous funding from the Ford Foundation. Many distinguished visitors were invited from many different countries. There were a number of African student participants. They were very lively since we were talking about their futures. The issue on the table was what obstacles there might be to the institution of government in the newly independent countries. For the

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<sup>\*</sup> Appointed Affiliated Professor of International Legal Studies at Harvard Law School, Victor S. Thomas Professor of Anthropology Emeritas, Harvard University. Ph.D. Columbia University, 1957; L.L.B. Columbia Law School, 1945; B.A. Barnard College, 1943. Presented for the “Layers of Law and Social Order” symposium held at the Florida International University College of Law on October 24, 2014.

<sup>1</sup> AN INTRODUCTION TO LAW AND SOCIAL THEORY (Reza Banakar & Max Travers, eds., 2002).

discipline of anthropology this was a pivotal moment because, with a few exceptions, it had not previously attempted to address the circumstances of states.

*Most classical anthropological work up to that period consisted of ethnographic studies of particular peoples, paying much less attention to the colonial state in which they existed. The focus had been on the description of single African cultures. There were a few exceptions. The Manchester School was doing studies of urban areas in which people from a number of different tribal groups lived together to work in the copper mines of Zambia.<sup>2</sup> But for the most part ethnographic works concentrated on one people at a time. Considering all the peoples in one nation state and their relationship to the central government was a departure for anthropology. This had been the realm of political science and sociology. In the colloquium there were scholars from all of these disciplines sharing an interest in the problems that new independent governments would face. This determined the content of discussion.*

The dominant figure in the colloquium was Professor M.G. Smith, a Jamaican who had written a book about pluralism in the West Indies, and who had done considerable fieldwork among the Hausa in Nigeria.<sup>3</sup> For him, there was no doubt that cultural and religious differences would mark important lines of segmentation in Africa. These were going to be the terms of political competition in African countries. There was scarcely any country in Africa in which there was a single ethnic group. The idea that there would be national unity under a constitution was an ideal, but there were visible ethnic and religious problems built into these societies. These would be the divides that counted.

What is significant for us here is the theoretical framework that Smith used to address the issue of cultural pluralism and nationhood. His basic postulate was that in any political field the significant political players were corporate groups. He derived his concept of the social corporation from Max Weber, but then developed it further. A corporation in Smith's definition was a formally organized group. This could include business corporations, but the conception was much wider in its reference. Smith's argument was that unless political groups were well organized and durable, they could not be effective players in the political arena. They could only play in the political scene if their membership was defined, if they had

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<sup>2</sup> J. Clyde Mitchell, *The Kalela Dance: Aspects of Social Relationships Among Urban Africans*, *Rhodes-Livingstone Papers No. 27*, (T.M.S. Evens & Don Handelman, eds., 2006) (Manchester Univ. Press, 1956).

<sup>3</sup> See, e.g., MICHAEL G. SMITH, *GOVERNMENT IN ZAZZAU 1800-1950* (1960); MICHAEL G. SMITH, *THE PLURAL SOCIETY IN THE BRITISH WEST INDIES* (1965); MICHAEL G. SMITH, *CORPORATIONS AND SOCIETY: THE SOCIAL ANTHROPOLOGY OF COLLECTIVE ACTION* (1974).

established methods of making decisions internally, and if they had ways of dealing with the outside world as a unit. Thus Smith's way of thinking about pluralism and politics was to think of completely distinct groups that were internally organized.

Smith was well aware that this kind of analytic formalism did not apply in all situations. After all, even in the colonial period in Africa ethnic groups were not all localized. Many were scattered and were found on various sides of national boundaries. There were intermarriages. People migrated. Some went to the cities. Labor migration was often an economic and social necessity for young men in Africa.

Cultural pluralism was a messier affair than could be represented by the corporate concept though it was highly relevant in some places and times. The example of apartheid South Africa weighed heavily on discussions in the colloquium. Smith tried to address this analytic problem by inventing terms for different kinds of pluralism: cultural, social and structural. He recognized that there were societies, like the United States, in which ethnic, racial and religious differences were not used constitutionally to define political units, and others in which such criteria were critical definers of groups. I will not linger on his redefinitions, and the analytic problems they raise, except to emphasize that there are multiple kinds of pluralism depending on which criterion you use to distinguish them.

Obviously decolonization and cultural pluralism were the key political issues being discussed in the U.C.L.A. seminars in the 1960s. The product of the year of meetings and discussions in the African Studies colloquium was a book edited by Leo Kuper and M.G. Smith entitled *PLURALISM IN AFRICA*.<sup>4</sup> Another U.C.L.A. product of the period was *The Journal for Legal Pluralism and Unofficial Law*. It came out twice a year and was a very modest effort. However today it is a slick item, with a shiny cover, published by Routledge of the Taylor and Francis Group, three times a year.

What I want to call your attention to is the title of the Journal, *The Journal for Legal Pluralism and Unofficial Law*. Here a distinction is being made between unofficial law and legal pluralism. Legal pluralism designates multiple forms of *official* legal order, while unofficial law means just that. But what has happened in the years since the 60s is that the 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. As you will see, I find this merging of meanings less than clarifying.

A major book that further developed the focus on official pluralism

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<sup>4</sup> *PLURALISM IN AFRICA, BERKELEY AND LOS ANGELES* (Leo Kuper & M.G.Smith, eds., 1969).

came out in 1975. That book was an important reference work by a legal scholar, M.B. Hooker. Titled LEGAL PLURALISM, its subtitle was, *An Introduction to Colonial and Neo-colonial Laws*.<sup>5</sup> It was a compendium of laws in British, French, Dutch, and a host of other countries where pluralism was present. For Hooker the condition of legal pluralism consisted of more than one legal system in the same polity, a dominant system, run by either a colonial or post-colonial government, and the subordinate legal systems *it recognized*.<sup>6</sup> The alternative form of legal organization would be a unitary system. Hooker ends his book by stressing that newly independent governments would have to choose between the two policies, plural or unitary.<sup>7</sup>

From the 1970s, which I calculate as the beginning of our second period, which extends to the present, we see that many governments created new constitutions to address this problem. For example, in Tanzania, where in colonial times there had been a system of courts for British residents, and a separate system of “Native Courts,” the independent government decreed that there would be only one court system for everyone. They opted for a unitary system. The government badly wanted its own authority recognized and to be the exclusive authority in the country. Tanzania wanted to erase any political trace of the tribal units which in colonial times had been the structures on which indirect rule was based.

In the new socialist Tanzania, everyone had to belong to the national Party, and the administration of the country was organized into decimal sub-units of the Party. There were units of ten-house cells at the base, and then one hundred cell units, and so on. The big point of this numerical calculation was that administrative organization would not be as it had been under the British, tribe by tribe, but in a unitary common organization of all Party members. The numerical mode did not recognize tribal distinctions, and was designed to help make tribes disappear. But, of course, this decimal organization, while theoretically neutral, erased nothing of the underlying social realities of local language, kinship groups and local social distinctions which continued to exist though they were not officially recognized.

All the independent governments of Africa had to cope with ethnic pluralism in the populations they governed, and they did so in a great variety of ways. The reality of ethnic and religious pluralism remains a thorn in the side of many countries. In many nation-states, whatever their official policy, governments find that they cannot divert the population

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<sup>5</sup> See generally M.B. HOOKER, LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS (1975).

<sup>6</sup> See *id.*

<sup>7</sup> *Id.* at 479.

from strong commitments to their own people and their ambitions as a collectivity.

My own fieldwork experience in Tanzania began in 1968. I chose to work on Kilimanjaro where about 700,000 Chagga speaking people lived.<sup>8</sup> My plan was to study their legal system. After some local experience with Chagga life, I came to the conclusion that it would be useful to find some term that would characterize their persistent ethnic reality despite the super-imposed socialist government. I called their situation “a semi-autonomous social field,” because while they were formally under government jurisdiction, in their relations with each other, they continued to practice their own system of customary law informally and privately.<sup>9</sup> In an early paper when I wrote about this, I also wrote about how such “semi-autonomous social fields” existed in the U.S. and used a segment of the garment industry in New York as a demonstrative instance.<sup>10</sup>

According to my invented definition, a semi-autonomous social field is one to which a body of formal law applies, but which has also generated its own enforceable customs and rules. In the garment industry the people involved wanted to continue operating in their own social field without using legal institutions, making informal contracts, giving credit, breaking formal contracts with the union, and so forth. In the New York instance it was the dress business, and in Tanzania was the ethnic/kinship/neighborhood complex in which people had lived all their lives. Kilimanjaro property (particularly land) was loaned, transferred, inherited, and fought about. Disputes were settled inside families and neighborhoods. In both instances, the social fields had their own norms. Failure to conform would mean being ostracized or ejected from the social and economic milieu that mattered most.

This conceptual framework was very soon attacked by John Griffiths, an American who was (maybe is) a law professor in the Netherlands. He objected on the ground that all enforceable norms should be characterized as “law,” that effectively they were sociologically alike, and that there should be no distinction between those enforced by the state and those enforced by unofficial agencies.<sup>11</sup> Griffith’s argument was that by recognizing only state enforced norms as “law” and distinguishing the norms of semi-autonomous social fields, I had exaggerated the importance

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<sup>8</sup> See generally SALLY FALK MOORE, *SOCIAL FACTS AND FABRICATIONS: ‘CUSTOMARY’ LAW ON KILIMANJARO 1880-1980* (1986).

<sup>9</sup> See *id.* at 213-319.

<sup>10</sup> Sally Falk Moore, *Law and Social Change: the Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 *LAW & SOCIETY REV.* 719, 719-46 (1973).

<sup>11</sup> J. Griffiths, *What is Legal Pluralism*, 24 *J. LEGAL PLURALISM & UNOFFICIAL LAW* 1, 1-56 (1986).

of the state, of the central government. My sin was that I was engaging in “legal centralism.” He was saying that by distinguishing official law from the norms of semi-autonomous social fields, I was over-emphasizing the formal system.

A major paper addressing these questions in the same general era was Marc Galanter’s essay entitled *Justice in Many Rooms*.<sup>12</sup> In it he took up the role of courts in the United States in order to discuss the much broader question of what he called, “indigenous ordering” or indigenous law.<sup>13</sup> These were the norms observed outside the courts in everyday activities. He says, “the notion of law as a comprehensive monolith—indeed as a ‘system’—are not descriptions of it, but rather part of its historic ideology. Legal regulation in modern societies, as in others, has a more uneven, patchwork character.”<sup>14</sup> He notes that this has been observed for some time. Among many other works, he mentions the 1963 article of Stewart Macaulay observing that in their dealings with each other, businessmen often prefer informal verbal agreements to written contracts. The handshake and the smile may often be enough to close a deal. They avoid formal legal arrangements.

In his article, Galanter alludes to the disdain that legal centralists have for such informality, yet that it can be found in many social contexts and transactions. He says, “any major advance in our understanding of how official legal regulation works in society depends on knowing more about indigenous law and its interaction with official law.”<sup>15</sup> He also talks about the great burden of work that rests on legal agencies, explaining that they have an overload of commitments, more than they can handle. The result, he argues, is selective enforcement.<sup>16</sup> Galanter goes on to say, “Courts (and other official agencies) comprise only one hemisphere of the world of regulating and disputing. To understand them we must learn how they interact with the other normative orderings that pervade social life.”<sup>17</sup> He acknowledges, in a less optimistic vein that, “the relation of official and indigenous law is variable and problematic.”<sup>18</sup> It is precisely this variability that should discourage us from finding a single “one size fits all” answer to the question what the relationship is between official and indigenous law. But variability should give us plenty of settings to investigate and compare.

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<sup>12</sup> See generally Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering and Indigenous Law*, 19 J. LEGAL PLURALISM 1, 1-47 (1981).

<sup>13</sup> See *id.*

<sup>14</sup> *Id.* at 21.

<sup>15</sup> *Id.* at 27.

<sup>16</sup> *Id.* at 33.

<sup>17</sup> *Id.* at 34.

<sup>18</sup> *Id.* at 25.

Instead, many accounts do not strive to arrive at generalizations, but address a particular type of situation: the unofficial norms of a closely-knit group. In 1980 an article by David Engel describes the former practices in a farming community in the mid-West of the United States.<sup>19</sup> There were many informal norms among the farmers. They made oral agreements about services, sales, and rentals and offered each other mutual assistance when needed. Agreements were not written. There was a moral code among them that, “a farmer’s word is good between farmers,” and they had commitments to help one another in all sorts of situations, exchanging “information, goods, and equipment” and helping each other with the harvest.<sup>20</sup> The sanctions for breach were gossip, boycott, and self-help, sometimes violence.

Interestingly enough Engel describes a radical change in these internally regulated relationships when the farmers move to town and rent their land to strangers. In dealing with outsiders there was an increase in the use of written agreements and some increase in the use of the local courts. However, even then, when there were disputes, negotiated settlements were more common than lawsuits. That was because there was general knowledge that if one went to court and the case went to a jury, local people would apply local norms.

In 1991, Robert Ellickson, a Yale law professor, made a very detailed examination of the norms governing relationships among neighbors, and why they are the way they are.<sup>21</sup> He was aiming for a general thesis. In his book, *ORDER WITHOUT LAW* he argues that close-knit groups “develop and maintain norms whose content serves to maximize the aggregate welfare that members obtain in their workaday affairs with one another.”<sup>22</sup> Stated more simply, “the hypothesis predicts that members of tight social groups will informally encourage each other to engage in cooperative behavior.”<sup>23</sup> He undertook to test this hypothesis by studying close neighbors living in Shasta County in California. Some of them were cattle ranchers and some were not. Ellickson examines the law regarding animal trespass, and animal-caused damage.<sup>24</sup> Some of the areas he in which he was interested were open range, while other parts were closed range. In open range areas cattle are not fenced in. In closed range areas cattle owners are supposed to erect fences around the areas in which cattle graze.

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<sup>19</sup> See generally David M. Engel, *Legal Pluralism in an American Community: Perspectives on a Civil Trial Court*, 5-3 AM. BAR FOUND. RES. J. 425, 425-54 (1980).

<sup>20</sup> *Id.* at 438-39.

<sup>21</sup> ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

<sup>22</sup> *Id.* at 167.

<sup>23</sup> *Id.*

<sup>24</sup> See generally ELLICKSON, *supra* note 21.

Cattle do not read the law and where they are not fenced in, they often wander out of their owner's areas into the land of others, or on to roads where they may cause accidents. There are many legal precedents governing these matters, however, the neighbors involved in Shasta County were not particularly informed about legal details. They were most interested in maintaining good relations with their neighbors with long term ongoing relations in mind. When differences arose, on the whole they worked out their problems peacefully. They cited general norms which all of the neighbors held without paying attention to the legal underbrush.

Ellickson uses this material to criticize a law and economics view of behavior, seeing it as always motivated by a calculation of costs and wealth maximizing strategies. He also attacks a version of legal centralism, which he attributes to Hobbes, and which implies that law alone governs behavior. He also attacks what he calls law and society theory and quotes Arthur Leff saying that "law and economics was a desert, and law and society was a swamp."<sup>25</sup> Ellickson says "[a] key shortcoming of the law-and-society school has been its failure to develop a theory of the content of norms."<sup>26</sup> His basic argument is that "law is not central to the maintenance of order" and that "the presence of transaction costs is what leads people to ignore law in many situations."<sup>27</sup> In trying to develop his own theory of informal norms, he reviews a vast literature critically. His conclusion: "that people often choose informal custom over law not only because custom tends to be administratively cheaper, but also because the substantive content of customary rules is more likely to be welfare maximizing."<sup>28</sup> Ellickson's careful review of other theories ends with what to an anthropologist seems a fairly obvious conclusion. He ends by telling us that there is a likelihood that people in close, long term relationships, who have common interests in their day to day encounters, are likely to cooperate, and turn to customary rules and practices rather than formal authorities and courts.<sup>29</sup>

After the Griffiths paper that identified me as a legal centralist,<sup>30</sup> I did not participate further in the argument about categories and definitions. I felt I had had my say. All of my fieldwork was about non-state actors and their occasional resort to official law. I did not respond to Griffith's argument that all enforceable norms should be termed "law." But curiously enough the terminological question whether all enforceable norms should be treated the same way as law has continued to be discussed. It continues

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<sup>25</sup> *Id.* at 147.

<sup>26</sup> *Id.* at 149.

<sup>27</sup> *Id.* at 280.

<sup>28</sup> *Id.* at 288.

<sup>29</sup> *See id.* at 280-86.

<sup>30</sup> *See Griffiths, supra* note 11, at 20.

as a live theoretical issue. Brian Tamanaha has proposed that the matter should be reframed as a question of “normative pluralism.”<sup>31</sup> Other versions of this theoretical dispute have reappeared a number of times. For example, in 2002 a paper was published by Franz von Benda-Beckmann, in which he reviews all the strongly held opinions.<sup>32</sup> He wisely observes that what people choose to do research on depends on what they are interested in, and their theoretical positions follow.<sup>33</sup> He comments that legal pluralism should be studied in empirical situations and historical processes, that there is no point in quarreling about abstract concepts. He must have written the paper in a light-hearted mood because he called it, “Who’s Afraid of Legal Pluralism.”<sup>34</sup>

These theoretical discussions aside, in recent years, the empirical examples of legal pluralism in the literature have expanded enormously. There is no end of ethnographic descriptions of specific situations. It is now understood to be a topic relevant to every country in the world, industrial countries as well as developing ones, and some have found it relevant to global questions. In the bulk of the literature there is a tendency for *factual reporting to replace theorizing*, but there are still scholars wrestling with the theory and the terminology. There is an obstacle to classification: it is the immense variety of circumstances in which these multiple layers of order are found.

I want to briefly describe three settings that are very different from the small moral communities approach of Engel and Ellickson, one in Taiwan, one in Bolivia, and the third in the global domain. Jane Winn describes the extra-legal ways that small and medium size businesses in Taiwan conducted their affairs in the 1990s.<sup>35</sup> They had limited access to the formal banking system, so they used personal networks and extra-legal techniques to obtain funds in the informal economy. Rotating credit associations were one possible resource, provided one had reliable friends interested in forming such an association. Another method was to offer a lender a post-dated check. There was great loss of face, shame and erosion of business reputation if one defaulted on paying such a check, so these were regularly used in loan agreements. A third resource in the informal economy was to borrow from a moneylender for a short term at a high

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<sup>31</sup> FERNANDA PIRIE, *THE ANTHROPOLOGY OF LAW* 20 (Oxford Univ. Press 2013) (quoting Tamanaha).

<sup>32</sup> See generally Franz Von Benda-Beckmann, *Who’s Afraid of Legal Pluralism?*, 47 J. LEGAL PLURALISM & UNOFFICIAL LAW 37, 37-82 (2002).

<sup>33</sup> See *id.*

<sup>34</sup> See generally *id.*

<sup>35</sup> Jane Kaufman Winn, *Relational Practices and the Marginalization of Law: Informal Financial Practices of Small Businesses in Taiwan*, 28 LAW & SOC’Y REV. 193 (1994).

interest rate. Moneylenders had connections with organized crime and could easily collect a debt either by sending thugs to the debtor's home, or even merely by threatening to send them. By these means small businesses in Taiwan managed to raise money for themselves without going on the record, i.e. they raised money for their businesses in a non-taxable way. These strategies were what Winn calls "relational practices" which were used instead of the formal financial system, and which, incidentally "marginalized" the legal system.<sup>36</sup> This, then, was a non-legal set of norms of operation generally understood by people running small businesses as the way things were done. Winn mentions but refuses to use the term "legal pluralism."<sup>37</sup> She thinks it's more useful just to present her empirical observations.

As for the Bolivian example, I shall give a very short sketch of a paper given by Daniel Goldstein that I heard him give a week or two ago. Its title was *The Men in Black*.<sup>38</sup> His case study was of the operation of the huge central market in Cochabamba, Bolivia.<sup>39</sup> The market has hundreds of small stalls, each rented by a merchant. The state licenses the merchants, whose businesses are endangered by two types of illegal activity. There are illegitimate, unlicensed street vendors who carry their merchandise with them and set themselves up wherever they can find a spot. The market is also plagued with petty thieves.

Nevertheless, the merchants have prohibited the federal police from coming into the market. Instead they have outsourced their need for protection.<sup>40</sup> They have hired teams of black-jacketed tough guys to protect them and their merchandise. Each merchant regularly pays small sums to this organization for protection. The men in black jackets meet every morning as a group. At that time their commander tells them which sector of the market each is to patrol for the day.<sup>41</sup> The men in black have absolute discretion about how to deal with the street vendors and the young people stealing. They can beat them up or do worse. This is a completely extra-legal operation.<sup>42</sup> The police know about it but cannot intervene since they have been banished by the merchants, and have accepted their ouster.

This market protection situation is not the small norm-generating

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<sup>36</sup> *See id.*

<sup>37</sup> *Id.*

<sup>38</sup> Daniel M. Goldstein, Invited Lecturer, Remarks at Harvard University, Department of Anthropology event: *The Exception from Below: Sovereignty and Policing with the Men in Black* (Sept. 22, 2014), in *THE OWNERS OF THE SIDEWALK: SECURITY AND SURVIVAL ON THE FRINGES OF THE GLOBAL ECONOMY* (forthcoming 2015) (on file with author).

<sup>39</sup> *See id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *See id.*

moral community envisaged by Engel and Ellickson. The market is a very large place of business, being protected by a group of people who extort money for the protection, but who have the consent and sponsorship of the merchants who are supporting them. It has some of the flavor of a mafia-type arrangement. The legal system, in the person of the Federal police, has been excluded.<sup>43</sup> The municipal police have been given access to work, but only on specified limited matters. For example, they have the right to insure that merchants are using the proper weights and measures. They cannot interfere with the men in black who deal with an entirely different domain. This again is a non-legal form of order with its own rules, a non-legal normative system. Goldstein calls this an “alternative sovereignty.”<sup>44</sup> Would it shed any light on this arrangement to call it legal pluralism?

#### GLOBAL LEGAL PLURALISM?

My favorite account of global legal pluralism is by Francis Snyder. It appeared in the *EUROPEAN LAW JOURNAL* in 1999.<sup>45</sup> It is about the Barbie doll, how she is produced, regulated and sold. She is labeled “made in China” but the reality is more complicated. China supplies the factory space for assembling her parts, provides labor, electricity and cotton cloth for her dress. But Japan supplies the nylon hair. Saudi Arabia provides oil which is refined in Taiwan to make plastic pellets for the body. Molds come from the U.S., Japan or Hong Kong. The molds are the most expensive item in her manufacture. The U.S. provides cardboard packaging and paint pigments. Banking and insurance come from Hong Kong. The raw materials are delivered to factories in South China who put them all together. Snyder tells us that two Barbie dolls are produced every second and sent to forty countries by Mattel, Inc. of El Segundo, California.<sup>46</sup>

Snyder next takes up some of the legal elements in this picture. In fact, the rest of his paper concerns the tangle of laws, international agencies, local negotiations and players in the game, that affect Barbie’s production. Among other regulations, the invention, marketing, and production of toys is affected by: (1) U.S. intellectual property law, there are copyrights on Barbie; (2) by anti-trust law which defines the number of key participants in this process, and prevents mergers; and (3) European community regulations . . . . The Council of the European Union legislates on such matters as imports and licenses, and has replaced in whole or in part the law of member states with European Community Law on such matters. An

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> See generally Francis Snyder, *Governing Economic Globalization: Global Legal Pluralism and European Union Law*, 5 *EUR. L.J.* 334, 334-74 (Dec. 1999).

<sup>46</sup> *Id.* at 339.

international organization called *Toy Industry in Europe* now makes rules for the European side of these matters. It is an amalgam of national associations of toy producing companies. However, retailing arrangements are concentrated in the U.S., Hong Kong, Europe, and Japan.

The overarching ruling framework relating to this is the World Customs Organization, which has 150 member states. It is concerned with the harmonization of technical customs rules and practices. It is headed by a Council and has a sizeable internal bureaucracy. It drafts and promotes agreements, makes recommendations about the interpretation and application of its existing conventions, and acts as a conciliator in disputes between contracting parties. Snyder tells us that the legal status of the recommendations of the W.C.O. is “ambiguous.”<sup>47</sup> China has only agreed to some, not all, of the rules of this World Customs Organization.

The international commodity chain in toys has many different players, many investors, distributors and marketers. The toy factories in south China “often are part of Hong Kong companies. Production, distribution, quasi-political activities such as participation in trade associations, and often personal or family relations are closely intertwined.”<sup>48</sup> Chinese companies produce toys on contract for the world’s biggest toy companies. “To the extent that power in the toy chain lies in Asia, it is based in Hong Kong,” a place through which more than half of China’s toy production is exported.<sup>49</sup> Hong Kong courts have heard trademark and copyright cases brought by Mattel, the manufacturer of Barbie dolls. American law on these matters is taken to apply in Hong Kong.<sup>50</sup>

As for labor, all the multinational companies have adopted codes of conduct with regard to labor. But these are not legally binding. NGOs and labor rights groups bring pressure on trade associations to try to get conformity, and evidently have some success. “Codes of conduct . . . are analogous to multilaterally negotiated treaties which are then applied as standard-form contracts laid down by the leading firms in a particular market.”<sup>51</sup> But these codes of conduct, though applied contractually, are not necessarily observed in practice.

Toy manufacture is also affected by health considerations. For example, Greenpeace has banned the use of certain chemicals. There are also legal rules about toy safety.

Other sources of international norms that affect agreements about trade

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<sup>47</sup> See *id.* at 321.

<sup>48</sup> *Id.* at 322.

<sup>49</sup> *Id.*

<sup>50</sup> See *id.*

<sup>51</sup> *Id.* at 324.

in toys include WTO (World Trade Organization) and GATT (the General Agreement on Tariffs and Trade). These affect the commodity chain in toys.

After much complex discussion about these various authorities and their hierarchical relationship to each other, Snyder produces his conclusions. He tells us that these economic networks, of which Barbie's production is just an example, are a moving scene with many contingent elements. He says that the "economic networks are governed by . . . strategically determined, situationally specific, and often episodic conjunctions of a multiplicity of" factors.<sup>52</sup> He tells us that the relevant factors are located at many sites throughout the world, some of them institutional, some normative and some processual. Some of these sites are market based; some are established by political structures. What Snyder declares in conclusion is that the totality of these sites represents a new global form of legal pluralism.

I have not done justice to his presentation, but he has certainly made the case that there are so many players, so many trade associations, so many countries involved, and so many links in the chain of toy production and sale, that one can easily see that legal regulation is only one element in the assemblage and its activities. Given the multiplicity of contracts, codes, conventions, treaties, and international agreements, there are more ways that norms can be established than there are bees in a hive.

#### CONCLUSIONS

Snyder's description of this situation as a new, global form of legal pluralism seems a reasonable way to characterize the international commerce in toys. But it is not clear how much that trade has in common with the small scale, face to face, community based, normative, non-law system, generated by farmers in the Midwest or ranch owners in Shasta County. That kind of community non-law has also been called "legal pluralism."

The common theme that permeates both the local and the global is the fact that these are social fields that have their own unofficial rules. But people in these social fields, despite having their own norms, also operate in the presence of laws, which certainly affect them. Even in the global field, without a world government, many of the norms of the global commodity chain are generated in law-like formal agreements, documents, treaties, and conventions. Should the complex international toy-producing scene be classified with the instances of local community understandings? Does it clarify matters to call them both instances of "legal pluralism?"

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<sup>52</sup> See *id.* at 327.

Today, as we have seen, the concept of legal pluralism has been applied far and wide from colonial structures, to post-colonial ethnic “customary” practices, to local systems of relationships among neighbors, to lenders and borrowers of money, to merchants buying private protection, and to the present global scene. It was certainly a major advance in legal sociology to give full emphasis to the fact that there are many non-state normative systems, and to acknowledge how important these systems are to the shape of any society. It was also useful to dispel some of the mythology of legal centralism.

But what comes next? What about classifying the many situations that have been called “legal pluralism” into types. Those founded on an intimate small community might be one sort. It might even be tempting to go further and try to divide the other social settings into a few types. Classifying would make things look simpler. But would we really know any more? Perhaps.

I want to conclude by pointing out a basic difficulty about trying to create a typology. There is an important reason why we cannot easily describe in general terms the relation of non-official norms to official systems. *This is because their interaction is not a fixed state of affairs. It is a process, taking place over time.* The official and unofficial are not static “systems.” Official law may be thought of as fixed, but over time, and even at one time, as Galanter pointed out, its content or its practical implementation can be quite variable. By definition, the unofficial can also undergo variations and transformations. Changing circumstances redefine the modes of operation of people in the social field, fields in which they function. The kinds of relationships their activities create may not be stable over time. So the search for regularities in the formation and content of non-legal orders may often be elusive, being temporary, and situationally determined.

The way the term “legal pluralism” is now used is at best a general conception of a highly variable process. It lumps together official forms of law with clusters of unofficial rules. The inquiry into these phenomena needs to be refined. There are important distinctions to be made among the kinds of circumstances in which these rule systems operate, and in the specifics of these situations. There is work to be done.