

Legal Pluralism and Social Justice in Economic and Political Development

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1 Introduction

There is a tendency for all knowledge, like all ignorance, to deviate from truth in an opportunistic fashion. The fact that conceptions of reality, and ideologies and theories, are influenced by the interests as commonly perceived by the dominant groups in the society where they are formed, and that they so come to deviate from truth in a direction opportune to these interests, is easily seen and, in fact, taken for granted when we look back at an earlier period of history. But in our own intellectual endeavours we ordinarily preserve a naive non-awareness about such influences working on our minds – as, indeed, people have done in every earlier epoch of history. We believe – as they did and with equal firmness – that we are simply factual, basing ourselves on observation of reality when we think, argue and conclude. A first precondition when trying to unfetter our minds from biases in order to reach a truer perception of reality is to see clearly the opportunistic interests affecting our search for truth and to understand how they operate. In this attempt to overcome naivety, a backward look becomes helpful. (Gunnar Myrdal, 1970:21–22)

The terms of reference for the ‘rule of law’ workshop conveyed, at first glance, the impression that issues of legal pluralism might not get the attention they deserved. For where the words ‘law’, ‘rule of law’, or ‘legal institutions’ are used, or when ‘the performance of legal systems’ is spoken of, the implicit or explicit assumption seems to be that we are to think primarily about state law and state legal systems. There is little or no attention to religious law, international law or traditional laws, or to the question of the extent to which they also impinge on the livelihood and security of citizens, and what role such systems play and might play for economic and political change. Where non-state normative and institutional forms are referred to, it is mainly in the sphere of ‘access to justice’, and non-state forms or procedures are called ‘informal’ or ‘alternative’. There is thus a bias towards the state apparatus and its laws and regulations.

A backward view, such as Myrdal encourages us to take, certainly is required, in my opinion. I want to engage in two retrospectives. One is to place our

workshop in context. In the second retrospective I want to look back at experiences that relate to the intention of this workshop 'to explore how, in the fields of private law, land law, and family law, law affects citizens' security of property and livelihoods and power relationships between individuals and groups'. In between I shall discuss the issue of legal pluralism that is relevant in both.

2 The New Boom in Law and Development

In the world of development policy and practice, we can observe a new boom in the attention given to law- and rights-related issues. Carol Rose (1998) has spoken of a 'new law and development movement' in the context of globalisation. Its primary concern is the instrumental use of legislation or other forms of legal regulation for redesigning political, economic and social institutions in order to engineer economic change. Law is an essential instrument, because law lays down blueprints for social, economic and political organisation; and at the same time provides the legitimisation of these organisational forms. It is especially important when the existing structure of rights, of legitimate positions of social, economic and political power, is to be changed. Law is seen as an important causal force and often used as a 'magic charm' to bring about economic development (Benda-Beckmann 1989). The earlier law, the one to be replaced, is also seen in the context of causal assumption and is regarded as the main cause or reason for the unsatisfactory social and economic conditions to be changed; it becomes the scapegoat for underdevelopment. Law and 'institutions' must, therefore, be researched and, even better, newly designed. While the older law and development movement of the 1960s was mainly confined to reordering legal rights and relations within states, and was driven by lawyers, the recent wave more strongly focuses on inter- and transnational legal relationships, and the set of actors involved is more varied (see Burgh 1977; Merryman 1977; Gardner 1980; Trubek and Galanter 1974). American, European and, in Indonesia, Australian 'law merchants' offer their technical legal support for drafting legislation and contracts, as well as their capacity as negotiators or mediators (see Dezaley and Garth 1995; Nader 1995; Silbey 1997; Rose 1998). But also governments, international

institutions such as the World Bank or the Asian Development Bank (ADB) and non-governmental organisations (NGOs) of different European states offer or impose their help in the context of sustainable resource management policies, poverty alleviation, or good governance strategies.

In this context, much attention is given to changing economic conditions by facilitating the global flow of financial capital and investment opportunities. Yet a central element remains a redesign of property rights in the wider sense and of the conditions under which property can be appropriated and circulated. These new efforts share with the older law and development the attempt to make property – mainly in natural resources – marketable. This is a two-pronged strategy. On the one hand, it requires that vestiges of non-marketable property rights held under local, traditional or customary rights finally be individualised and made transferable. On the other hand, it means that rights over natural resources held by the state be privatised, transformed into conventional private ownership or released into the market via 'new properties' (Reich 1964) such as licenses and concessions. The scope of the resources exploited has dramatically expanded due to improved infrastructures and new extraction technologies. It now comprises forest resources, minerals and other sub-soil resources, which in earlier times had been hardly accessible and in recent times has been extended also to water and the creation of water markets.

To varying degrees, these discussions and policies show an awareness of the existence of non-state rules, rights and obligations that find their legitimacy in local customary laws or religious laws. It simply cannot be overlooked that, despite non-recognition by national legislation, local populations still prefer to regulate their property affairs in their own ways, as many unsuccessful land reforms suggest. In the field of non-commercial resource management and environmental protection, local communities have been discovered as the natural guardians of natural resources assumedly held as common property. Under the headings of 'new partnership', 'joint management' or 'community-rights-based resource management', local peoples' rights are often said to be recognised, or it is advocated that they should be recognised. In academies a new mainstream literature has emerged

around the governing of the commons (see McCay and Acheson 1987; Berkes 1989; Ostrom 1990; Lynch and Talbott 1995). Those populations that consider themselves 'indigenous peoples' in the sense of UN conventions in particular reach out into international arenas. Thanks to the increasing prominence of indigenous peoples' rights there is pressure on state governments and big donor agencies to take non-state rights more seriously. However, the recognition of non-state law and rights is made mostly subject to new 'conditionalities', which can be considered the new 'repugnancy clauses' (Benda-Beckmann and Benda-Beckman 1999a). In order for their rights to be recognised, local communities must remain 'traditional'; they may not exploit the resources commercially and must prove that they do indeed maintain resources as efficiently and sustainably as anticipated (Benda-Beckmann 1997). Through this new popularity, law and rights join 'the brave new world of concepts', as Bourdieu and Wacquant (2000) have called it. Words like 'sustainability', 'efficiency', 'equity', 'social justice', or 'social capital' and 'civil society' that have become commonplace in the world of powerful development and donor agencies, are used to define and legitimate research interests and research funding. Given this background, we need to ask ourselves: to what extent are we, and do we want to be, part of such new law and development movements? What can we learn from earlier experiences, such as the first 'self-estrangement' of the 1960s as voiced by Trubek and Galanter (1974) more than twenty-five years ago, when designing our own research and policy agendas? How do the relative absence of attention to legal pluralism and the labelling of non-state forms as 'informal' or 'alternative' fit in? It is against this background that I want to place my brief discussion of legal pluralism.

3 Legal Pluralism

Though originally introduced, with modest legal ambition as a 'sensitising' concept, the concept of legal pluralism has become a subject of emotionally-loaded debates. In my view, the crucial issue in discussions about legal pluralism, and the one distinguishing it from the common discussions over the concept of law, is whether or not one is prepared to admit at the conceptual level the *theoretical possibility* of more than one legal order, based

on different sources of ultimate validity and maintained by forms of organisation other than the state, within one political organisation (Benda-Beckmann 1997). There are two basic alternatives. One is to couple law directly to the state (the sovereign, the monopoly of legitimate violence). This statist conception of law derived from state's sovereignty has a (dis)reputable basis in Hobbes' political philosophy, and many legal theories are built upon it. 'Legal pluralism', then, is a *contradictio in terminis* and indeed a 'folly' (Tamanaha 1993). Other normative orders have a lower conceptual status per definition; they are 'only' social rules, or informal rules. They can only be 'upgraded' into law if recognised by and under the conditions of state law or international law, as was the case in colonial legal systems and to a lesser extent still is the case in post-colonial systems.

The other alternative is to conceive of law analytically by a set of properties in a way in which the exclusive connection to the state organisation is given up, and other organisational structures and sources of validity, such as old or invented traditions or religion, can match the analytical properties of the concept. This approach is taken by many legal anthropologists and some legal sociologists. Law is then defined independently from the way in which state legal systems define it and the respective spheres of validity of non-state normative orders. It assumes that claims to sovereignty, to the exclusiveness of state law and the monopoly of legitimate violence, are only normative constructions, and that such claims can also be made for non-state normative orders. If one accepts this theoretical possibility, then the probability that most political organisations will exhibit *some degree* of legal pluralism is the nearly automatic consequence. Such an analytical approach also implies the following:

- First, the theoretical possibility of legal pluralism tells us nothing about the degree to which empirical political organisations are characterised by legal pluralism.
- Second, substantive content and social significance of different elements in plural legal constellations change over time. In early colonial times state law may have been insignificant outside the boundaries of regions firmly in the

hands of the new colonial rulers, and local societies' laws may have been the dominant legal form in the rest of country claimed as a state; but in the present, state law has become the most important legal form in many domains of political and economic organisation. However, if state law remains accepted as 'law' under such conditions, so should customary or religious law. The concept of legal pluralism covers all these historical variations.

- Third, the theoretical possibility of legal pluralism as such does not suggest any moral or political preference for or against any specific plural legal constellation or their components, or as to how it would relate to 'social justice'.
- Fourth, generalisations over what law 'is', and in what ways it becomes significant in struggles over control and exploitation of people and natural resources by governments, bureaucrats, business enterprises, individual rural people or population groups, cannot be deduced from the normative content of the various bodies of law, whether traditional, state, religious or international. It has to be researched.

It therefore makes little sense to attach any serious theoretical or moral considerations to a reified notion of law or legal pluralism. An analytical notion of legal pluralism treats all laws according to the same analytical standard. It does not postulate any concrete empirical form or social and political significance of any law. However, it must also be realised that outside of the context of academic discussions it becomes evident that, empirically, we are not just concerned with the ideals, ethereal rights and values that are the subject of lawyers and philosophers, but also and primarily with the economic and political resources to which these rights refer, and which they legitimate. Whether or not some claim or relation is 'legal' determines who has the right to exercise political control over people and resources, land, forests, water and minerals; and who can exploit them economically and profit from this exploitation. The definition of what law is, and what legal rights are, is thus highly political. And it is this political nature, and the partisan positions taken, that complicate the discussions of legal pluralism. While social scientists may of course also engage in political

action, they should take care that their moral and political judgement should not be disguised as social science.

4 Property Rights and Development: Some Historical Experiences

I want to go back now to the relationships between types of property rights and economic development. In Europe, as well as in developing countries, discussions about the relationship between types of property rights and social and economic development are characterised by certain assumptions about relationships between specific types of property rights, such as individual private ownership, communal ownership and state ownership, and certain courses of economic development. Such relationships are often interpreted as causal: certain forms of property more or less cause, or are expected to cause, certain types of economic or ecological development. The most important assumption is the one concerning the relationship between individual private ownership rights and economic growth.

Generally, the introduction of European style of individual and marketable private ownership to productive resources was seen as a precondition for economic development. It would free the individual actor from the communal obligations which prevented him (generally him, and not her) to become the rational economic actor able and willing to pursue maximising production and profit. It was assumed that such rights would also increase land tenure security. Moreover, such rights could be used as security for credit loans, without which farmers would not be able to invest in productive resources. This combination of legal engineering and neo-liberal assumptions provided the scientific legitimisation for large-scale restructuring of land laws in many colonial and post-colonial states. Traditional customary laws and their common or communal property rights to resources were rather uniformly associated with 'underexploitation', and so became the scapegoat for underdevelopment. They thus had to be abolished and replaced by 'the magic charm' of so-called modern European law (Benda-Beckmann 1989). What is the experience? From the history of many developing countries we must conclude that such

natural resource rights reforms, when successful, usually lead to considerable direct or indirect expropriation of most rural people. Some losses are direct, for those whose traditional rights are not recognised through the new legal categories. Within the rural population, women and migrants usually suffer more from the transformations than do male members of the local community. Indirect losses of rights result from the newly created land markets, because the local and national élites manage to accumulate new ownership rights, licenses and concessions at the expense of local populations. Outsiders, civil servants, politicians, and companies are far better equipped to make use of the possibilities for registration and manage to withdraw resources from the local economy (Fisiy 1992; Neef 1999). The end result is often a dramatic redistribution of resources, not from the rich to the poor, but in the opposite direction.

In terms of economic security and livelihood, the record of state land laws is not very impressive. Many local legal systems, on the other hand, have been shown to have a greater potential for protecting security of property and livelihood. Contrary to the economic and policy assumptions held by many bureaucrats and policy makers there is evidence that economic production can be quite effective also when based upon customary law rights to natural resources. Indonesian producers, before and after colonisation, have produced crops for the world market quite successfully (Dove 1986; Benda-Beckmann and Taale 1992). Producers often suffered more under government constraints on their production, bureaucratic marketing organisation and price fluctuations than from any constraints inherent in their local land rights.

Furthermore, the newly introduced legal forms did not successfully replace earlier legal forms, customary or state regulated. These continue to influence people's dealings with property, irrespective of whether they are officially recognised by the state law or not, and independent from the extent to which they were transformed by colonial legal interpretations and applications (see Chanock 1985; Spiertz 1991; Wiber 1993). Since local property rights are often intimately interwoven with other social relationships, they could not simply be 'taken out' of such a system of multi-stranded and multi-functional relationships. Consequently, there

was usually no increase in legal security, both in the sense of clarity and stability of the rights. On the contrary, in many cases the introduction of new legal rights added to the already existing legal insecurity (see Okoth-Ogendo 1984; Bruce and Migot-Adholla 1994).

There is, however, little reason to romanticise local laws or to assume that we would always have to deal with a contradiction between the state apparatus and its laws and local people and 'their' laws. Conflicts of law, or of economic and political claims that are translated into claims based on different legal orders, are often looked at in the constellation where local populations are confronted with state governments, or with economic interest groups allied with state governments. This has created a general image of legal pluralism in which local economic interests are associated with customary law, and state economic interests with government law. Local customary laws, however, rarely express the values and aspirations of *all* members of the rural population. Studies critically examining local traditional laws, focusing on class, caste, gender and age differences, have shown that 'folk law' often turns out to be the law of local élites and/or the senior male population (Chanock 1985; Agarwal 1994; Simbolon 1998). Recourse to state law and its 'non-traditional' values can be an important resource in the struggle for emancipation.

Moreover, tension or conflict may also occur between customary laws. Voluntary and involuntary migration has led to increasing contacts between population groups that until then had been living in relatively closed communities. Group migration, movement of individuals or individual families settling in new communities and inter-marriage, produce great problems about the rights of newcomers in their new host communities. Often migrants have a second-rate political and economic status under their hosts' customary law (for Ambonin the Moluccas, see Benda-Beckmann and Taale 1992). Especially in situations of increasing scarcity of economic goods, competition over rights to the means of production tends to increase. Earlier 'hospitality' will then easily turn to hostility and may lead to violent conflict. These problems are especially relevant once there are large-scale population movements, streams of refugees

produced by war, settling elsewhere or returning to their original homes after a number of years.

So there need not be a one-to-one correlation between legal form and political and economic interest. The co-existence of a plural normative and institutional orders offers opportunities for many actor groups to pursue different economic and political objectives (see Benda-Beckmann and Taale 1992:83). State law may not only be an instrument to impose the hegemonic claims of the government, but may also be used to pursue local and quite traditional economic interests. The recourse to tradition and traditional law, on the other hand, is sometimes an important means by which governments express and legitimate their own policy objectives (see Spiertz 1991).

All this is, of course, only part of the story, in a way the private law story, but there is the 'public' side as well.¹ The economic consequences of state sovereignty rights and public law based upon it are especially grave, because states do not merely assume the final authority and regulatory power over resources and people, but often the right to take direct economic profit from resource exploitation as well.² In fact, the colonial legal history has seen states as 'proprietary monsters', gradually usurping property exploitation rights on a large scale. While, in the first mercantile phases of colonisation, state involvement was mainly directed at controlling markets and trade, it gradually became important for colonial governments and economic enterprises to control land, timber and sub-soil resources as a basis for production (see also Lynch and Talbot 1995:35-36; Cullen 1997). Evermore legislation usurped rights of local populations and 'vested' them in the state. Notorious are the declarations of state domain over resource areas that, in colonial interpretation, were deemed to be 'waste lands' or '*terra nullius*'.³ Most post-colonial states have retained and even expanded proprietary rights over vast resource environments. Only recently has this legal usurpation started to be successfully challenged in some countries, and mainly by populations considered to be indigenous peoples. Australia's High Court has for the first time acknowledged that the continent was not *terra nullius*. And in New Zealand some of the appropriation of land by the colonial state is now being declared void on the

basis of the Waitangi tribunal sessions. However, even in Australia and New Zealand, as in the Canadian situation, the recognition remains in the shadow of state sovereignty, and cannot prevent state governments from passing legislation to extinguish or seriously curb 'native titles'.⁴

These examples show the importance of looking at both public and private rights (Benda-Beckmann and Benda-Beckman 1999b). If one takes 'recognition' of local populations' rights to natural resources seriously, one also has to include public and regulatory rights. In state legal policies, but also in many NGO policies, however, recognition of non-state rights remains in the shadow of sovereignty and at best leads to more benign constructions of what has been called 'weak legal pluralism' (Griffiths 1986; see Stavenhagen 1994:26, 27; Benda-Beckmann 1997).⁵ If one assumes with most current state laws that the resources are indeed owned/held by the state, then to involve local people (or communities) in cooperative and participatory management activities, and perhaps even in profit-sharing exploitation ventures, seems to be a generous attitude. Extending government's hands to local people to form partnerships or engage in co-management suggests a benign enlightened government that offers more than what most democratic principles of political and administrative organisation would call for. If, on the other hand, one's point of departure is that the resources in question are legally held by non-state property holders (whether as communal, group, village or individual rights) on the basis of customary or folk laws, the situation looks quite different. An external imposition of 'participation' is no longer self-evident at all, insofar as projects and policies relate to other people's property (Benda-Beckmann and Benda-Beckmann 1999a).

5 Property and Economic Development in Europe

I want to look back briefly at development in Europe, because the European example has played and still plays an important role in the maintenance of these assumptions, and also provides the legitimation of the 'export' of European notions of individual ownership and a free market regime of economic transactions. What role did property play

in these processes? Was the attainment of high levels of welfare due to a specific property form such as individual private ownership? Perhaps we also need a fresh perspective here.

It cannot be denied that the elaboration of the classical ownership concept went hand in hand with and facilitated tremendous economic development. But what was its significance compared with other factors that facilitated this development? We have to inquire into other and possibly more important conditions for economic growth in Europe (see Renner 1929; Tigar and Levy 1977; Sugarman 1981). Possibly this was due more to the fact that European enterprises and factories had access to cheap resources in the period when European capitalistic industrial societies emerged. Labour was cheap and could be exploited. There were long labour days, child labour and abominable labour conditions. Raw materials could easily be obtained through the exploitation of the colonies and on the basis of very unequal terms of trade relations in the world market. This laid the basis for highly skewed profits and economic differentiation. Moreover, mass emigration was a safety valve through which much of the pressure of European economic development could be absorbed. Superfluous, unemployed, disinherited Europeans could still move to the United States or the other colonies to build an economic existence at the cost of the local population there.

Moreover, there was no democracy as we understand it now. There was open gender discrimination and political discrimination on the basis of wealth differences. Ideologically, legally and politically, the situation was quite different. Fighting for human rights, equality and good governance were subversive. That the economic inequality which characterised the emergent industrial capitalism in Europe was eventually tempered and led to a relatively high standard of welfare for the majority of the population was, on the other hand, largely due to the struggle of socialist movements against the power that unrestricted ownership rights gave, and that led to new conceptualisations of 'the social function' of ownership. That European and American economic systems can maintain their effectiveness and dominance is certainly also largely due to the fact that the terms of world trade relationships are still highly unequal, that cheap

labour can be found in Asian and Eastern European countries, and that transnational enterprises increasingly directly control and profit from natural resources in poor states (see Evans 1985).

The question therefore arises: can one achieve the end result of this historical process – a relatively high standard of welfare – without its historical foundation? With a less anachronistic perspective, we can learn more from the European experience than we would like to know. There seem to be more parallels with European developments, indeed, but they do not reflect the standard of welfare European states now have, but rather the conditions under which economic growth started. Where some of these conditions are given in third world states, they are regarded as highly undesirable, such as child labour, inhuman labour conditions, the repression of workers' associations, political inequality. Under the name of 'good governance', foreign and international donors exert great pressure on governments in the third world to abolish such economic and political factors (Benda-Beckmann 1994). Other conditions that facilitated economic growth in Europe are not given. Most countries in the third world do not have overseas colonies to exploit, and the exploitation of their internal colonies or indigenous population groups is not compatible with democratic organisation and international law and conventions. Moreover, the safety valve, mass migration, which Europeans had, is much more limited in terms of geographical scale and economic opportunity. While European migrants still could conquer resource-rich regions in Africa, Asia and the Americas, migrants from the third world coming to Europe or the United States or to other third world countries now find themselves at the bottom of the social and economic ladder. European governments declare their countries to be 'full' and increasingly restrict immigration.

6 Some Further Conclusions

6.1 Legal pluralism

We should take legal pluralism seriously. Even if one's main orientation is to accept the inevitable primacy of the state and state law as *the* means for change, one nevertheless has to take into account the overall constellation of normative and institutional orders in which the state apparatus, its

institutions and regulations, are only one part. 'Taking into account' means that legal pluralism and non-state legal forms, whether recognised or not in state law, are treated as relevant factors that together constitute the present reality of complex normative orders – independent from any positive or negative moral or political evaluation. For whatever significance the state legal and institutional framework may have on political, economic and social practice, this significance will always be relative to that of non-state normative and institutional orders for the same practices. We can assume that it will matter for such significance, whether or not such normative orders are recognised as valid by the state administration. But it is equally clear that we cannot deduce the social significance of any legal system (whether it is state, international, religious or local-traditional) from the claims and assertions of the system itself. So even if one should find the concept of legal pluralism unacceptable, the constellation of normative and institutional complexity to which legal pluralism refers needs the same serious attention.

6.2 Legal pluralism and rights to natural resources: rephrasing the question

Let me take this perspective back to the intention stated in the terms of reference for the discussion: 'to explore how, in the field of private law, land law, and family law, law affects citizens' security of property and livelihoods and power relationships between individuals and groups'. Looking at it through the eyes of legal pluralism, this question would have to be rephrased and expanded. 'Law' would be replaced with plural legal institutions and rights-relations, and the main question would be about the relative significance that different types of rights based in different normative orders have for the livelihood security of different categories of the population.

For future policy scenarios, we should ask what the potential of different legal forms would be for certain desired economic and social developments, and through which legal and non-legal measures such potential could be mobilised. For this, we have to evaluate the experiences of the past and present. It was often not an absence of legal regulation that was the problem. If, nevertheless, we are not satisfied with the actual political and

economic conditions in many countries and are concerned with the necessity of change, we should take care not to assume that now all of a sudden good laws might function better than in the past. We really cannot say much about this – unless we have an understanding of what factors constitute the conditions, and possible causal forces, for the poor functioning of the older laws, and whether there is a change in these factors that could lead us to expect that the new laws might function better. In fact, the state apparatus in natural resource rights policies has been a source of insecurity for the majority of rural populations. Thus the question of who should get the benefit of our doubts and our wishful thinking is difficult, and cannot be generalised independent of the concrete conditions that obtain in a particular region.

Thinking in terms of legal pluralism also forces us to question what is meant by 'land'? Is it the surface of the earth, does it include vegetation, forests or individual trees? Does it include sub-soil resources? We are likely to be confronted with a situation that such categorisation of resource elements may be different and contradictory in different legal sub-systems within the state organisation, with different rights and obligations flowing from such differences – a source of legal uncertainty and many socio-economic and often political conflicts.

Another question is whether the actual problem can usefully be seen through the eyes of our legal distinction between private and public law. Can we give a useful answer if we see land law as 'private law', and exclude public legal regulations about the legitimate control over and the exploitation of land or other resources on and under the land-surface? With Myrdal in mind, we could ask whether treating these issues in terms of private law may obscure the fact that it is just in this field of rights to natural resources that public law and regulation of access and exploitation rights are extremely important, as well as the many 'new properties' (Reich 1964) that government largess fetches out of the seemingly bottomless pit of state sovereignty?

Admittedly, all this is easy to say for a social scientist who sees his or her main task in the description and analysis of complex societies and complex legal systems. It is difficult to maintain such analytical distance for those engaged in practice – whether we

talk about state officials, development experts, NGO activists, or local people themselves. Living and working in a plural legal system demands choices between and pragmatic accommodation to the given political and economic constraints. Development experts and NGO activists may be aware that what is called 'the recognition of local communities' rights' to land and forest areas only comprises a small percentage of the resources traditionally held by the local people, and that the rights allegedly recognised are severely curtailed by state- or donor-imposed restrictions; nevertheless they may work on such projects in the hope that at least some more control is given to local people, and in the expectation that full restoration of earlier rights will simply be impossible.

It is obvious that social science or 'legal pluralism' cannot provide direct answers to pragmatic political and economic questions. Thinking in terms of legal

pluralism can help in providing better insight into the complexities around law and rights, and it should make us critical of certain conceptual usages and their own role in the reproduction of such concepts. If a political measure is called 'recognition of traditional rights', but in fact is not, there is no reason to contribute to the reproduction of such euphemistic concepts that obscure what is really going on. If 'access to justice', in the sense of having access to the court system, may actually mean access to injustice, we should say so. If 'equity' is interpreted as meaning that changes be proportional to the present distribution of rights to resources, we should say that it reproduces existing unjust distributions. We should also engage in a critical self-reflection and a 'cleansing' of our concepts and assumptions from possibly too idealistic or ideological presuppositions in the light of historical experience. This may help us, as Myrdal suggested, to unfetter our minds from biases.

Notes

1. See Benda-Beckmann (2000) for an analysis of the confrontation between different conceptions of public and private in third world legal systems.
2. Cullen (1997:166) describes with respect to Australia how sovereign rights over the territorial sea and the continental shelf, including the right to 'exploring and exploiting its natural resources', were vested in the Crown in Section 6 of the Seas and Submerged Lands Act of 1973, thus giving a 'proprietary spin' to 'sovereignty'.
3. In the Mabo case. See Cullen (1997), Mardiros (1997).
4. See Mardiros (1997), Cullen (1997) for Australia. On the Canadian developments, see Keon-Cohen (1982).
5. Most international legal conventions such as the ILO Convention 169, the Rio Declaration or the Biodiversity Convention, concerned with the protection of the rights of indigenous communities, also adopt a language that does not directly challenge state sovereignty.

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