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The Liquidity of Law as a Challenge to Global Theorising

Werner Menski

Abstract This essay argues that the inherent liquidity of law as a global phenomenon is a troubling reality that scholars and especially judges have to learn to manage better in the never-ending search for the “right law” and, ultimately, for “justice”. Providing an overview of the major strands of arguments in theorising legal pluralism, both for and against its recognition, the essay suggests that this challenge will never stop, mainly because there will always be competing perspectives and views of what is “intolerable” and what needs to be controlled or outlawed. The resulting struggles over different strategies of state involvement in legal management will continue. Hence the only safe advice that may be given is to be as prepared as possible to face law's liquidity in both theory and practice and to become as skilful as possible in navigating the internal pluralities of law.

Keywords equity, justice, legal pluralism, “new natural law”, value pluralism

The Enormity of the Problem

This article provides at first a brief overview of the rather tedious and tortuous progress made so far in theorising legal pluralism, a progress still constantly interrupted and at times halted and reversed by irritated protests from several corners. Notably, objections are still raised that if anything goes, under the label of law, then we might as well stop theorising altogether. However, especially as there is no global agreement about the definition of law, it seems that legal scholars (or those that intervene in legal debates) need constant reminders not only about that resultant reflection of law’s liquidity, they also need to take seriously that law and life are everywhere intricately connected in myriad ways. The article concludes, in due course, that the deep liquidity of law as a global and ubiquitous phenomenon challenges legal theorising today to show more respect for the practicalities of accepting the views of “the other”.

This means that comprehensive legal scholarship cannot merely ever be an elitist armchair occupation or a sophisticated enterprise that clearly pays much attention to corporate business and ‘big money cases’, but disregards the often far less clear-cut but equally important experiences of the so-called subaltern. That law in its various formal and informal manifestations is a critical part of the complexities of all people’s lived experience, anywhere in the world, goes without saying. But we often forget this, apply middle class lenses or elitist perspectives, privileging certainty over flexibility and thus systematically ignore massive evidence of the multiple liquidities within and around the law, both in theory and in practice.

It has been claimed, repeatedly, that talking about legal pluralism risks becoming intellectually lazy, engaging in idle conversations with no point and wider relevance at all.\textsuperscript{1} If everything is said to depend on situation-specificity, cherished notions about rules, established processes, and firm commitment to certain ‘global’ values, everything that supposedly counts in mainstream legal theorising, would appear to fly out of the window and that of course then endangers cherished core principles of certainty in the law. But where is the right balance between uniformity and diversity, between certainty and justice-focused possibilities for situation-specific exceptionality? These core questions for legal and moral philosophers also impact on daily legal lived practice. Such turbulences and tensions, as a constructive and immensely helpful new study on \textit{Legal Pluralism and Development} richly confirms, have been causing major problems in the delivery of justice everywhere in the world.\textsuperscript{2} This implies that theorists must take more avid note of such practice-focused findings, of “risks for authoritarian possibilities” – abuses of the law in the name of the law in clear text - which indeed constantly arise everywhere, and not just when legal pluralism is involved,

\textsuperscript{1} A much-cited polemic text is B.Z. Tamanaha, “The folly of the ‘social scientific’ concept of legal pluralism”, \textit{Journal of Law and Society}, 20 (1993), 2, 192-217. Readers should note that Tamanaha has apologised for the tone of that article, while claiming that his views have not substantially changed. See B.Z. Tamanaha, “Understanding legal pluralism: Past to present, local to global”, \textit{Sydney Law Review}, 30 (2008), 375-411, p. 391, n. 47.

or ‘religion’ and/or ‘culture’. Since, as is now increasingly acknowledged, legal pluralism is everywhere a normal state of affairs, logical conclusions have had to follow among legal theorists and practitioners. Both now realise that legal pluralism is at the same time part of the problem and of the solution.

The partly nihilistic and often narcissistic responses to serious scholarly efforts to achieve greater clarity about the internally competitive aspects of law as a global phenomenon indicate that scholars may need a dose of “appropriate humility”. The enormity of the challenges ahead for anyone trying to write and speak about ‘legal pluralism’ or, if the reader prefers this choice of words, ‘normative pluralism’, remains simply mind-boggling. To make matters worse, the choice of words does not appear to make a real difference to the enormity of the problems faced. Any specific terminology to capture the liquidity of law simply emphasises concern over certain sub-issues of the deeper problem of drawing boundaries around something that seems constantly to slip away and evade complete control. Some clever commentators, Cesar Arjona among them in Barcelona and London, suggest that a preferable term and more user-friendly nomenclature might be ‘transnational law’. This may risk taking a reduced myopic perspective that merely considers as vitally relevant those forms of legal conflict and competition observed between state-centric laws and the increasingly powerful fields of international law and human rights. In today’s postmodern world, however, people’s customs and values, including even remnants and recreations of old concepts of various culture-specific natural laws, have not simply vanished or been superseded by formal methods of law-making. Yet a huge number of lawyers and legal scholars, largely due to deficiencies and systematic failures of legal education, still struggle with such manifestations of legal liquidity and would like the world to be different. We see here powerful reflections of the

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3 Ivi, p. 158.
5 Ivi, p. 14.
6 Ivi, p. 15.
7 Currently co-director of the Center for Transnational Legal Studies (CTLS) in London.
8 See also Tamanaha, Sage and Woolcock, cit., p. 69.
familiar is/ought conundrum that afflicts any type of legal theorising, anywhere in the world. So it is actually unsurprising that we struggle with ‘legal pluralism’ and related concepts. The present article will not resolve this conundrum, but hopefully throws light on some bottlenecks of understanding the consequences of the inherent liquidity of law.

**Justice consciousness in view of law as a ‘plurality of pluralities’**

While we may by now look back at significant progress, it seems necessary to criticise to some extent why European legal theorising remains so significantly deprived of sensitivity to pluralism. Current developments indicate, however, that there is an end in sight to this quite unsettling and partially reductionist politicking over the ways in which law in this interconnected world needs to be and is theorised. At a recent conference arranged by the new Centre for Law and Society in a Global Context (CLSGC) at Queen Mary, University of London on ‘Relative Authority’, there was finally widespread agreement that legal pluralism has gone mainstream. When one attends conferences on such themes in non-Western jurisdictions today, the intellectual climate is often remarkably different, basically far less hostile to ‘other’ types of law, maybe because more voices come from ‘others’. There is also often more constructive debate about various possibilities of pluralist navigation, and it is probably no co-incidence that the most successful recent conferences on legal pluralism have been held in jurisdictions that are laboratories of pluralist navigation, such as South Africa. It will be fascinating to see what will happen in Mumbai, where the next Legal Pluralism Conference is to be held in December 2015.

In many non-Western discourse contexts there is often a notable intrinsic acceptance of the fact that law and morality are closely connected, so that no major statements need to be made about that fact, nor new books written. It appears to be part of non-Western people’s ways of life to be deeply aware of such connectivities, while indeed this does not mean that one disarms or lacks all kinds of defences for human rights rationales. That this basic realisation of inevitable connectedness (‘relative authority’) may have huge implications on how state
structures and related laws are perceived outside Europe is evidently under-researched.

On the other hand, dominant Eurocentric positivisation has ignored at its peril, and for rather long, that rationality is never really value-neutral. Increasingly evident today, rejection of religious forms of belief is itself perceived and perceivable as a form of belief. Connected to this are ongoing fierce debates about secularism, peripheral to the present discussion, but deeply informed by it.\(^9\)

It is also a rather significant realisation and experience that on the arduous journey towards increasing sensitivity to the internal pluralities of law, important help has been provided by cross-disciplinary orientations, often seen as quite peripheral to legal education, including sociology of law, legal philosophy and legal anthropology. It seems in hindsight that such assistance was crucial and quite necessary to dig the discipline of law out of a hole into which it had sunk over a prolonged period because of excessive reliance on certain Eurocentric models and reductionist patterns of thought. It is also necessary to report and acknowledge that quite important support for deeply plurality-conscious legal theorising has come from multiple inspirations provided by interdisciplinary activism as well as the interventions of non-Western scholars and voices over some time. This confirms what we know but are reluctant to admit, namely that in today’s interconnected world there are important limitations to eurocentricity also when it comes to legal theorising. It is simply not possible to assume any longer ‘law’ is a Western category, or that Hindu law or Muslim law are just ‘religious’ entities, or that the Japanese do not have ‘religion’, while Western-centric assertions and discussions about the global phenomenon of ‘law’, which are of course themselves intensely plural, can serve as guidance for all legal development worldwide. The globally present phenomenon of law, as a deeply contested and constantly negotiated ‘plurality of pluralities’,\(^{10}\) means that Eurocentric hubris

\(^9\) Both of these issues were analysed in depth by the RELIGARE project in Leuven, www.religareproject.eu, in efforts to advise the European Commission about how to handle the challenges of religious pluralism.

\(^{10}\) While this notion of what I now call ‘POP’ is causing irritation among doctrinal lawyers, and even some scholars of pluralism, liquidised or fuzzy plurality, and not just legal pluralism \textit{simpliciter}, is a fact. In this, I do go further than John Griffiths in 1986 (see note 19 below).
now faces unsettling new challenges in an age of globalising trends that manifestly does not result in ‘one law for all’ at global level. Instead, we see that hybridisation processes constantly generate and re-configure multiple forms of ‘glocal’ laws that we are struggling to accept, to understand, and most crucially, to manage and operate as devices to improve and fine-tune that elusive supposedly ultimate aim of all law and legal activity, justice.¹¹

A global picture of the liquidity of law

In this highly volatile context, the perception of law as a liquid entity that takes different shapes and forms depending on its environment, as does water itself, another essential ingredient of human life, seems an apt guiding image for the present article. The time-space context within which all forms of life develop contains parallels and important lessons about how one may envisage the various manifestations and uses of law. There are clearly various methods to understand and manage legal diversity and pluri-legality. These different approaches are presentable as models or ideal types, which in every case yield an image of internal plurality, despite dominant first impressions of uniformity.¹²

Firstly, in the global north, we often presume to be governed by one law for all, assuming that this rule of law model has universal relevance when in fact it is quite culture-specific and depends very much on respective national contexts. In lived experience everywhere, this formal and potentially rigid model of legal uniformity seems to survive in practice because of its inherent capacity to allow the frequent exercise of discretion through making exceptions on the part of certain law-managing agents, in all kinds of specific legal scenarios. This observation actually matches Hart’s well-known analysis of law and its emphasis

¹¹ Though himself not a lawyer, significantly, the contribution to this debate by Amartya Sen, *The idea of justice*, Cambridge, MA, Harvard University Press, 2009, follows similar reasoning as Jacques Derrida and others, to the effect that justice is always “in the making” and thus remains a constant challenge and a never completed task. The intrinsically dynamic nature of law is thus shown to be manifestly a reflection of this inherent tension between is and ought, certainty and flexibility, rule and exception, and so on.

on the multiple possibilities for the bureaucratic management of law, building on Weber and much else in earlier theorising. While the fiction of legal uniformity is formally maintained, the lived reality is thus totally different, often intensely plural, not only in terms of class and personnel, but also in relation to specific topics of deep concern to current legal practice and its stakeholders. This constantly generates new forms of legal regulation that confront and address issues of liquidity in supposedly uniform legal systems.¹³

A second major variation of the global picture of liquid law is marked by the strategy of making exceptions for specific groups of people, customarily the original inhabitants of specific national jurisdictions as found today. The USA, Canada, Australia and New Zealand are classic examples of this specific form of yielding to legal pluralism. However, much richer and still more complex evidence is found in jurisdictions like India with its various affirmative action programmes, or now South Africa, and many other countries. Aware of the fact that some people within their boundaries may have and do raise specific historical claims to special recognition of their statuses and certain law-related issues, the formal legal structures acknowledge that specific kind of difference.

The third type of legal structure and its plurality-conscious management is found in those many jurisdictions that operate a general law in many respects, such as a common Constitution, common contract and commercial laws and evidence rules, common civil and criminal procedure laws, and so on. Side by side with such laws, however, such jurisdictions also manage to handle the pluralist challenges of co-existing personal status law systems. Often heavily contested and deeply politicised, both internally and externally, they are a lived reality in many more jurisdictions of the world than their governments care to admit. It is actually, in terms of numbers, the most dominant pattern globally, and this has been so for millennia. Legal history, another neglected minority subject, teaches that this specific pattern of pluri-legality is not a fairly recent creation of

¹³ Notably, the most recent issue of Social & Legal Studies, 22 (4) December 2013 contains an impressive array of articles problematising these kinds of limits of law. And if we turn to reported case law, the troubling background facts of YLA v PM & MZ [2013] EWHC 3622 (Fam) dramatically illustrate the agony of decision makers faced with cases in which legal liquidity appears as a core theme.
colonial interventions, but reflects ancient patterns of competitive co-existence of different communities and faith groups. Their respective power relationships would tend to change over time and thus give rise to many, often violent, contests and conflicts. These types of structures, today, prominently generate new tensions between local lived experience and supposedly global claims of certain authoritative patterns. In the age of human rights, such new conflicts over values and customs have risen high on comparative lawyers’ agenda. This is most clearly manifested in Southern Africa’s contested co-existence of ‘official customary law’ and ‘living customary law’. Lawyers need to remember that this merely confirms the powerful notion of ‘living law’ theorised by Eugen Ehrlich at the start of the twentieth century. Today, this is indeed an integral part of the ‘global Bukovina’.

There is, however, much continuing resistance to the formal legal recognition of such forms of hybrid law, including specifically new liquidities that tend to arise in scenarios where Southern global migrants bring their cultural and legal luggage with them to new Northern homes. Further below, it will be possible to identify why particularly such new conflicts are often so aggressively responded to, even giving rise to new forms of scholarly and street-level violence that we should remain alert to. For, as we shall see, on the road to understanding these kinds of conflicts, in terms of theory as well as practice, we need to absorb today the troublesome realisation that fights over ‘the right law’ today arise often over competing values rather than conflicts of rules or struggles over which legal processes to follow. This tells us something important about the liquidising impact of new human rights interventions that have clearly increased the heat in the cauldrons of legal pluralism debates.

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On the road to progress

This section does not seek to present a complete account of all the voices involved in the process of developing the various theories of legal pluralism to their current advanced state. That would be impossible today due to a number of reasons. However, some important signposts can be established. Oddly enough, in view of the overarching argument about the liquidity of laws and the increasing realisation that global pluralist theorising remains a never-ending challenge, the main references here still remain to certain European voices in this debate and their contributions, even often to Anglophone voices. There are, many readers will know, rich strands of relevant literature in other European and also some non-European languages. Further articles and books on comparative law and global legal theory will need to be written, preferably by teams of authors from various jurisdictions, to highlight the richness of these often neglected voices engaged in the ongoing multi-layered discussion, clearly not restricted to Europe and North America. To trace how and to what extent progress may have been made in different jurisdictions and in different parts of the worlds would clearly require a much larger article than is envisaged here.

Within the context of mainly European debates on the subject, in 1975 Barry Hooker pioneered further thinking and the nomenclature of legal pluralism in an important book. We know now that this mainly highlighted what came to be called ‘weak legal pluralism’, the internal plurality of state-centric laws. Due to various hybridisation processes, such forms of state-centric legal pluralism appeared mainly in colonial contexts and in scenarios where a jurisdiction decided to use foreign transplants, whether by imposition or more or less voluntarily.

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17 One could go back to St. Thomas Aquinas and his lex humana, on which see Menski, Comparative law, pp. 142-144.

Then, in 1986, an important year for legal pluralism studies globally, John Griffiths famously asserted that legal pluralism is a fact, and identified the co-existence of weak and strong forms of legal pluralism in various manifestations. His arguments instantly convinced me, not the least because around the same time Masaji Chiba in Japan produced a path-breaking cross-cultural legal study. I found this immensely useful because Chiba identified the co-existence and multiple internal conflicts of ‘official law’, ‘unofficial law’ and what he called ‘legal postulates’. I then developed Chiba-sensei’s theories further to construct my own models of legal pluralist methodology, suggesting at first a still somewhat static triangular structure of law. My students were excited, but also persistently critical of my initial reluctance to incorporate human rights law and international law into this structure. Practice-focused work in courts and anthropological settings at the time prominently confirmed that legal pluralism studies cannot afford to ignore various situation-specific, bottom-up dimensions, nor the impacts of ‘religion’, ‘ethics’ and ‘culture’. At the same time, reservations about top-down legal regulation remained strong and in fact grew.

Yet, as the increasing importance of supposedly uniformising and globalising trends was becoming overwhelming, more explicit recognition of human rights jurisprudence and methods of international law would be needed in yet more complex pluralist models of law. This swiftly led to graphic representations of legal pluralism into the form of a four-cornered kite, designed to express the dynamism of law and the interconnectedness of all its various competing and yet co-operating manifestations.

However, this did not mean that the concept of legal pluralism itself or these particular approaches to pluri-legal analysis became more widely accepted. In fact, instant repudiation for daring to engage in such ‘un-legal’ theorising came

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20 Chiba, Asian, cit., pp. 1-12.
from colleagues who had their own reasons, oddly at SOAS, for not wishing to listen to the voices of the ‘global South’. Such excessive reliance on Eurocentric visions and related ‘modern’ human rights rationales remains a major problem for scholarly progress in pluralist theorising today. It often bluntly denies a voice to Asian and African ‘others’, expecting them simply to learn from us Europeans. Treating ‘them’ as virtual ‘children’, to be ‘civilised’ and socialised into ‘our’ ways of thinking and arguing about law, however, one fails to respect the axiom that law is everywhere culture-specific. This is a basic methodological error when faced with law’s global liquidity. Such myopia is increasingly untenable and is deeply presumptuous. Today, there is indeed reluctant, but increasing acknowledgement that ‘culture’ and ‘religion’ are part of law’s intense liquidity.

While meanwhile Sally Engle Merry had produced a detailed overview of what has come to be known as ‘traditional’ legal pluralism,23 agonised debates continued over this messy and irritating phenomenon, over the next few decades, sometimes marked by exaggerated polemics which authors might later regret (see note 1). Notable in this ongoing debate is also that every major participant displays keenness to develop his or her own methodology and nomenclature. World class scholars were thus debating the same issues, but largely talking past each other – more evidence of myopia. All along, it remained easy to disregard other participants in the debates by simply claiming they belonged to a different sub-discipline. We see here the pernicious effects of extending the strategy to divide law from everything else by segregating all participants in the emerging global debate and putting them into separate ‘black boxes’, as Twining came to call this.24

This mental self-imprisonment seems to have delayed the realisation that the only way forward for legal pluralist theorising would be to connect the various dots rather than to segregate and separate them. It has thus become increasingly clear in the global discourse about legal pluralism that research efforts needed to be focused on what law may actually be or may become, and how widely it may

23 See S.E. Merry, “Legal pluralism”, cit.
then extend, rather than to exclude certain phenomena, entities or influences. Atonement for the earlier focus on segregating law from other phenomena and entities is reflected in today’s virtual though still somewhat reluctant global agreement that it may be unproductive to spend excessive energy on seeking to define what law is not.

Notably, that also meant a radical departure from dominant Eurocentric methods of theorising. At first sight, this appears to be the most painful issue of methodology which troubled many opponents of legal pluralism. Dominant euro-patterns of theorising privileged focus on one-dimensional state-centric analysis, or monist methodology, as I now call it. This would treat as offensive and basically ‘intolerable’ (more about that concept later) any attempts to provide holistic, more plural analyses of law. How this regression happened in relation to law cannot be examined here in depth, but the main culprits may well have been a combination of intellectual laziness and the strong tendency among lawyers to see the field of ‘law’ as a separate and superior entity dominated by states and nations and their authority claims. Also implicated is the rather prominent corresponding reaction of other social scientists to treat law as a separate field, hence often not to discuss it at all, working with reductionist stereotypical assumptions.25

Such critical observations focus on theorising law. A parallel and equally damaging process appears to have occurred in legal practice. Here, and not only in civil law systems, which relied more strongly on codified rules of law anyway, the tendency to build up bodies of authoritative precedent through common law methodology privileged a situation which today is often challenged where different legal cultures meet formal legal systems. Most instructive examples come from the case law of India and from the rainbow nation of South Africa, both torn between East and West, or rather between the global South and the global North. The not so new but hugely instructive distinction or ‘dichotomy’, as Chiba would have called this, between ‘official law and ‘unofficial law’, more specifically between ‘official customary law’ and ‘living customary law’, is a sign

25 In this regard, though much of his writing concerns legal developments, see S. Vertovec, “Super-diversity and its implications”, Ethnic and Racial Studies, 30, 6, pp. 1024-1054.
that the judiciary of South Africa, at any rate, has become super-conscious of the need to strengthen the links of the people of this young nation to its formal laws. One way to do so, hardly new at all, is for state law to just accept what the people are doing – but this is precisely where the shoe pinches, as giving in to ‘tradition’ is today widely perceived to contradict and be incompatible with the legitimate expectations of globally informal new rights consciousness. It is here that tensions between old and new laws and their attached value systems are played out in full force across the globe, and law’s liquidity threatens to become explosive.

Liquid laws as a global theoretical and practical challenge

Some of the new ways experienced by legal systems today of being forced to reconcile and connect tradition and modernity through legal interventions, rather than dividing up the internally plural legal field into what is ‘legal’ and what is ‘extra-legal’ contains highly significant global lessons. I have written about this in various recent articles on the need for plurality-conscious navigation of the realities of pluri-legality. These comments contain hints not only about how to conduct pluralist analysis in the torture chambers of academics who sentenced themselves to hard labour by their choice of vocation, as Upendra Baxi calls this, but also in the courtrooms of judges.26 While more and more jurisdictions have become alerted to such irritating challenges of pluralism, the superior Indian courts are a forum in which momentous challenges have been raising their head. Such dilemmas are by no means unique to India: Where is the boundary between legal formality and informal liquidities to be drawn? And what, then, does this mean for corresponding responsibilities of the state? Does one, to take one prominent example, insist on formal state-controlled registration of marriages to determine legal status, or is adherence to the norms of personal status systems within the contexts of ‘culture’ and family-based norms sufficient? All over

Europe today, as a result of massive migration of people from various parts of the global South to Europe, we find that judges are faced with tricky questions of this kind, often concerning new forms of conflicts of law that simply do not fit the supposedly well-established standard parameters of private international law.\(^{27}\) Notions of law itself are facing significant liquidisation.

So what should judges do when they hear strong sensible evidence that people living in their jurisdiction do not fully follow the law of the land? How long can one ignore such evidence, and what should be the judicial response if the letter of the official law results in manifest injustice? We already have answers to such questions, good and solid answers,\(^ {28}\) though it may be necessary to go to several rounds of appeal to achieve such – in my view - correct legal outcomes. The notable recourse to equity in such scenarios is familiar to lawyers who studied their legal history well. However, it troubles those who either because of incomplete training or personal predilection tend to suffer from narrow vision and see only a restricted range of options. Such lawyers, and also a number of legal academics who discuss such cases, are unable or unwilling to admit in such scenarios that justice is, at the end of the day, more important than strict adherence to fixed rules or standard processes. Judicial activism means, then, that ‘living law’ can become part of the official law. It is not banished to the unofficial realm forever, provided the state law itself is able to remain supple and thus somewhat liquid itself.

A highly instructive more recent example of skilful judicial pluralist navigation is a case that involved a divorcing Jewish Canadian-British couple with two young children who after prolonged negotiations settled their disputes through the Beth Din in New York. Amazingly, they then succeeded in having that outcome formally accepted by the High Court in London.\(^ {29}\) Evidently such cases are the

\(^{27}\) For the gravity of such conflicts see W. Menski, “Islamic law in British courts: Do we not know or do we not want to know?”, in J. Mair and E. Örűcü (eds.), The place of religion in family law: A comparative search, Mortsel, Intersentia, 2011, pp. 15-36.

\(^{28}\) See for example Chief Adjudication Officer v. Kirpal Kaur Bath [2000] 1 FLR 8 [CA] which applied a presumption of marriage to an unregistered Sikh marriage in the UK.

\(^{29}\) See Al v. MT [2013] EWHC 100 (Fam), a case which incidentally endorses and cites with approval the much-pilloried views of the former Archbishop of Canterbury, Dr. Rowan Williams,
exception rather than the rule, and fortunately so. Otherwise the significant structural gaps between official law and unofficial law would be even wider and more troublesome to navigate, and liquidity would risk becoming a noxious ‘free-for-all’. But it is evident that judges, these days, have a key function in such processes everywhere and are under enormous stress to fly those legal kites without causing crash scenarios.

Of course we are privileged in European jurisdictions, where normally legal guarantees mean what they say and fundamental rights guarantees are seen implemented, not just promised on paper. However, in stressful times of aggressive discourses about excessive immigration, we see presently that British immigration lawyers have again strong reasons to doubt such benevolent presumptions. There are related doubts whether due process is followed in many areas of legal regulation, and even whether certain areas of life can be fully regulated by formal laws (see note 13 above). If that kind of stability cannot even be presumed in highly developed Western jurisdictions, then how much more dangerous would comparable scenarios be in India or South Africa? We may wish to close our eyes and ears and shut out such evidence, but a comprehensive global legal theory cannot ignore the pungent evidence of such legal liquidities and abuses of the law. Since solid global legal theorising cannot engage in fictitious strategies of make-belief, or simple assertions of power and authority, it has to face the challenge of constant serious fundamental rights violations, often on a massive scale. Such deprivations may demand quite drastic counter-active strategies, such as judicial activism and what is known as public interest litigation or social action litigation in South Asia, Southern Africa and elsewhere. But where does this realisation of the existence of many bottlenecks of justice leave global legal theorising? Has theory itself been infected with the virus of liquidity, total

that the time has come for English law to recognise ‘other’ normative systems than purportedly secular state law.

See the deeply troubling comments in the “Editorial” of Immigration, Asylum and Nationality Law; 27, November 2013, 4, pp. 284-285.
relativity, so that no yardsticks are possible anymore, and we drown in the politics of liquidity?

**Avoiding the intolerable**

We learn from such troubling and messy scenarios only that requirements and legitimate expectations to the effect that good law should be produced have to take account of multiple law-related aspects that impact on legal decision-making processes, whether in terms of policy making or appropriate decision-making in courts of law. Putting the problem this way indicates that we are basically going round in circles. Today we live in an age where state-centric reasoning suggests that the *dharma* of state law is to provide and secure justice. But we are also learning again, in this late modern or post-modern age, that when state-centric law faces limits in terms of justice delivery, it needs the help of the other types of law to secure real justice. This may mean that law and legal processes need the help of other disciplines and alternative techniques to traditional judicial decision making. It is in this context that important new research focuses on informal methods of dispute settlement and their promises to bring significant insights. However, how informal may such processes be if we want to avoid unaccountable ‘palm tree justice’? As long as many scholars take a basically negative and often outright hostile stance to such methods and pre-judge them as efforts to bypass state-centric laws, we are always going to fall back into traps of state-centric reasoning. This is going to be unproductive, though ongoing debates are beginning to indicate a greater extent of acceptance of such methods and strategies. This is about time, but we must leave this specific matter there.

While in certain cases equitable remedies can be seen as viable, we learn, yet again, that official legal processes and high-level litigation are the exception rather than the rule. The *Bath* case in England (see note 28) is somewhat extreme, but one is aware of many such cases, and they arise with increasing frequency. Knowledge levels are low because such cases remain mostly unreported. Realising that law is much more than state-centric management of rules, processes and concepts, we must acknowledge that pluralist legal theorising is becoming an
important device to prevent legal systems from slipping into blind adherence to doctrinal assumptions about ‘rule of law’, sparking absolutist anarchy, deep dissatisfaction, and riots even on the streets of Western cities.

The opposite is often alleged, though, when pluralist navigation is dismissed as legal trickery or claiming unfair advantages. One simply blames the victims of legal myopia. Working from case to case rather than being bound by statute or case-based precedent is widely seen in euro-centric circles as inefficient and dangerous, as we remain wedded to notions that justice should be based on firm principles of equality and fairness. But applying axiomatic understandings of equality to people or scenarios that are manifestly not equal is deeply problematic, and we seem to encounter more and more cases where this is evident. As noted, all around the world except Europe, there is much higher awareness of such differentiations. In reality, though, the strategy to make exceptions in such scenarios is actually practised all the time, for example when cases are simply distinguished on the basis of their specific facts. Awareness of this is, it appears, constantly downplayed by a defective legal education system that uses shortcuts to make money from courses in the briefest possible time, at the cost of students who then have to pick up ‘best practice’ tools in the rough and tumble of courtroom battles.

That skilful lawyering demands nimble-footed plurality-consciousness rather than slavish adherence to basic formal principles such as precedent is dawning on more and more legal actors today, however. Whether they draw practical consequences from such realisations is quite a different matter. Much more could be said, therefore, about the need for better, more plurality-conscious legal education. Some experiments show that well-structured clinical legal education helps to empower legal practitioners to argue cases that seem, at first sight, to run into trouble because they violate basic principles of law. On closer inspection, such principles as part of a liquid superstructure may be negotiable with a view to achieving some higher public good, namely situation-specific justice.

When we take a global look at such issues, in a way which probably only lawyers who work on different jurisdictions can do comprehensively, we have to
acknowledge very fast that certain presumably firm principles, notions and rules are not globally valid and applicable at all. There is also no global law, while there are many lawyerly ambitions to construct normative uniformities out of liquid hybridities existing at various levels. An illustrative example is the presumption among Western lawyers and their non-Western acolytes that all marriages in the world are (or should be) legally valid only after formal registration by the state. Even this most basic element of legal regulation is deeply contested at global level, not to speak of polygamy, the appropriate ages for marriage, or matters of consent. It appears that for quite a few stakeholders in such global battles, failure to register a marriage becomes seen as an ‘intolerable’ violation of basic legal principles. But since there are so clearly different degrees and views of what is ‘intolerable’, the assessment of such criteria is itself subject to the conundrum of law’s liquidity. Again, thus, we are going around in circles of competitive fussiness.

Given the increasing recognition of the need to accept a plurality of values today, I suggest here finally, therefore, that it will be productive to discuss in more depth the highly potent effects of the global shift to what I and others call ‘new natural law’. It appears that the resulting conflicts over values, rather than rules and processes in legal discourses, which have been noted by many observers but not sufficiently theorised, offer a key to why we risk drowning in the law’s liquidities. I found that a much-neglected study offers remarkable insights on where and how to draw lines. However, I am discovering in discussions that this study has not been read by legal theorists and philosophers, and thus its powerful messages remain hidden.

Basically, a leading Western theorist, William Twining, engaged in prolonged conversations with four major Southern voices of human rights theorising. The aim was to challenge the parochialism of Western legal theory and to understand how far these Southern thinkers would go in accepting plurality. The findings are dramatic and troubling: Twining reports that these mature scholars all struggle in

their own way to respect cultural diversity and value tolerance, but this involves no commitment to “tolerating the intolerable”. They all stress different techniques to handle this key challenge, but nobody can offer a key that solves all problems. The stark reality is, thus, that the liquidity of law, here of value pluralism in terms of ethics, morality, religious beliefs and so on, makes it simply impossible to establish firm and rigid boundaries.

So we face a double barrier against any efforts to find globally agreed criteria for legal decision making. First the meanwhile much more widely accepted situation that there is simply no global agreement on what we mean by law. Secondly, the need to preserve the individual’s agency to determine for himself/herself what one finds ‘tolerable’. In ongoing discussions and forthcoming conferences in 2014, this particular issue will generate important fresh debates: When certain individuals decide to find certain conditions of their life acceptable, though others may reel in horror, what should be the approach of ‘the law’ in making authoritative decisions? Or should the law, that is the respective state law that might be invoked, simply look the other way and leave such matters to self-regulation?

Not by coincidence, it has struck more scholars recently that what we are talking about here are methods to manage various forms of ‘indirect rule’, which were not merely a phenomenon of colonial times, but are an inevitable consequence of the inherent liquidities of law today. It is almost trite to say that most disputes never reach formal fora. So then, why do we insist that in many cases where people appear to be happy with unsatisfactory life arrangements and conditions, there needs to be the intervention of stakeholders that purport to protect the rights of what is now widely called ‘vulnerable individuals’? Where, one may ask, is the boundary between being a vulnerable individual and simply being treated with less care and attention than other individuals in similar situations? Human rights approaches are today often the motor for interventions in such dilemmas. But excessive attention to human rights ideologies may cause its own problems.

32 Ivi, p. 218.
Readers will be aware that there have been serious scholarly attempts to declare all brown women as vulnerable, and to rescue them from such predicaments. Or that all women and children of certain kinds (not only Muslims) are victimised by their ‘culture’ and thus need legal protection. The examples could be multiplied ad nauseam, but I shall not engage in polemics here. Rather, we need to realise that the subjectivity of human assessment is itself a core element of legal liquidity and that today, when it comes to ‘ethnic minority legal issues’, the heat of disputes increases. As indicated at the start of this article, we are left with grave challenges, as it is not possible to regulate all legal problems in the world, and any attempts to do so may cause serious new problems rather than offering meaningful remedies. This does not mean one sinks into nihilistic inactivity or gives up a commitment to human rights. Rather, the guidance needs to be to strengthen deeper analysis of situation-specific problematics, in all areas of life and law, aware of the fact that ‘the right law’ for one person is most probably not completely the right solution for the next person.

I acknowledge that general appeals to holistic, interconnected analysis do not solve anything, for solutions have to be case-specific, related to the time-space context. What this discussion has brought out, however, in stark clarity, is that today we appear to be back in an age where we are arguing over values rather than rules and processes. So in late modernity, we are thrown back into an age of natural law, not quite the pre-Westphalian type, but a post-Westphalian avatar of value pluralism that risks the outbreak of not so new wars over competing convictions. Certainly, as one can observe in abundance in academic conferences, too, there is much violence at lower levels. There is much evidence of fights over values rather than rules and processes, but these struggles are also reflections of power, in fact different kinds of law-related or legal power in competition with each other. Since each type is aligned to a specific type of law, each makes its own truth claims and offers its own promises of justice and a better future. No miracle that the debates remain convoluted and heated, for we often forget to respect the voice of the other.
Finale

By 2014, then, there is growing recognition of legal pluralism as a troublesome ubiquitous phenomenon as well as a powerful methodological approach for analysing and negotiating deeply contested scenarios all around the world. But at the same time, we are also learning more about the depressing fact that we will never completely stop fighting with others over different values. The reason for this is that we are all, whether as individuals, members of social groups, citizens, or global citizens, affected by the various liquidities of law existing all around us. This embroils us in an ocean of competing legal entities and perceptions that we just cannot extricate ourselves from until we die. In fact, then, we are infected by this legal liquidity, depending on the perspective we may take, burdened with the inevitable risk of subjectivity when it comes to making decisions about the various kinds of law that we are all involved with, whether we like it or not.

While misgivings continue over nomenclature, reflecting continued nervousness over extending the apparently coveted label of ‘law’ as a separate and powerful entity to entities that are clearly related in some form to state law, but have different roots, that is not the real problem at a philosophical level. Thus, in the views of many, these different types of normativity should be given different names, or we may choose compound names with different combinations of the word ‘law’, such as natural law, positive law, and so on.

However, we seem to know all that, so how do we move on? More important in today’s day and age is acknowledgement that much of what appears as state law is in fact not made by the state, but was accepted by state-centric systems as law, always connected, as Chiba-sensei taught us, to different competing values. Different methodologies thus exist for how to incorporate such normative orders into formal legal systems. Questions need to be asked whether in changed social, material and ideological conditions, further adaptations of state laws to prevailing social norms should be tolerated. However, that risks changing the entire nature of legal systems if one has, as many states in Europe now see, large numbers of ‘foreign’ citizens, who may be technically citizens, but follow different value systems.
Prominently, we can identify the earlier common law technique of turning local customs into reported official case law, or one could take a more radical civil law approach and pretend or claim that custom has been superseded completely by state law. Legal pluralities and liquidities will, however, continue to exist no matter what techniques of management we choose to adopt or privilege. Such discussions, then, are neither here nor there, for the deeper issue identified in this article is the troubling realisation that the real fights we have, even today, are about very personal convictions and assumptions of what is ‘tolerable’ and what is not. In many European contexts currently, there is a marked fear of ‘the other’ becoming too powerful also when it comes to formal legal regulation.

For ensuing debates about the risks of excessive liquidity in the law to be productive, what needs to be done? It is quite clear by now that arguing in favour of legal pluralism merely for the sake of argument is no justification for its existence at all. No form of law can be trusted to deliver justice on its own all the time, legal pluralism included. The key question then becomes whether adopting pluralist methodology can be more conducive to achieving better justice.

As ‘good law’ seems everywhere to be an amalgam of the various types of potential legal ingredients, in particular proportions, we find that we are neither able to trust legal pluralism per se, nor can we dismiss it out of hand. It always has to prove its worth, from case to case. On closer inspection, though, we have abundant proof that legal pluralism, both in procedural and normative terms, can be conducive to justice, but may still not be trusted. The most powerful examples are those where legal systems have systematically co-opted non-state law as law, and where the unspoken reality of pluralist navigation is not just daily practice but constitutes part of the foundation of entire legal systems. In other scenarios, naturally when more recent migrant groups are involved, this is less evident and more a matter of case-by-case application in efforts to generate the right outcomes and thus produce ‘good law’.

As indicated it remains problematic that much of eurocentric scholarship struggles with accepting the non-European ‘other’ when it comes to law and thus would voice grave opposition to the statements of the previous paragraph.
However, it is not a fact that only non-Western legal systems have adopted certain local and other cultures, this is a global phenomenon, everywhere, as the RELIGARE findings on the relationship of law and religion in various European states brought out in full force (see note 9). These are not matters of East v. West, therefore, they are globally shared problematic issues. Everywhere normative pluralism exists at multiple levels and legal liquidity becomes a virtual glue that binds – and arguably affects and infects - entire structures. This is simply a fact of life that we have to learn to manage as best we can.

In conclusion, then, the need to be alert to intense pluri- legality is unquestionable, and there are basically no clearly definable limits, as one person’s sense of the tolerable is going to differ from the next person’s perceptions. Finetuning will be needed of how we handle the vexing issues of adjudging what is ‘intolerable’, but this will forever remain contested.

What has not been raised here yet is what the remedy should be if something or someone is seen to be totally intolerable. Various unconvincing efforts have been made to establish or suggest agreed criteria or minimum standards. To take the simplest of examples, does one justify killing serial murderers, as otherwise there will be more deaths? Or does one incapacitate such individuals in other ways to prevent harm? What, at the end of the day, is ‘harm’? I do not see much evidence of agreement among academics, while there is ample evidence that many judges face deeply troubling pressures to hand down their decisions.

Thus, the fact that law itself remains an un-agreed phenomenon will continue to be troublesome, and it will be matched by the equally disconcerting fact that value judgements over legal processes, rules and norms will also always remain deeply contested. As a result there will be no complete closure of these debates, good news for people claiming paid thinking time. There may be some sense of agreement or an understanding of commonality and shared values, but all of this remains partially liquid. The best that plurality-conscious legal education can do, then, is to provide young people everywhere, and not only in law schools, with the tools to manage the continuing competitions and to seek to find the right – or even just the best possible – solutions for specific situations and scenarios. There is no
fit for all, no ready remedy, and just as there is no realistic scope for constructing one law for the whole world, at lower levels of organisation sensitivity to the pluralities of specific scenarios will and should remain a key feature. This is, I think, not a depressing finding. Rather, it contains an appeal to work harder to cultivate open-mindedness and deeper respect for ‘the other’, at all levels of legal management.