

PROBLEMATIC LEGAL PLURALISM: CAUSES AND SOME POTENTIAL ‘CURES’ 2014

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Abstract

The tools of analytical positivism and economic analysis are applied to the phenomenon of legal pluralism. An analytical framework is developed to ascertain when legal pluralism is problematic in the control of wrongdoing. It is demonstrated that there are three specific cases; rivalrous compliance, sanctions for wrong behaviour that are deemed to be wrongs themselves and the uncoordinated sanctioning of common wrongs. Then there is a discussion of the consequences and some approaches that can be used to ameliorate each case that has been identified. It is hoped that this framework will be used to guide future practical and theoretical discussions on legal pluralism and its potential problems.

Keywords: legal pluralism, law and economics, legal dissonance, norms, criminal law, religious law

1. INTRODUCTION

This article provides a framework for organising and guiding theoretical and practical discussion that relates to the phenomenon of legal pluralism. It is suggested that legal pluralism can only become a truly useful concept for those concerned with institutional design if there is greater analytical clarity and a more systematic analysis of its problematic manifestations. It is hoped that this article provides some much needed progress in these areas, something that seems all the more important given that the term is growing both in recognition and use, especially by policy makers and development practitioners.²

We know that non-state groupings can greatly enhance the quality and meaning of people’s lives. These groupings, often with their own rules of conduct, can also order social relations and provide an important role in regulating harmful and anti-social behaviour. They include various religious organisations, indigenous customary tribes and clans, sporting clubs, companies, organised crime networks and various professional and trade organisations. While the state usually asserts supremacy over all the rules these groups produce, nonetheless these groups may claim their authority from other sources that are completely separate from the state. As such, they may aim to continue to enforce their rules, regardless of the state’s stance toward them – whether it be supportive or hostile.

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² For instance, see Tamamaha *et. al.* (2012) that was the product of a World Bank initiative aimed at ascertaining the usefulness of legal pluralism for their researchers and practitioners.

The phenomenon of co-existing rule generating groupings in the same society can be referred to as legal pluralism, and this term, or more correctly *concept*, needs some explanation.³ The most important assumption embedded within the legal pluralism literature provides the conceptual foundation for this paper. This assumption is simple but it has significant analytical consequences. This assumption (or claim) is that there is no single validating source of law or laws in a society.⁴ This implies that there can be other sources of law completely separate from the state. Both Griffiths (1986) and Woodman (1999) stress that non-state groupings can maintain their own distinct sources of legitimacy and authority separately from the state.⁵ While state activity can affect the workings of non-state groupings (and vice versa), this assumption implies that these interactions are to be considered in terms of a horizontal rather than a vertical relationship.

While one can acknowledge that multiple legal orders with their own sources of authority may exist within a given society, it is a separate issue whether legal pluralism has positive or negative effects— the topic this article investigates. On the *is* rather than the *ought*, it is noteworthy that there is a body of literature that stresses that co-existing ‘legal orders’, with very different sources of legitimacy, is the norm rather than the exception, both across place and time in human society. Indeed Benton (2012), Glenn (2010), and Twining (2009) all highlight the fact that in Europe the state’s claim to a monopoly of law has been asserted for no more than two centuries.⁶

In the interest of analytical precision, while acknowledging the longstanding debate over what is ‘law’, the following definitions are used: *legal pluralism* refers to a situation where at

³ This explanation is necessary as it remains, at least to some extent, a contested term and concept. This is apparent from discussions with those who use the term. It is also apparent in the literature. *Some* of the definitions include: ‘legal systems, networks or orders co-existing in the same geographical space’ (Twining 2000:83); ‘the co-existence of multiple legal orders and multiple systems or bodies of rules’ (Twining 2000:224); ‘different legal mechanisms applicable to the same situation’ (Vanderlinden 1971 c.f. Griffiths 1986:14); ‘different rules for identical situations’ (Vanderlinden 1971 c.f. Griffiths 1986:14); ‘multiple uncoordinated, coexisting or overlapping bodies of law’ (Tamanaha 2008:375); ‘a context in which multiple legal forms coexist’ (Tamanaha 2012:34); ‘a situation in which two or more legal systems coexist in the same social field’ Merry (1988: 870); ‘the situation in which a population observes more than one law’ Woodman (2012:129); ‘[w]henever the group subject to a particular law contains members who are also subject to another law’ Woodman (1999:14); ‘that state of affairs, for any social field, in which behaviour pursuant to more than one legal order occurs’ Griffiths (1986:2); and ‘semi-autonomous social fields’ (Moore 1978 c.f. Griffiths 1986:36). Despite the plurality of definitions, which *can* lead to very different analytical methods, there is an unmistakable thread that describes a society subject to more than one legal order.

⁴ Woodman (1999:10) tells us that deep legal pluralism acknowledges the fact that different legal orders have ‘separate and distinct sources of content and legitimacy’.

⁵ This is contrasted with the concept of *state* legal pluralism which refers to a situation where the state may incorporate laws or legal practices from outside into its own and can be described as a ‘technique of governance’ (Sezgin 2004:101).

⁶ Tamanaha (2008) argues that just as the state was increasing its market share at the expense of religious, trade, and customary orders in Europe, and thus reducing the degree of legal pluralism at home, it was increasing it elsewhere through colonisation. He goes on to suggest that the clash of differing legal regimes in Europe was dealt with by the gradual assertion of state law. He argues over time religious and customary legal regimes lost their former equal standing with state law (due to state takeover) and became norms, still socially influential, but carrying a different status than the state law.

least two legal orders assert jurisdiction over the same geographical space and persons within that space; and a *legal order* is defined as a set of rules and practices that are oriented towards ordering relations between persons with its own source of authority.⁷ It is also suggested that each legal order has its own production function that converts various inputs into the provision and enforcement of *law*.⁸ These definitions are adopted primarily for practical reasons. They are broad enough to capture interactions between state law and religious law, indigenous customary law, and the ‘law’ of various other non-state legal orders.⁹ However, they are also narrow enough to exclude some phenomena traditionally bundled under the heading of ‘norms’ in the law and economics literature, including internalised morals and individual social conventions.¹⁰

The study of the phenomenon of legal pluralism as defined above is non-trivial for two reasons.¹¹ First, many developing nations were subject to a colonial legal transplant, which effectively saw a new legal order being overlaid on a pre-existing one, and both often continue to enforce their rules to the present day. The recent empirical work of Michalopoulos and Papaioannou (2013) and others highlights the enduring importance of pre-colonial institutions today in many developing countries.¹² In terms of problematic

⁷ This is drawn primarily from the work of Twining (2004, 2009, 2012) who provides insight into separating legal institutions from other social institutions, particularly at their borders. This ordering job concerns both the patterning and control functions of law. Primarily this social ordering job enables people to co-ordinate their actions within a group and between groups and provide for basic necessities such as sustenance and security. While some of this ordering job relates to patterning, such as deciding on what side of the road to drive on, it also relates to social control, such as dealing with deviance and opportunistic behaviour (wrongs). In the area of criminal law, this job relates to both the patterning and controlling of sub-parts of the ordering of relations function; social control by sanctioning (punishing) certain behaviour and providing a patterned method for individuals to respond (for example, seeking assistance from the state by going to the police when wronged). As Twining fully acknowledges (2009) it would be naive to suggest that the only job of law is to order relations between persons within a society. Clearly law serves many purposes, albeit to differing degrees in different times and in different societies. Law may be developed primarily as an instrument for wealth maximisation, repression and social control. It may primarily serve elites for their own ends in efforts to generate and maintain power and wealth. It may serve social reformers (and conservatives) in efforts to change (maintain) society’s views of what should be rewarded and what should be sanctioned. However, it also seems difficult to deny that a basic job of law is to order relations between persons within a society.

⁸ A legal production function has many similarities to a legal *system*. See Nobles and Schiff (2012) who apply systems theory to study legal pluralism. Their work builds heavily on the seminal work of Luhmann (2004).

⁹ Whether someone accepts that non-state groupings can create and enforce ‘law’ depends on one’s definition of law – an old chestnut that has vexed Anglo-American jurisprudence for some time. It is acknowledged that the rules of most non-state groupings that fit within the following definitions would not pass Hart’s (1961) conception of law, but some might.

¹⁰ It is also suggested that it provides a workable answer to Merry’s (1988:878) pertinent question: ‘Where do we stop speaking of law and find ourselves simply describing social life?’

¹¹ Note that the definition above explicitly rules out much of the literature concerning conflict of laws. While the conflict of laws literature acknowledges that law can have multiple sources, it is almost always assumed that *someone* (usually a judge or legislator) ultimately decides what law is applied, rather than the legal orders asserting their rules (See Whincop 1999 and Solimine 2002). The definition does allow for federalism if both legal orders claim independent sources of legitimacy, – in this sense the framework can also be applied to determining problematic interactions between federal/state enforcement.

¹² See Larcom (2013) who finds a strong relationship between *current* state enforcement, *current* crime rates and *pre-colonial* institutions.

interactions Rautenbach and Jacques (2010) have highlighted a range of injustices faced by people living under indigenous custom in South Africa who find themselves in a state court with differing conceptions of what is wrong; Bierschenk (2008) has highlighted the fact that non-state obligations can lead public servants to engage in activities considered criminal by the state in Benin; Forsyth (2009) has identified wrongdoers being excessively punished by multiple punishments from multiple sources in Vanuatu; while Larcom and Swanson (2013) highlight the practice of (extrajudicial) payback killings in Papua New Guinea, that are deemed to be a legitimate sanction under traditional customary law.

The second reason for better understanding legal pluralism mainly primarily concerns a number of Western states that are experiencing the phenomenon brought about by large migrations from east to west and south to north. Just as European settlers brought their laws (including their non-state religious law) and norms with them to new lands, it is equally reasonable to expect migrants from other parts of the world should also aim to bring theirs too, and indeed many do. In this regard, it is noteworthy that the Muslim population makes up a sizable minority in the United States and Western Europe which is projected to grow both in proportional and absolute terms over the coming decades.¹³ It is also noteworthy that there has been a wave of recent legislative activity aimed at ‘banning foreign laws’ in the United States. Since 2010 seven states have enacted legislation and another 25 have introduced similar bills into their legislatures.¹⁴ But those Muslim Americans who may wish to abide by Islamic law are one of many groups of persons who aim to abide by their own rules. In the United States, in addition to over one hundred Native American groups who claim their own law, so do other religious faiths, with Canon Law and Halakha, being two other prominent examples.

Religious observances can place an individual in direct conflict with the criminal law of the state. For instance, since the Protestant reformation, Roman Catholic priests in England have no explicit penitent-priest privilege in relation to Confession and may find themselves in Contempt of Court if they fail to divulge the contents of such a conversation under oath..¹⁵ However, under the Code of Canon Law (Canon 983) which also applies to Catholic priests in England it is ‘a crime’ for a priest to break the seal of confession ‘for any reason’. In relation to Sikhs, under their Five Articles of Faith, those initiated (*Amritdhari*) are required to wear *kirpan* (a dagger) and there have been number of instances in the United States and

¹³ In Western Europe the Muslim population was estimated at 18 million people 2010 and is expected to rise to 30 million in 2030 (or 7.1 per cent of the population). The Muslim population of the United States was estimated at 2.6 million 2010 and is expected to rise to 6.2 million in 2030 (or 1.7 per cent of the population). (Pew Research Centre 2011). Shar (2013) provides an account of Islamic tribunals operating in the U.K and their legal authority. For a discussion on some of the specific problems brought about by large scale migration of religious minorities to the West and the emergence of ‘illiberal liberalism’ see Adamson *et al* (2011) and Nussbaum (1999).

¹⁴ See Boyer 2013 and Venetis 2011 for an overview of the scope and intention of this legislation. While much of the legislation does not specifically refer to *Shari’a* law (as it did in Oklahoma’s case) there seems to be little doubt over the target of this recent wave of legislative activity – to limit the practice of *Shari’a* law in the United States and to prevent the consideration of Islamic jurisprudence in court judgements.

¹⁵ There remains some uncertainty over priestly privilege in the United Kingdom. See Ormerod and Hooper (2014) for commentary on Confidential but Non-privileged Relationships in Blackstone's Criminal Practice.

Canada where Sikhs have faced criminal charges for wearing a *kirpan* and some children have been barred from school for wearing them (Juss 2012). In relation to Shari'a law while most *hudud* crimes, are also crimes or civil wrongs in the United States (e.g. theft, highway robbery, rebellion, and slander) some are not, most notably, apostasy and the drinking of alcohol. In addition, many of the specified sanctions, if taken literally, would be considered grave crimes themselves (e.g. flogging for slander; amputation for theft and highway robbery; and death for apostasy).¹⁶ However, the potential for problematic interactions between different rule generating bodies is not only an issue in relation to religion. For instance, certain by-laws of country clubs governing the admittance of members can run counter to Constitutional rights and privileges and anti-discrimination laws (Charpentier 2004); there can be conflicting rules between different financial market regulators (Lenglet 2011); while some cults and gangs are known to sometimes deliberately create and enforce rules that are in direct opposition to the state or (broader society) in an effort to force a decision to stay or leave (Iannaccone 1992).

From actual observation we know that the state can take many different stances to non-state legal orders. Sometimes, it explicitly condemns them and attempts to eradicate them (e.g. the Mafia); other times it incorporates parts of their rules into its own law (e.g. the Uniform Commercial Code); other times it makes concessions (e.g. Canon Law and priestly privilege in the United States) and most often it simply ignores them.¹⁷ We can also expect non-state legal orders to react to the state's negative stance in various ways; for instance by reducing enforcement (customary sanctions in many developing societies), reforming their substantive rules to make them more consistent with the state (e.g. the Church of Latter-day Saints and polygamy) or defying the state (either openly or with secrecy as is the case with many criminal gangs) and engaging in a battle for institutional survival. Both law and norms change over time, with a vast literature on how and why this can occur, however this analysis is focused on the comparative statics of legal pluralism – the time period (which may last centuries) when different rule generating bodies, with their own different sets of rules, co-exist in the same society.¹⁸

The study of legal pluralism in this context raises one of the most fundamental questions that any legislator, or state authority, must consider: what harms or injuries can occur *systematically* if one community within a larger community adopts its own governing rules? This article aims provide an answer to this question. Specifically, it aims to identify when legal pluralism is problematic in relation to wrongdoing and provide some guidance on how

¹⁶ For an overview of Islamic law relating to criminal matters see Badar (2011). Some Islamic scholars consider that the specified sanctions for wrongdoing, including those for *hudud* wrongs can be substituted, and usually are in most Islamic states, with less severe sanctions (Peters 2005). Importantly Jackson (2008: 168-169) suggests that Muslim jurists have recognised for many centuries that 'beyond the bright red boundary surrounding the family no one but the State had the right to impose legal sanctions.'

¹⁷ See Tamanaha (2008) and Morse and Woodman (1988) for a discussion on the various stances taken by the state in relation to non-state law.

¹⁸ See Hirshleifer (1982) likens the evolution of different institutions as a struggle for existence and likens it to Rome and Carthage's duel for survival. For the evolution of efficient law enforcement see Shavell (1993). Further references to this large literature are made below.

such circumstances can be ameliorated. It hoped that this analysis can be applied to the interactions between the law of the state and any subgroup in society who aims to enforce its own set of rules. However, it should be noted from the outset that it is acknowledged that greater analytical precision comes at a cost; especially in terms of recognising the complexity of legal pluralism, the interactions between legal orders, and the legal orders themselves. All the same, this article aims to provide some clarity in the current haze of the literature.

The outline of this paper going forward is as follows: first there is brief a review of the literature that relates to legal pluralism and its potential problems, with a specific focus on the law and economics literature has to offer this topic; this is followed by the development of an analytical framework that enables legal pluralism to be conceptualised for any society, including the identification of idiosyncratic and common wrongs and sanctions; this framework is then used to identify the three specific cases of problematic legal pluralism; then there is a discussion on how each specific form of problematic pluralism can be ameliorated; and finally, there are some concluding comments.

2. REVIEW OF THE LITERATURE

Both the legal pluralism literature and the law and economics literature that relates to the phenomenon of legal pluralism are extensive, however, do date, there has been no comprehensive analytical framework developed for considering it in a systematic fashion or the application of economic analysis to the phenomenon. In this sense, and as mentioned earlier, it is hoped that this paper not only extends the literature but also provides a framework for judging the current arguments in the literature that lack formality or are formalised badly.

As a general comment, while the legal pluralism literature is rich in descriptive case studies, it is poor in analytical clarity and normative analysis; and as such is not particularly helpful for those concerned with institutional design. Conversely, the economic literature has a normative focus, but varies considerably in terms of formalisation and the phenomena that seeks to analyse and as such is highly disjointed, and to some extent confused. Therefore, the purpose of this brief review is to draw-out what is already known concerning legal pluralism and its problems (primarily) from the economics literature to provide a systematic analysis to the phenomenon of legal pluralism.

Since Ellickson's (1992) seminal book, the literature on the interaction of law and norms has grown considerably, and much of this is directly relevant to the study of legal pluralism. A considerable literature has developed analysing whether different 'norms' are complements or substitutes to the 'law'.¹⁹ In terms of substitutes, the most obvious economic application is

¹⁹ See McAdams and Rasmusen (2007) for an overview of the Norms and Law literature. Authors such as Shavell (2002) have modelled norms primarily as complements to the state legal order and analysed the optimal mix of such institutions. Others, including Posner (1997), McMillan and Woodruff (2000), and Kaplow and Shavell (2007). While not an economist, it is noteworthy that Black's (2010) seminal analysis made the case much earlier that informal sanctions can substitute for state sanctions (and vice versa) and that many crimes committed are in effect non-state punishments for perceived wrongdoing.

to model an oligopolistic market for legal services.²⁰ Indeed some authors have used Cournot and Stackelberg models, most notably Ben-Shahar and Harel (1995) and Silva and Caplan (1997).²¹ Benabou and Tirole (2011) and Zasu (2007) have combined key elements of the literature to show how norms can act as both complements and substitutes to state law.²² Some have also concentrated on the efficiencies associated with sanctions and enforcement efforts from multiple sources, such as Landes and Posner (1975) and Kaplow and Shavell (2007). Critically, however, there is a general presumption that the multiple sources of rules (or law) deem the *same* behaviour as wrong.²³ When analysts do acknowledge that norms can differ from the state law, the omnipotence of the state is often assumed. For instance Cooter (1998), Dharmapala and McAdams (2003), Geisinger (2002), and Funk (2005) all emphasise the social engineering capacity of the state (often termed as the expressive or communicative function of law). It is often assumed that the state is able to create and perpetuate norms through the communicative role of the law in changing internalised beliefs within society. Others, such as Posner (1996a, 1996b) and Posner and Rasmusen (1999:382), emphasise the coercive power of state, suggesting the state can eliminate ‘inefficient’ or ‘bad norms’ through criminal sanctions.²⁴ More recently, Aldashev *et al* (2012), applying a bargaining in the shadow of the law model, suggest greater access to state law courts will lead to convergence between non-state rules where they differ.

However, we know that sometimes non-state groupings doggedly resist the state, raising the potential for long lasting (or even persistent) problematic legal pluralism.²⁵ Here the club literature pioneered by Buchanan (1965) and the economics of religion is of particular

²⁰ See Grossman (1995) on the interactions of the state and organised crime. In his model, both the state and the mafia provide public services in order to maximise taxation revenue. He assumes that competition between these two organisations can lead to efficiencies and an increase in social welfare.

²¹ Modelling legal pluralism in this manner is closely aligned with Moore’s (1973) conception of the phenomenon as semi-autonomous social fields interacting with one another. McAfee *et al* (2008) have considered the importance of sequencing in relation to these interactions while Briggs *et al* (1996) and Coffee (1986) have also considered the aggregation of public and private enforcement efforts and jointly determined level of deterrence. Licht (2008) has also considered interactions between the state and groups of norms.

²² Benabou and Tirole (2011) who model how as state incentives increase they crowd (internal) motivations; and Cooter (1997a) and Shavell (2002) both look at optimal state sanctions with the presence of norms and suggest that state sanctions could be decreased to account for the existence of social or internalised sanctions; conversely Galanter and Luban (1993) argue there is nothing unusual in being sanctioned heavily by both state and non-state institutions while Garoupa and Fernando (2004) consider it optimal. Benabou and Tirole (2011) build on the crowding-out literature of Akerlof and Dickens (1982) and Frey and Jegen (2001) who look at the consequences of state activity through affecting *internal* motivations. There is also some literature on overlapping jurisdictions, and the negative interaction effects (see Hutchinson and Kennedy 2008, Langpap and Shimshack 2010), or, Kovacic 2001 in the context of antitrust enforcement externalities.

²³ See Cooter (1997a; 1997b; 1998; 2000) who argues that law often evolves out of social norms leading to efficiency gains. Also see Segal and Whinston (2006), Garoupa (1997, 2003) and Polinsky (1980).

²⁴ Knight (1992) suggests that for a new state law to displace conflicting norms, expectations among the population must change through expressive information and the use of state sanctions. He suggests that without a proper enforcement mechanism there is unlikely to be a move from the old equilibrium to a new state based equilibrium. Kahan (2000: 607) who provides a basic model to analyse state efforts to change what he calls ‘sticky norms’ and suggests that ‘gentle nudges’ can be more effective than ‘hard shoves’ as agents of the state.

²⁵ The fact that norms and non-state rules can persist for long periods despite being punished by the state has also been highlighted by Bicchieri (2006), Greif (2006), Aoki (2001), and Basu (2000).

relevance. Iannaccone (1992) suggests certain groups may maintain rules that are in direct opposition to the state in an effort to encourage commitment and reduce defection. If members have broken state laws, defection is less likely as they will likely face punishment by the state coupled with a loss of protection from the sect. Therefore, resisting convergence makes participation in state related activities more costly, and can lead to a ‘corner solution’ between the members of the sub-group and the larger society.²⁶

While there are many insights from the law and norms literature of direct relevance, especially modelling providers of law in an oligopolistic market, the economic literature has not yet fully grasped the concept legal pluralism. Specifically there has been a failure to recognise that non-state legal orders can be complex systems and that they often aim to regulate a broad scope of behaviours; which means they have the potential to simultaneously support, undermine and be inconsequential to the state. It will be shown below that a more systematic approach allows for some analytical insights to be gained. For instance, somewhat paradoxically, problematic legal pluralism can arise when the legal orders have the same conceptions of wrongdoing and may not arise when they have completely different (but not opposite) conceptions of wrongdoing. A key insight gained from the analysis below is the distinction between legally *wrong* behaviour and the *sanctions* that are attached to such behaviour.

3. ANALYSING LEGALLY WRONG, NEUTRAL AND GOOD BEHAVIOUR IN A LEGALLY PLURALISTIC SOCIETY

This section applies analytical positivism to conceptualise legal pluralism at a high degree of precision. For the moment, consider a homogenous society where only one legal order operates, and therefore by definition, legal pluralism is not present. To begin the analysis, and building on the work of Ellickson (1992), the universe of behaviours, A , which includes both acts and omissions, is divided into legally wrong, W , legally neutral, N , and legally good, G , behaviour. That is:

$$W = \{\textit{legally wrong behaviour}\}$$

$$N = \{\textit{legally neutral behaviour}\}$$

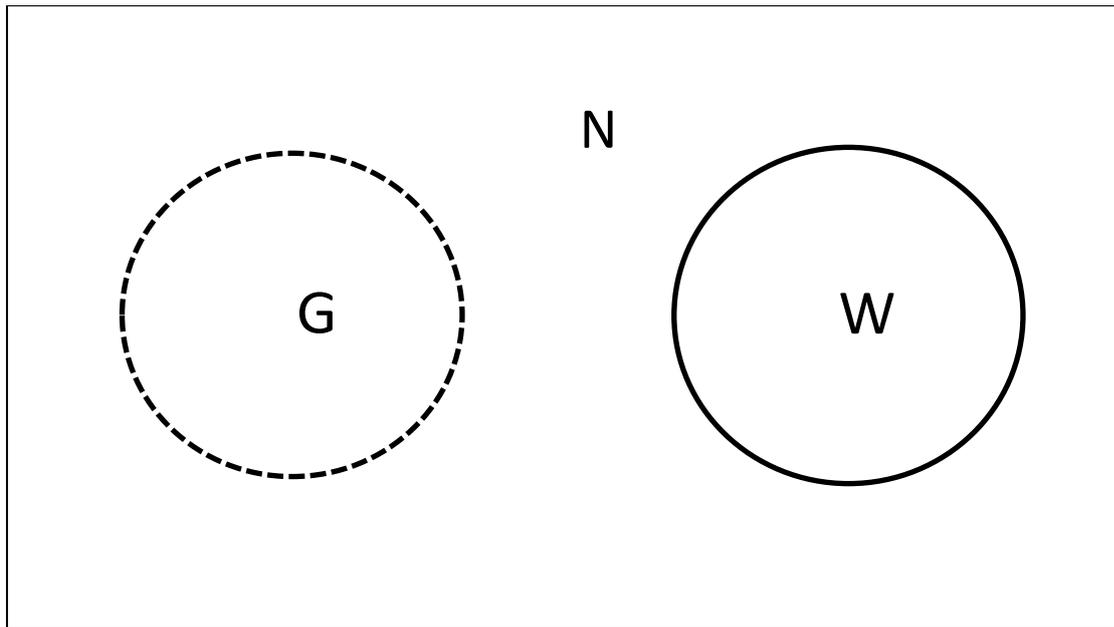
$$G = \{\textit{legally good behaviour}\}$$

This analysis is represented in Figure 1 below, where the box represents all possible behaviours in this society. In a society with only one legal order all possible behaviours, A , are contained in either the sets G , N , and W . Furthermore, we assume that the legal order does not contradict itself, and therefore the three sets are complements to one another. That is, a certain behaviour cannot be an element of more than one set.²⁷

²⁶ Carbonara *et al* (2012) have also provided a model suggesting that if the state chooses to punish activities that are considered socially acceptable it may actually increase its practice through protest activity.

²⁷ More formally this can be written as: $G = \{b_i \in G | b_i \notin N \text{ or } b_i \notin W\}$; $N = \{b_i \in N | b_i \notin G \text{ or } b_i \notin W\}$; and $W = \{b_i \in W | b_i \notin N \text{ or } b_i \notin G\}$.

Figure 1: Universe of Behaviours in a Homogenous Society with One Legal Order



We can expect that these behaviours will have legal consequences: legally wrong behaviour is punishable, legally neutral behaviours have no legal consequences while legally good behaviour is to be rewarded.²⁸ While Ellickson's (1992) typology is a useful starting point, it is augmented to gain greater insight into the legal pluralism and its consequences.

In deeming behaviour to be of a certain type the legal order observes both the acts and omissions of those individuals it asserts jurisdiction over. That is, whether or not certain *behaviours* are deemed to be legally wrong, legally neutral, or legally good will depend on *commission and omission of certain acts* and each legal order's concept of prohibited, imperative, and good actions. This distinction is necessary to develop the concept of *rivalrous compliance*, a concept new to the literature.

Prohibitions, *P*, are as those actions that the legal order deems shall not be done. Imperatives, *I*, are those actions that the legal order deems shall be done. While good actions, *GA*, are those that the legal order deems to exceed imperative actions in terms of their merit.²⁹ As before, we assume that the legal order does not contradict itself, in terms of actions so the three sets *P*, *I* and *GA* are complements to one another and therefore these actions, a_i , cannot be an element of more than one set.³⁰ That is:

²⁸ Legally wrong behaviour is 'punishable' in the sense that the wrongdoer is *subject* to legal punishment; however the actual punishment may not be enforced: due to insufficient capacity of the legal order (e.g. the wrongdoer may be unidentified or out of reach of the legal order's agents); or due to a lack of will to punish the wrongdoer (e.g. due to clemency, mercy or amnesty provisions that are found in almost all legal orders). Similarly, a reward good behaviour may not be awarded.

²⁹ Such behaviour is referred to supererogation in moral philosophy.

³⁰ More formally this can be written as: $P = \{a_i \in P | a_i \notin I \text{ or } a_i \notin GA\}$; $I = \{a_i \in I | a_i \notin P \text{ or } a_i \notin GA\}$; and $GA = \{a_i \in GA | a_i \notin P \text{ or } a_i \notin I\}$. For this assumption to hold, a degree of specificity is required by the legal order in defining *P*, *I* and *GA*; in terms of the physical act itself and the circumstances that surround it (e.g.

$P = \{\text{actions that the legal order deems shall not be done}\}$

$I = \{\text{actions that the legal order deems shall be done}\}$

$GA = \{\text{actions the legal order deems exceed imperative actions in terms of merit}\}$

Having defined prohibitions, imperatives, and good actions and allowing for behaviour to consist of both the commission and omission of acts we can define legal classifications as:

$W = \{\text{commission of } P, \text{ or omission of } I\}$

$N = \{\text{commission of } I, \text{ omission of } P, \text{ or omission of } GA\}$

$G = \{\text{commission of } GA\}$

The different types of legal behaviours in terms of prohibitions, imperatives, and goods and actions and omissions are also summarised in Table 1 below.

Table 1: Legal Behaviours in Terms of Commissions and Omissions.

	Commission	Omission
Prohibition	Wrong	Neutral
Imperative	Neutral	Wrong
Good	Good	Neutral

3.1 A legal Positivist Framework

In distinguishing between legally wrong, neutral, and good behaviour a legal positivist approach is used. That is, it is assumed that there is no necessary connection between the law and morality (internalised values).³¹ In a legally pluralistic society, a legal positivist approach is essential, unless both legal orders have the same conceptions of what is legally wrong, neutral, and good, and that this accords with the morality of the entire population.³² In any case, the potential for a divergence between law and morality arises for two obvious reasons in any society, whether it is legally pluralistic or not.

This divergence can occur if the morals or objective functions of those who make the laws differ from that of society. The most obvious example is a dictator who uses law primarily as an instrument for wealth maximisation, repression, or social control. Alternatively, in a representative democracy if law is made by social reformers (conservatives) for the purpose of changing (maintaining) morality we can also expect a divergence. More generally, we

consequences, intention and defences). In reality this is difficult, and despite tonnes of ink in some cases, most legal orders have some degree of ambiguity concerning the legal consequences of certain acts and omissions.

³¹ See the seminal works of Bentham (1843), Austin (1879), and Hart (1961).

³² Indeed, even if there was the same number of moral frameworks as legal orders in a society which could allow for each legal order to mirror each moral framework however, there would still be a disconnection between different legal orders and different moral frameworks.

should expect a divergence between law and morality if law or morality changes over time and there is some inertia.

Assuming that law and morality do converge over time, we can also expect a divergence between law and morality due to differences in the *scope* of behaviour that a legal order seeks to regulate compared to the domain of morality. Even in a homogenous society where the legal order mirrors morality not all legally wrong behaviour may be considered immoral, nor will all immoral behaviour necessarily be considered legally wrong. This reality is highlighted by the well known concepts of *mala in se* and *mala prohibita*. While some legally wrong behaviour may not be considered immoral, it is equally true that some behaviour that may be considered morally wrong may not be legally wrong.³³

3.2 Distinguishing between Wrongs, Harms, and Sanctions

In order to manage the analytical complexity, and with little loss of explanatory power, the analysis going forward will concentrate on *wrong* behaviour, its punishment, and the consequent effect of legal pluralism on the deterrence of *legal wrongs*. Casual observation suggests that legal orders, state or non-state, devote most of their effort to defining and punishing wrong behaviour rather than rewarding good behaviour.³⁴

To adequately consider legally wrong behaviour and its punishment, it is necessary to make a distinction between wrongs (i.e. legal wrongs) and harms. Harms, *H*, are defined as behaviours, either by act or omission, which cause physical or mental pain to an individual. That is:

$$H = \{ \text{behaviours that causes physical or mental pain} \}$$

Harmful behaviour occurs regardless of intention or circumstances, it is merely behaviour that causes pain. Evidently, not all harmful behaviour is legally wrong. This may be because the legal order explicitly takes into account the circumstances surrounding the harmful behaviour or that the behaviour is outside the scope of regulation. For instance, in relation to circumstance, harmful behaviour may not be legally wrong if there was no intention to cause harm, while in relation to scope, the betrayal of a friend may not be legally wrong *per se*. In both cases, despite the potential to cause great pain such behaviours may not be legally wrong. The fact that not all harmful behaviours are legal wrongs was highlighted by Bentham (2011:182)³⁵ who spoke of ‘the multitude of crying injuries which are left without redress’. The key point to be made is that not all harmful behaviours are legally wrong due to the circumstances and a reluctance, or inability, of most legal orders to intervene in every

³³ The most obvious example is lying. While lying may be considered morally wrong it is unlikely to be legally wrong *per se*. Similarly, some morally good behaviours are unlikely to be legally good behaviours.

³⁴ Indeed traditional definitions of law relate to the ability to inflict suffering on wrongdoers (see Bentham 1843 and Austin 1879). In the process of punishing wrong behaviour, legal orders may offer rewards to secure the punishment of a wrongdoer. As noted by Hart (1961) legal orders can also confer power on individuals to make binding agreements (e.g. marriages and contracts) however, even the violation of these agreements can be seen as a wrong.

³⁵ Note that the first complete version of Bentham’s *Place and Time* was first published in 2011.

aspect of human life. The set of behaviours contained in the set of legal wrongs, W , is not necessarily the same as those contained in the set of harms, H . However, it is reasonable to expect a significant degree of overlap between legally wrong behaviour and harmful behaviour in a homogenous society. That is, in terms of behaviours (the commission and omission of acts) we can expect the intersection of each of the sets, W , and H ($W \cap H$) to be non-empty. This means that we can expect some behaviour to be both wrong and harmful. However, we can also expect some behaviour to be harmful but not wrong and for some behaviour to be wrong but not harmful.

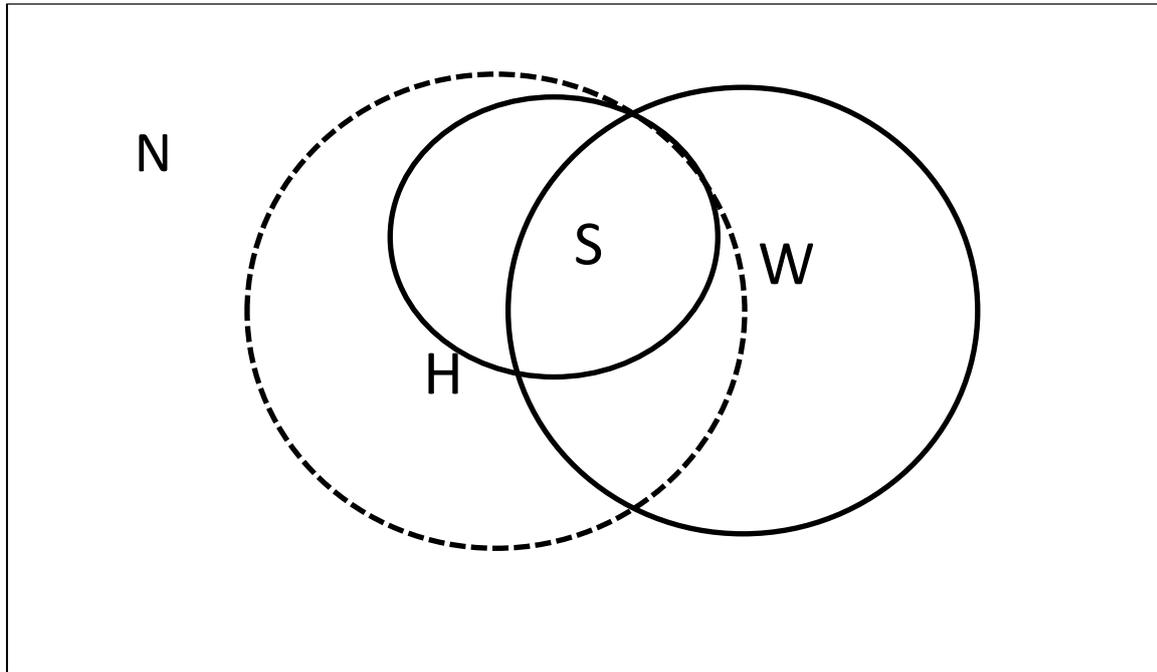
We can also expect a legal order to punish wrong behaviour. Specifically, some *harms* regardless if they are *wrong*, are *sanctioned* by the legal order as a legitimate punishment for legally *wrong* behaviour, ($S \subset H$). This subset of harms is labelled as *sanctions*, S , and are defined as:

$$S = \{\text{harms permitted by the legal order as punishment for a wrong}\}$$

In terms of behaviours we can expect that the intersection of the sets W and S ($S \cap W$) to be non-empty. That is, some harms used as punishment for wrong behaviour would themselves be wrongs if they were not sanctioned.³⁶ For instance, a legal order may sanction various harms as punishment for wrongdoing; including homicide (capital punishment), deprivation of liberty (imprisonment), and the seizure of assets (fines or compensation payments). Finally, we can also expect that not all sanctions would be wrongs, for instance the withdrawal of certain privileges or permissions or simply shunning someone. The intersection of harms, wrongs and sanctions (a subset of harms) is represented in Figure 2 below.

Figure 2: Overlap of Wrongs, Harms and Sanctions

³⁶ That is, the behaviour (act or omission) would satisfy the specific requirements deeming it to be a prohibition or imperative (making it a wrong) other than the fact that it is deemed to be a legitimate legal sanction by the legal order for wrong behaviour. The process of converting an otherwise wrong behaviour into a legitimate punishment will vary between legal orders; however a warrant serves this purpose in a number of formal legal jurisdictions.



A summary of the key analytical insights to date is contained in Table 2 below and explained as follows. *Wrongs* are the commission of *Prohibited Acts* or the omission of *Imperative Acts*. Behaviour deemed to be wrong is punishable. A distinction was made between *Wrong* behaviour and *Harmful* behaviour. *Harms* cause physical or mental pain, either by act or omission regardless of their circumstance. Importantly, based on due process, some *Harms* are *Sanctioned* by the legal order as a punishment for *Wrong* behaviour. By definition, the set of behaviours that are *Sanctions* for *Wrongs* are a subset of harms ($S \subset H$). Furthermore, the intersection of the sets of behaviours W and S ($S \cap W \neq \emptyset$) is assumed to be non-empty in the sense that some, perhaps most, behaviours that are sanctions would be *Wrongs* if they were not *Sanctioned* as punishment for *Wrong* behaviour.

Table 2: Wrong Behaviour and its Consequences under Legal Monism

Legally Wrong Behaviour	Legal Consequences
<ol style="list-style-type: none"> 1. Wrong (W) behaviour consists of: 2. The commission of a Prohibition Act ($a_i \in P$), or 3. The omission of an Imperative Act ($a_i \notin I$). 	<ol style="list-style-type: none"> 1. A Wrongdoer is Sanctioned (S) 2. Sanctions are behaviours that are a subset of harms (H) that are permitted by a legal order as punishment for wrongdoing ($S \subset H$). 3. Some Sanctions are Wrongs ($a_i \in P$) or ($a_i \notin I$), so that $S \cap W \neq \emptyset$

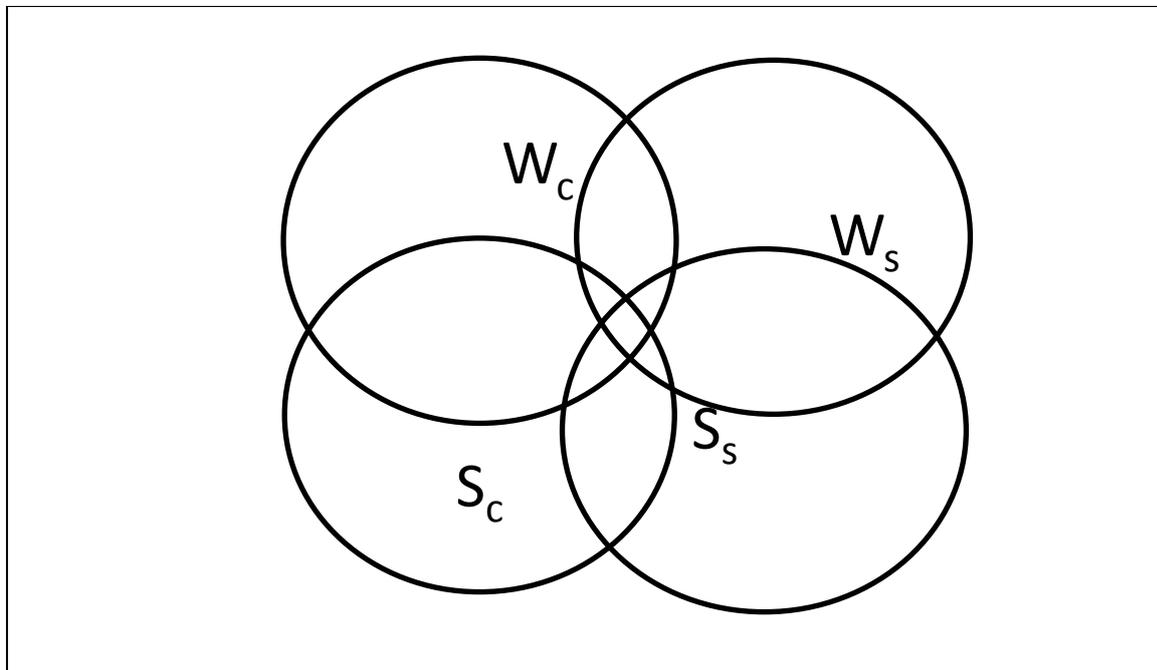
3.3 Multiple Wrongs and Sanctions

To date, the analytical effort has been devoted to considering the nature of wrongs and sanctions in terms of acts and omissions in a legal monistic society. Now it will be

assumed there are two legal orders that assert their jurisdiction in a given society, the non-state legal order (subscript c) and the state legal order (subscript s).

Within this society, some behaviours are deemed to be wrong under the non-state law, W_c , and some harms are sanctioned under the non-state legal order, S_c , as punishment for wrongs. For grave wrongs the sanctions, S_c , may be severe. Therefore, if an individual behaves in a way that is an element of the set W_c he or she faces a sanction that is an element of the set S_c under the non-state law. In addition to the non-state law, the state legal order also claims jurisdiction over the same geographic space and persons within it. It also deems certain actions as wrong and sanctions them. The behaviours the state legal order deems wrong are contained in the set labelled W_s and its sanctions are contained in the set S_s . The overlay of the state legal order on the customary legal order is represented diagrammatically below.

Figure 3: Space of Wrongs and Sanctions under legal pluralism



Within the set, W_c - non-state wrongs - are all the behaviours that are wrong under the non-state legal order, and within the set, W_s - state wrongs - are all behaviours that are wrong under the state legal order. Within the set, S_c - non-state sanctions - are all sanctions under the non-state legal order, and within the set, S_s - state sanctions - are all sanctions under the state legal order.

As can be seen, each of the sets intersect. This represents some overlap between the two legal order's conception of wrong and sanctions. However, it also suggests that some state sanctions are non-state wrongs, and most importantly for this analysis, that some non-state sanctions are state wrongs.

Both legal orders sanction wrongs, however, only those that *it* deems wrong. In this legally pluralistic society the total set of wrongs is represented by the union of the sets W_c and W_s . It contains the behaviours considered wrong by either legal order. The set of *total wrongs* is represented by:

$$TW = \{Total\ Wrong\} = W_c \cup W_s.$$

Both legal orders may deem the same behaviours as wrong. The set of wrongs common to both legal orders, *common wrongs*, is represented by the intersection of the two sets W_c and W_s :

$$CW = \{Common\ Wrong\} = W_c \cap W_s.$$

One legal order may deem certain behaviours as wrong, while the other does not. The set of these actions, *idiosyncratic wrongs*, can be represented by subtracting those behaviours considered wrong by one legal order with those considered wrong by the other. The set of idiosyncratic non-state wrongs is represented by:

$$IW_c = \{Idiosyncratic\ Non - state\ Wrong\} = W_c - W_s; \text{ and}$$

the set of idiosyncratic state wrongs is represented by:

$$IW_s = \{Idiosyncratic\ State\ Wrong\} = W_s - W_c.$$

The size of each of these derived sets will depend on the degree of difference between the two legal orders. If the set of wrongs of the two legal orders were identical, that is $W_c = W_s$, the sets TW and CW would also be identical. In such a case the sets IW_c and IW_s would be empty: $IW_c = \emptyset$ and $IW_s = \emptyset$. However, if the sets W_c and W_s are not identical, then the sets TW and CW will not be equivalent and the sets IW_c and IW_s may not be empty. There are various possibilities when the sets W_c and W_s are not identical.

Perhaps the most plausible scenario is that each legal order deems some behaviours as wrong, but also deem some others as idiosyncratically wrong. In this case, the set of common wrongs will be non-empty: $W_c \cap W_s \neq \emptyset$, as will be the two sets containing idiosyncratic wrongs, $IW_c \neq \emptyset$ and $IW_s \neq \emptyset$. This scenario is represented in Figure 2 above, where the sets W_c and W_s intersect but not completely. Interestingly, most of the economic analysis to legal pluralism implicitly assumes that the behaviours considered wrong are shared by both legal orders, whereas it is shown here that there are three possibilities with two legal orders.

While sanctions can be categorised in terms of total, common, and idiosyncratic, it is more useful to analyse them in terms of whether they are considered wrongs by the other legal order. Two sets represent the intersection of one legal order's set of sanctions with the other's set of wrongs: represented by:

$$S_c W_s = \{Non - state\ Sanctions\ that\ are\ State\ Wrong\} = S_c \cap W_s; \text{ and}$$

$$S_s W_c = \{State\ Sanctions\ that\ are\ Non - state\ Wrong\} = S_s \cap W_c.$$

Two other sets represent those sanctions that do not intersect with the other legal order's set of wrongs. They are:

$$S_cNW_s = \{\text{Non - state Sanctions that are not State Wrongs}\} = S_c - W_s; \text{ and}$$

$$S_sNW_c = \{\text{State Sanctions that are not Non - state Wrongs}\} = S_s - W_c.$$

The possibility of an intersection of one legal order's set of sanctions with the other legal order's set of wrongs is represented in the figure above. The reason for this intersection will depend on the *type* of sanction and whether the legitimacy of the legal order is recognised by the other. When one legal order's sanction is a wrong under the other, it has the potential to bring the two legal orders into conflict both in the sanctioning of idiosyncratic or common wrongs.

4. CAUSES OF PROBLEMATIC LEGAL PLURALISM

From the preceding analysis, problematic legal pluralism (or legal dissonance) can now be identified with precision, something that has not been done before. It is claimed that there are three potential causes of problematic legal pluralism in the control of wrongs. The first concerns situations where wrong behaviour, under one or the other legal order, is inevitable - labelled rivalrous compliance. The second potential cause is when one legal order's sanction for wrong behaviour is deemed to be a wrong by the other. The third is the uncoordinated sanctioning of common wrongs.

The first two types, rivalrous compliance and sanctions that are wrongs, are deemed problematic because they necessarily lead to increased enforcement costs and/or lower productivity levels for the legal orders involved. Specifically, these two types can lead to one or both legal orders imposing negative externalities on the other. The third type, uncoordinated sanctioning of common wrongs is problematic because the magnitude of the sanction (in aggregate) attached to a given wrong is excessive compared to what both legal orders would consider to be just. However, as will be shown all three types of problematic legal pluralism identified have the potential to produce injustices. Importantly the mere existence of idiosyncratic wrongs is not considered to be problematic as it does not necessarily lead to the generation of negative production externalities or injustices. Indeed the existence of idiosyncratic wrongs under various non-state legal orders (whether they be generated by religious, social, sporting, commercial or many other types of groupings) that are punished by sanctions that are non-state wrongs describes many well functioning harmonious societies.

4.1 Rivalrous Compliance

Rivalrous compliance arises when avoiding wrong behaviour under one legal order necessarily leads to wrong behaviour under the other legal order. This situation necessarily forces the individual to choose between committing a wrong under one or the other legal order. Rivalrous compliance results from two specific circumstances, opposite conceptions

of wrong and rivalrous imperatives. The first circumstance, *opposite conceptions of wrong* refers to a situation when a given act is prohibited under one legal order but deemed to be an imperative under the other. Examples include the imperative imposed on an initiated Sikh to carry a *Kirpan* under the Five Articles and a prohibition on carrying knives by the state; the imperative imposed on a Catholic priest to divulge the contents of a conversation under oath by the state and the prohibition under Canon Law on breaking the seal of Confession; the prohibition placed on a police officer in acting in a partial manner and the imperative imposed under the customary law of Papua New Guinea to always help your kin, no matter your office. The second circumstance is the existence of *rivalrous imperatives*, which refers to a situation when the commission of two different imperative acts under each legal order is required but they are mutually exclusive. This situation is most likely to arise due to finite resources, most usually time or money. However, an example that does not include time is the imperative to wear a motorcycle helmet by the state and the imperative under the Five Articles for male Sikhs to wear a turban and unshorn hair.

Using the framework developed and set notation, rivalrous compliance, arises with:

$$\textit{Opposite Conceptions of Wrong} = \{a_i \in P_c \text{ and } a_i \in I_s, \text{ OR, } a_i \in P_s \text{ and } a_i \in I_c\}$$

$$\textit{Rivalrous Imperatives} = \{a_i \in I_c \text{ and } a_j \in I_s, \text{ and } a_i \oplus a_j \}$$

The existence of rivalrous compliance is clearly problematic for the individuals subject to legal pluralism but it is also problematic for the legal orders themselves, as whatever the decision of an individual, a wrong has been committed under one or the other legal order. As discussed later, the existence of rivalrous compliance also has the ability to have detrimental effects on a legal order's cost and production functions.

4.2 Sanctions that are Wrongs

The second case of problematic legal pluralism occurs when the sanctions of one legal order are considered wrong by the other. Using set notation:

$$\textit{Sanctions that are Wrongs} = \{a_i \in S_c \text{ and } a_i \in W_s, \text{ OR, } a_i \in S_s \text{ and } a_i \in W_c\}$$

Sanctions that are wrongs can arise both in relation to the punishment of idiosyncratic wrongs and common wrongs. There are countless examples of this phenomenon, as by definition all sanctions are harms, and many harms are wrongs (unless sanctioned as punishment). At its most extreme, a non-state legal order may sanction a homicide for a grave wrong, either common or idiosyncratic.³⁷

³⁷ While it may be more intuitive to consider this problem arising in relation to non-state sanctions that are state wrongs (e.g. a payback killing under customary law in Papua New Guinea) it could also arise in relation to state sanctions that are non-state wrongs (e.g. a state execution deemed wrong by a non-state legal order). Whether a state sanction is considered a wrong by a non-state legal order will largely rest on whether it accepts the legitimacy of the state and its sanctioning process (which is effectively the non-state version of 'state legal pluralism'). While casual observation suggests this is indeed normally the case, it is not always. For instance, the legitimacy of the state itself may be disputed (e.g. apartheid South Africa); the legitimacy of legal order may be disputed (e.g. Nazi law); the legitimacy of the sanctioning process may be disputed (e.g. due to rampant

4.3 Uncoordinated Sanctioning of Common Wrongs

The existence of common wrongs raises the potential for the third type of problematic legal pluralism, uncoordinated sanctioning of (common) wrongdoers. While the existence of common wrongs is a necessary condition for excessive sanctions, it is not sufficient. Excessive sanctioning will occur when the legal orders fail to co-ordinate the enforcement of sanctions, in terms of total *magnitude* of sanction. This type of problematic legal pluralism arises when both legal orders have the same conceptions of wrong but effectively ignore the other's sanction.³⁸ If both legal orders impose a high magnitude sanction without recognising the other, the total sanction the individual faces is in excess of what either legal order considers just. In terms of set notation:

$$\text{Uncoordinated Sanctioning of Common Wrongs} = \{a_i \in W_c \text{ and } a_i \in W_s, \text{ and, } \Sigma S > S_c \text{ or } S_s\}$$

The prominence of uncoordinated sanctioning of common wrongs is more likely to arise when non-state sanctions are of high magnitude. However, more generally it can be seen as a problem that arises when the two legal orders' sanctions *are* substitutes in terms of magnitude but they are not recognised by the other, for example, ignored or perceived as complements. While this form of problematic legal pluralism is clearly troublesome for the wrongdoer it is not apparent that this form of problematic legal pluralism will directly affect either legal order's production or cost functions.

4.4 Consequences of Problematic Legal Pluralism

In short problematic legal pluralism has the potential to negatively affect a legal order's production and/or cost functions. This can make enforcement activity less productive or more costly. If this is acute, the existence of problematic legal pluralism can make one or both legal orders enforcement activity (and any deterrent effect they are hoping to generate) ineffective both in relation to idiosyncratic and common wrongs.

In relation to idiosyncratic wrongs, non-state sanctions that are state wrongs will directly increase the cost of non-state enforcement, as there is a probability that those who execute a non-state sanction will be sanctioned themselves. However, the existence of non-state sanctions that are wrongs will also detrimentally affect the state legal order. This is so as the propensity to commit a state wrong has increased and therefore for a given level of enforcement effort the probability of being sanctioned by the state will fall, as its enforcement efforts are spread more thinly. A similar effect should result in relation to situations of rivalrous compliance, as the propensity to increase idiosyncratic wrongs under both legal orders will increase with the other's level of enforcement. In relation to rivalrous

corruption); or a non-state legal order may consider that a given act is never sanctionable (e.g. the Brethren, Mennonites, Amish and Quakers all refuse to recognise the right of the state to commit homicide (Gudorf 2013). Despite these important exceptions, for reasons of practicality the discussion is focussed on non-state sanctions that are state wrongs.

³⁸ This analysis shows that the potential inefficiencies from multiple enforcement as identified by Landes and Posner (1975) and Kaplow and Shavell (2007) is a subset of a co-ordination problem associated with common wrongs, which is one of the three potential causes identified here.

compliance, there is also the special case where a factor of production faces such a scenario: for instance, a state agent (e.g. a police officer) compromised by another legal order.

In relation common wrongs, the existence of sanctions that are wrongs and situations of rivalrous compliance faced by those imbedded in a legal order's will have a similar result. This suggests that even if the two legal orders are concerned with sanctioning the same wrong behaviour (for example, murder, rape and robbery), the existence of sanctions that are wrongs and situations of rivalrous compliance can lead to a net fall in deterrence for common wrongs. This result is not simply an intellectual curiosity as Larcom (2013b) has shown that countries that had pre-colonial institutions that condoned high magnitude privately enforced sanctions (e.g. retributive killings) currently have lower levels of state crime enforcement and higher levels of crime, while controlling for a range of other relevant factors.³⁹

While the third type of problematic legal pluralism, the uncoordinated sanctioning of common wrongs should not directly enter either legal orders' production or cost functions, it is still problematic because it can result in injustices for the wrongdoer. This is so as he or she can be excessively sanctioned in relation to what each legal order would consider to be just. As will be discussed in the next section, this arises when legal orders act simultaneously in sanctioning common wrongdoers, when sequential enforcement would produce a more just outcome.

5. SOME 'CURES' FOR PROBLEMATIC LEGAL PLURALISM

If they are significant, the most obvious response to these problematic interactions is for a society to become legally monistic. Perhaps the state could engage in a 'surge' in enforcement, above what would be statically optimal, with the aim of eliminating the non-state legal order (or the parts that are problematic). However, non-state legal orders can be stubbornly persistent, despite concerted efforts to eradicate them.⁴⁰ In any case, non-state legal orders may also generate substantial benefits, despite the problematic interactions. Another potential solution is for the state to withdraw completely or to withdraw enforcement based on type of person or geography. The history of Western Europe is replete with examples of the state withdrawing enforcement based on type of person and/or geography, which currently occurs to some extent in relation to Native American Law in the United States and Canada.⁴¹ While complete or partial state withdrawal always remains a possibility, the discussion below focuses on how each specific form of problematic legal pluralism can be ameliorated based on the assumption that the state remains *in situ* enjoys at least a degree of legitimacy. In considering these potential 'cures' it is worth pondering

³⁹ Also see Larcom and Swanson (2013) for a detailed study of this particular phenomenon relating to retributive violence and group loyalty in Papua New Guinea.

⁴⁰ This may be due to internalised views of law (Hart 1961) or the fact that in many developing (and some developed) countries the state is (and sometimes always has been) relatively weak in relation to non-state legal orders. In some (failed) states, non-state legal orders may even have more resources and higher levels of productivity.

⁴¹ In relation to the state withdrawing enforcement activity in Europe, two prominent examples are the *benefit of clergy* rule under English law that existed for many centuries (see Briggs et al. 1996) and the legal arrangements depending on one's religion in (and soon after) the period of Moorish domination of Spain (see Benton 2002).

Damaska's (1986) theory of criminal procedure which highlights the perceived role of the state in society. That is, whether one perceives the state as a *policy implementing* social engineer or *conflict solver*. It should also be noted that the willingness of either legal order to adopt any of these approaches will depend on the perceived gravity of the wrongs in question and the political and legal constraints that each face.

5.1 Sanctions that are wrongs

There are two broad approaches that can be taken by the state to ameliorate the problem of non-state sanctions that are deemed wrong. If the wrong is idiosyncratic to the non-state legal order, the state can sanction it itself. This was a common practice among European colonial administrations (Morse and Woodman 1998).⁴² However, this is not costless, especially if state law is seen as a tool for social engineering. As would be expected, Geschiere (2006) finds evidence that state adoption of non-state wrongs can entrench internalised beliefs in the wrongfulness of such behaviour.⁴³ If the wrong is common to both legal orders, the state can aim to sanction the wrongdoer (or signal its willingness to do so) before he/she is sanctioned by the non-state legal order. One example of this, in addition to mitigating flight risk, is imprisoning suspects prior to trial. As long as the state sanction is perceived to be a sufficient and legitimate substitute, this approach will reduce the propensity of the non-state legal order to enforce a sanction that is deemed to be a state wrong.

The second approach is for the state to exempt, or provide a defence, for such sanctions that would normally be considered wrong. A well known example is baseball's effective exemption from anti-trust law in the United States. Without this, some sanctions imposed on players and clubs by the Baseball Commissioner would almost certainly be state wrongs (Sommer 2012).

A non-state legal order can also take ameliorative action; specifically it can alter its conception of wrong or change the type of its sanction that it attaches to it. The Catholic Church's stance on usury provides an example of a non-state legal order redefining what it deems to be wrong behaviour. While the Catholic Church continues to deem usury to be an explicit wrong, how it is defined has changed since the 12th Century (Reed and Bekar 2003). In terms of substituting sanctions it is also noteworthy that while medieval Church Courts did not impose death sentences (leaving that solely to the state) they did imprison wrongdoers for ecclesiastical wrongs (Langbein 1976). Another example relates to the practice of indigenous customary law, where the use of elaborate peace ceremonies and compensation agreements has replaced retributive violence in some communities (Larcom 2013a).

5.2 Rivalrous Compliance

⁴²For example, given the gravity of sorcery and adultery under customary law in Papua New Guinea, where homicide was often a legitimate sanction for such behaviour, the colonial administration made both behaviours crimes with considerable prison terms attached (Jinks *et al* 1973).

⁴³In analysing the consequences of the state adopting witchcraft as a crime in Cameroon and South Africa he evidence that it has entrenched belief in its existence and its power within these societies.

Ameliorating the effects of rivalrous compliance requires one legal order to ‘reform itself’ or provide an exception for those individuals placed in such a circumstance. If neither legal order is willing (or able) to do this, this form of problematic legal pluralism could persist indefinitely. In relation to priest-penitent privilege, while Catholic priests have no explicit priestly privilege in England, they do in all 50 U.S. states and the District of Columbia and in numerous civil law jurisdictions in other parts of the world (Cassidy 2002). Despite no explicit exemption in the United Kingdom convictions over the last two centuries have been almost non-existent.⁴⁴ This highlights another form of amelioration; prosecutorial discretion and tacit non-enforcement. The unwillingness of state agents (whether they be police, prosecutors, judges or juries) to enforce sanctions that are deemed to be unfair, immoral or excessive has been well documented.⁴⁵

Another religious example relates to the Five Articles of Faith of Sikhs. In many states, persons are prohibited from carrying knives in public places while the persons riding a motorcycle must wear a helmet. The first case relates opposite conceptions of wrong while the second relates to the performance of mutually exclusive imperatives (as the wearing of unshorn hair and a turban can preclude the wearing of a motorcycle helmet). In response, some nations have explicitly exempted Sikhs from the prohibition of carrying knives and/or the imperative of wearing a motorcycle helmet. For instance, the *Criminal Justice Act 1988* in the United Kingdom provides a specific exemption for carrying an offensive weapon for religious purposes, while the *Motor Cycles (Protective Helmets) Regulations 1980* contains a specific exemption for Sikhs wearing turbans. In relation to wearing a helmet, observant Sikhs would be required to substitute away from motorbike to other forms of travel. Avoiding circumstances of rivalrous compliance is often used by state and non-state legal orders with various ‘conflict of interest’ measures. For instance, it was a common colonial practice to deliberately station police and state agents away from their home communities, despite their local knowledge.

5.3 Uncoordinated Sanctioning of Common Wrongs

The phenomenon of uncoordinated sanctioning of common wrongs occurs where both the state and non-state legal order impose high magnitude sanctions on the same wrong. It is therefore likely that it will be most evident in societies subject to a colonial legal transplant (e.g. indigenous communities in settler nations and post-colonial states). However, instances of vigilantism, vendetta, and organised crime executions occur in Western societies.⁴⁶ As in relation to non-state sanctions that are wrongs, this can be ameliorated by effectively moving from a simultaneous enforcement game to a sequential enforcement game. Specifically, if the state is able quickly signal that it will sanction a wrongdoer it should reduce the propensity of a high magnitude non-state sanction being enforced.

⁴⁴ This uncertainty seems to arise from the paucity of cases before the courts on this matter over the last two centuries (see See Ormerod and Hooper 2014).

⁴⁵ See Kahan (2000) for a discussion and formal model that takes account of this phenomenon.

⁴⁶ For instance, Vendetta was practiced in parts of Southern Europe well into the 20th Century and still continues some pockets (Spierenburg 2012).

Alternatively, and more controversially, the state could recognise a high magnitude non-state sanction as a valid substitute for its own high magnitude sanction. While this was once common practice in England and some other European societies (see Friedman 1979, 1984 and Garoupa and Klerman 2010), the most notable current examples of this practice occur in post colonial states. For instance, in Pakistan, Saudi Arabia, Iran and parts of Nigeria, the state recognises the payment of a *diyya* (a specified or mutually agreed compensation payment under Islamic law) to wholly substitute for a death sentence or imprisonment (Badar 2011).⁴⁷ Some other post-colonial states, where indigenous custom is still widely practiced, large compensation payments can substitute for imprisonment, sometimes formally and more often informally through prosecutorial discretion.⁴⁸

6. CONCLUSION

This article is based on the assumption that multiple legal orders, with their own separate sources of legitimacy, can co-exist in a society for considerable periods of time, perhaps indefinitely. Legal pluralism can arise due to migration, colonisation, conquest or the formation of autochthonous groups within a society who generate their own rules – all of which seems to be continually repeated throughout human history. Therefore, given that the phenomenon of legal pluralism seems to be ubiquitous both across place and time, this article has focused on identifying the precise causes of problematic legal pluralism and how each can be ameliorated. In doing so, it is hoped that this analysis will guide future empirical and theoretical research and inform policy discussions on the phenomenon. Conceptual advances and classification schemes have often proven to be important in the history of scholarship: whether this analysis proves useful or not remains to be seen, as one must wait and see how the framework is used to solve problems and facilitate discussions. In conclusion, it is worth highlighting again what is *not* problematic about legal pluralism. It was shown that problematic legal pluralism may arise when the legal orders have the same conceptions of wrongdoing and may not arise when they have different conceptions of wrongdoing. A key insight gained from this analysis is to recognise the distinction between legally *wrong* behaviour and the *sanctions* that are attached to such behaviour. In the absence of rivalrous compliance, legal orders can co-exist harmoniously with a very different set of idiosyncratic wrongs as long as the sanctions attached to wrong behaviour are not deemed to be wrong by the other. For instance, some religious legal orders may deem apostasy, usury, abortion, working on holydays and consumption of proscribed products as wrong. However, as long as the sanctions for such wrongs are not state wrongs, problematic legal pluralism will not arise – unless of course the state (or non-state legal order) takes an activist (or antagonistic) stance toward the other. Indeed the harmonious co-existence of the state with non-state regulators captures many current interactions, relating not only to religion, but also companies, sporting associations and professional bodies. In relation to common wrongs,

⁴⁷ Indeed, Hasan (2011) notes that it was the Pakistani state's explicit recognition of Shair'a Law in their Criminal Code, that allowed U.S. 'diplomat' Ramond Davis to be freed from prison and to leave Pakistan. This is despite him being charged with two counts of murder and the Pakistani state unwilling to recognise his claim for diplomatic immunity.

⁴⁸ See Larcom (2013) for an account of this in Bougainville Island where the state has effectively re-ordered the sanctioning process, allowing customary law to enforce (non-violent) sanctions first, even for gravest of crimes.

again the degree of harmony achieved will depend on the type of sanctions used, and the degree of co-ordination between legal orders.

Every society must grapple with legal pluralism and this paper identifies when it is problematic and when it is not in relation to wrongdoing – both in terms of those individuals who are subject to multiple legal orders enforcing their rules on them and the legal orders themselves. If one wishes to ameliorate these problematic interactions there are three policy prescriptions that fall from this analysis. The first relates most closely to those societies who received colonial legal transplants and where pre-colonial legal institutions remain strong; it may be better for the state to recognise non-state sanctions as substitutes to their own – if they are in fact substitutes. The second relates most closely to those states that are experiencing large scale migration from cultures and religions different from the majority of their citizens; in relation to instances of rivalrous compliance it may be better for states to use the discretion available to them and provide those who face these situations with exemptions, if it means a great deal to them and little to the state. The third relates to the non-state legal orders themselves; if they wish to avoid trouble with a (liberal) state they should not enforce sanctions that are state wrongs.

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