

BOOK REVIEW

Hanne Petersen and Henrik Zahle (eds.), *Legal Polycentricity: Consequences of Pluralism in Law*, Aldershot: Dartmouth, 1995.

Gordon R. Woodman

This book consists of eleven papers presented at a conference on "Legal Polycentricity: Consequences of Legal Pluralism in a European Context" in Denmark in 1992. The first part of this review comments on some of the papers, and the second seeks the meaning of 'legal polycentricity'.

Anne Hellum's paper, "Actor perspectives on gender and legal pluralism in Africa" reflects on the experience of the Women and Law in Southern Africa Research Project (WLSA), an activist socio-legal research programme the practical objective of which is to improve the lives of women. WLSA has recognised that a study of the formal norms of state law is insufficient. It has been found necessary to understand the prevalent deep legal pluralism, in which state law (which may be internally pluralist) coexists with "multiple sources and types of regulation that operate outside the legal system of the nation state and that are recognized by its members as binding" (15). She gives useful examples of instances in which the customary laws practised by a people have changed over time, while the official statements of customary law have continued unchanged. She argues that, while anthropologists have recognised this pluralism more readily than lawyers, the anthropological approach fails to go beyond description and analysis. Women's law analysis requires the 'actor perspective'. This begins and stays with women's experiences in life management, examining the possibilities for women to perceive and use such options as they have in their legal environment. Again, Hellum provides useful examples of the possibilities.

Surya Prakash Sinha provides in his footnotes so many references to literature that he seems to have no room left for clear argument, new information, or original ideas. Inger-Johanne Sand, with far fewer references, seems equally, as far as I can follow, not to advance understanding or knowledge. But as a result of the convoluted style, and the abundance of propositions full of abstractions, I may have failed to appreciate the merits of this paper. Masaji Chiba presents some

© Copyright 1997 - Gordon R. Woodman

BOOK REVIEW
Gordon R. Woodman

interesting observations which develop arguments in his book (1989), in a paper directed primarily to arguing for the importance of study not only of the objective, social implications of legal pluralism but also of its subjective effect in the minds of persons whom it affects.

Roel de Lange, in a paper which modestly claims to be mere "notes on polycentricity and unity in law", provides a series of stimulating arguments. He reports a number of cases in which Dutch courts, in deciding rights regarding children, had to take account of systems of law with different concepts from those of Dutch state law. He suggests a new set of categories of what he calls "non-unity" of law. And he argues that the constitutional lawyer should be interested in polycentricity because it involves problems of sovereignty, of federalism, of minority rights, of defining communities (which are "not given by nature, they are socially constructed": 114), and of conflicts of law. Much in de Lange's paper is thought-provoking and could be the object of more discussion than is possible in a brief review.

Thomas Wilhelmsson explores with subtlety and originality aspects of the harmonisation of the laws of states within the European Union and in the wider international field. He argues that these have disintegrative effects on national (state) laws. André-Jean Arnaud also discusses the relationship between legal pluralism and the construction of the law of the European Union. This he places in a broad historical context, arguing that legal pluralism was not conceived as a problem in Europe until the 13th to 14th centuries. Today, he argues, Europe will achieve unification or harmonisation of its law only through a "postmodern" pluralism in law.

Hanne Petersen reflects on the decline of custom as a source of formal law and as a subject of philosophical reflection. She argues that the customs recognised in European state laws have been gender-specific, and that their observance has contributed to the social power of men. However, she argues, informal laws (which she sees as more limited in geographical and operational scope than customs), made by "ordinary people", can redress this imbalance. Lawyers need to learn "to *find* the fragmented, particularized, pluralist, conflicting post-modern norms, and to *reveal* the principles they express, [and] to train and *practise* the necessary 'juridical tact' to apply them" (182; emphasis in the original). Henrik Zahle gives instances of the pluralism of sources of state laws and European Union law. He emphasises the conception of legal pluralism as the coexistence of state laws with non-state laws, as well as the conception of it as the coexistence within a state legal system of laws of different sources; and he explores the implications of the contrast between these conceptions.

John Griffiths gives a detailed study of legislation in the Netherlands on

euthanasia. His paper provides an illustration of how the notion of legal pluralism can assist socio-legal analysis, in this case the analysis of the functioning in society of legislation. Finally Anna Christensen advances persuasively the view that legislation in the modern state is a codification of already existing moral practice; and that, because moral practices are many and are not always consistent with each other, the law must be polycentric and cannot avoid contradictions. She concludes that "[j]urists ought to wake up from their Kelsean dream about a legal system that can produce an answer to all legal questions" (239).

Clearly there is much of interest in this volume for students of legal anthropology and sociology. The common purpose of the contributions, according to the editors' preface, is "to contribute to the discussion about a shift of paradigm in legal science" (8), this being the shift to "the new paradigm [of] legal pluralism" (Griffiths at 201, quoted by the editors at 8). But few of the papers contain discussion about this or any other development in legal science. It may be more accurate to say that they aim to contribute to discussions about various topics in legal science, within the conceptual framework of the new paradigm.

The title of the book, the editors' preface, and most of the papers refer to the concept of legal polycentricity. The title, the preface and most of the contributors also refer to legal pluralism. Hellum, Chiba, Wilhelmsson and Griffiths refer to legal pluralism but never use the words polycentricity or polycentric. The concept of legal pluralism is well known. It has been defined as: "the existence within a particular society of different legal mechanisms applying to identical situations" (Vanderlinden 1971: 19, my translation); "the situation in which two or more laws interact" (Hooker 1975: 6); "that state of affairs, for any social field, in which behavior pursuant to more than one legal order occurs" (Griffiths 1986: 2); "the situation, for an individual, in which legal mechanisms arising from different orderings are potentially applicable to that situation" (Vanderlinden 1993, my translation); "a situation in which two or more legal systems coexist in the same social field" (Merry 1988: 870); and "the condition in which a population observes more than one body of law" (Woodman n.d.). Explicit discussion of the phrase over more than 25 years, and at least four books with it as their principal title (or five according to Chiba 1989: xi), have clarified the field. Detailed aspects of the definitions just quoted and others are disputed, but for most purposes there is agreement upon a clear enough central notion of the concept. (There may, however, be a grain of doubt about Griffiths' optimistic assessment that "the idea that law everywhere... is fundamentally pluralist in character... [nowadays] is generally accepted...; anyone who does not is simply out of date and can safely be ignored": 201. Several contributors to this book indicate that they see the contrary, legal centralist view as still widely accepted.)

It is otherwise with regard to the concept of polycentricity. A few years ago, in a

BOOK REVIEW
Gordon R. Woodman

report on the research programme which preceded the conference on which the present book is based, Agnete Weis Bentzon wrote:

The researchers interested in Polycentricity are primarily concerned with the problematic use of the conventional doctrine of the sources of law in the different parts of the state administration.... The polycentric character of law presents itself by the fact that the different authorities in the different fields of regulation use different sources of law and in different orders. (Weis Bentzon 1992; see also Weis Bentzon n.d.)

This passage states that polycentricity designates a feature of the laws of state administration. It asserts an important claim about state law, but refers to a far smaller field of study than that of legal pluralism. It is possible that in a different context polycentricity might bear a wider meaning. If that is so, this wider meaning may be expected to be made clear in the present work.

The title of the book might seem to suggest that polycentricity consists of the consequences of legal pluralism; but that is unlikely to be the intended meaning. Perhaps it implies that polycentricity is the same as legal pluralism. The editors' preface, after some introductory paragraphs, proceeds:

What is legal polycentricity then? - The origin of the concept 'polycentricity' is blurred but it is perhaps mostly used in sociopolitical analysis. The use of the term 'legal polycentricity' indicates an understanding of 'law' as being engendered in many centres - not only within a hierarchical structure - and consequently also as having many forms. In this way, it resembles the term 'legal pluralism'. (8)

The claim that the world contains laws generated in different centres is so obvious that the editors must mean more than that. I infer from this elliptical paragraph the proposition that legal polycentricity is the notion that the laws of a social field are engendered in more than one institution or sub-field, and that these sources do not belong to one hierarchical order. This is indeed how many would define legal pluralism, with the exception that those who write about legal pluralism do not refer to the generative sources of law as "centres". I return to this particular point below.

The editors refer again to the distinction between legal pluralism and legal polycentricity shortly afterwards:

If one should distinguish between a legal pluralist and a legal polycentric approach to law the difference lies perhaps mainly

in the perspective. Whereas the legal anthropologist and legal sociologist [sc. legal pluralists] may mostly tend to understand and describe the legal landscape from outside, legal polycentricity approaches legal science from within and tries to reach another understanding - and practice - of law to influence and interact with the landscape. (8)

They add, presumably with reference to Nordic feminist scholars' assistance to and involvement in WLSA:

...Women's law in a Nordic context constitutes the meeting point for the discussion between legal pluralism and legal polycentricity. (9)

The contrast which emerges with some vagueness from these passages needs to be made more specific. Four particular distinctions between the two concepts seem to be suggested.

First, legal pluralism is seen as the preserve of legal anthropologists and sociologists. It is not explicitly said that legal polycentricity is the preserve of lawyers, but the reference to those who "approach legal science from within" seems to imply this. But such a distinction between sociologists-anthropologists and lawyers would ignore the major contributions made by scholars who have been accomplished in both fields. Moreover, a glance at any list of students of legal pluralism - for example, the membership list of the Commission on Folk Law and Legal Pluralism, or the list of those who worked on the Australian Law Reform Commission Reference on the Recognition of Aboriginal Customary Law (ALRC 1986) - shows that this distinction between disciplines would be mistaken.

Second, legal pluralism is concerned with "the legal landscape" (whatever that may mean), while legal polycentricity is concerned with "legal science", which appears to mean legal dogmatic study. If "the legal landscape" means all social phenomena (such as norms, roles, and institutions) which can be described as legal, this would seem to be correct as to legal pluralism. But it is difficult to believe, in the light of the papers in this collection, that legal polycentricity is restricted to something less.

Third, anthropologist and sociologist students of legal pluralism study their subject from outside, whereas the practitioners of legal polycentricity study it from within. If this has a precise and significant meaning, it must imply the extraordinary claim that anthropologists do not succeed in understanding societies from the viewpoint of their members, whereas the scholars of legal polycentricity do.

BOOK REVIEW
Gordon R. Woodman

Fourth, whereas students of legal pluralism are concerned only to understand and describe, students of legal polycentricity additionally are activists. Again, the falsity of the contrast can be seen from noting that a significant proportion of the students of legal pluralism are concerned with the political, legal and social means of producing change. While the Nordic activists who are claimed for the legal polycentricity camp have played an admirable part in work by and related to WLSA, they have hardly been the sole representatives of the world of learning in the movement against gender-biased legal structures.

I may have failed to understand the intended meaning of this passage, but I cannot find in it any sustainable statement indicating the distinctive nature of legal polycentricity.

The contributors who mention legal polycentricity either say nothing to suggest that it differs from legal pluralism or put some of the distinctions just mentioned. The one possible exception is de Lange. Having noted instances of the distinction between public law and private law in European national legal systems, he remarks that "it would certainly be far-fetched to consider [this distinction] as a form of legal pluralism, but we may describe it as a form of polycentricity" (109). This conclusion appears to be derived from his claim that "[l]egal pluralism is commonly described as the situation in which... normative/legal orders collide with each other on the same social field" (111). However, the notion that every instance of legal pluralism entails collision or conflict between the constituent laws is to be found in none of the various definitions which have been proffered, including that of Merry (quoted above), on which de Lange relies. If the public law and private law of a state are different legal orders (which is arguable), it would seem to follow, according to all the definitions given, that their coexistence is a form of legal pluralism. In the remainder of de Lange's paper, every statement about legal polycentricity could as well have been made of legal pluralism.

There remains one possibly distinctive feature of legal polycentricity, suggested by a literal construction of the words, and apparently endorsed by the editors. Whereas legal pluralism is the state in which a plurality of laws coexist, legal polycentricity is that subcategory of legal pluralism in which laws generated in a plurality of centres coexist. Legal polycentricity is according to this interpretation concerned only with laws generated in what may be called "centres", such as legislative assemblies, sections of bureaucracies, dictators and priesthoods. It is not concerned with laws generated in the amorphous mass of a society at large, that is, with folk laws or popular customary laws (as distinct from lawyers' customary laws). If the concept of central generation has any meaning, it must rest on this distinction.

And yet this is not what the more specific writers mean. Hanne Petersen demonstrates this the most clearly when she writes: "By *polycentricity* I understand that legal norms are produced by different 'centres', semi-autonomous fields (Falk Moore 1978) or networks..." (171). The reference to Moore's concept is significant. The normative orders of the semi-autonomous social fields of the Chagga and the garment-workers of Manhattan, as described by Moore, are emphatically not orders generated by 'centres'. Possibly scholars could distinguish those cases of legal pluralism in which each constituent law was generated by a 'centre', but the exponents of legal polycentricity do not intend this, and it is difficult to see what purpose would be served by doing so.

I conclude that this book should be recommended as containing a great deal which will be useful to readers of this *Journal*, but that the concept of legal polycentricity does not contribute to the advance of understanding.

References

ALRC (AUSTRALIAN LAW REFORM COMMISSION)

1986 *The Recognition of Aboriginal Customary Laws*, Report No. 31. Canberra: Australian Government Publishing Service.

CHIBA, Masaji

1989 *Legal Pluralism: Toward a General Theory through Japanese Legal Culture*. Tokyo: Tokai University Press.

GRIFFITHS, John

1986 "What is Legal Pluralism?" *Journal of Legal Pluralism* 24: 1-55.

HOOKER, M. Barry

1975 *Legal Pluralism: An Introduction to Colonial and Neo-colonial Laws*. Oxford: Clarendon Press.

MERRY, Sally E.

1988 "Legal Pluralism." *Law & Society Review* 22: 869-896.

VANDERLINDEN, Jacques

1971 'Le pluralism juridique: essai de synthèse.' Pp. 19-56 in: John Gilissen (ed.), *Le Pluralisme Juridique*. Bruxelles: l'Université Bruxelles.

1993 'Vers une nouvelle conception du pluralism juridique.' *Revue de la recherche juridique - droit prospectif* XVIII.

WEIS BENTZON, Agnete

1992 'A note on the polycentricity of law. A Danish version of legal pluralism.' *Commission on Folk Law and Legal Pluralism Newsletter* XXI: 30.

n.d. 'Closed legal systems and open minds', unpublished paper. Copenhagen: Institute of Legal Science, Section B, University of Copenhagen.

BOOK REVIEW
Gordon R. Woodman

WOODMAN, Gordon R.

n.d. 'Ideological combat and social observation: recent debate about legal pluralism.' *Journal of Legal Pluralism*, forthcoming.