

MCGILL CONVOCATION ADDRESS: LEGAL PLURALISM IN PRACTICE

*Sally Engle Merry**

EDITOR'S NOTE

Professor Sally Engle Merry was awarded an Honorary Doctor of Laws at the McGill Faculty of Law's 2013 convocation ceremony. A leading American legal anthropologist, she reminds us in her graduation address of the importance of legal pluralist framework—not only to the study of law, but also to a general understanding of human interaction. She demonstrates the need for jurists to be alert to the effects of overlapping legal systems using examples of her varied experiences studying these systems' multidimensional roles in society—in colonial Hawai'i, the urban United States, and East and Southeast Asia, among other locations—and her analyses of the manner in which different levels of law interact to ensure the protection of human rights.

Moreover, Professor Merry's own career illustrates to graduating law students the lengthy reach of legal scholarship into other academic fields and walks of life: her interdisciplinary research interweaves an understanding of legal traditions with examinations of governance, colonialism, human rights, and race and gender issues. Her work and the insights of her graduation address both exemplify one of the aims of McGill's legal education program: to prepare jurists not only to practice or study law but also to recognize and explore its reach into all aspects of everyday life. It is the *McGill Law Journal's* privilege to share Professor Merry's ideas with a broader audience and to dedicate the publication of her address to the Faculty of Law's 2013 graduating class.

MOT DE LA RÉDACTRICE

Lors de la cérémonie de remise des diplômes du printemps 2013, la Faculté de droit de l'Université McGill a remis un doctorat honorifique en droit à la professeure Sally Engle Merry. Anthropologue judiciaire éminente aux États-Unis, elle a rappelé dans son discours l'importance d'un cadre juridique pluraliste, tant pour l'étude du droit que pour une meilleure compréhension des rapports humains en général. Elle montre que les juristes se doivent d'être sensibles aux effets de la coexistence de différents systèmes juridiques. Elle s'appuie pour cela sur ses diverses expériences accumulées lors de ses travaux de recherche sur les rôles multidimensionnels de ces systèmes dans la société—tel que, entre autres, la société hawaïenne postcoloniale, les milieux urbains américains, de l'Asie de l'Est et de l'Asie du Sud-Est.

Elle s'appuie également sur ses analyses portant sur la façon dont l'interaction des différents niveaux de législations assure la protection des droits de l'homme. La carrière de la professeure Merry donne aux finissants en droit un excellent exemple de la portée significative de la recherche juridique pouvant toucher d'autres disciplines académiques et différents milieux sociaux. Son approche interdisciplinaire allie une compréhension de différentes traditions juridiques avec des analyses des questions de gouvernance, de colonialisme, de droits de l'homme, de genre et de race. Ses travaux et son discours de remise des diplômes illustrent tous deux l'un des objectifs de la Faculté de droit de McGill: préparer des juristes non seulement à pratiquer ou à étudier le droit, mais aussi à en reconnaître et explorer la portée dans plusieurs aspects du quotidien. C'est avec grand plaisir que la *Revue de droit de McGill* publie le discours de la professeure Merry pour en faire bénéficier une plus vaste audience et le dédie à la promotion 2013 de la Faculté de droit.

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It is a great honour to receive this degree, particularly from a law school that I have long admired for its commitment to social justice and human rights and to the concept of legal pluralism. I admire its effort to see law through the lens of socio-legal analysis, as well as its commitment to an international and a domestic focus on law. These critical perspectives contribute to McGill's visibility and its international reputation as an excellent law school. Today I want to talk in particular about the value of a focus on legal pluralism.

McGill's Faculty of Law has taken a leading role in developing and promoting this perspective on law. This is an extremely valuable framework, and I urge you to recognize its value and to hold on to it as you go out into the world as practicing or academic lawyers. Legal pluralism is not a theory of law or an explanation of how it functions, but a description of what law is like. It alerts observers to the fact that law takes many forms and can exist in parallel regimes. It provides a framework for thinking about law, about where to find it and how it works. As such, legal pluralism provides an invaluable guide to thinking about law in its multiple instantiations and intersections and to paying attention to alternative understandings and practices of law, particularly among the less powerful members of a society.

Legal pluralism offers three critical insights about law:

1. It shows that law affects social life in many ways, both inside and outside formal legal institutions. Law defines identities such as citizen or alien, allocates who can use which spaces, provides belonging through mechanisms such as birth registration, offers security of ownership to land and houses, and serves as an authoritative source for creating knowledge and history. Law is enacted in multiple places, such as community mediation centres, zoning hearings, university disciplinary hearings, UN human rights treaty bodies, and professional association ethics committees. Religious communities often make formal or informal normative judgments about their members. Legal decisions are made in these diverse tribunals even when they are not part of formal state law. Such varied legal sites are often the place for decisions such as whether a political leader carried out genocide, or whether a minority religious woman deserves a divorce.
2. These myriad instantiations of law are fragmented, inconsistent, and contradictory. They are a bricolage built up from practice, history, and the legacy of efforts to solve earlier problems. Legal practices may be chaotic and incoherent, as a result of developing from a variety of local practices, yet they can be more attuned to local practices than is a remote state law. For example, considerable

3. anthropological research on small-scale communities, following Malinowski's pioneering work in the 1920s,¹ suggests a disjunction between local ideas of justice and the formal state law.
4. These systems are constantly interacting with one another and redefining each other. Law is, in practice, shaped through interactions among multiple legal orders.

The value of legal pluralism as an analytical framework for understanding how law works emerged from my research experiences, with three examples being particularly pertinent. The first emerged during my research on community mediation in the 1980s.² I was studying a system of conflict resolution that claimed to stand outside the American legal system. The program handled cases that were taken to court and diverted to mediation at early stages of the legal process. Most concerned conflicts between neighbours, spouses, boyfriends and girlfriends, or parents and children. Much of this alternative dispute resolution movement was framed as a necessary corrective for an overly litigious society and took a strong anti-law perspective. It promised to diminish the alienating and costly use of law for interpersonal and property problems by replacing it with informal, community-based mediation. Local leaders rather than lawyers staffed these programs.

I studied one community mediation program attached to a lower court in Massachusetts, which handled cases people had taken to court. The program's office was in the courthouse, but the mediation sessions took place in local schools and churches. At the end of each session, the participants were encouraged to sign an agreement. The document had a court logo at the top, and mediators told the parties that the agreement would be placed "on file" with the court. What that meant was never explained, however. When I interviewed litigants afterward, many thought that the mediation session was part of the court process and that the agreement they signed would be enforced by the court—but, in fact, it had no legal standing. This is an example of the intersection of plural legalities. The informal mechanism adopted the trappings and forms of state law, even when it lacked its formal authority.

Indeed, people using informal mechanisms often seek to make them appear similar to formal legal institutions. For example, in 2005 I studied a women's local court in India, called the *nari adalat*, that handled cases

¹ See e.g. Bronislaw Malinowski, *Crime and Custom in Savage Society* (Paterson: Littlefield Adams, 1959).

² See Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans* (Chicago: University of Chicago Press, 1990).

of domestic violence, divorce, and dowry.³ It had no legal authority, but over time it began to register cases in a large book, charge filing fees, and issue decisions on “stamp paper”, the form of legal decisions used in British and then Indian courts. In effect, the women in the *nari adalat* appropriated the trappings of state law. In these examples, the formal legal system slides into other modes of dealing with conflict, as informal systems appropriate the rituals and forms of law. The boundaries between these systems are fuzzy, underscoring the pluralism of law in practice. Formal law slides readily into everyday life.

A second encounter with legal pluralism emerged from my research on colonialism and law in nineteenth-century Hawai‘i.⁴ Colonialism and law was a major subject of anthropological research in the first part of the twentieth century, particularly in British Africa. Anthropologists examined tribal courts, moots, village mediation, vengeance, and feuds, as well as modes of peacemaking, all in small-scale communities. They studied processes of managing conflict and maintaining order, from feuds to witchcraft to chief’s courts. The goal was to understand the nature of local legal practices. But as anthropologists expanded their framework from the village to the larger social field during the twentieth century, they realized that the phenomenon they were examining, sometimes called “customary law”, was in fact a product of colonialism.⁵ Researchers studying colonial Africa, for example, recognized that customary law was often constituted by British district officials asking the new African leaders conversant with British practices and ideals to tell them what the law was, rather than asking more traditional leaders.⁶ Yet it was also clear that customary law was part of a system of legal pluralism. British colonialism in particular emphasized the creation of a dual legal system,⁷ accepting customary law as long as it was not defined as repugnant to good conscience.

³ See Sally Engle Merry, “Transnational Human Rights and Local Activism: Mapping the Middle” (2006) 108:1 *American Anthropologist* 38 at 46–48 [Merry 2006].

⁴ See Sally Engle Merry, *Colonizing Hawai‘i: The Cultural Power of Law* (Princeton: Princeton University Press, 2000) [Merry 2000].

⁵ See Martin Chanock, “Making Customary Law: Men, Women, and Courts in Colonial Northern Rhodesia” in Margaret Jean Hay & Marcia Wright, eds, *African Women & the Law: Historical Perspectives* (Boston: Boston University Papers on Africa, VII, 1982) 53; Martin Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge: Cambridge University Press, 1985).

⁶ See Sally Falk Moore, *Social Facts and Fabrications: “Customary” Law on Kilimanjaro, 1880–1980* (Cambridge: Cambridge University Press, 1986); Richard Roberts & Kristin Mann, “Law in Colonial Africa” in Kristin Mann & Richard Roberts, eds, *Law in Colonial Africa* (Portsmouth: Heinemann, 1991) 3.

⁷ See *ibid* at 21; see also Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton: Princeton University Press, 1996).

Officials identified customary law by asking local experts to determine what the law was, thus reframing flexible and situationally defined oral codes into fixed, written rules. This move to establish a customary law went hand in hand with creating dual legal systems for colonists and the colonized. This has been described as the imposition of law,⁸ but it is clear that it was not a simple imposition of one legal system over another, but rather the creation of a complex, layered duality with mutually constitutive practices.

This duality clearly enshrined racial and cultural difference and inequality, yet it did have the effect of preserving some features of local legal systems. In contrast, when the United States colonized Hawai'i during the nineteenth century, it established a unitary legal system.⁹ The American legal advisors to the Hawaiian king and government, largely New Englanders dedicated to abolishing slavery, did not want to create one legal system for Hawaiians and one for whites. As a result, they created a unitary legal system, at first based on Hawaiian law and practices and written in Hawaiian, but gradually transformed into an American one written in English and translated into Hawaiian. To achieve this transformation, it was necessary to create new words and procedures. For example, the missionary-influenced Americans struggled to change Hawaiian practices of sexuality and marriage, which were based on the idea of a set of brothers and sisters raising children together rather than on the nuclear family model, into the model of the sexually exclusive monogamous family idealized in New England. To make this change happen, the missionaries invented a term for fornication and adultery—"moe kolohe"—which literally means "mischievously sleeping".¹⁰ They encouraged Hawaiians to catch their neighbors engaging in illegal sex by peering through the thatched walls of houses. The emerging system of courts, based on American models, then prosecuted the offense. Perhaps a dual legal system would have been less disruptive to local social practices.

A third encounter with legal pluralism and its theoretical contribution to the analysis of legal systems came with my study of human rights.¹¹ The international human rights legal regime represents another layer of legal pluralism. It is a multilateral treaty system consisting of nine human rights conventions that are monitored by a system of expert committees that periodically assess the extent to which ratifying countries com-

⁸ See Sandra B Burman & Barbara E Harrell-Bond, eds, *The Imposition of Law* (New York: Academic Press, 1979).

⁹ See Merry 2000, *supra* note 4 at 113–14.

¹⁰ *Ibid* at 248.

¹¹ See Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago: University of Chicago Press, 2006).

ply with their terms. It is layered above state law and seeks to regulate it, but it also exerts influence at the local level. The human rights regime offers social movements a powerful ideology of equality and justice. Social movements that encounter resistance from their own states may raise human rights claims in international fora instead. For example, LGBT groups that have difficulty getting recognition in their own countries may make human rights claims, as one group I studied in India did.¹² Thus, although as a system of law the human rights framework is inconsistent and unevenly enforced, it is also ideologically powerful. It promotes techniques for making human rights violations known, such as modes of documenting violations and reporting them, that affect the ability of publics to see injustices and violations that are otherwise invisible. It provides an important ideology for social movements. It develops and changes all the time through global–local interactions.

As a way of understanding how human rights law regulates social life in local communities, I focused on the construction of gender violence as a human rights violation and the effect of this construction on local organizations and social movements in several Asia/Pacific countries. The idea that women had the right to be free of violence emerged as an important human right in the early 1990s.¹³ At the same time, debates over the universalism of human rights mushroomed. Whether or not human rights constituted a universal set of standards was always a fundamental issue, but it became particularly controversial in the 1990s. With the end of the Cold War, pressure on certain states to comply with human rights norms ratcheted up, generating new resistance to the regime, especially by some Asian states. China and Singapore in particular claimed that human rights and Asian values were deeply incompatible.¹⁴

Intrigued by this debate, in the early 2000s I studied how this new idea of a woman's right to be free from violence was adopted or rejected by local communities. Were the relativists right that this universal system was irrelevant in many cultural contexts? Or was it universally applicable? I did research in Fiji, China, India, and Hong Kong. In all these countries, I found the widespread practice of appropriating women's human rights concepts by translating them into terms that made sense in local

¹² See Peggy Levitt & Sally Engle Merry, "Making Women's Human Rights in the Vernacular: Navigating the Culture/Rights Divide" in Dorothy L Hodgson, ed, *Gender and Culture at the Limit of Rights* (Philadelphia: University of Pennsylvania Press, 2011) 81.

¹³ See Charlotte Bunch, "Women's Rights as Human Rights: Toward a Re-Vision of Human Rights" (1990) 12 *Hum Rts Q* 486 at 486.

¹⁴ See Joanne R Bauer & Daniel A Bell, eds, *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999).

contexts. There was little explicit reference to UN declarations, to the Women's Convention or *CEDAW*,¹⁵ or to the statements of special rapporteurs or the resolutions of the (as it was then called) Human Rights Commission.¹⁶ Instead, human rights norms were creatively translated into ideas that made sense to local activists and communities. For example, in my research on local women's organizations in Gujarat, India, I found that a woman's right to be free from violence was interpreted to mean that women could stand up for themselves, and that hitting was not justified even if a wife failed to provide a good evening meal.¹⁷ Additionally, the NGO encouraged poor women who came for help with violence and abuse in marriage to stand up for themselves and to renegotiate their relationships with their husbands. Since separation and divorce typically leave a woman living alone, vulnerable, and poor, such a strategy for protecting her from violence may be her only option.

In my research on the localization of women's human rights in several countries—China, India, Peru, Fiji, and the United States—I did not find an opposition between universalistic standards and local ideas, but instead discovered activists translating global concepts into terms that made sense locally.¹⁸ In all the countries I studied, human rights law and the global movement against gender violence were important, but their influence was mediated by translators of various kinds. I called this process of translation “vernacularization”. Human rights law offered a transcendent source of international authority, legitimated by its creation through international debates and decisions, which was then vernacularized by local activists. Even if the sanctioning power of international human rights law is limited, its regimes are powerful resources for local social movements. Thus, the legal pluralism frame provides a way to understand the effects of global human rights law on local social justice practices.

¹⁵ *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13, Can TS 1982 No 31.

¹⁶ See World Conference on Women, “Beijing Declaration and Platform for Action: Platform 3” The IV World Conference on Women, 1995, 16th Plen Mtg; Radhika Coomaraswamy, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, UNHRC, 52d Sess, E/CN.4/1996/53, (1996); Radhika Coomaraswamy, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, UNHCR, 58th Sess E/CN.4/2002/83, (2002).

¹⁷ See Peggy Levitt & Sally Merry, “Vernacularization on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States” (2009) 9:4 *Global Networks* 441 at 446.

¹⁸ See e.g. *ibid*; Merry 2006, *supra* note 3; Sally Engle Merry et al, “Law from Below: Women's Human Rights and Social Movements in New York City” (2010) 44:1 *Law & Soc'y Rev* 101.

Such global perspectives are, of course, not always welcomed. Even in the United States, a bastion of human rights activism, conservative groups resist the human rights system—even as more progressive groups seek to use it locally within social movements. For example, two progressive NGOs in New York City that I studied, Voices of Women and the Human Rights Project of the Urban Justice Center, vernacularized human rights as a way of challenging violence against women.¹⁹ For these groups, the language of human rights offered a way to build alliances among anti-poverty, educational, and housing rights organizations. It also offered a way to make their issues visible. One group, for example, did a documentation study of how New York City family courts treat battered women, citing a range of human rights violations.²⁰

What might we take away from this brief overview of the analytical benefits of a legal pluralist perspective? Clearly it suggests wariness about seeing legal systems as homogeneous and neglecting the importance of local, community, or religious-based systems of law and conflict management. It also raises questions about rule of law projects that ignore local law. There are clearly difficult issues presented by legal pluralism, of course, such as local legal systems that violate principles of the national and international system by allowing racial discrimination or by tolerating domestic violence. But the solution is not to ignore local systems. Instead, the legal pluralism framework leads scholars to look for dialogue and intersection. It asserts the complexity of law, including its ideology, rules, practices, and knowledge techniques, as well as, perhaps most importantly, the interconnections among legal systems. And this framework opens up spaces for local activism. Armed with this powerful concept, I am sure you will be better lawyers and scholars as you seek to promote social justice at home and around the world.

¹⁹ *Ibid.*

²⁰ See Voices of Women Organizing Project, “Justice Denied: How Family Courts in NYC Endanger Battered Women and Children”, online: The Leadership Council <www.leadershipcouncil.org/docs/VOW_JusticeDenied_sum.pdf>.