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Sally Engle Merry, Legal Pluralism, and the Radicalization of Comparative Law

Jeremy Webber
Mireille Fournier
Val Napoleon
John Borrows

At the very beginning of her career, Sally Engle Merry focused on the legal relations of nonlegally trained people—often members of the working class, marginalized or racialized groups. She explored the disjuncture between those people's understandings of disputing and the concepts, language, and procedural distinctions of legal professionals (Merry 1979, 1990, and more). That work brought her into contact with a number of scholars working on what Merry (1988) would call "new legal pluralism": taking legal pluralism beyond the colonial and postcolonial contexts in which it had predominantly been deployed ("old legal pluralism") and portraying it as a characteristic of virtually all societies and all law.

Two figures were increasingly important interlocutors and intellectual friends in Merry's engagement with this expanded scope for legal pluralism: Harry Arthurs, whose emphasis on the plural sources of law grew out of his work in connection with specialized, context-specific, administrative tribunals, particularly in the field of labor law (see especially Arthurs 1979, 1985a, 1985b); and Rod Macdonald, who, as a student, had pursued an interest in comparative law (we suspect because of a patriotic desire to master the whole of Canadian law), and whose work then extended to embrace normativity outside the state (see especially Macdonald 1986, 1992, 2011; Kleinhans and Macdonald 1997).[1]

Please direct all correspondence to Jeremy Webber, Faculty of Law, University of Victoria, PO Box 1700 STN CSC, Victoria, BC, V8W 2Y2, Canada; e-mail: jwebber@uvic.ca.

[1] See Merry's tributes to Arthurs (Merry 2006b: 54; 2017: 298–99) and Macdonald (Merry 2015). Harry Arthurs is President Emeritus of York University, where he was a transformative Dean of Osgoode Hall Law School (1972–77) and President (1985–92). Rod Macdonald died (alas) in 2014, after an inspiring life in which he was Dean of Law at McGill University (1984-89), founding President of the Law Commission of Canada (1997–2000) and President of the Royal Society of Canada (2009–11). When he was working in the history of labour law, Webber had the repeated experience of finding that, whenever he thought of a point of interest, Arthurs had already canvassed it insightfully long before him. This is no exception. See Arthurs (2007) for an exploration of many of the themes in this tribute (and more) in the specific context of comparative labor law.

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It was especially as a result of these connections that Merry became, from the late 1980s into the first decades of the twenty-first century, an important and valued participant in a burgeoning community of Canadian scholars working with law in diverse societies.

Many of those scholars were stimulated by the need to develop adequate conceptual tools for grappling with three forms of legal diversity present in Canada: the coexistence of the Civil-Law and Common-Law traditions in Canada (especially in Quebec); the long encounter between these legal traditions and those of Indigenous peoples; and indeed increasingly the diversity of Indigenous legal traditions themselves. Those conversations brought about two ambitious teaching projects. First, in the mid-1990s, the Faculty of Law at McGill University sought to transform its teaching of the Civil Law and the Common Law in its joint Bachelor of Civil Law/Bachelor of Laws (BCL/LLB), now Bachelor of Civil Law/Juris Doctor (BCL/JD), program. McGill had originally been a Civil-Law school. In 1968, it had introduced the "National Program," teaching both the Civil and Common Law (Macdonald 1990). In its first iterations, the joint program had been optional; many students obtained only a Civil Law or a Common Law degree. The discussions of the 1990s considered (a) whether to make the dual degrees compulsory, and (b) whether the program should be revised to build comparative teaching into the very fabric of the program, so that several courses would be taught "transystemically" (both traditions being taught simultaneously in the same class). In 1998, after vigorous debate, the Faculty adopted both objectives: henceforth all students would need to complete both the Civil Law and the Common Law, and the teaching of both would be tightly integrated (Glenn 2005; Janda 2005; Dedek and de Mestral 2009; Emerich and Plante 2018).

The McGill project furnished much of the inspiration for a second joint-degree program, this time at the University of Victoria (denominated Juris Doctor/Juris Indigenarum Doctor: JD/JID). It sought to teach, as even-handedly as possible, both the Common Law and Indigenous legal orders. It was the product of long gestation. From 2004 to the program's inception in 2018, scholars at University of Victoria and elsewhere engaged in a long series of workshops, community consultations, conferences, and pilot projects. The program had to grapple with the richness and diversity of Indigenous legal traditions; there is no such thing as a pan-Indigenous law. The program would therefore introduce a sampling of Indigenous legal traditions in sufficient depth that students would understand their key concepts, institutions, procedures, modes of transmission, and styles of reasoning—a

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knowledge that was not simply external, not simply ethnographical, but rather appropriate to someone working within that tradition, reasoning in its terms and acting through its processes (Borrows 2010: 228–37; Napoleon and Friedland 2016: 741–48; Webber 2018).

These projects were allied to intense intellectual reflection, research, and theorization. Both drew upon long histories of research on the legal traditions that were the subject of study, at the host institutions and beyond. The work of graduate students contributed mightily to both projects, as did research units at each university.[2] This theorization brought the legal pluralist literature into close conjunction with comparative law—perhaps surprisingly, for the two subdisciplines had tended to operate to that point utterly separately, as two autonomous universes of intellectual inquiry, without much knowledge or indeed respect for each other. Bringing them into conjuncture produced major challenges. These challenges were most obvious on the comparative law side, where a discipline that had been entirely state-centered was forced into an encounter with law that was not the product of a state, perhaps even "stateless law" (Dedek and Van Praagh 2016). The range of legal orders judged appropriate for comparative analysis was vastly expanded to include, in principle, religiously based or customary legal orders (Glenn 2014). These developments in turn advanced questions about the very purpose of comparative law. They threw into question the implicit teleology—the confidence in a scientific progression of legal knowledge toward a rational and ideal ordering of all societies—that had been part of the modern comparative project since its founding in the late nineteenth century (Frankenberg 2016: 45–46; Fournier 2018). Methodologically, they shifted the focus away from comparing the terms of a closed set of legal orders to the challenge of how to maneuver in a normatively diverse world (Macdonald and Glover 2013).

But the encounter also had implications for legal pluralism—implications that sociolegal scholars have, if anything, been less quick to recognize. Legal pluralism, old and new, had originated in an anthropological or sociological mode of analysis and took, like that analysis, a predominantly external approach to law. Its exponents often neglected the argumentative resources within the orders they studied. When they did address those resources, they generally saw their role to be one of describing the orders' terms rather than reasoning with them to address the challenges of particular human societies. Indeed, the terms were sometimes treated

[2] Note especially the Paul-André Crépeau Centre for Private and Comparative Law at McGill (https://www.mcgill.ca/centre-crepeau/) and the Indigenous Law Research Unit at Victoria (http://ilru.ca/).

as emerging naturally from interaction within a particular social order, untouched by human hands, not the product of argument, power plays, and structures of decision making (Webber 2006). The new teaching programs subverted this approach. They aspired to teach students how to work with these legal orders critically. They sought to train individuals who would be insiders, taking responsibility for the development of those orders, seeking to articulate and to realize what justice ought to mean within and between the orders (Napoleon et al. 2013; Snyder et al. 2014). They sought to train people who could build institutions, develop new legal regimes, conduct legal operations, and advance legal arguments in this multijuridical world.

Sally Engle Merry was an integral member of these conversations. She was a key member of a research group, led by Rod Macdonald, working on "Law and the Determinants of Social Ordering" in the lead-up to the transformation of the McGill program. She served as an international reviewer during the development of the Victoria program. Beyond these formal connections, her work inspired ours and vice versa. These conversations were not a matter of instruction or tutelage. Rather, Merry was a constituent member of a community of scholars trying to work out how to do these things with integrity and the theoretical implications deriving from them. Her insight and perspicacity helped to bring the projects to fruition. And that engagement, those conversations, in turn impacted her own research production, notably her important work on the pursuit of gender equality cross-culturally through international law (Merry 2006a, 2006b, 2009, 2013b, 2016, and more).

These initiatives did not come easy. Their implications will be developed with time. In the remainder of this brief appreciation we will sketch three of the challenges, identify some of those implications, and note how this reflection was manifest in the work of Sally Engle Merry.

* * *

1. Challenge 1: The Problem of Fidelity

Legal traditions are not simply better or worse devices for the functional organization of human activity. The organization of different societies can differ substantially. Moreover, the distinctive character of societies, and the legal grammar used to order and revise them, can matter deeply to their members. The grammar of their law furnishes the terms by which they have come to understand their place within the world. Those terms can be constitutive of their social identity (Webber 2009, 2017).

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For that reason, any attempt to work across legal traditions can generate acute concern that one's tradition is being compromised, displaced, co-opted, or eroded. Those engaged in the work cannot help but ask themselves: What does it mean to work within a tradition? What needs to be maintained? What can be changed? Is it legitimate to borrow from another culture and, if so, on what terms?

Such questions were fully evident in McGill's debate over the move to transsystemic teaching. There was foreboding, among some students and faculty members, that the reform might erode the Civil Law culture of the school. Some faculty who provided much of the intellectual framework for the project, both before and after its adoption, including Sally Engle Merry's interlocutor Rod Macdonald, had doubts about whether to proceed with the change given the extent of opposition. It would not have proceeded without the commitment of the then Dean, Stephen Toope (now Vice-Chancellor of Cambridge University). Finally, after 4 years of ad hoc curriculum committees and, in the last three-and-a-half months, eleven successive faculty meetings, the reform was adopted by a vote of nineteen to fourteen (five members of faculty council had left the meeting or abstained from voting).[3] Very soon, a clear majority of faculty members came to see transsystemic approaches as central to the character of the school. The decision had, then, transformed the lay of the land. But questions of what it means to work within and across traditions remained.[4]

The Victoria program, in contrast, was adopted unanimously. But the same kinds of concerns have been present throughout the project. Indigenous students have often found law school hard, experiencing an impostor's syndrome (Schwartz 2018) or asking themselves whether they are in the process of being co-opted. Those worries have not disappeared with the new program's pronounced focus on Indigenous legal orders. Working with Indigenous legal traditions, applying them to contemporary needs, requires that one strives to identify their animating principles, weighs interpretations, analyzes power, considers principles' application to new situations, encounters ways in which they have changed under the impact of colonization, and reflects upon, and seeks to extend, their continued development. The law is treated as more than simply an ideal vision of society but rather something that must be worked with human hands. Students can doubt their entitlement to do so (Napoleon 2019).

[3] Faculty of Law, McGill University, Minutes of the Faculty Council meeting of March 04, 1998, chaired by Dean Stephen Toope, secretary Professor Geneviève Saumier.

[4] To this day, doubts occasionally resurface. See, for example, Foccroulle-Ménard (2020).

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Sally Engle Merry confronted similar questions in her work. Her book, *Colonizing Hawaii* (Merry 2000), explores the ways in which the Hawaiian legal order was altered under the onslaught of colonialism. She describes how those changes were often pursued by Hawaiian elites. She chronicles how they resulted in the dispossession of Hawaiian commoners and the implantation of a capitalist, industrial, sugar economy. She notes the role of non-Hawaiian reformers, actuated by motives that were often altruistic. And she also asks, insistently, whether ideals and critical stances that we now hold might one day be recognized to be equally damaging.

But, importantly, she also rejects easy answers. She refuses to treat legal change, borrowings, and transplantation as inherently objectionable. She expressly rejects a conception of cultures as radically independent wholes. On the contrary, she builds her analysis around twin processes of social change: cultural production and cultural appropriation, both potentially (but certainly not necessarily) positive. She is closely attentive to, and critical of, the development of gender relations. In her evaluation of the proposed Victoria program (Merry 2011), she advised that we not "reify indigenous law as an ancient or unchanging system," presenting it in a "static, ahistorical way," and that we take seriously aspects of today's Indigenous law that are a product of colonialism (see also Merry and Brenneis 2004). Moreover, in her important late work, she argues for ways in which human rights and gender equality might be actively promoted across societies by methods that are geared to the particularity of different societies, and indeed might be assessed, cross-culturally, by appropriately framed indicators (Merry 2013b).

It is instructive that that late work takes the form of self-reflective practice, responsive to the lessons of experience. She is careful in her judgments, always alive to the presence, and acceptability, of varying institutions and processes. She avoids grand claims. But she nevertheless rejects the twin dangers of essentialism and relativism. She sees us as living in a single world, able to learn from each other, needing to act within and among our societies. She is not content to remain ensconced in the comfortable seat of the critic.

2. Challenge 2: Maneuvering among State and Nonstate Societies

Bringing comparative law into conjunction with legal pluralism also raises the challenge of how to work between state and nonstate legal orders—between centrally organized legal systems,

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with institutions designed to provide firm answers regarding the application of the law, and legal orders in which authority is widely distributed, no one institution can conclusively determine and impose the law, and normative disagreement can thus persist for long periods of time.

This challenge has sometimes been subsumed within arguments over the very definition of law. Merry rejected what had become an arid argument over definitions. Instead, she observed that legal anthropology had rightly "adopted a pragmatic approach. Law was defined as a set of ideas and practices for managing conflict and creating order but the more precise definition depended on the particular goal of the inquiry" (Merry 2011).

This still left the problem of the methods appropriate to identifying and reasoning with the principles and processes of non-state orders. When engaging with Indigenous legal orders that challenge requires that students be introduced to the structural features of Indigenous societies (the way, e.g., that kinship determines relationships, responsibilities, and entitlements); the modes of transmission and testing of legal knowledge (e.g., the role of stories and formal and informal responses to stories); the forums and styles of expression used in public decision making (e.g., the oratory of the feast hall); and indeed often the very nature of the land, and the beings upon the land, themselves (Borrows 2010, 2016; Friedland and Napoleon 2015–16; Jobin et al. 2020).

It also requires that one adapt to the more allusive character of legal reasoning and expression in Indigenous societies, and that one finds ways to sustain the character of that reasoning, both when bringing it into conversation with state-structured bodies of law and when one explores its dynamic character in the present.

Linguistic analogies are instructive in this regard (Webber 2009, 2020). They capture the commonality inherent in a culture, without reducing that commonality to a set of agreed-upon propositions. The commonality consists in the normative order's continually expanding stock of experience, often expressed in literary form; in its conceptual architecture; in its styles of argumentation; in its body of past decisions and disputes. Linguistic analogies can also furnish tools for comprehending interaction across legal traditions through analysis of translation and its perils. It is striking that Sally Engle Merry drew heavily on linguistic images in her scholarly work. She spoke often of translation and vernacularization, especially in her late work on international human rights, describing how the concerns of gender equality might be framed and pursued in quite different terms, appropriate to different societies, which has inspired our work on human rights in Indigenous societies (Snyder et al. 2015). In her

2011 commentary on the plans for Victoria's new program, she cautioned that if the parallels between Canadian law and indigenous law were drawn too closely, there was a danger "that indigenous law will be understood through the lens of the common law and expected to manifest similar systems of rules, institutions, and procedures" (Merry 2011). It was important that the conceptual categories, through which Indigenous law was approached, not be those of the Common Law alone, but be faithful to their own. This work involves finding the means to convey Indigenous legal concepts to audiences not raised within the community's form of life, often not speaking the people's language, thus trying to convey the interdependence of legal thought and life upon the land, reaching for a sufficient language of perspicuous contrast (Taylor 1985; Borrows 2016).

Of course, this expansion of the intellectual framework also has benefits for comprehending state law, as both McGill's and Victoria's programs make clear. It points toward an expanded awareness of the determinants of law, it suggests how we might analyze the permeability of state law to normative traditions in society more broadly, and it focuses our attention on the discursive openness of state law itself. Above all, it is valuable in understanding the nonstate legal order of which states are members: international law. It prompts us to refrain from squeezing international law into the boxes of state-structured law but encourages us to capture that law's use of distributed authority, discursive methodologies, translation, and adaptation. It is no wonder that McGill's embrace of legal pluralism has been especially evident in the areas of international and transnational law.

3. Challenge 3: The Problem of Power

A third challenge in the new comparative law is how to account for power, how to redress power imbalances internally and externally, and how to do so without evacuating the aspirational dimension of legal reasoning.

This, of course, is a problem in all legal analysis. We know that power conditions the operation of legal institutions in all societies but we nevertheless hope, through our practice, to advance ideas of justice that transcend the effects of power (Merry 2017: 299–300). We know that all human relations are shaped by power—they are, after all, framed within historical settings—yet we also hope that our normative arguments might constitute something beyond a simple power play. We have difficulty bringing those two orientations into conjunction. We see that difficulty in the stark distinction that often exists between sociological

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explanations (external) and normative explanations (internal) of law. How can we consider power and justice together? How can we analyze them, tough-mindedly, persuade others of their force, and act upon them to pursue change? The problem is especially acute when dealing with nonstate law. Because that law works, in substantial measure, discursively, often without stark mechanisms of coercion, our valorizations of discourse can obscure social power.

Here again there are no easy answers. For one thing, the distribution of power within society is not independent from arguments of justification; those assertions of justification, their currency within the society, the extent of their acceptance, sustain differences of authority and impact (Snyder et al. 2015). The persuasiveness of authority is socially constituted.

We think that the only way forward is self-reflective, self-critical, continually reevaluating, historically aware, but nevertheless vigorous practice. In this respect as in others, Sally Engle Merry's work was a model: she never lost sight of power; she always asked the power question; she charted the impact of power over time; yet she also accepted the validity of normative aspiration and she sought to realize that aspiration in her own practice. She kept before her an ideal of equal and nondominating interaction and she fought for it, knowing that our attainment of that ideal would always be imperfect.

* * *

Sally Engle Merry once said that legal pluralism was not a theory; it was "a description of what law is like" (Merry 2013a: 2). For her, and for us, that observation has two implications. First, plurality is an inescapable fact of our human predicament and we had better get to work on understanding how to act in a plural world. Second, that plurality does not come equipped with a highly specified, predetermined theoretical apparatus. Our theorizations have to be modest, partial, open to trial and error and to continual revision in the light of experience. But we nevertheless have to act.

This openness was evident in the theory that Merry adopted in her last work: New Legal Realism (Klug and Merry 2016). That framework is not a systematic or static portrait of the world. It is a call for legal analyses that combine empirical and normative modes; that incorporate sociological insights into the internal workings of law; that work transnationally; and that retain our sense of normative aspiration. She continually affirmed our need to hone our critical capacity and our agency as legal actors. And she argued that we must do so with full attentiveness to our world's plurality.

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That is what, at its radical best, comparative law ought to be, as we train our students to exercise their responsibilities as active custodians and practitioners of their world's legal orders.

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Jeremy Webber *is Professor and former Dean of Law at the Universities of Victoria (2013-18) and Sydney (1998-2002). As Dean, he was a leader in the effort to establish the joint degree program in Common Law and Indigenous Legal Orders (JID/JD) at the University of Victoria. He also chaired the Ad Hoc Curriculum Committee at McGill University which, in 1997–98, piloted the adoption of the transsystemic program for teaching the Civil Law and the Common Law (BCL/LLB).*

Val Napoleon *is Law Foundation Chair of Indigenous Justice and Governance; Director, JID/JD; and Founding Director, Indigenous Law Research Unit, all at the University of Victoria. She is Cree from Saulteau First Nation and an adopted member of the Gitanyow (Northern Gitxsan). She was a principal leader in the effort to establish the joint degree program in Common Law and Indigenous Legal Orders (JID/JD) at the University of Victoria*

Mireille Fournier *is a PhD candidate at the Faculté de droit, Université Laval, in cotutelle with the Sciences Po Law School. She studied in the Bachelor of Civil Law and Bachelor of Laws (BCL/LLB) transystemic program at McGill University and completed her LLM at the University of Victoria.*

John Borrows *is Canada Research Chair in Indigenous Law at the University of Victoria. He is Anishinaabe/Ojibway and a member of the Chippewa of the Nawash First Nation. He was a principal leader in the effort to establish the joint degree program in Common Law and Indigenous Legal Orders (JID/JD) at the University of Victoria.*