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Sally Engle Merry and Global Legal Pluralism

Paul Schiff Berman

When I started out as a law professor in 1998, I had the extraordinary good fortune to be invited to join a law, culture, and society reading group hosted at Amherst College. This group was fundamental to my development as a scholar in a great many ways, but among the most important was that it brought me into contact with Sally Engle Merry. And Sally, being the incredibly friendly and generous person that she was, extended herself to me from the start, offering her mentorship, providing advice, and generally serving as a bright-spirited and supportive academic comrade. Over the next two decades, we stayed in regular contact. We participated in panels and workshops together. Sally commented on my work, both formally and informally. And nearly every book or article I have published over the past 15 years cites Sally at least once. Finally, I am honored that perhaps Sally's last published work appeared in print shortly after her death in a volume I edited, *The Oxford Handbook of Global Legal Pluralism* (Berman 2020a). The last email I have from her was typical. She offered enthusiastic congratulations to me on finishing this book, with no reference to her own role as a crucial contributor. Even as her own strength was ebbing, she was a cheerleader for others.

I owe Sally so much. Indeed, the entire focus of my scholarly career, Global Legal Pluralism (as well as the title of my book of the same name, which she suggested; Berman 2012), is inspired by, and arises from, her work. So, although Sally contributed in very important ways to many strands of scholarship over the years, I will focus here on her efforts to understand and extend the anthropological work on legal pluralism to the global arena.

Sally's 1988 article in *Law & Society Review* entitled "Legal Pluralism" provided me and so many others with a clear and direct introduction both to the anthropological literature on legal pluralism and to the seminal work of law and society scholars that Sally

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cannily repackaged under legal pluralism's auspices. Her first sentence beautifully captures the aim of the essay in the simple direct prose style that always made Sally's work such a joy to read. She writes: "The intellectual odyssey of the concept of legal pluralism moves from the discovery of indigenous forms of law among remote African villagers and New Guinea tribesmen to debates about the pluralistic qualities of law under advanced capitalism" (Merry 1988, 869). In that one sentence, which purports merely to summarize existing scholarship, Merry pushed the trajectory of legal pluralism scholarship forward.

Most importantly, she helped move legal pluralism out of the limited realm of the ethnographic encounter with indigenous law under colonialism and into a study of how law operates in all societies, even contemporary western democracies with strong formal legal frameworks. Her article notes that the early pluralist scholarship focused on the hierarchical coexistence of what were imagined to be quite separate legal systems, layered one on top of the other. For example, when Pospisil (1981) documented the way in which Kapauku Papuans responded to the imposition of Dutch law, it was relatively easy to identify the two distinct legal fields because Dutch law and Kapauku law were extremely different. As a result, Pospisil could readily describe the degree of penetration of Dutch law, the areas in which the Kapauku had appropriated and transformed Dutch law, and the sites in which negotiations between the two legal systems formed part of a broader political struggle. Despite the somewhat reductionist cast of the model, these pioneering studies established what Sally described as the key insights of legal pluralism: a recognition that multiple normative orders exist and a focus on the dialectical interaction between and among these normative orders (Merry 1988, 873).

As Sally tells the tale, the scholarly work of the 1970s and 1980s complicated the picture of legal pluralism in three significant ways. First, the new scholarship questioned the hierarchical model of one legal system simply dominating the other and instead argued that plural systems are often semiautonomous, operating within the framework of other legal fields but not entirely governed by them (Kidder 1979; Moore 1973). As Sally recounts, this was an extraordinarily powerful conceptual move because it placed "at the center of investigation the relationship between the official legal system and other forms of ordering that connect with but are in some ways separate from and dependent on it" (Merry 1988, 873). Second, scholars began to conceptualize the interaction between legal systems as bidirectional, with each influencing (and helping to constitute) the other (Fitzpatrick 1984). This was a distinct shift from the early studies, which had tended only to investigate ways in which state law

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penetrated and changed indigenous systems and not the other way round. Third, scholars defined the idea of a legal system sufficiently broadly to include many types of nonofficial normative ordering, and they therefore argued that such legal subgroups operate not only in colonial societies, but in advanced industrialized settings as well (Merry 1988, 870–71).

Of course, finding nonstate forms of normative ordering is sometimes more difficult outside the colonial context because there is no obvious indigenous system, and the less formal ordering structures tend to "blend more readily into the landscape," as Sally noted (Merry 1988, 873). This is why pluralists needed to argue that, in order to see nonstate law, scholars would first need to reject what John Griffiths called "the ideology of legal centralism," the exclusive positivist focus on state law and its system of lawyers, courts, and prisons (Griffiths 1986, 2). Instead, Sally saw pluralists turning to documenting "forms of social regulation that draw on the symbols of the law, to a greater or lesser extent, but that operate in its shadows, its parking lots, and even down the street in mediation offices" (Merry 1988, 874).

In this move, Sally retells the story of sociolegal scholarship through the lens of legal pluralism. For example, I doubt Stewart Macaulay, when he was writing about the gaps between contract law on the books and the reality of contractual relations in actual practice (Macaulay 1963), was thinking about legal pluralism or about early anthropological work among indigenous communities. And he may not have been conceiving contractual relations as an alternative legality at all. Yet, here he is, showing up in Merry's narrative right beside Eugen Ehrlich, as providing examples of legal pluralism in action (Merry 1988, 873).

This was Sally's special gift to legal pluralism scholarship. She built a coherent, seamless story that pushed the framework of legal pluralism further into all forms of sociolegal study regarding the multiple legalities present in contemporary western societies. She wasn't the only one to do that, of course, but unlike more polemical writers such as Griffiths, Sally never seemed to be pursuing a radical agenda or challenging received legal dogma. Instead, she matter-of-factly marshaled her literature review and quietly made the case for the obvious legal pluralism present in all societies at all times.

Having helped forge a more capacious understanding of legal pluralism, Sally then worked to expand the frame still further, seeing in the international and transnational arena another set of sites for legal pluralism. Indeed, in retrospect it is not at all surprising that, when I first met her and told her I was writing about jurisdictional contestation with regard to cross-border internet-

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based activities, she immediately saw my project as yet another example of legal pluralism in action.

This move from legal pluralism to global legal pluralism proved incredibly fruitful. Indeed, it allowed scholars to understand with more nuance how international legal regimes actually work, given that they generally operate in the absence of coercive sanction. In the first decade of the twentieth century, conservative scholars, taking up the mantle of so-called international relations realism, were pushing the claim that international law was not really law at all. From their perspective, international law was merely an epiphenomenon of state power: states follow international law when it is in their interest to do so, and they ignore it when it is not (e.g., Goldsmith and Posner 2005).

Against such assertions, legal pluralism offered an alternative way of understanding how law actually operates, one that did not rely on formal definitions of law, official bodies, or even coercive power. From a pluralist perspective, law is not only that which coercively forces individuals (or states) to do things that they do not want to do. Indeed, pluralists argue, coercive power is not the only way that law can have an effect, either domestically or internationally. Instead, "[s]ocially constructed rules, principles, norms of behavior, and shared beliefs may provide states, individuals, and other actors with understandings of what is important or valuable and what are effective and/or legitimate means of obtaining those valued goods" (Finnemore 1996, 15). As a result, law has an impact not merely (or perhaps even primarily) because it keeps us from doing what we want. Rather, law changes what we want in the first place.

Thus, as sociolegal scholars had long demonstrated, law operates as much by influencing modes of thought as by determining conduct in any specific case. It is a constitutive part of culture, shaping and determining social relations (Ewick and Silbey 1998, 41) and providing "a distinctive manner of imagining the real" (Geertz 1983, 173). Indeed, "it is just about impossible to describe any set of 'basic' social practices without describing the legal relations among the people involved—legal relations that don't simply condition how the people relate to each other but to an important extent define the constitutive terms of the relationship" (Gordon 1984, 103). In this vision of law, the fact that international legal norms do not have coercive power behind them is not determinative because coercive power is not the only way that law constrains (Berman 2006). Legal pluralism trains the gaze on law's efficacy, not its formal status.

Sally helped bring these insights from sociolegal scholarship into the international and transnational arena. And she did so through serious case studies of how various international norms

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are developed and how they do in fact constrain behavior, even in the absence of sanction. For example, in a collaboration with a graduate student, Rachel E. Stern (now herself a professor at UC Berkeley), Sally wrote a wonderful article about how women in Hong Kong were able to leverage the international Convention on the Elimination of All Forms of Discrimination Against Women to gain a voice in domestic politics and reform local property inheritance laws to make them less discriminatory (Merry and Stern 2005). This case study shows the very real way that international law can impact on-the-ground reality even without literal coercive power.

Thus, legal pluralism has provided an ongoing answer to those who discount the importance of international treaties, commissions, standard-setting bodies, corporate codes of conduct and so on. Legal pluralists are unwilling to be confined by a single formalist definition of law or a preexisting hierarchy of legitimacy among legal orders because they recognize that any such definition or hierarchy is likely to derive from a particular subject position that accords certain social action the mantle of law while denying other social action the same respect. Indeed, as Merry observed, for years pluralists wrestled with trying to define law before effectively giving up the project as inevitably fraught and biased, privileging some instantiations of law over others (Merry 1988). Accordingly, pluralists turned the focus to observing sociological fact: where do we see "institutionalised and authoritatively mediated collective action?" (Lindahl 2018, 1). What is it that individuals and communities come to consider to be law over time? What pronouncements of decision makers do they defer to, what rules do they obey, and whose decisions are they willing to enforce? And what practices do they enter into that impact their practical sense of binding obligation?

This approach allows us to include a variety of "emergent" systems within our purview and to conceptualize the possible creation of global law from below, born not of treaties and nation-states, but of more inchoate orders, such as the Basel Committee for Banking Supervision, the International Accounting Standards Board, the consumer-based Clean Clothes Campaign, international standard-setting bodies, the Codex Alimentarius, and even the law promulgated and imposed by online platforms such as Google or Facebook (Berman 2020b). Such inchoate orders can form their own quasi-legal regimes, and Sally dove in to chart their epistemologies and impacts. For example, Sally persuasively showed how the metrics and indicators often used in various global governance regimes can serve to replace political debate with technical expertise and distort the reality they purport to measure (Merry 2016; Merry et al. 2015).

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As noted above, perhaps Sally's final published work appeared in *The Oxford Handbook of Global Legal Pluralism*. Here, in an essay entitled "An Anthropological Perspective on Legal Pluralism," she provided a summation of much of her life's project, using examples ranging from her early studies of community mediation and of colonial law in Hawaii to her later analyses of human rights instruments, indicators, and the ways in which ideas of women's rights worked their way into specialized women's courts in India. In the end, while acknowledging that specific instances of legal pluralism surely can instantiate illiberal norms, Sally, as usual, focused on emancipatory potential, writing that "legal pluralism opens up spaces for individual choice and local activism" (Merry 2020, 185).

That sort of idealism is what first attracted me to cultural anthropology when I was an undergraduate. It was more than the fact that anthropology offered a richer descriptive account of the world, though it certainly did that. But in addition I was drawn to its celebration of possibility. If "the way things are" is not natural and inevitable, but instead culturally constructed and contingent, then that means alternatives are open to us. Likewise, legal pluralism is in some sense a fundamental celebration of the values of diversity, multiplicity, compound and flexible identities, and alternatives to the seemingly natural state of things. There is always resistance to the official norms promulgated by formal governmental authorities. And those sites of resistance, contestation, and dialog are also sites where alternative futures are articulated.

Sally's work, and her presence in my life over the past two decades, sent me into one of those alternative futures, brimming with possibilities. Instead of only writing about internet jurisdictional conundrums or narrow doctrinal conflicts-of-law problems, I began, with Sally's urging, to see my work in a broader context, analyzing jurisdictional contestation of all kinds in the global arena as an example of legal pluralism and later elaborating on legal pluralism as both a descriptive and a normative project for understanding and pursuing procedures, institutions, and practices that bring those various jurisdictional assertions into dialog with each other. Sally's conception of legal pluralism—capacious, nuanced, and above all generous of spirit—was a gift that I feel every time I sit down to write, and it is a gift that scholars will still be receiving for generations to come as they develop yet new trajectories for understanding global legal pluralism in an ever-shifting, ever-contentious world.

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