From Limited Realism to Plural Law. Normative Approach versus Cultural Perspective

ANDRÉ-JEAN ARNAUD

Abstract. Soft law, alternatives, informal conflict settlement procedures, are all the daily fare of legal sociologists who accept pluralism as part and parcel of the legal scene. Not so legal dogmatics, however, whose legal experts are still loath to think in terms of legal pluralism. For legal dogmatics, the “modern” theory of the State and its legal system—a theory forming the plinth of our Western concept of laws and rights—is founded on a pyramidal structure of legal norms and the exclusive validity of the laws created by the State. As a result, no given social system can formally allow several legal norms proposing different interpretations of the same matter to exist at the same time. In our “monocentrist” Western tradition of law and the State, pluralism is in oddity, an anachronism.

When legal experts try to come to grips with the pluralism issue, they usually view the question as a matter of compatibility among different normative systems; for example, a legal statute, compliance with which would place some citizens in violation of the rules set down by normative systems other than the State’s legal system, i.e., ethical, religious, sports norms etc. Faced with several norms dictating contradictory behaviour, the individual is at a loss as to how to act.

For years, however, legal sociologists have been compiling irrefutable examples of the existence of alternative, informal means of conflict resolution subscribed to by an increasing number of people as an alternative to the state legal system to which they are subject. These alternatives include both practices or procedures proposed by the legal authorities (law teller) as well as norms specifically chosen by parties to apply to a legal agreement, which fall outside the scope of the set of norms provided for by the State—I do not refer here to a third form of pluralism concerned with the multiplicity of sources of legal dispute resolution and legal solutions within the same legal system, i.e., the pluralism derived from the study of legal polycentricity (Arnaud, 1995). By informal is meant all practices or procedures which,
either automatically or by express determination of the parties concerned, are not encompassed by the ordinary or extra-ordinary norms in force normally applicable to the particular case.

How can legal experts be encouraged to take on board these examples of legal pluralism whose importance in contemporary societies is increasingly evident but which are not easily incorporated into a body of laws based on theories whose very founding principles do not admit such phenomena? There are several ways of approaching the question of legal pluralism. One is the traditional socio-legal approach steeped in the concept of fundamental categories set down by legal dogmatics; another is to refer to the concept of legal culture. This article aims to examine these two approaches from a systemic standpoint, whereby pluralism is considered as the existence of several sub-systems within the same legal system.

1. Limited Realism: Pluralism Viewed by Legal Dogmatics within the Framework of Legal Normativism

It would be wrong to assume that legal experts never come across contradictory norms. In their view, however, any such contradictions are always only an apparent conflict of norms and may be resolved by either invoking the legal hierarchy of the sources, the supremacy of certain rules over others, or by force of legal argument. In short, the legal systems generated by the Western legal tradition that is ours, have, as a rule, no place for contradictory norms. If a contradiction does arise, there are always internal rules that will settle the conflict. Indeed, is it not the judge’s duty to pronounce a ruling even in the case of silence of or uncertainty in the law (see Art. 4 of the French Civil Code)? Civil Law countries, and perhaps to an even greater extent, Common Law countries whose legal system is founded essentially on “precedent,” have developed a body of Case Law which is held together by the very existence of a Higher Court.

Beyond the strictly legal context, however, everyday life frequently presents situations which seem to contradict this logical denial of legal pluralism. The legal sociologist will cite examples occurring outside the legal framework of parties to a dispute declining to present their appeal before a court of law. Were a dispute regarding legal pluralism to be brought before a judge by parties demanding the application in their favour of contradictory texts, the solution would as a rule pose few problems. Three outcomes would be possible: the first, that the courts at different levels would not agree on the applicable rule: the hypothesis of the absence of consolidated case law; the second, that the case in point falls outside the scope of current legislation: the hypothesis of a “gap” in the law. (Indeed the word “gap” is highly charged: Admitting that a law may be susceptible of lacunae, is to admit that the law is designed to cover and settle all matters. By the same token, this implicitly recognises that in the event of failure of the legal system to
provide a ruling, it is up to the legitimate authority and the legitimated authority alone to fill that gap and create law); the third solution would be to qualify the behaviour of the party failing to follow the letter of the legal rule in force in an orthodox manner. The behaviour is simply considered as violating “the law,” and the case is qualified as one of “deviance” (in a broad sense).

From the perspective of legal dogmatics, the idea of deviance throws a new slant on the issue of pluralism. While the concept of *casus omissus* or gap in the law leads to one outcome only: a request that the competent law-making authority of a given society take adequate action, the idea of deviance is susceptible of eliciting a less rigid approach than that dictated by pure legal dogmatics. Deviance, according to the tenets of legal dogmatics, signifies that a person has not played the role expected of him/her by other members of the community according to the game rules set down by the body of law in force. In such case, the momentary disturbance in play caused by deviant behaviour can easily be rectified through the institutions especially provided to sanction erring players. These institutions are of varying nature, arbitrating or passing judgement, set up to protect society or coerce the offending party. They are in place either to oblige, as far as possible, the deviant person to meet society’s expectations or, if necessary, reply in his/her place, or again, if these solutions are unfeasible, exact some form of retribution to compensate for the damage or wrong caused by the failure to come up to society’s expectations. Which of these institutions will be the most influential will depend on the time and place, the political, social and economic environment—in a word, on the historical and cultural setting for any given society.

By institutions that “arbitrate or pass judgement” is meant the whole judicial and para-judicial machinery of the state. The institutions “set up to protect society” are generally those public or private bodies set up to expedite the role which the deviant individual has failed to perform (welfare organizations, minimum pension allowance, non-contributory social security provision, etc.). The coercive institutions include the policing and punitive apparatus of the state. These can be summed up as follows:

![Ordinary Legal Relation Diagram](image-url)
There is, however, another way of viewing things, which is to ask what the intention of that person was when accomplishing the act qualified as deviant. Was it his/her intention to contravene the norm and not meet society’s expectations in that particular situation? Or rather, was he/she perhaps obeying another normative reference other than the law in force?

If these situations are considered in polysystemic terms, it is feasible to imagine a clash of contradictory judicial systems and hence envisage the possibility that legal norms may be changed. Indeed, why do changes in the laws take place if not for the fact that, at a given moment, a solution postulated by the legal regulations of a particular society proves inadequate? Legal experts happily admit in such cases that societal events have prompted the legislator to enact changes in the law. But no fact or event can, strictly speaking, change the law. If a rule, body or indeed system of law may be changed, it is because another rule, body or system of the same kind—a juridical system in as far as “juridical” means that there is something pertaining to “law” outside the “legal” system (in the literal sense)—has gained greater importance and relevance than the system of law officially in force. That rule is part of a parallel “juridical system” in competition with the current legal system. Under the official system in force (or legal system), A’s expectations of B’s behaviour will be disappointed. In the system coming into force with a change in the law, B’s behaviour will now meet the expectations of A. An upshot of this new setting may be that the justice and policing institutions find themselves at a loss as to how to play their role to restore the balance upset by deviant behaviour. This change can only be brought about by a change in attitudes, mentality, practice, etc.

In this way collective action can lead to legal change through legislation but also Case Law when magistrates seized with the case or with a past ruling are alerted to what, in the view of many, including the press and media, is considered an outright injustice. There are examples of legislative
changes coming about in the wake of a decisive overturning of Case Law. A typical example is shown by the change in the law banning abortion. Formerly, the Public Prosecutor declined to follow up cases of abortion which, as an accepted behavioural pattern, had become so frequent as to risk clogging the court machinery to the great embarrassment of the legal system. Subsequently, however, women’s groups started demanding that these cases be brought to trial to prevent official reluctance from side-stepping what in their view was a serious social problem. In several countries, this led to the courts systematically passing symbolic sentences, with reprieve, discharging the accused for a variety of reasons. The result was to draw the issue to the attention of the legislator, who subsequently changed the law.

If seen, as described above, as a series of juridical systems, the process becomes clear. Several systems of rules co-exist simultaneously and the state’s legal system finds itself in competition with a juridical system founded on mental constructs (the collective imagination of legal relations) and on a collective practice (or living law), whose consistency and strength both make it able to vie with the legal system in force.

Several lessons can be learned from this:

1) Studying legal norms as part of a mosaic of normative systems, in a truly systematic manner, throws light on the conflicts between the (state) law and (apparently) deviant practices. This approach also serves to predict areas of conflict by assessing the extent to which a given legal system is destined to clash with the juridical system(s) condoning the different forms of conduct. This can be quantified (Arnaud 1981, 2nd part).

2) With this approach, the law appears as a system comprising a series of legal relations enacted in compliance with the norms promulgated and sustained by the State. At the same time, however, it becomes apparent that there also exist juridical relations which, although not referring strictly to the system of state law, cannot be dismissed as isolated occurrences.

3) Several juridical systems may co-exist at the same time, in the same place, referring to the same type of relationship between the same parties. Only one of these systems, of course, enjoys the name of the legal system. The others are (simply) juridical systems, not only by virtue of their proximity to phenomena of law but also since they may become law when changes are made in the legislation, case law or customary law. How should these phenomena, which, although not comprising law in the strict sense of the term, are nonetheless not purely social phenomena, to be defined? This has been well illustrated, for example, in the case of automobile accidents in Japan (Tanase 1990) or in disputes in the African communities in Cape Town (Burman and Schärf 1993). This is another reason to make a clear distinction between the official “imposed” (law of the State) and juridical systems, which often go beyond strict legal boundaries and which legal experts cannot avoid but fear to tackle (Arnaud 1998a, 1998b). The law is only ever the reflection

of a given social reality, while the other juridical systems are the flesh and bones of the society and as such cannot be strictly qualified as merely social, sporting, religious, political or economic in nature. However, these juridical systems do not carry the weight of law until they have officially replaced the law in force.

4) Such a systemic approach presents a heuristic overview of legal pluralism within the framework of the theory of legal norms. Investigation is focused on the issue of the creation of the legal norm—change being considered a means of creation, albeit not an original mode of law production—to such an extent that one may well ask whether an ordinary means of law creation is not part of the school hypothesis, the history of law being a process of legal changes (Arnaud 1972). Being relegated to the phase of law creation, legal pluralism cannot be admitted except in the phase prior to the establishment of the law, prior to that moment when the legislator decides what shall be law—“law prior to its enunciation” (Arnaud 1981, especially 338–86). From this perspective, legal dogmatics is not wrong in not admitting pluralism in the sense of several legal systems existing simultaneously to be taken into consideration by legal experts in their daily practice.

5) By his/her very nature, the legal expert cannot confine himself/herself to being a mere scholar, a purveyor of legal codes and collector of case law. If he/she is to be a worthy professional of the law, he/she must, on occasion, be able to step back from his/her exclusive consideration of the law and observe the phenomenon of legal pluralism as it exists within society.

2. Legalism Renewed: Investigating Pluralism through Socio-cultural Analysis of Legal Systems

The sociological analysis of legal systems constitutes another way of examining pluralism. Rather than a study of existing norms, the approach is cultural. And culture today implies not just the manner of presentation and interpretation adopted by legal practitioners, nor the overall opinions people harbour about the law, nor the values, principles and ideologies behind the law, but also “all the national and local differences in legal thought and practice” (Rebuffa and Blankenburg 1993).

This approach to pluralism was first highlighted by the development of research into the alternatives to state law and more specifically, into the revamping of institutions and reconstituting of formal and official modes of conflict settlement as well as the emergence of institutions and informal and unofficial modes of conflict settlement. The alternatives described by anthropologists and legal sociologists still require further categorization, however, before any attempt can be made to construct a model of the structure and dynamics of legal pluralism.
2.1 The Alternative: an Attempt at Taxonomy

For many years, the term “alternative” signified what the Italian group of Pietro Barcellona had introduced in the 1970s with the expression “Alternative use of the law” (Barcellona et al. 1973). Everything that existing law offered—however unusual or untoward—could be made use of by the legal expert, especially the magistrate, in order to bring about change in society. In the case of an industrial accident, for example, it was not unusual for a magistrate to order the preventive detention of the employer, a measure which gave the image to society of a legal system equal for everybody and not a system geared to a specific class. Such alternative usage of the law, it was thought at the time, would revive and restore the very image of the law and justice.

There were occasions, however, when the rules proposed by the competent law failed to provide the necessary possibilities to achieve this image of fairness the judge was anxious to restore. This led to episodes of personal rebellion—as in the case of the “good judge Magnaud” in France at the end of the 19th century (Arnaud 1975, 102, 103–5)—or collective movements like the Brazilian “alternative judges” in the 1990s (Capeller and Junqueira 1993). Obviously, the debate was not one of legal science but rather of ethics and political commitment.

Today, the alternative approach centres around the forms of intervention which, if we are to believe the researchers, legal practitioners are likely to be increasingly confronted with in the future. Although this is not the context for a debate on the advantages and unfortunate distortions of the alternatives which, created to bring out “less State” often led to the presence of “more State” (Cohen 1985), it is obvious that such forms of intervention exist and are becoming legend in the legal domain. Given their place in society, they cannot be ignored not only by legal practitioners, but also by legal theorists. However, a distinction must be made among several types of alternatives. Some fall within the scope of state law itself, others outside this sphere. There are even extreme examples of parallel justice bodies of norms in outright contradiction to the dictates of state law.

1) Within the framework of State law, many countries are seeing an increase in parajudicial means of conflict settlement. These are usually alternative or informal forms of conflict resolution indicative of the appearance and development of settlement measures on the fringe of official law. Carbonnier names this “internormativity,” i.e., the phenomenon of interaction between normative systems. In other words, unofficial juridical systems clash with the law in force. Here, the interaction is among juridical normative systems whose legal standing has not been officially established. Unlike past practice, in order to arrive at decisions in the settlement of litigation, for example, “social initiatives” are increasingly the order of the
day, consisting of spontaneous experiences issuing from the social actors involved—usually grouped together into consumer, tenant, family or other organizations (Bonafé-Schmitt 1986, 30; 1987, 271). On occasion, official recognition of such unofficial conflict composition proves more effective than settlement through the law—which is what is signified when it is said that entire areas of the law are becoming “socialized.” Although this type of expression still strikes dismay into the hearts of many professors of law, it is nonetheless something that is here to stay.

The systematic move towards the adoption of “social initiatives,” inaugurated in the 1970’s in the United States, was the result of a specific campaign prompted by the Department of Justice to divert court cases towards more informal forms of conflict management and to encourage mediation (Harrington 1985; 1993). This led to alternative dispute resolution programmes (ADR). At the same time, France experimented with the “boutiques de droit”—a kind of legal service for people who did not have ready access to the judicial system or preferred alternative ways of solving their conflicts, because of their social extraction, education, environment or means. The objective of the American initiative was different: forms of ADR—geared specifically to minor dispute contingencies—were introduced to ease the bottlenecks created in the judicial machinery, with judges often being relieved of their competence in such cases (Harrington 1993). Later on this system was to be introduced partially into France and other European (and non-European) countries despite the dangers and limitations the American exercise was shown to have by numerous socio-legal studies as a remedy to cure State Justice structural problems.

The above illustrates how the alternative approaches to modern-day legal relations experts are called upon to tackle already boast a history. A characteristic feature of these alternative approaches, as concerns judicial procedure, is the fact that plaintiffs are resorting less and less to legal texts and arguments, even if—and this is still the case even for minor disputes—they address an official judicial authority. Appealing to a judge simply to ratify or arbitrate is also on the increase, with the result that actual dispute settlement is only formally accomplished by official legal means. Very often, however, minor disputes are preferably settled in an informal manner. Even though legal practitioners still play a considerable role, this does not mean that the decision is taken by a judicial authority. And the role of legal professionals is steadily diminishing, to the point where recourse to types of settlement procedures other than those deriving from conciliation or an official judicial procedure is now the most frequent practice (Bonafé-Schmitt 1986, 94, 99, 151, 224, 159, 184, 190–91, 218, 245).

Evidence of a progressive transformation of legal relations seems linked to the continuation of a complex industrialised society which by tradition has never placed great confidence in the law and which has tended to lose confidence in the law. This was particularly well shown in the case of Japan
The authorities are aware of this since, rather than produce further laws to embrace all fields, they are seeking to improve social relations. The drive to “delegalise” disputes that was the ADR programme takes it cue from a rethinking of disputes themselves and an awareness of their social dimension and implications (Bonafé-Schmitt 1986, 253).

It should be noted that these alternatives do not derogate, in substance, from traditional legal ideology. The very term delegalization has its roots in the word “legal” (Harrington 1985, 171). Just as the *pax americana* is none other than an updated version of the *paix bourgeoise* (Arnaud 1973, 147–76), deregulation (in its widest sense) is none other than an adjustment of the pre-existing system by momentarily changing its frontiers. In no way does this alter its fundamental character.

2) Numerous conflict settlement alternatives have been developed outside the strict sphere of state law and this in all legal cultures, even our own formalist, legalist traditions. They arise, as a rule, where the law proves unable to settle issues in accordance with the current economy of a given society. Research has for some time now pointed to the fact that disputes are being resolved through specific means where state law, although existing, does not penetrate. The creation of residents’ associations in the shanty towns of Rio de Janeiro in Brazil is part of an effort to revive and rehabilitate these degraded areas. The associations represent an essential link between the public authorities and the local community, maintaining order and public safety, and assisting its members where possible (De Sousa Santos 1977, 118 ss.; Capeller and Junqueira 1993. As to Western Europe, Bonafé-Schmitt 1986; 1987; 1993). Before the ineffectiveness of the law, the authorities understood that a locally-based juridical system, more socially than legally geared, would help to resolve the problems of these communities. When still under apartheid, South Africa presented the image of a country which, while theoretically governed by the same state juridical system, was in fact divided into a state juridical system for whites and an alternative juridical system of the street communities for blacks (Burman and Schärf 1993). In the terms of this study, these are two successive attempts to redefine legal regulation, one by the older generation, the other by the younger generation later. Both, however, sought solutions outside the framework of existing state law. This signifies that the need for legal dispute resolution does not disappear with the incapacity of official law to settle relations. What is new is the setting up of informal, alternative forms of resolution, not the disappearance of the means of regulating socio-legal matters, that this is accomplished at the fringe of state law and, furthermore, that this new form of resolution sets itself up as “as-if-state-law.” This implies a progressive awareness of the complexity involved in formulating and managing these forms of dispute resolution.

These examples certainly serve to draw attention to one fact: that numerous dispute resolution procedures have been devised in the most diverse of
societies, all of which fall outside the ambit of State law. When these disputes arise, even over minor matters, a lawyer is called in. We have seen when dealing with globalisation, that social actors are increasingly resorting to legal professionals to get advice on the legal implications of their conduct in a world whose overall economy no longer matches the tradition, style or mindset of the law (Arnaud 1998a). It is the specific job of researchers engaged in socio-legal studies to pull these phenomena together starting with studies in the field in as many countries as possible in order to follow the development of these alternative approaches and understand their meaning.

3) Sets of alternative norms applying to legal relations, although not referring to the law of the State, often appear along the alternative solutions to conflict resolution conceived outside the ambit of the State. In fact, rethinking conflict settlement modalities has led to the development of a corpus proper of formal rules. Very often these are customary rules which are best followed in order to achieve alternative dispute resolution. In this case, the alternative approach is not wholly informal and indeed a clear distinction must be made between the two concepts. Alternatives may be very formal or, albeit less frequently, may be informal procedures existing within the framework of State law. An example would be certain commercial or maritime practices and some forms of penal mediation. An example of such a body of alternative law would also be the *lex mercatoria* which, either on the fringe or alongside international law, presents itself as a body of juridical rules regulating market relations in a globalised economy.

2.2 *The Structure and Dynamics of Cultural Pluralism*

If we return to the approach presented above for analysing legal pluralism, we are perforce led to complete the picture and include non-State interventions which may be identified by socio-cultural investigation into legal relations.

The failure of an ordinary legal relation (two legal entities, A and B, having a mutual relation) may lead to the intervention of a judicial institution, say the police (J-P: case no. 5). A series of intermediate dispute resolution measures exist, however, which although not completely alien to the practice of legal professionals, has nonetheless been underestimated to the point of not being deemed worthy of systematic presentation to law students attending Law Schools. Since it is these very intermediary solutions which are seeing development, researchers must gear their socio-legal investigations accordingly.

A careful distinction must be made between the various alternative dispute resolution modes, formal or informal, which permit acceptable fulfillment of a legal relation by resolving cases of failure to meet the obligations deriving from the adoption or granting of rights by a statute. Thus, if the
legal relation is not fulfilled in the usual manner with the consent or endorsement of each of the parties, an alternative, informal means of dispute resolution falling outside the control of the State (case no. 1) may be brought to bear subsequently, alternatively or retroactively, prior to the adoption of the classical legal solution (case no. 5). Alternatively, a solution may be sought in procedural forms outside State control (case no. 2), or in alternative, informal resolution procedures envisaged within the framework of the law of the State (case no. 3), or in procedures under State control offering an alternative solution (case no. 4). Moreover, all these issues must also be linked to the study of the “mobilization” of the law, or to “research into the selection process, probability, alternatives, motivations, aims and social differentiation in the use of the law machine” (Hörmann and Black 1993).

The “return to ethics” observed by contemporary sociologists and psychologists alike fits into this picture well. In fact, it is striking that the higher one goes on the scale of proposed resolutions, the more the involved parties stand to gain. On the contrary, the more the parties decide to resort to a solution towards the bottom of the scale, the more they stand to lose. The solution that practitioners of law would traditionally choose is solution no. 5, i.e., the last solution which is closest to the use of brute force, i.e., the coercion exercised by public institutions like the judiciary or the police. In
such an event, there will be a winning party—which, however, always loses something—and a loser, who, however, will not lose absolutely everything. Rarely, however, does any party feel entirely satisfied. More often the feeling is one of discontent, bitterness and general disillusionment with the “system of Justice,” its practitioners and all those involved in the State machinery. With alternative solutions, the parties can hope for a solution to their dispute more to their satisfaction and a procedure that complies more fully with their initial request for justice. This goes back to the idea of the “project” which is tied to a constructivist approach in epistemological words (Arnaud 1992; 1998b; Arnaud and Fariñas Dulce 1998, 168 ff.).

In the future, legal professionals will have to change mindset and move away from the “winner/loser” concept toward a future action project which reaches beyond conflict and offers the hope that each of the parties may find the least disadvantageous solution, both feeling “winners” for not having resorted to the most radical means of settling their dispute. In other words, a negotiated legal order is gradually replacing the traditional, imposed legal order familiar to our societies. And this will come about through a radical change in public mentality. How can those responsible for the teaching of law be persuaded of the necessity to lead young students and scholars from a limited realism to a truly new approach to legal systems, taking on board the increasing importance of legal pluralism even in our old Western societies? That is the real question.

References


