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Some Reflections on the Fourth Chilean-German-Tanzanian Legal Talk

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REFLEXÕES SOBRE O QUARTO ENCONTRO CHILE-ALEMANHA-TANZÂNIA EM DIREITO

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On December 3, 2021, the Heidelberg Center for Latin America convened a group of academicians from around the world to explore the way legal pluralism contests values (including the protection of universal human rights), disrupts our national legal systems, and provides for self-determination. The transnational webinar was co-sponsored by the University of Heidelberg and University of Bayreuth of Germany, Universidad de Chile, University of Dar Es Salaam in Tanzania, Faculdades de Campinas in Brasil, as well as California Western School of Law/Proyecto ACCESO in the United States, and the German Academic Exchange Service (DAAD). The webinar featured Chris Maina Peter, Professor Emeritus at the University of Dar Es Salaam, Tanzania, Professor Dr. Nancy Yañez of the University of Chile and Director of its Center for Human Rights, and Dr. Susanne Epple of the Frobenius Institute in Frankfurt, Germany. Dr. Sven Korzilius of the Heidelberg Center for Latin America and Jebby Gonza from Tanzanian-German Centre for Eastern African Legal Studies at the University of Dar es Salaam coordinated the webinar. Dr. Inés Recio provided welcoming remarks. The webinar brought together participants with an interest in Comparative Law, Indigenous Studies, Legal Anthropology, and Sociology of Law - over some two and a half hours! I served as moderator for this prestigious panel due to my work on legal pluralistic initiatives and legal reform in South America[1] and as a Member of the Academic Staff at the Heidelberg Center for Latin America.[2]

This Essay seeks to provide some notes to accompany the video proceedings of the webinar that is embedded in this volume of the Revista DESC at the Faculdades de Campinas of Brazil.[3] Starting with a definition of legal pluralism, this Essay explores the manner in which elements of legal cultures were transplanted during the Colonial Periods of different countries.[4] The Essay examines exercises of judicial imperialism which involved the wholesale importation of other countries' norms, rules and institutions and the calls, in the post-Independence era, for more locally sourced legal cultural practices. Such calls have grown louder over the last several decades due to globalization. There have been corresponding attempts to introduce

1 *See* James M. Cooper, *Legal Pluralism and the Challenge to Human Rights in the New Plurinational State Bolivia* 17 WASH. U. GLOBAL ST. L. REV. 1 (2018), https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1635&context=law_globalstudies.

2 Press: Three Countries Launch Comparative Post-Graduate Diploma, HEIDELBERG CENTER FOR LATIN AMERICA, http://www.heidelberg-center.uni-hd.de/english/presse_condor210504.html (last visited on Dec. 14, 2021).

3 *See* DESC, Revista do Programa de Pos-Graduacao em Dereito FACAMP, https://desc.facamp.com.br/seer/index.php/FACAMP (last visited on Jan. 28, 2022).

4 *See* James M. *Cooper, Competing Legal Culture and Legal Reform: The Battle of Chile,* 29 MICH. J. INT'L L. 501 (2008), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1151&context=mjil.

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elements of traditional, Indigenous justice systems to run parallel with the Western-sanctioned ones that remained when the Colonial Periods formally ended. Following growing support for Indigenous rights and the rising desire to compensate for past injustices, recently newly independent governments, attempted to implement Indigenous customary laws .[5] This Essay explores the challenges that such exercises of legal pluralism pose to the state-imposed legal system inherited from the Colonial experience. This Essay concludes with a call for more comparative work to advance the study, teaching, and application of legal pluralism in our legal systems today and provides an appreciation of the contributions of the webinar's panelists.

I. LEGAL PLURALISM DEFINED

Legal pluralism has been broadly defined as a set of independent and coexisting institutionalized legal systems that are followed within a single "social arena."[6] Legal pluralism has signified the existence of multiple legal systems - an official legal system largely influenced by former colonizing powers, running parallel with the more traditional or customary laws of Indigenous Peoples.[7]

Legal pluralism recognizes the importance of custom, the ways and means of solving problems in traditional communities, not just the western-styled laws imported from Europe or elsewhere in the so-called developed world. For Nafay Choudhury

Legal pluralism generally describes a situation where two or more legal systems or legal orders coexist in the same social setting. Legal systems include those beyond the state system, such as religious or customary legal systems. Legal pluralism also recognizes that legal mechanisms can also be found in other social settings, such as villages, families, or churches, where rules and conventions exist, inducing compliance.[8]

Often in these underserved regions which are rural and poor areas to which the modern state has little reach and even less impact, state authorities provide little access to justice in addition to poor healthcare, roads, and the basket of other public goods.

An equitable and efficient system of justice is important, but state authorities do not know the citizens in these areas and the citizens have no confidence in these state authorities. Communities address their challenges through local means and traditions.[9] Often these problem-solving ways work in parallel with the imported (or imposed) laws and this balancing act became legal pluralism.[10] Legal monism, on the other hand, is "the idea that there must be one and only one centralized

5 *See* Debra L. Donahue, *Education and Cooperative Management of Tribal Resources,* 42 TULSA L. REV. 5 (2006) (exploring the struggles for self-governance, self-determination and their ties to resource management).

6 Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global,* 30 SYDNEY L. REV. 375, 375 (2008).

7 Raquel Yrigoyen Fajardo, *Legal Pluralism, Indigenous Law, and the Special Jurisdiction in the Andean Countries,* 10 BEYOND LAW 32, 33 (2004).

Classical legal pluralism was confined in two ways: Geographically, it concerned only the interplay of Western and non-Western laws in colonial and postcolonial settings; conceptually, it treated the indigenous nonstate law as subordinate to the official law of the state as introduced by the colonizing power. The new legal pluralism extended the concept to Western societies and the interplay between official and unofficial law more generally.

Ralf Michaels, *Global Legal Pluralism,* 5 ANN. REV. L. & SOC. SCI. 243, 245 (2009).

8 Nafay Choudhury, *Reconceptualising Legal Pluralism in Afghanistan,* WINDSOR REV. LEGAL & SOC. ISSUES 21, 22 (2010).

9 James Michael Cooper, *Se abre una nueva oportunidad: Importando sistemas horizontales de justicia durante una epocha de reforma judicial,* 2 REVISTA CREA 96 (2001), http://repositoriodigital.uct.cl/bitstream/handle/10925/881/CREA_03_2001_2_art6.pdf?sequence=1.

10 James M. Cooper, *Naciones y Nociones Indigenas: Soberania Cultural y Justicia Horizontal en Tiempos de Reforma Judicial,* in RESOLUCION DE CONFLICTOS EN EL DERECHO MAPUCHE: UN ESTUDIO DESDE LA PERSPECTIVA DEL PLURALISMO 15 (2003).

hierarchical legal system in each state. This idea has dominated the political and legal imagination of the West."[11]

Human rights literature has long documented both forms of pluralism. These help us understand alternative forms of justice and the various ways that agents creatively invoke human rights norms with the goal of adapting them strategically.[12]

The one centralized legal monistic regime was imposed by Colonial authorities forcing adoption. The Colonies, in contrast, are the receivers and recipients of this top-down process. There is no give and take. The colonial masters give the law and the Colonies receive it. It is a model of Positivism – the ultimate authority being the colonial master, ideally a Royal such as Queen Isabela or King Leopold (Belgium), a sovereign from the House of Braganza, or a Kaiser Wilhelm II. It was not a mix-n-match game, for not all colonial experiences are equal. The French in West Africa, the Maghreb, and in Indochina brought Enlightenment in its mix of liberté, égalité, and fraternité. But ultimately, it was more like the administrative state sucking out every last resource - a downstream imposition of the Napoleonic Codes of the French Republic to its foreign possessions. And when Guinea decided, post-Independence, to reject a constitution that made it a junior partner in a new French Community, the French made an example of the disloyal upstarts by pulling out every last telephone wire from the nascent country[13] — the height of the extractive state.[14] This self-interest was not unique among the French. The British were also profit-minded, bent on ensuring their geopolitical relevance as long as they had their Empire on which the sun never set.[15] The Belgians ruled with brutality in the Great Lakes area and ended up creating new states composed of ancient tribes such as Hutus and Tutsis who hated each other, The Portuguese were the first in and last out of their possessions — they liked a long Colonial party. Ultimately, extraction becomes addictive.

We learned about that African experience from Chris Maina Peter, who pointed us to Chinua Achebe's classic novel THINGS FALL APART. The Colonial experience for Britain's Nigeria was emblematic of the mix of village life with the Imperial rule of law. As for Tanzania, the British administration differed from than the German administration pre-World War One in Southwest Africa (Namibia) and Tanganyika. Post-World War One, this was not simply be a pure even swap exercise as Berlin and London fomented different imperialist projects, not just different legal cultural fragments. Those newly independent countries became cauldrons for reform and laboratories for legal pluralism that we study today. Legal pluralism is a reaction to all this Imperialism be it through formal Colonialism, post-Independence or post-pandemic.

II. JUDICIAL IMPERIALISM: LEGAL TRANSPLANTS

Legal transplantation was a large part of the colonial experience. Throughout the world, European colonial administrations imported the laws and regulations of the motherland/metropolis. Spanish laws were brought over to the Americas with the *conquistadores* and imposed on the Indigenous Peoples whom they ruled. Portuguese laws were sent to Angola, Brazil, Cape Verde, and Mozambique. Dutch laws went to Indonesia and Surinam. French laws were imposed on Mali, Louisiana, Mauritius, Quebec, and Upper Volta. Independence did not change that, but the monopoly that the former European

11 Daniel Bonilla Malonado, *Extralegal Property, Legal Monism, and Pluralism*, 40 U. MIAMI INTER-AM. LAW R. 213, 213 (2009).
12 KAMARI MAXINE CLARKE, FICTIONS OF JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE CHALLENGE OF LEGAL PLURALISM IN SUB-SAHARAN AFRICA 232 (2000).
13 Elizabeth Schmidt, *Made by History - Perspective: The historical roots of Guinea's latest coup,* WASH. POST (Sept. 21, 2021), https://www.washingtonpost.com/outlook/2021/09/21/historical-roots-guineas-latest-coup/. See generally ELIZABETH SCHMIDT, COLD WAR AND DECOLONIZATION, 1946-1958 (2007).
14 *See* ALEXANDER DUNLOP & JOSTEIN JAKOBSEN, THE VIOLENT TECHNOLOGIES OF EXTRACTION: POLITICAL ECOLOGY, CRITICAL AGRARIAN STUDIES AND THE CAPITALIST WORLDEATER (2020): ("Total extractivism denotes how the techno-capitalist world system harbors a rapacious appetite of all life – total consumption of human and non-human resources – that destructively reconfigures the earth."). Id. at 1.
15 *What Does The Sun Never Sets On The British Empire Mean?,* WORLD ATLAS, https://www.worldatlas.com/articles/what-does-the-sun-never-sets-on-the-british-empire-mean.html (last visited on Dec. 14, 2021).

master had was over. It was no longer a closed shop for laws to be imported – a more open marketplace could result.[16] In the Independence movement that swept Latin America in the early nineteenth century, one set of laws was often replaced with another – often without much success. As Brian Loveman stated: "When the independence movements of the early nineteenth century overturned the divinely inspired law of the Spanish kings, the liberal principles of France, Britain, and the United States usually failed as replacements."[17]

A successful legal transplant – like that of a human organ – will grow in its new body and become part of that body just as the rule or institution would have continued to develop in its parent system. Subsequent development in the host system should not be confused with rejection.[18]

There was no opportunity for rejection if the developing country not initially colonized in the first place. Daniel Berkowitz, Katharina Pistor, Jean-Francois Richard propose that countries which have their formal legal order internally have a comparative advantage in building effective legal institutions over those countries which had its foreign formal legal order imposed externally.[19] Ethiopia is one such place. Yet that country cannot escape the vagaries of legal pluralism: In our webinar, Dr. Susanne Epple helped us focus on the pitfalls of legal pluralism and the current challenges to the rule of law period in that East African state.

It is important to distinguish transplants that are voluntarily imported into a country by the local population and the transplants that were forcibly integrated by outsiders, like colonial powers.[20] For example, the governments of Latin America that transitioned their respective criminal procedures from the inquisitorial to the adversarial systems looked to Germany and the United States for models. These countries responded with the full blessing of the local governments and their operators as they modernize their legal systems.

These attempts can be criticized as window dressing, mere show-pieces of legal pluralism for the media, to placate civil society groups, international funders and academia. Professor Nancy Yañez reminded us that there are power structures in everything, and that mere tokenism will not save the day. In other words, just because the President of the Constituent Assembly in Chile is a Mapuche woman[21] does not mean that a century and a half of the "Pacification of Araucania" – Mapuche territory in the south of Chile – can be forgotten[22] It still "constituted a genocide of the indigenous population."[23]

Numbers should not scare us. None of this is a cookie-cutter process as no two states are entirely the same, even if they both share the same colonial master. And differences are oftentimes frowned upon in the halls of power. In 2006, while working in Bolivia, I informed the President's Representative to the Constituent Assembly negotiations that I was from

16 YVES DEZALAY & BRYANT G. GARTH, THE INTERNATIONALIZATION OF THE PALACE WARS: LAWYERS, ECONOMISTS AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES 6 (2002).

17 BRIAN LOVEMAN, THE CONSTITUTION OF TYRANNY: REGIMES OF EXCEPTION IN SPANISH AMERICA 4 (1993).

18 ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 27 (2nd ed., 1993).

19 Daniel Berkowitz, Katharina Pistor, & Jean-Francois Richard, *The Transplant Effect,* 51 AM. J. COMP. L. 163 (2003). According to the authors, the manner in which a country received its formal law is a much more important determinant of the current effectiveness of its legal institutions than the particular legal family that it adopted.

20 JAMES A. GARDNER, LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA 30 (1980) (finding that the "legal export experience of the European colonialists is particularly relevant and instructive").

21 Global Initiative for Economic, *Social and Cultural Rights, Election of Indigenous woman Elisa Loncón as President of the Constituent Assembly rewards Chile's social struggles* (July 5, 2021), https://www.gi-escr.org/latest-news/election-of-indigenous-woman-elisa-loncon-as-president-of-the-constituent-assembly-rewards-chiles-social-struggles. *See also Elisa Loncon, Mapuche native at the head of the Constituent Assembly, promises "a new Chile",* https://bbc-edition.com/international/elisa-loncon-mapuche-native-at-the-head-of-the-constituent-assembly-promises-a-new-chile/.

22 Rodolfo Stavenhagen, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People: Mission to Chile,* 6 U.N. Doc. E/CN.4/2004/80/Add.3 (2003). *See Larry Rohter, Mapuche Indians in Chile Struggle to Take Back Forests,* N.Y. TIMES (Aug. 11, 2004), http://www.mapuche-nation.org/english/html/articles/art-15.htm..

23 Ramona Wadi, *In Chile, Dismissing Mapuche Resistance As Terrorism,* MPN NEWS (Aug. 12, 2014), https://www.mintpressnews.com/in-chile-dismissing-mapuche-resistance-as-terrorism/195192/.

Canada. I was then asked by someone in Vice-President Alvaro Garcia Linera's office, "How many constitutions has your country had?" I responded proudly: "One and we got it from Great Britain in 1982, amended from its 1867 original version." The staffer asked the group incredulously: "Why is this guy here? We have written lots of constitutions here, so how exactly can this possibly guy help us?"

Peruvian sociologist Hernando de Soto concurs to some degree: "[C]reating an integrated system is not about drafting laws and regulations that look good on paper but rather about designing norms that are rooted in people's beliefs and are thus more likely to be obeyed and enforced."[24] I learned that the hard way - I very well may have been engaging in some judicial imperialism myself with my advisory/consulting work for the Latin American government and Indigenous Peoples by applying my personal perspective and facilitating my inherent biases. While consulting with the Bolivian Vice-Ministry of Decentralization and the President's Office for the Constituent Assembly Negotiations I laid bare my cultural presupposition that all things written were good and that custom had to be reduced to writing so that all citizens had notice about the rules that were to be enforced.[25] Western notions about separation of powers, the social contract, and checks and balances may not have a rightful place in the Andes, or anywhere at all, once everything is up for grabs in a post-Colonial world.

III. THE DANGERS TO HUMAN RIGHTS AND THE CHALLENGES OF MEASUREMENT

This may create a parallel reality [of sorts] — one legal systemic stuck in a modern age, based on fundamental human rights as prescribed by the myriad international treaties signed, ratified, and deposited by Bolivia and the other based on an ephemeral, yet traditionally and wholly subscribed to, set of principles. Moreover, when it comes to Aymara, Quechua or Guaraní *justicia comunitaria,* these communities of Indigenous Peoples exist in more than one nation-state.[26]

In our webinar of December 3, 2021, we reflected on the challenges that comes with pluralistic legal systems, some of them on steroids. Dr. Susanne Epple spoke of Southern Ethiopia, the focus of her fieldwork. She reflected on the scores of ethnic groups and sub-groups within such a small geographic area. We were reminded of the nightmare of cultural relativism, the dangers of translation, and the vagaries of harmonization. That much of this now exists in a brewing civil war makes the work on facilitating cultural differences in customary law by localities, both a simultaneous post-modern exercise and pre-modern exercise. Indeed, formalization of Indigenous justice can clash with some of the core principles of human rights law. The very foundations that countries have laid to fulfill their commitments to various international and regional treaty regimes are shaken. If the exercise of Indigenous self-determination may violate other human rights, how shall we move forward balancing and sequences these different rights?

IV. A CALL TO ACTION

There is no doubt that our webinar made clear that we must think outside the box and the box, in this case, is the state.

[W]e need to think more precisely about the meaning and enactment of justice and politics in local contexts — how

24 HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 159 (2000).

25 JAMES M. COOPER, EL DESAFÍO BOLIVARIANO HACIA LA MODERNIDAD: DERECHOS HUMANOS Y PLURALISMO JURIDICO EN EL NUEVO ESTADO DE BOLIVIA (2016).

26 "[T]here are norms and practices that apply or have force in more than one jurisdiction, but without any transcendent authority. We might call *parallel* norms. They apply to more than one country or jurisdiction, but on a voluntary basis, so to speak." Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STANFORD J. INT'L L. 65, 69 (1996).

it should work, whom it should include, and whom it excludes. We must rethink the conditions within which we envisage justice in the first place and expand the basis on which we locate political beings. For it is limiting to assume that "the law" — rule of law, criminal law, national law – is the only way that justice can be achieved, especially because justice itself is not a thing but a set of relations through which people establish norms of acceptability.[27]

Law and Development lawyers, for-profit legal reform merchants, diplomatic corps, public sector leaders, and international aid agencies should take these words to heart. And in establishing norms of acceptability, we can try to make our justice systems more equitable, accessible, and reflective of each country's culture.

Legal pluralism in and of itself is not an end. Our webinar panelists from around the world informed us it is not a destination. Rather, it is a journey, a process of weighing differing norms, balancing the rules that emerge from those rules and building the institutions that enforce those rules. In the traditional state structure that the European Colonial masters left behind — the vestiges of legal culture competed with that which existed prior to European "discovery". Legal pluralism is a structural way to allow for these competing, if not complementary, legal systems to best serve the interests of each state's citizenry and to provide an opportunity for local self-determined problem-solving.

27 KAMARI MAXINE CLARKE, FICTIONS OF JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE CHALLENGE OF LEGAL PLURALISM IN SUB-SAHARAN AFRICA 147 (2000).

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