

The New Legal Realism Volume II Abstracts Studying Law Globally

Edited by Heinz Klug and Sally Engle Merry

1. Studying Law Globally: New Legal Realist Perspectives

Introduction

Heinz Klug and Sally Engle Merry

2. African Constitutionalism from the Bottom-up

Martin Chanock

Focusing on the story of African constitution-making, from the period of decolonization to the latest phases of democratization, this chapter explores, through a comparative historical method, the relationship between global developments and ideas, including colonialism, decolonization, modernization (of both the capitalist and socialist varieties), the cold war and neoliberalism, and the struggle to build an African constitutionalism that is rooted in the embrace of the rule of law by African societies and not imposed from above.

Rule of law, rights based, constitutional democracies are now a global project, a part of globalization. But the African story is not encouraging. The story is one, less of state failure, though there are examples of these, but of failing states. This is a process in which governance without a rule of law, sometimes because of lack of capacity, sometimes because of lack of desire, is crucial. While this failure is primarily an African failure, this chapter emphasises throughout the contexts in which it takes place. Of these, rapid and badly planned decolonisation and the imperatives of the Cold War set the stage. The latter in particular encouraged the emergence of military rule while the dominance of modernization theory, in its socialist and capitalist forms, shaped the kleptocratic bureaucracies of both right and left. The development state and the failure to accommodate African law in the new states, inhibited the emergence of a rule of law. Pluralist democracy was, and continues to be, rejected as incompatible with African traditions. From decolonization onwards no constitutional architecture to deal with ethnically fragmented states has successfully emerged. The limited conceptual inheritance of common law constitutionalism and administrative law, in which commonwealth African lawyers were trained, was a significant disadvantage. The emergence of structural adjustment, and later the end of the Cold War, provided a false dawn for African governance. While a new constitutionalism of rights and new democracies emerged this chapter will argue that a rule of law cannot be based on constitutional bills of rights which are essentially untranslatable into local languages and lives, and which may simply be swept aside by the raw exercise of power. If only real popular movements can provide accountability, but are unlikely also to provide restraint, it becomes essential to explore broader sources of legal and political restraint in the voices and debates of African societies as they confront the need for sustainable systems of governance in the 21st century.

3. Human Rights Monitoring, State Compliance, and the Problem of Information

Sally Engle Merry

How does ratifying a human rights convention affect a state's human rights compliance? This critically important question has inspired considerable scholarship in the last decade, some of it using sophisticated statistical techniques and a nuanced political analysis. However, an ethnographic study of encounters between states reporting to the committees that monitor compliance with human rights conventions suggests that countries are generally willing to comply on many issues, particularly those focused on social and economic development, but resist strongly some that raise particular political concerns in the country. Thus, compliance depends on domestic political issues as well as overall willingness to comply with the terms of the treaties.

4. Intellectual Property and the Creation of Global Rules

Susan K. Sell

The dynamic interplay between domestic politics, international institutions, and state and non-state actors produced global rules for intellectual property protection. A small group of US-based private sector actors effectively lobbied for changes in American trade law, and later, a binding multilateral agreement in the international trade regime to promote foreign protection of US-held intellectual property. Since the 1994 adoption of the Agreement on Trade-Related Intellectual Property Rights (TRIPs) in the World Trade Organization (WTO) many have criticized its effects on developing countries. Both advocates and adversaries of stronger intellectual property protection have engaged in strategic forum shifting in order to gain the upper hand. Advocates, such as the U.S. and the EU, have engaged in vertical forum shifting between multilateral, plurilateral, regional, and bilateral negotiations in order to cement standards of protection and enforcement that go far beyond TRIPs. Adversaries, such as developing country governments and NGOs, have engaged in horizontal forum shifting, such as between the WTO and the World Health Organization (WHO), in order to maximize TRIPs flexibilities to retain policy space for development. The latest battles address protection and enforcement in the digital era. The recursive dynamic between various levels of rulemaking, implementation and enforcement has produced unintended consequences and surprising results including the killing of two proposed US laws (the Stop Online Piracy Act, and the Protect Intellectual Property Act) and a TRIPs-Plus plurilateral agreement (the Anti-Counterfeiting Trade Agreement) in 2012. The fate of the Trans-Pacific Partnership negotiations remains unclear, although Wikileaks released the intellectual property chapter in November 2013 that generated sharp criticism and outrage in many quarters.

5. Colonizing the Clinic: The Adventures of Law in HIV Treatment and Research*

Carol A. Heimer and Jaimie Morse

Sociolegal scholars have been sensitive to the variety of ways that law in action differs from law on the books. Gaps between the two are especially likely to arise when law moves across boundaries. This paper looks at the use of law in HIV clinics (in the US, South Africa, Thailand, and Uganda) that are involved in both treatment and research. In this case, law moves simultaneously across two boundaries when it is transported from the global North to the global South and from legal arenas to medical settings. Because the (new) legal forms are arriving in settings that already have rules, guidelines, and norms, the process of importation is quite complex. Moreover, medical conventions about how to work with rules are different than lawyerly ways of using rules, necessitating further adjustments. This chapter uses ethnographic data to show how this translation actually occurs.

6. The Politics of Islamic Law and Human Rights: Sudan's Rival Legal Systems

Mark Fathi Massoud

This chapter presents an empirically grounded analysis of law from the perspective of the everyday poor who experience the force of an authoritarian government using Islamic law for political purposes. Adopting a new-legal-realist approach that seeks to understand local experiences of law, politics, and power, it asks, how do people experience Islamic law and human rights in a political context marked by authoritarianism and civil war?

Sudan offers a remarkable case to examine the material and discursive uses of Islamic and human rights law. Until the secession of South Sudan in 2011, the country has been at war with itself for all but 10 years since gaining independence in 1956. Sudan's multi-colonial legacy – Turco-Egyptians in the 19th century followed by the British during the first half of the 20th century – forms the bedrock for the contemporary authoritarian leadership's commandeering of Islamic law to achieve political goals.

The analysis proceeds in two parts. First, the chapter explains how state officials disguise their political approach to Islamic law as an immutable will of God. But Islamic law in Sudan is made up of plural sources, including non-Islamic traditions imported by colonial and non-state actors and then labeled "Islamic" by subsequent governments. In this way, plurality and fluidity in Sudanese legal history are masked by a legal rigidity manufactured by state authorities seeking to monopolize political and economic power. Second, the chapter examines how international human rights activists in this context encourage the war-displaced poor to see human rights as a form of permanent law supplanting the immutable law promoted by the regime.

Understanding legal development from the perspective of those who experience it is an inherently interdisciplinary enterprise. Ultimately, the chapter illuminates how studying the rise and maintenance of modern forms of Islamic or human rights law necessarily involves investigating local interactions among law, politics, culture, and economic development.

7. Women's Seeking Justice at the Intersections between Vernacular and State Laws and Courts in Rural KwaZulu-Natal, South Africa

Sindiso Mnisi Weeks

For the last five years since its introduction to parliament in 2008, the South African government has seemed adamant about passing the Traditional Courts Bill – a piece of legislation that rural people, academics and civil society have criticized as being disconnected from the realities of rural people and, particularly, the needs of women. This is despite the insistence by the Bill's preamble that it is both celebrating customary law and aligning it with the Bill of Rights, and hence international rights obligations, by its terms of recognition and regulation of 'traditional courts'. Nevertheless, even as politics, uncertainty and controversy around the Bill persist, poor rural people (women making up the majority of them) must find access to justice and security somehow.

This paper draws from an eleven-month ethnographic study of how justice and security are accessed and negotiated in two traditional communities in Msinga, KwaZulu-Natal. These are communities that are troubled by high levels of interpersonal violence and personal insecurity, even as they face an ever-latent threat of political instability from long-standing tensions with

their neighbours. The paper's primary institutional focus is on the headmen's and chiefs' courts but the interplay between these forums and the many others (formal and informal) that compete with, complement, support or undermine them both locally and beyond community boundaries make up an important part of the picture. Women's stories of successfully and unsuccessfully negotiated justice and security in this area, as well as vulnerability and strength, are understood within the broader context of social relationships, values, politics and economics. An analytical framework that accommodates diverse dispute management goals helps to understand 'success' in this regard in a more nuanced way. The empirically-based findings raise uneasy questions for the quest for justice and security by rural women amidst legal and institutional pluralism and what role legislation like the Traditional Courts Bill can hope to play therein.

8. New Legal Realism and International Law Gregory Shaffer

Distinctive features of a new legal realist approach to international law are its commitment to empirical work, its assessment of the role of institutions in mediating the pursuit of social goals, its engagement with critical analysis in a self-reflective manner to question incoming biases, and its grounding in social problems in a pragmatist vein. The purpose of engaging in research in a new legal realist vein is to uncover issues and perspectives through empirical engagement about which we are otherwise ignorant, permitting our incoming predispositions (inevitable no matter how neutral we try to be) to be challenged and transformed. This is particularly important in a world characterized by constituencies with different priorities, perspectives, and opportunities to be heard. The chapter situates new legal realism in relation to the original legal realist movement in the United States and the current transnational context. It provides research examples of what a new legal realist approach to international law offers.

9. The Deconstruction of Offshore Sol Picciotto

Lawyers have played a central role in the construction of the central institutions of contemporary capitalism, which are generally taken for granted as 'natural'. They work at the interface between economic and political power, move between boardrooms and staterooms, draft and negotiate contracts, legislation and treaties, and are then responsible for interpreting the same texts, and devising forms of compliance. This chapter will focus on some key episodes in the construction of 'offshore': the exploitation of convenient jurisdictions and regulatory interactions, for purposes ranging from ship registration and tax avoidance to international financial manipulation. This dynamic was central in the 20th century to both the creation of national 'sovereignty', and its later de- or re-construction, into today's forms of multilayered regulatory interactions. These broad themes will be explored through the specific stories of the lawyers and other professionals who played key roles in these processes, especially Rudolf Elmer, whose experience exemplifies how an actor-centred account, from a historical perspective, can provide critical insight into central social institutions.

10. The Changing Roles of Lawyers in China: State Bureaucrats, Market Brokers, and Political Activists Sida Liu

Three decades of rapid reform has changed the landscape of the Chinese legal system in fundamental ways. This chapter traces the changing roles of Chinese lawyers in both the legal services market and the state by analyzing three periods of China’s legal reform: (1) the 1980s: when lawyers and other legal service providers worked in state-administered institutions and mainly served in the role of state bureaucrats; (2) the 1990s-2000s: when lawyers were gradually privatized from the state and adapted to their new role as market brokers between clients and the state; (3) the mid-2000s to the present: when lawyers were entrenched in a fragmented market for legal services but began to mobilize collectively and to challenge the state as political activists. During this time the primary role of lawyers in Chinese society has been transformed from state bureaucrats to market brokers, with a symbiotic exchange relationship forming between law practitioners and state officials. In recent years, a new political role has emerged with some progressive lawyers mobilizing individually or collectively to challenge state power. Although the Chinese state has overwhelmingly emphasized lawyers’ market function and marginalized their political function through its laws and regulatory policies, in practice the pursuit of basic legal rights and professionalism has become increasingly important for the legal profession in China. Meanwhile, even after the large-scale privatization in the 1990s, many Chinese lawyers still perform the functional role of state bureaucrats in their everyday work. These three roles, as state bureaucrats, market brokers, and political activists, are likely to persist and their interactions will characterize much of the future transformation of the Chinese legal profession.

11. The Irreconcilable Goals of Transitional Justice

Bronwyn Leebaw

Transitional justice institutions are associated with an array of ambitious goals. As abstract ideals, such goals are mutually reinforcing and complementary. In practice and in political context, however, the institutions and advocacy associated with transitional justice embody conflicting, even irreconcilable, goals. This analysis is informed by the work of legal scholars and political theorists that have drawn attention to the dual role of law in relation to violence. While law can be a tool for regulating violence and exposing abuses of power, law is also utilized to obfuscate and legitimate abuses of power. Similarly, transitional justice institutions aim to challenge the legitimacy of prior political practices by confronting denial and transforming the terms of debate on past abuses, yet they also seek to establish their own legitimacy by minimizing the challenge that they pose to dominant frameworks for interpreting the past. This chapter demonstrates how a better understanding of this tension sheds light on problematic assumptions and unacknowledged trade-offs associated with prominent claims regarding the role of transitional justice institutions in advancing political reconciliation. It concludes by discussing the implications of the analysis for transitional justice policy as well as the significance of expanding transitional justice advocacy.

12. Pushing States to Prosecute: Positive Complementarity, the Inter-American Court and the ICC

Alexandra Huneeus

A key issue regarding the future of the International Criminal Court (ICC) is the evolution of its complementarity regime. The chapter argues that the ICC should learn from and build upon the Inter-American system for supervising and guiding transitional justice situations. It begins with a description of the Inter-American System’s response to transitional justice in the post-dictatorship era, and the organic emergence of something akin to what many hope the ICC’s complementarity regime will become. It then highlights two distinctive features on which the ICC should focus as

it develops its complementarity regime: experimentalist methods, including third-party and victim participation in legal processes; and the creative pairing of retributive with restorative justice measures. The article closes with a discussion of the challenges currently facing the Latin American system in addressing international crimes and their aftermath.

13. When Law and Social Science Diverge: Causation in the International Law of Incitement to Commit Genocide

Richard A Wilson

In international criminal law, direct and public incitement to commit genocide is an “inchoate” crime, meaning that only the intention of the speaker matters, there is no need to prove that the crime was actually carried out, and no causal link need be established between a speech act and violent genocidal acts. Nonetheless, in a number of cases at the International Criminal Tribunal for Rwanda judges have found evidence of a direct causal connection between speeches by the accused and subsequent public violence. Social scientists conducting perpetrator interviews and surveying the extent of radio coverage in Rwanda have produced evidence challenging the international tribunal’s account of the role of propaganda and the media. This chapter examines the reasons why legal actors in international criminal tribunals have sought to connect speech acts and violent acts, even though there is no legal requirement to do so. The chapter evaluates Susan Benesch’s proposed framework to gauge the likelihood that a speech act might have led to genocide and offers a more empirically-oriented approach. The chapter concludes with reflections on the divergences between legal understandings of the concepts of causality and probability and those of social science.