UBIQUITY OF LEGAL PLURALISM AND ITS CONSEQUENCES

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This article is a lightly edited version of the keynote address delivered at the 2023 ICON•S Annual Conference, held at Victoria University of Wellington—Te Herenga Waka, on 5 July 2023. I provide an overview of legal pluralism and its implications, addressing why legal pluralism heretofore has been overlooked by jurists, the historical roots of legal pluralism, how to identify what qualifies as law, internal and external legal pluralism, three categories of law that help frame legal pluralism, why customary law is difficult to incorporate within state law, the implications of legal pluralism for legal development and human rights, and much more.

I am honoured to deliver this keynote address on the conference theme, Public Law in a Plural World. A caveat is necessary at the outset: legal pluralism is manifested in a variety of complex ways across the globe; the observations that follow are based on generalisations, which do not hold in every context. With this in mind, the framework I present is a useful starting point for examining situations of plural bodies of law.

I begin by describing the standard view that jurists hold of law—what I call the monistic law state—an idealisation that tends to obscure and distort legal pluralism. Many jurists have been indoctrinated into seeing law this way. I show that this widely held view is theoretically unsound, descriptively false and normatively problematic. Following this critical engagement, I articulate a theoretical framework for legal pluralism that addresses key issues and comports more closely with how people in society perceive and engage with law.

I MONISTIC LAW STATE

The standard view is that law is exclusively the product of sovereign states. State law is unified, hierarchical, comprehensive, monopolistic and supreme over all other orders within society. *Unified* means the legal system is a coherent whole. *Hierarchical* means it is internally constructed in a hierarchy that provides for authoritative resolutions. *Comprehensive* means it covers the entire

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society. *Monopolistic* means it is the exclusive form of law within society. *Supreme* means no other form of authority stands above state law.

This standard vision is commonly held by lawyers and legal philosophers today. Joseph Raz, for example, asserted: "We would regard an institutionalised system as a legal system only if it is necessarily in some respect the most important institutionalised system which can exist in that society".[1] "By making these claims the law claims to provide the general framework for the conduct of all aspects of social life and sets itself up as the supreme guardian of society".[2] "In a nutshell", Raz states, a legal system is "a system of guidance and adjudication claiming supreme authority within a certain society and therefore, where efficacious, also enjoying such effective authority".[3] This image is monistic because it construes state law as a singular unified system with supremacy over a territory.

II TWO THRESHOLD POINTS

Two points about the monistic state law image bear emphasis. First, this image of a unified, hierarchical, comprehensive, monopolistic and supreme state law is a relatively recent invention. Although many jurists take it for granted today, this notion developed in the 17th through 19th centuries, when the territorially-based state legal system gradually consolidated in Europe. Prior to this period, law (in Europe) was decentralised, with multiple different bodies of law and tribunals co-existing, including imperial law, regal law, church law, law of barons, law of villages, law of cities, law of guilds and merchants, and customary law of various communities. The establishment of state law involved building the governmental legal bureaucracy and absorbing co-existing forms of law within the state. Not until deep into the 19th century was the bureaucratic consolidation of law within the state substantially achieved, and even then it was not fully accomplished anywhere. This is the second point: although the image of monistic state law has become dominant in the minds of jurists, it is not a descriptively accurate account of law in the world. Even highly developed state legal systems in the West have not achieved unified, hierarchical, comprehensive, supreme state legal systems with a monopoly over law.

State legal systems around the globe are internally pluralistic and externally pluralistic.

III INTERNAL AND EXTERNAL LEGAL PLURALISM

The United States, for example, has many different bodies of official law, which create internal pluralism. There is federal law and the law of 50 states, and also law of Native American tribes, multiple territories, the District of Columbia and countless municipalities. These official forms of law in the United States are not all consistent and rationally organised in a coherent whole. A concrete example is that 38 states have legalised the sale and use of medical marijuana, two dozen of which

1 Joseph Raz *The Authority of Law* (2nd ed, Oxford University Press, New York, 2009) at 116.

2 At 121.

3 At 43.

allow recreational marijuana—but under federal law it is a crime to sell and possess marijuana. A person who consumes marijuana in these states commits an act that is simultaneously legal and illegal.

A common aspect of legal pluralism is forum shopping, in which people pick and choose where to file their legal claims because the law and judges differ, and potential litigants select the forum they believe is more likely to produce a favourable outcome. Forum shopping at the state and federal level is rampant in the United States in torts cases, corporate law cases, patent cases, civil rights cases and so forth, precisely because law is internally pluralistic.

Another example of internal legal pluralism is the European Union (EU). The Court of Justice of the European Union claims that EU law is supreme, but national courts have resisted this claim. As Mattias Kumm describes:[4]

> For the most part national courts have not accepted that EU law is the supreme law of the land. But nor have they simply assumed that national constitutional law is the supreme law of the land …

European legal scholars have described the relationship between EU law and national law as "a kind of contested or negotiated normative authority".[5] The uncertainty over supremacy in EU countries is clearly contrary to the monistic state law image of law as unified, hierarchical, monopolistic and supreme.

In addition to internal pluralism, bodies of law external to state law also commonly exist. For instance, Jewish law and Islamic law exist in the United States and European Union, conflicting with state law on certain matters, but nonetheless are followed by believers. In the United Kingdom, for example, over half of Islamic marriages are not registered as civil marriages. These couples are married in the eyes of Islamic authorities, but not married from the standpoint of the state. A British court recently ruled that an Islamic marriage is a "non-marriage" under state law.[6] Furthermore, women with both Islamic and civil marriages who obtain a civil divorce, but not an Islamic divorce, are still married. A *fatwa* on divorce pronounced by the Islamic Council of Europe states this emphatically:[7]

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4 Mattias Kumm "How Does European Law Fit into the World of Public Law? Costa, Kadi, and Three Conceptions of Public Law" in Jürgen Neyer and Antje Wiener (eds) *Political Theory of the European Union* (Oxford University Press, New York, 2011) 111 at 127.

5 Miguel Poiares Maduro "Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism" (2007) 2 EJLS 137 at 137.

6 Harriet Sherwood "Islamic faith marriages not valid in English law, appeal court rules" *The Guardian* (online ed, London, 14 February 2020).

7 Shaykh Haitham Al-Haddad "Fatwa: A Civil Divorce is Not A Valid Islamic Divorce" (17 February 2017) The Islamic Council of Europe <www.iceurope.org>.

> In conclusion … the divorce issued by the civil court in response to the wife's request is neither a valid divorce nor legitimate marriage dissolution. This means that such a wife remains a wife and is not free to marry another man. Marrying another man while the original marriage is still in place is a violation of Islamic law and a crime.

The *fatwa* goes on to say that any future children a woman might have will be considered children of the first husband.

Another form of external pluralism exists across the Global South today. A World Bank report on customary law states:[8]

> In many developing countries, customary systems operating outside of the state regime are often the dominant form of regulation and dispute resolution, covering up to 90% of the population in parts of Africa. … Customary tenure covers 75% of land in most African countries, affecting 90% of land transactions in countries like Mozambique and Ghana. … In many of these countries, systems of justice seem to operate almost completely independently of the official state system.

This extends beyond Africa. Across Southeast Asian and Pacific societies as well, particularly outside the main cities, many people resort to customary law and tribunals to resolve their disputes. A 2006 New Zealand Law Commission report on customary law systems in the Pacific found that "the vast majority of disputes in many Pacific countries, especially in Melanesia, are resolved by customary means",[9] and that "[m]any states depend on custom to maintain local peace and order and have not the wherewithal to replace it with state institutions".[10]

Hence, the monistic image of state law is false in two dimensions. Internally, state law is not unified and hierarchically organised. Externally, state law is not comprehensive, monopolistic and supreme within society.

IV PROBLEMATIC CONSEQUENCES OF MONISTIC IMAGE

Although the monistic state law image has never been empirically accurate, it nevertheless has exerted significant consequences because jurists implicitly and explicitly invoke this image as the standard for what a proper legal system looks like. Consider a 19th-century High Court decision from New Zealand, *Wi Parata v Bishop of Wellington*.[11] Chief Justice Prendergast declared in 1877 the Treaty of Waitangi between the British Crown and Māori Chiefdoms, which had been in effect for

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8 Leila Chirayath, Caroline Sage and Michael Woolcock *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems* (World Development Report Background Paper, 2005) at 3.

9 Law Commission *Converging Currents: Custom and Human Rights in the Pacific* (NZLC SP17, 2006) at [4.2].

10 At [4.2].

11 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC).

nearly four decades, "a simple nullity" because "barbarians without any form of law or civil government" are incapable of entering a treaty with a civilised nation.[12] In addition, Prendergast CJ invalidated two existing British colonial statutes that had recognised Māori customary law property rights. These statutes are null and void, he asserted, because "no such body of law existed", and "a phrase in a statute cannot call what is non-existent into being".[13] Customary law is not law, in Prendergast CJ's eyes, because, consistent with the monistic state law image, only state law counts as law.

As far as state law was concerned, following his decision, Māori had no law. However, just because Prendergast CJ declared that Māori had no law does not mean that they had no law. Māori communities continued for some time to live under customary law in the face of sustained efforts by the colonial state to deny and suppress its existence.

This example was not unique. The monist law state image was utilised by jurists as a justification for Western colonisation of large parts of the globe. Historian Andrew Fitzmaurice remarked: "[t]erritorial sovereignty, they argued, was only to be found in modern states. Such states were to be placed higher in the progress of history and therefore possessed superior rights" over societies without state law.[14] The monistic law state image was wielded as a cudgel to denigrate and seize control over societies with different types of legal and political institutions.

Various problematic consequences of the monistic image continue today. In development activities around the globe, for example, it has been widely assumed that any society that does not have a monistic state legal system is profoundly defective and must be rectified. Legal development and reform initiatives heretofore have focused on creating unified state legal systems, which have shown little progress notwithstanding decades of effort and billions of dollars. Only recently have development organisations begun to take legal pluralism seriously and look at customary and religious law for functions that state law cannot provide.

V WHAT IS LAW?

In response to these arguments, a jurist might insist that only state law is law, so Prendergast CJ was right—the Māori did not have law. Moreover, a jurist might say, Muslims might believe that Islamic law is law, but this belief is incorrect because only state law is law.

This response forces us to take up the classic philosophical question: what is law? Theorists have been unable to resolve this question despite numerous attempts. To get to the bottom of this puzzle,

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12 At 77–78, as cited in John Tate "The three precedents of *Wi Parata*" (2004) 10 Canta LR 273.

13 At 79, as cited in Robert Joseph "Re-creating Legal Space for the First Law of Aotearoa-New Zealand" (2009) 17 Wai L Rev 74 at 80.

14 Andrew Fitzmaurice *Sovereignty, Property and Empire, 1500–2000* (Cambridge University Press, Cambridge, 2014) at 6–7.

let us instead start with a related question: what makes *state* law *law*? This might seem bizarre. Of course state law is law, you might think.

But still: *why* is state law *law*?

The answer is that state law is law because people within society collectively recognise state law to be law. HLA Hart made this point when he grounded the ultimate rule of recognition in social conventions. The crucial existence condition for state law is collective recognition that it is law.

Collective recognition is often by the community subject to the law—but that is not necessary for law to exist. Colonial legal systems were collectively recognised by the colonising power and the legal officials themselves, though not by the native community, at least not initially. In a seldom discussed passage in his classic book, *The Concept of Law*, Hart stated that the ultimate rule of recognition for British colonies was the Queen in Parliament in England:[15]

> At this stage the legal system of the colony is plainly a subordinate part of a wider system characterised by the ultimate rule of recognition that what the Queen in Parliament enacts is law for the colony.

Hart made no mention of conventional recognition by natives subject to the law, a striking omission, which implicitly acknowledges that recognition need not be from the community subject to law. Although Hart argues that law is not a "gunman writ large", that is exactly what colonial law was for the natives of colonised lands.

While Hart was right that state law is law because it is conventionally recognised as such, he failed to consider that the very same existence condition applies to other forms of law as well. International law is a form of law because governments and people around the globe collectively recognise international law as law. Customary law exists across the Global South because people within these communities collectively recognise customary law and utilise it to arrange their affairs. Religious law exists because people collectively recognise religious law, including Canon law, Islamic law, Hindu law, Jewish law, Buddhist law and others.

The existence condition for all forms of law—state law, customary law, religious law, international law—is precisely the same: each is law because it is collectively recognised as law. There is nothing special about state law that sets it apart from other forms of law. State law seems to be special only because it claims to be monopolistic and supreme and jurists are indoctrinated into seeing state law this way.

VI WHY THEORISTS HAVE OVERLOOKED LEGAL PLURALISM

Hart declared that primitive (or customary) law and international law are not law—but rather are pre-legal. How he arrived at this conclusion is critical to understand. Hart posited state law as the central case of law because, he claimed, most people see that as law; he then pared away non-essential

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15 HLA Hart *The Concept of Law* (Clarendon Press, Oxford, 1961) at 117.

characteristics to find that law consists of a union of primary rules of obligation and secondary rules for recognising, changing and applying primary rules. Customary law and international law are not law, he asserted, because both lack fully developed systems of secondary rules. What Hart did, in effect, was use state law as the standard for law, resulting in the conclusion that customary law and international law are not law because they lack the features of state law. What Hart failed to seriously consider, however, is that many people also recognise other forms of law besides state law, and he assumed that law must consist of a single set of features or elements.

Contemporary legal theorists have overlooked legal pluralism for two main reasons evident in Hart's mode of analysis. First, the monistic image elevates state law as the epitome and exclusive form of law, denying that other forms of law exist. Secondly, the classic question "what *is* law?" is framed in the singular. This very way of posing the question has led legal theorists to search for a single definition or concept or law.

But no theoretical or empirical justification dictates that only one form of law exists or that law must have a single set of defining elements or features. If law is what people collectively recognise as law, as I have argued, then forms of law—like customary, religious and international law—may have features different from state law and still constitute law. The theoretical recognition of legal pluralism immediately follows from this insight, and it brings theory into alignment with the ubiquitous reality of legal pluralism within societies.

Having shown that the monistic state law image is theoretically unsound, normatively problematic and empirically false, I will now articulate a framework to help think about contemporary legal pluralism.

VII COMMUNITY LAW, REGIME LAW, CROSS-POLITY LAW

When examining situations of legal pluralism, it is often useful to think in terms of three categories (with simple descriptive labels): Community law, Regime law and Cross-Polity law.[16] These are loose generalisations, not fixed distinctions, and various overlaps exist among them, but they helpfully distinguish among types of law involved.

Community law addresses basic matters of social interaction. This includes property, agreements, debts, personal injuries and killings, marriage, inheritance, care for children and a few other matters. Every society has laws of this sort. Bronislaw Malinowski, the pioneering legal anthropologist who studied the Trobriand Islanders in Papua New Guinea, asserted:[17]

16 These categories are elaborated more fully in Brian Z Tamanaha *A Realistic Theory of Law* (Cambridge University Press, Cambridge, 2017) at chs 5 and 6.

17 Ian Schapera "Malinowski's Theories of Law" in Raymond Firth (ed) *Man and Culture: An Evaluation of the Work of Malinowski* (Routledge, London, 1957) 139 at 140.

> Under civil law in a native society we can understand the set of rules regulating all the normal relations between persons, as kinship, marriage, economic co-operation and distribution, trading, etc; and between persons and things, property inheritance, etc.

The pioneering legal sociologist, Eugen Ehrlich, identified the same set of rules in all societies: "All these matters, marriage, family, possession, contracts, succession, are legal affairs unthinkable without a law".[18] The particular rules vary across societies and change in content over time, but all societies have rules addressing these matters. Customary law and religious law typically cover community law, among other issues.

Regime law, the second category, is the law established by governing regimes that relate to their power, operation and pursuit of objectives. Common examples of regime laws are taxation and fees, required military service, forced labour, border controls, laws against treason and sedition, laws relating to the operation of government, laws issued to advance government objectives, and vastly more. Regime law exists in all societies past and present that are organised polities. Chiefdoms and early states, for example, had regime law related to the power and status of the governing elite within society.

Cross-polity law, the third category, addresses matters between and across organised polities. This category includes such matters as agreements between states, rules followed in war, rules about treatment of ambassadors and foreign nationals, rules addressing trade and transactions across state lines and so forth. Cross-polity law is what we typically think of today as public international law, though it also includes aspects of private international law as well.

Legal pluralism often involves a mixing and matching of laws from these various categories, as I will now explain.

VIII EMPIRES AND BRITISH COLONIALISM

Empires have been a common source of legal pluralism throughout history and today. An empire is an imperial centre that extends its domination over peripheral territories for its own political and economic benefit. These peripheral territories typically have their own cultures, languages, polities and forms of law, which the imperial power must deal with when exerting control.

Empires create legal pluralism when they erect a governing legal and administrative structure—often relying on indigenous elites—while leaving local community law in place. This is called "indirect rule". Indirect rule allows the imperial power to control the periphery at the least cost to itself. People continue to live under existing community laws, with the imperial power relying on local intermediaries to carry out imperial mandates and resource extraction.

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18 Eugen Ehrlich and Nathan Isaacs (translator) "The Sociology of Law" (1922) 36 Harv L Rev 130 at 131.

This is a time-honoured approach. After studying the Roman Empire and other ancient empires, Machiavelli, in *The Prince*, written in 1513, recommended indirect rule as the most effective strategy: "allow them to live with their own laws, forcing them to pay a tribute and creating an oligarchy there that will keep the state friendly toward you".[19]

The British Empire relied on indirect rule when it colonised vast areas of Africa, India, the Near East, Southeast Asia and the Pacific. They created a colonial state with a legal system and laws transplanted from England, enforcing the power of the colonial state and furthering the economic goals of the state and expatriate settlers. They also relied on indigenous elites to collect taxes and maintain order. In many locations, these actions in effect gave native chiefs greater power than they previously had under indigenous arrangements. Meanwhile, the vast bulk of the populace, particularly those who lived outside colonial towns, were left to live under existing customary law on matters of land, injuries, agreements, marriage, inheritance and so forth.

To put it in terms of my categories, in British colonies, regime law was transplanted from Britain and oriented to colonial control and objectives, and included community law for expatriate settlers and people living in colonial towns. Meanwhile, community law was customary and religious law utilised within native communities. This juxtaposition immediately created legal pluralism.

IX A BIFURCATION OF LAW AND SOCIETY

The consequence of indirect rule was a de facto bifurcation of law and society. British colonial polities utilised British law in colonial cities and for colonial economic enterprises like plantations, ranching and mining. To rule the general populace, most of whom lived in rural areas, British colonial governments substantially relied on traditional leaders, and the bulk of the populace continued to live under customary law.

In an effort to bridge the gap between these two systems, the colonial states created what they called Native Courts staffed by indigenous elites appointed by the British to hear cases applying customary law. Customary law was allowed subject to repugnancy clauses that barred indigenous laws that were contrary to civilised British values. Despite their labels, however, officially recognised Native Courts were not customary and were not native, but were creations of the colonial state. They did not operate in the same way as traditional tribunals and were not seen as indigenous tribunals by the populace.

It is important to note that the bulk of disputes were not handled within the official colonial legal system just described, but occurred outside the state legal system in informal village tribunals, functioning much as they had prior to colonisation. These tribunals were typically presided over by

19 Niccolò Machiavelli *The Prince* (Peter Bondanella (ed and translator), Oxford University Press, Oxford, 2005) at 19.

village elders or chiefs—and their orientation was to resolve the dispute in a way that brings peace to the community.

Furthermore, it is important to understand why colonial powers recognised customary law. The British presented this policy as an enlightened way to allow indigenous people to live under their own familiar laws. But the bottom line is that colonial states had no practical alternative. To eliminate customary systems would have required sustained repression, and to replace existing customary systems would have required costly expenditures in constructing legal institutions, which colonial states had no interest in doing. Colonial economic and political goals were best served by leaving the bulk of the populace to manage their own affairs, as long as they did not interfere with colonial objectives.

It is also essential to see that official recognition of customary law did not create it. Lawyers might be inclined to think that customary law existed only because it was recognised by colonial law, but that is false. Customary law existed because people in the community had recognised it for generations and based their social intercourse thereon. The general populace lived under customary law—and wanted to retain customary law—because it was integral to their way of life.

X FOUR SOURCES OF LEGAL PLURALISM FROM COLONISATION

Legal pluralism was created around the world in the wake of European colonisation through the transplantation of law and the movement of people and ideas. This occurred in four basic ways.

First, as just described, colonisers transplanted Western-derived laws and legal institutions to maintain colonial rule, facilitate colonial economic enterprises, govern expatriate settlers, and maintain order in colonial towns and outposts. Outside of colonial towns, local forms of customary and religious law continued to function for the bulk of the indigenous populace. A similar process (with variations) occurred across the Global South, as well as in settler societies like New Zealand, Australia, Canada and the United States. The main difference is that in settler societies the native population over time was numerically overwhelmed by expatriate settlers, which marginalised native populations and their law—whereas across the Global South a significant bulk of the population continued to live under customary law.

The second way this produced legal pluralism is that European colonisers drew state boundaries over colonised lands in ways that disregarded pre-existing political-cultural-religious communities, encompassing within a single territorial state groups with different customary and religious laws, while, conversely, groups with the same laws were divided across separate state boundaries.

Thirdly, colonial economic enterprises like mines and plantations imported immigrant labourers in large numbers—Africans, Chinese, Indians and other labourers—through slavery, indentured servitude, or voluntarily, who recreated communities with their own customary or religious laws, particularly on family law and inheritance matters.

Fourthly, native people in colonised countries emigrated to imperial centres, settling in immigrant communities, bringing their customary and religious laws with them—especially on family law and inheritance matters—and creating pockets of legal pluralism in their new lands.

XI LEGACY OF COLONIAL INDIRECT RULE

With this history in mind, we can now understand why a majority of disputes in many countries across Africa, Asia and the Pacific today are resolved in customary tribunals that operate in ways mostly independent of the state legal system. The bifurcation of law and society established during colonisation remains in place today.

When decolonisation swept across the Global South in the decades following World War II, many newly independent countries expressed two goals related to law: to incorporate customary law into state law and to create unified systems of state law. Jurists in particular espoused these goals. They believed that legal pluralism was a harmful legacy of colonisation that prevented them from developing modern, unified state legal systems.

As the earlier cited World Bank report and the New Zealand Law Commission report indicate, however, very little progress has been made in achieving these two goals despite decades of efforts. Shortly, I offer an explanation for why these two goals have not been achieved. But first, I must mention yet another wave of legal transplantation that has been ongoing for several decades.

XII A SECOND WAVE OF LEGAL TRANSPLANTATION

Since the final quarter of the 20th century, and continuing through the present, another wave of legal transplantation has swept through the Global South. Initially, this was called legal modernisation, then the Washington Consensus, and more recently it has been called good governance and rule of law development. The World Bank, International Monetary Fund and Western development organisations have been primary drivers of this effort.

The basic idea is that developing countries must build state court systems and adopt Western legal regimes, particularly economic regimes related to the protection of property and enforcement of contracts, protections for foreign investors, bankruptcy laws and other laws related to economic activities, as well as anti-corruption laws to deal with government officials lining their pockets at the expense of the public. The stated goal of these efforts is to modernise their legal systems so that developing countries can be integrated within global capitalism. Financial aid, including grants and loans, were often made contingent on recipient governments adopting these legal reforms.

This same period also witnessed a separate initiative by non-governmental organisations (NGOs) and Western development organisations to advocate for human rights and women's rights across the Global South.

This second wave further exacerbates legal pluralism created by colonisation because transplanted legal regimes and human rights in various ways do not match local societies and their customary and

religious law. Consider, for example, the effort to register titles for land owners, one of the main legal initiatives to enhance development. State law property norms revolve around individually held titles for land that can be rented or sold on the market. Banks use land as collateral for loans, so titling programmes allow land to be utilised as economic capital. In many societies in the Global South, in contrast, land tenure involves collective rights of use and authority over land, divided up in various ways not reflected in fee simple ownership. Customary law, for example, determines who can fish from certain reefs, take coconuts from certain groves, cross the land, be consulted on proposed uses of the land and so forth. The titling of property with the state results in people losing customary land rights. In addition, land is often linked to political power, and is seen as having spiritual ties to the community, connecting ancestors and future generations—all of which can be disrupted or destroyed when land is treated as a purely economic asset.

As for women's rights, many customary tribunals and leadership positions are staffed exclusively by men, and customary laws in various ways favour men or fail to protect women. For example, in many situations women do not hold or receive land under customary laws of possession, divorce, inheritance, or the death of a spouse. Customary law or religious law in some areas permit child brides; force a rape victim to marry the rapist; give girls to a victim's family as compensation for injuries or wrongs; condone honour killings; restrict women's work outside the home; and divorce, adultery and inheritance laws are more favourable to men than women. Customary law also clashes with human rights on harsh physical punishment or banishment. And customary tribunals are constituted and function in ways that violate norms of unbiased courts and due process (which I address further in a moment).

XIII TENSIONS FROM LEGAL PLURALISM

As a result of these two waves of legal pluralism—the colonial wave and contemporary wave—multiple co-existing forms of law are present in these societies today in highly complex ways. This legal pluralism creates a tension among and within international law, state law and local customary law.

On the one hand, for example, the United Nations *Declaration on the Rights of Indigenous Peoples* recognises the right of indigenous peoples "to maintain and strengthen their distinct political, legal, economic, social and cultural institutions".[20] The Indigenous and Tribal Peoples Convention recognises the right of indigenous people to live in accordance with "their own social, economic, cultural and political institutions".[21] On the other hand, the *Universal Declaration of Human Rights*[22] and the Convention on the Elimination of All Forms of Discrimination against Woman (CEDAW)

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20 *Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007), art 5.

21 Indigenous and Tribal Peoples Convention 1650 UNTS 383 (opened for signature 27 June 1989, entered into force 5 September 1991), art 1(1)(b).

22 *Universal Declaration of Human Rights* GA Res 217A (1948).

recognise the equality of women in "political, social, economic and cultural fields", the same rights as men to enter and dissolve marriages, the same rights to ownership of property and to obtain employment, and more.[23] The tension is that certain customary and religious law and practices have been criticised as violative of women's rights and human rights.

The potential clashes that arise are not only state law versus customary or religious law, or state law versus international law, or customary or religious law versus international law. State law and international law are each themselves internally divided and clash. The conventions cited above are contained within international law; and many of these states have constitutional or statutory provisions that recognise customary law and religious law and also recognise human rights and women's rights. Thus, state law lines up on opposing sides of the same issue, and international declarations and conventions line up on opposing sides of the same issue.

These tensions affect many societies around the world. A recent study estimates that 57 per cent of the global population live in societies that recognise both state law and customary law.[24]

XIV PREFERENCE FOR CUSTOMARY LAW OVER STATE LAW

In many of these societies, particularly in rural areas, people strongly prefer customary (or religious) law over state law in connection with community law matters related to property, injuries, debts, marriage, inheritance and so forth.

There are many reasons why they do not go to state law. State courts may be too distant to easily access; lawyers and court fees are too costly for most people; the procedures and legal rules that courts utilise are unfamiliar to people; the language used by the court differs from the local vernacular; state court judges are not aware of the social context or customary norms of the community; the state legal system may be seen as oppressive and/or corrupt; court cases take a long time to process; court outcomes, which have winners and losers, might not resolve the social rupture in the community; and there may be social pressure to resolve the dispute within the community.

Local customary tribunals, in contrast, are easy to access, inexpensive, understandable and transparent; they use familiar procedures and norms, produce immediate results and effectively resolve the matter.

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23 Convention on the Elimination of All Forms of Discrimination Against Women 1249 UNTS 1 (opened for signature 18 December 1979, entered into force 3 September 1981), art 3.

24 Katharina Holzinger, Florian G Kern and Daniela Kromrey "The Dualism of Contemporary Traditional Governance and the State: Institutional Setups and Political Consequences" (2016) 69 Pol Res Q 469 at 469.

XV FOUR PROPOSITIONS ABOUT LAW AND SOCIETY

To explain why these societies have struggled to integrate customary law and create unified state legal systems, I must step back to present four general propositions about law and society. Though I cannot defend them here, they are not controversial.

First, law evolves within society over time subject to surrounding social, cultural, economic, political, ecological, technological and legal influences, as well as in relation to influences from external societies, including neighbours and those farther away. Law is the product of the history and totality of a society.

Secondly, because law evolves within society, typically it reflects and matches the society within which it exists. Legal institutions, processes, doctrines and knowledge generally match the culture, society, economy, ecology, technology and polity. Law is a mirror of society.

Thirdly, legal systems form a totality in which legal institutions, processes, norms and legal knowledge are generally coherent and mutually consistent. This is what makes them legal systems.

Fourthly, it follows from these propositions that, because law typically matches the society within which it exists, when law is transferred from one society and superimposed on another society, it will not match the society onto which it is transplanted. The transplanted law will clash with the circumstances of the receiving society. In addition, the two juxtaposed systems of law, each of which is a holistic product of its own society of origin, will clash with one another in terms of norms and processes.

The overarching implication of these four propositions is that law does not function in isolation, but is part of a much deeper and broader historical and social context. Two legal distortions occur when a transplanted state legal system is superimposed onto a society that follows customary law. First, the transplanted state legal system itself functions differently, and often less effectively. Since it evolved under very different circumstances, it does not fit within the totality of recipient social surroundings. The second distortion is that when customary law is extracted from its social surroundings and brought into the transplanted state legal system, customary law does not work in the same way that it did in its original customary setting.

To appreciate how this plays out, I must draw out several ways in which state law and customary law, and the social contexts in which they operate, are very different.

XVI DIS-EMBEDDED VERSUS EMBEDDED

A major difference is that state law and customary law have completely different relationships with society. State legal systems typically are *dis-embedded* from society, while customary law systems typically are embedded within society.

What I mean by dis-embedded is that legal institutions staffed by jurists create legal knowledge, declare law, execute law, carry out legal tasks and apply law. The legal system is differentiated from

society in the sense that it is institutionalised and largely operated by people with specialised training in law. Because legal actors control the creation of state law, the law they create can diverge from social values. This divergence is precisely what occurred with colonial legal systems.

Customary legal systems, in contrast, are *embedded* in society in the sense that members of the immediate community preside over disputes, engage in discussions over the applicable norms, render decisions and often carry out sanctions. There is no separate institutionalised legal system as such which handles things. The community itself identifies and carries out the law. For example, when a council of elders decides that the wrongdoer must suffer a beating as punishment for a rape, the beating is socially authorised punishment, which is duly carried out by members of the community.

The difference between dis-embedded law and embedded law can be seen when state legal officials criticise people for "taking the law into their own hands". This rebuke is a manifestation of the monistic state law claim to exercise a monopoly over law. According to this image, any actions to enforce legal norms not by the state legal system is "taking the law into their own hands". However, since customary law is embedded within the community, the community "taking the law into their own hands" is literally how customary law works. And significantly, it is a positive feature of the law that it is carried out by the community. The community acts collectively to apply law to maintain social cohesion.

This gives rise to a fundamental disjunction between the recognition of customary law by dis-embedded state legal systems and socially embedded customary law. When state court judges incorporate customary law, they produce what scholars have called "judicial customary law"—distinct from "living customary law" as it functions in the community. Judicial customary law is incorporated by legal officials to fit within state law concepts and processes. Consequently, judicial customary law is not the same as and diverges from customary law ongoingly manifested in community life.

XVII CONTRASTING DECISION-MAKING ORIENTATIONS

A second major difference between state law and customary law is that they have very different processes and decision-making orientations. State legal systems operate through the application of written legal rules—statutes, regulations and judicial precedents—to individuals and entities involved in situations covered by the rules. Lawyers and judges identify the applicable laws, and evidence is considered to determine the facts that occurred. The task of state court judges is to apply the law to the facts to determine the outcome required by the rules. There are winners and losers as determined by the applicable legal rules. This is rule-oriented decision-making.

In customary law, in contrast, the legal process applied and the way norms are utilised operate differently from state law. Customary norms typically are unwritten, and consist of many norms and exceptions, which are generally known by chiefs, elders and the community. When a problem arises, the decision-makers discuss the issues, hearing from the people involved and others in the community about what occurred and what the consequences should be. The decision-makers take into consideration the broader social context and relationships—including past and future interactions

between the parties and their families, and consequences to others in the community. The objective of the proceedings is to come to a resolution that restores peaceful co-existence going forward.

Although norms play a significant role in customary law, the ultimate goal is to repair the disruption in the community. In contrast to rule-oriented decision-making by state judges, this is outcome-oriented decision-making in the sense that the goal is to arrive at a generally acceptable resolution. This orientation makes sense when one considers that people in small communities live in close proximity so disputes must be resolved—the sooner the better. After a decision is made and carried out, often the proceedings are concluded with a ceremonial reconciliation gathering.

XVIII RIGHT TO AN INDEPENDENT AND IMPARTIAL TRIBUNAL

Let me momentarily pause my discussion of major differences between state law and customary law to make a broader point. Article 10 of the *Universal Declaration of Human Rights* states that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal".[25] Article 14 of the International Covenant on Civil and Political Rights (ICCPR) states "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".[26]

This human right is based on the (dis-embedded) state law model of rule-oriented judging. But it does not fit customary tribunals. Members of the community, who preside in these hearings, are not independent or impartial in the senses meant by these rights declarations. Rather, the decision-makers (elders, chiefs, respected community members) are immersed in what occurred, as is everyone in the community. A jurist might conclude, therefore, that these customary tribunals are defective and must be reformed. But that is not possible. Customary systems cannot be changed to meet the standards of state law because they will no longer function in the (embedded) ways that make them effective.

The broader point is that this standard in effect dictates that customary law systems are bad and violate human rights—and it does so precisely because the standard assumes that the only legitimate legal tribunal is based on how state courts operate. This is a highly contestable assumption and the very fact that it is declared as an international human right shows how deep runs the monistic assumption that state law is the only proper form of law.

Now back to the differences.

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25 *Universal Declaration of Human Rights*, above n 22, art 10.

26 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 14(1).

XIX CONTRASTING SETTINGS

Another fundamental difference is that state law and customary law often operate in very different settings. State law operates primarily and most effectively in large cities. People interact daily with strangers as they go about their affairs. Land is a significant economic resource and there is an active market for property rentals and sales. Most people earn money through their labour, and they purchase their food, clothing and other items in stores. Major commercial transactions are arranged through contracts—particularly those involving businesses from outside the country. Crime control deals with violations that arise in every society, like murder, assaults, theft, fraud and so forth. Government offices, including legal institutions, are located in cities.

Customary law, in contrast, operates primarily in rural communities. Villages are small. For their daily sustenance, people engage in subsistence activities, obtaining their food through farming, herding, gathering, fishing, trapping and so forth. Their lives revolve around the community. Property and commercial transactions are limited. These are face-to-face societies where everyone knows and interacts with everyone else for much of their lives.

To appreciate the significance of differences in setting, imagine that you live on one of the many populated outer islands or atolls scattered across the Pacific Ocean. Several decades ago, I went to Ifaluk Atoll, in Yap State of the Federated States of Micronesia. About 500 residents live on Ifaluk, which has about 1.5 square kilometres of land distributed across several small islands surrounding a lagoon. Ifaluk is accessible only by an occasional ship from the main island of Yap, which takes over a week to get there.

Needless to say, there is no commercial market for land, which is not individually owned. People get their food from planting and fishing. There is no courthouse, no lawyers, no police officers. It is a community unto itself, although people travel to and from the main island, so they are not completely isolated. State property and contract law have little relevance on Ifaluk. The atoll cannot be divided into separate slices with fee simple ownership over each piece vested in individuals. That makes no sense. People do not engage in commercial transactions with others on the island over the fish they collectively gather in the lagoon using nets.

Even a number of human rights have little application. What does freedom of speech mean on Ifaluk? What does freedom of movement mean? What does the right to work and freely choose employment mean on Ifaluk? What does the equality of men and women mean on Ifaluk, where men and women typically engage in different tasks in relation to food, shelter and child rearing?

Each of the human rights I have mentioned above presupposes ways of life, and choices, that are present within urban centres but do not always exist on isolated islands or remote rural areas where customary law holds sway within the community.

XX WHY STATE LAW STRUGGLES TO INCORPORATE CUSTOMARY LAW

Following decolonisation, as I mentioned earlier, newly independent countries expressed two desires related to law: to incorporate customary law within state law and to create unified systems of law. But little progress has been made to achieve these objectives in well over half a century. Drawing on the preceding propositions about law and society, I will now summarily explain why these goals have proved so difficult.

The underlying source of the difficulties is that state law and customary law is each a holistic (integrated) product of its respective surroundings in the course of its development and operation. This holistic product includes processes as well as norms, which all work together. The content of the norms differ and how they are utilised within law differs. State law and customary law are like oil and water that cannot easily be combined because each consists of a cluster of integrated traits that cannot be pried apart and selectively merged with one another.

Western legal systems involve unbiased judges applying written legal rules to the facts at hand to determine outcomes for the individuals involved. Customary systems apply unwritten customary norms and exceptions in a fashion that takes into consideration the broader social context and relationships, and the objective of the proceedings is to come to an acceptable resolution.

Reinforcing these differences, officials in state legal systems have been trained to understand law as a coherent system of legal institutions, processes, doctrines and knowledge. When state law judges attempt to incorporate norms from customary law, they do so in terms that fit within state law doctrines and concepts. This usually occurs by analogising the customary norm to state legal norms. But this mode of incorporation inevitably alters the content and operation of the customary norm. That is because, as I mentioned, customary norms have different content and do not operate the same way. A state court that takes customary norms and applies them as binding law—or, for example, that analogises a customary property right to state property doctrine—distorts the content and operation of those customary norms.

Another factor inhibiting the incorporation of customary law into state law is the background of judges. During colonisation the courts were staffed by colonial expatriates—and even after independence in many locations the courts continued to be staffed by expatriate judges. It goes without saying that state judges who know little about customary law will not be able to incorporate it. To deal with this, state courts have relied upon customary law assessors or experts, often elders or chiefs, who advise the judge on relevant customary law norms. The state court judge then treats the existence of the customary law norm as a fact, or as law, to be applied as the judge deems appropriate. However, as mentioned, the operation of customary law is distorted when judges incorporate particular customary norms in terms that conform to state law processes and concepts.

While I do not question the sincerity of expatriate judges, who have provided important and necessary services to many countries, it is undeniable that they are not well-suited to incorporating

customary law into state law. Not only might they not fully understand or appreciate customary law, but they might be unsympathetic to certain customary norms and processes that they find problematic.

The point should be obvious: no state that intends to develop a body of jurisprudence that fits the values, customs and practices of its own society would appoint foreign judges. It follows that the best way to bring customary law and values into the legal system is to have more native judges. Incorporation will still be difficult, for the reasons just explained, but the advantage native judges bring is that they understand and appreciate both systems.

XXI WHAT STANDS IN THE WAY OF UNIFIED STATE LEGAL SYSTEMS

The same reasons for the failure to incorporate customary law into state law also help explain why these societies have not been able to create unified state legal systems. Several additional factors have contributed to this failure.

State legal systems in many societies across the Global South have very limited institutional capabilities. They do not have the institutionalised power and presence to effectively reach the entire society. There are multiple reasons for this, but a critical enduring factor was the de facto bifurcation of law and society—the division of legal tasks between city and rural residents—entrenched during colonisation. State legal systems were circumscribed from the very outset to exclude dealing with the daily affairs of the bulk of the indigenous populace. Once this was set in place, it established the scope of tasks the state legal system was constructed to meet. To expand the reach of the state legal system would have involved an extraordinary expense that newly independent governments simply could not afford.

Moreover, increasing funding for state legal institutions alone is not sufficient to solve the lack of institutional development. Widely available educational institutions are also necessary—including legal education to train people to staff legal institutions. Small scale societies, in particular, struggle with a lack of sufficient funding for state legal institutions and lack of trained lawyers. Consider countries like Tonga, Kiribati and the Federated States of Micronesia, with populations in the range of 100,000; the Marshall Islands with 41,000 citizens; the Republic of Palau with 18,000 citizens; and Nauru with 11,000 citizens. Countries like these have limited finances to fund legal institutions, general education and legal education.

Geographical barriers also come into play. Recall my description of Ifaluk. It is not financially feasible to build courts and other legal institutions in distant rural areas or scattered small islands, where many people live. This limits the effective reach of the state legal system, which people do not have ready access to.

Another reason why unified state legal systems have not been created is that many native people do not identify with state law. They do not see these systems as consistent with their values and norms. They do not understand legal language and legal processes. Although these state legal systems have

been in place for generations, in some societies they are still referred to as "white man's law". This impression is further reinforced when high court judges are expatriates from another country.

A major factor inhibiting unified state legal systems is that these societies are heterogeneous. People in cities, large commercial enterprises, foreign corporations doing business and government officials tend to utilise state law. People living in rural areas tend to utilise customary law. Both forms of law provide important services for those who use it. So both state law and customary law are essential and necessary. Each serves part of society that the other form of law does not serve well. Since city users may have little commitment to customary law, while rural users do not identify with state law, it is hard to bring the two together under a single umbrella. The situation is slowly changing over time as more people move from rural areas to cities, from living under customary law to state law, though the basic division will remain in place for coming generations.

XXII TWO ALTERNATIVES FOR A UNIFIED STATE LEGAL SYSTEM

Jurists who advocate a unitary state legal system usually propose one of two basic alternatives. One alternative is to abolish or prohibit informal village tribunals. But this would be difficult to achieve and it would create severe backlash and dislocations for the populace. Abolishing village tribunals, which provide the bulk of dispute resolution in many locations, would deprive people of an essential service they rely on in their daily lives.

The second way to create a unified system is to bring village courts under the supervision of the state legal system. This was one of the main proposals by the 2006 New Zealand Law Commission report on customary law in the Pacific. The report recommends:[27]

> … that courts and legislatures develop *a more coherent legal system* by recognising and respecting the contribution of community justice bodies to dispute resolution, while also promoting the use of human rights norms in community justice.

From the standpoint of lawyers, it may seem necessary to have a "coherent legal system" that brings all forms of law under the umbrella of the state legal system. But I question this conventional wisdom. It is based, I believe, on the assumption that monistic state law is the necessary form that law must take to be fully developed and work properly. Jurists are uncomfortable with the idea that multiple legal systems may co-exist in the same society and they tend to assume that a coherent legal system must be unified and arranged in a hierarchy.

Once we realise that legal pluralism is quite common, however, then the choice can be presented differently. The assumption that legal unification is necessary should be dropped. Instead, one should ask what arrangement seems to work best in a given society. One must weigh the advantages and disadvantages of incorporating village tribunals under state law versus the advantages and

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27 Law Commission, above n 9, at [17.1] (emphasis added).

disadvantages of allowing these tribunals to continue largely functioning on their own. No single correct answer applies to all situations. The sensible course of action depends on the particular circumstances of each society. It might make sense to incorporate village tribunals, but it might make sense not to incorporate them. And this need not be an all or nothing decision. Incorporation can be limited to certain aspects but not others. It all depends on what works best under the circumstances. The bottom line is that village tribunals and customary law provide essential functions and despite their flaws they are preferred by many people in the community. Incorporation within the state legal system will inevitably alter how they operate, perhaps for the better, but perhaps for the worse. As long as these tribunals are working to the satisfaction of the communities that use them, the integration of village tribunals within the state legal system is unnecessary, and would perhaps be detrimental to how they function.

XXIII WHAT PEOPLE DO IN SITUATIONS OF LEGAL PLURALISM

Now I will say a few words about what commonly occurs in situations of legal pluralism. First, whenever multiple forms of law co-exist in a society, people will seek to utilise the form of law that they identify with, which reflects their values and understandings, and which they have access to. Secondly, although people in situations of legal pluralism usually prefer the form of law they identify with, they frequently will engage in forum shopping to seek access to whichever form of law they believe will best advance their immediate goals and interests. They may even approach multiple legal fora when their initial choice produces results they do not want. It is not unusual, particularly in land cases, for people to go first to customary law, then if unsuccessful, to go to state law to pursue their claim again. People who prefer state law can go to state legal institutions. People who prefer customary law can go to customary tribunals. And sometimes people go to both.

Defenders of monistic state law point to forum shopping and inconsistent legal results as the reasons why law must be united under the state. What this argument fails to appreciate is that even unified state legal systems have inconsistent results and forum shopping. As mentioned earlier, internal pluralism is common in the United States and in the European Union. Forum shopping and inconsistent laws exist to varying extents nigh everywhere. This undoubtedly generates problems, which, however, can be managed in ways that allow it to work for the benefit of the people. On the positive side, the co-existence of different bodies of law and tribunals creates opportunities for people to seek out legal fora that serve their needs and interests.

XXIV RESPONSE OF STATE COURTS AND CUSTOMARY TRIBUNALS

State legal officials and customary tribunals should strive to cooperate with one another. This cooperation need not be legally specified, for it often works best through informal understandings and arrangements. Each side must be aware of its own strengths and weaknesses—and the strengths and weaknesses of the other. And each should be committed to serving the role for which it is best suited,

while helping the other do what it does best. State law and customary law and tribunals are equal partners in producing distinct kinds of law that their societies require to function.

It is not easy for state legal officials to view customary tribunals as equal partners because the monistic image privileges state law as monopolistic and supreme. This image obscures the reality that customary tribunals carry out essential legal tasks and might even serve more people in their daily affairs than the state legal system does.

To appreciate the value of customary tribunals, think for a moment about the situation in the United States. Although the United States is a wealthy society with very well-funded state legal institutions, every year well over one million Americans are not able to obtain lawyers to handle their legal issues. These legal issues involve employment disputes, eviction from housing, child custody and other important matters. But many people cannot afford lawyers. And many disputes do not have substantial economic value so they are not worth bringing to court, though they are important to the people involved. Unserved legal need is a problem in many societies with highly developed legal systems. Customary tribunals fill this gap across the Global South by making law available to communities at low cost, with relatively quick results, providing people with access to a legal forum that is missing or under-provided in many societies with highly developed legal systems.

Yet another potential benefit of co-existing state courts and customary tribunals is that both might improve how they function to better serve people's needs. The fact that people have a choice among alternatives means that state courts or customary tribunals which are not working in ways that people find satisfactory might lose their influence over time.

XXV WHAT ABOUT HUMAN RIGHTS?

A common objection to customary law and tribunals is that they violate human rights, so the state legal system must supervise and reform customary law and tribunals. Earlier, I suggested that certain human rights do not fit customary tribunals, like the right to an independent judge and due process; and I suggested that certain human rights presuppose circumstances that do not exist in many isolated rural areas. Nonetheless, it is true that in many societies customary systems do not treat women equally in multiple ways, and certain punishments like beatings are draconian.

It is crucial not to romanticise customary (and religious) norms and processes. Like state law, they have positive aspects and problematic aspects. Both customary law and state law should be subject to critical scrutiny, evaluation and reforms.

But we must take a more nuanced view of the potential clashes with human rights. Placing customary tribunals under the supervision of state law will not get at the underlying source of the problems that reformers seek to address. The source of these conflicts lies in general social, cultural, political and religious views circulating within society. These cultural views are what place women in less favourable positions compared to men, and what support harsh physical punishments. When

these views change, customary tribunals and law will change along with them. This will be accomplished through education and social and political advocacy.

A human rights advocate might respond that law can lead the way towards changes in social attitudes and practices, so state legal officials should impose restrictions on customary law norms and processes that they deem contrary to human rights. Indeed, this might work. But this approach can also produce resentment towards state law, and people may ignore or circumvent state law restrictions and mandates that they disagree with. More often what occurs is that changes in cultural beliefs and values come first, and then law changes to reflect the cultural changes. Not only is this approach more likely to be effective, but also, importantly, it allows people to feel the law reflects their values and way of life.

The proposal to legally invalidate customary law when it conflicts with human rights is a direct contemporary parallel to "repugnancy clauses" utilised by colonial governments to strike down customary law and practices that they considered uncivilised. The parallel to colonial control over native law is even stronger when expatriate judges decide that certain native practices should be disallowed. This unsettling historical echo must be kept in mind by people who advocate that the state legal system exert greater oversight over customary tribunals and law to protect human rights. If these types of decisions are made, they should be made by native judges.

XXVI TWO CLOSING OBSERVATIONS

This brings me to two closing observations. First, the phrases "customary law" or "custom and tradition" tend to create the impression of backwardness. Monistic state law reflects the modern world, in this view, and customary law is the opposite of modern. But this contrast is profoundly misleading. The phrase "customary law and tradition" was formulated during colonisation to create a contrast with state law. Our understanding should not be dictated by the connotations of this label.

It is essential to understand that customary tribunals are contemporary institutions and practices. The people who live in these communities are well aware of the world today. Many of them have family members living in the main cities. Many use cellphones to make contact with others and for access to news. Many have relatives who live in places like New Zealand, Australia, the United Kingdom, the United States, France and elsewhere. Many have visited other places and returned to their home communities. When we keep this in mind, it is evident that customary law systems are not backwards at all. Customary law and tribunals are essential aspects of rich and meaningful ways of life that continue to thrive in many societies around the world.

Correctly understood, the contrast in these situations is not between modern state law and backwards customary law, as some perceive it. Rather, what exists are two versions of contemporary law: one tied to specialised state legal institutions and the other grounded in community understandings and actions. The genuine complexities that arise in these situations will be managed better if everyone recognises this.

Finally, a conceptual shift is necessary: these situations cannot be properly understood if they are viewed through the lens of the monistic state law image. This idealisation does not match law anywhere and distorts our perceptions of law. A better starting point is to accept that state law, customary and religious law, and international law are forms of law that co-exist within many societies. Legal pluralism is ubiquitous, and not in itself defective. That is simply how law has developed in contexts of legal transplantation and the movement of people and ideas across the globe. Acknowledging this reality enables us to take these situations on their own terms and try to make it work for the good of everyone in society.