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Observing the differences

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The theme of our conference links two separate entities with the word ‘and’: Pluralism and Law. Let us hope that Providence is speaking here in the avoidance of the expression Legal Pluralism. Now for once we will get a chance to think separately about pluralism and about law: how each of them deals with plurality. If legal pluralism had been our theme, we would discuss only the first issue, pluralism, and we would then have spent all our time searching for a theory or a system that would recognize a plurality of founding principles.

Pluralism however is non-existent from the law’s point of view. If the law comes across a pluralist trying to chart legal pluralist tendencies, it will break down the pluralist concept by selecting the relevant differences one by one. The law starts to incorporate these differences by conceptualizing them into one of its own concepts. It is even prepared to change its own concepts or conceptualization in order to cover all future occurrences. It is to the law’s credit if it achieves this transformation and transgression. The consequence of its success however is the fact that the differences of being different disappear one after the other.

Let me illustrate the way that the law deals with a pluralist concept and loses sight of the existing differences, by discussing two instances of the law at work that I have followed over the past few years and which occurred in the Anglo-Australian context - firstly in the issue of the land rights for Australian indigenous people and secondly in a prosecution concerning an aboriginal affair.

In the struggle for their land, the Aborigines have resorted to law on a number of occasions. The first notable outcome was in 1971, in the Gove case. In it the judge regretfully concluded that Australian law made no allowance for the property notions of the Aborigines. Every one of the qualities that the Aboriginals associate with their land rights is a negation of property law, according to Anglo-Saxon ideas.

In this case it is not hard to discern the basis for a legally pluralist perspective: there are at least two different cultures, the official Anglo-Australian culture and the local Aboriginal one, with the pertaining legal forms. In their separate ways, these legal forms reflect the contrast between the two cultures. On the one hand you have a law of landed property that allows the owner to refuse entry to anyone he wishes and to sell whenever he wants, on the other you have one that doesn’t allow anyone to refuse another to enter a tract of land for reasons of socio-economic or ceremonial duties - let alone that the owners may dispose of it. It is clear that the latter law of landed property, namely the Aboriginal one which relinquishes any total power of disposal, is diametrically opposed to that of Anglo-Australian law. In rejecting the Aboriginal demands, the judge in the Gove case in

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2Milirrpum v Nabalco Pty & the Cth, better known as the Gove Land Rights Case (1971) 17 FLR 141.
1971 also drew this conclusion - the Aboriginal concept did and does not fall under the prevailing Anglo-Saxon concept of property. With this decision, Anglo-Australian law necessarily entrenched itself behind its own propositions. Even so, it did not wish to institute exclusive rights or to exclude any other form of law that might exist alongside it.\(^3\) On the contrary, immediately after the decision a commission was installed to prepare a legislation that would allow scope for the Aboriginal concept. At first sight, the Aboriginal Land Rights Commission would seem to testify to an attempt to work towards a form of legal pluralism in the Australian Continent.\(^4\)

The first milestone in the history of the recognition of Aboriginal rights was reached when the Northern Territory passed the *Land Rights Act* in 1976. On the basis of anthropological findings, a formula was found for the traditional Aboriginal form of land ownership and it was enshrined in the law.\(^5\)

The first claims that ensued however exposed anthropological knowledge of Aboriginal culture as inadequate, with the result that the legal description of traditional ownership was not up to the task. Traditional ownership was reduced to a small nomadic social unit comprising a father with his married sons and grandsons; the existence of totemic as opposed to biological parenthood was only realized later. It wasn’t understood that it was the ceremonial responsibilities that are crucial and that these are passed on not to one’s own son, but to that of a sister. As a result, control over and responsibility for the sacred sites and the routes across the country connecting the different places lie in the hands of nephews, not sons. There was even less grasp of the fact that Aboriginal women maintain their own sacred places and routes and pass them on via their own lineage. To do more justice to the Aboriginal viewpoint and practice, traditional ownership as stated in the law, needs to be interpreted in a different, much broader and more flexible fashion. Anglo-Australian law has proven willing to expand the concepts juridically and here and there it has assigned land rights to Aboriginal groups.\(^6\)

It is tempting to interpret this willingness on the part of Australian judges and Australian law for a wider interpretation of the law and hence for the creation of scope for the Aboriginal viewpoint as an important step in the direction of legal pluralism. After a closer look at the material, however, one might understand my hesitation to translate the provision of rights in the Australian continent in terms of legal pluralism. Because what is it that really happens?

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\(^3\) In cases where it falls back on the dominant culture, one can assume that the law requires adaptation from the other cultures, in this instance that of the Aborigines.

\(^4\) The literature of legal anthropology uses Griffiths’ term for the adopted procedure - it is an attempt at *weak legal pluralism* (cf. Griffiths 1986, p. 5; Von Benda Beckmann 1996, p. 744). It is so called because the space that local law is given in the dominant legal system is always a subordinate one and is thus weak. Should the principle be that the two laws should exist side by side, the term *strong pluralism* is used. In that case a legal culture has its own terrain alongside and isolated from that of another legal culture.

\(^5\) The law speaks of a ‘...local descent group of Aboriginals who - (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for that land; and (b) are entitled by Aboriginal tradition to forage as of right over that land’.

\(^6\) For a detailed discussion of this episode concerning the *Land Rights Act* and claims related to it, cf. Schreiner (1997a, pp. 108-111) and the literature referred to.
In the space that Anglo-Australian law concedes to local Aboriginal law, local rights are necessarily translated into workable legal concepts. The legal anthropological expert witness cannot prevent Aboriginal viewpoints from sometimes being so distorted as to be unrecognizable - even when his or her knowledge and frame of reference is equal to the task. It would seem as though at the moments just described as legally pluralist, local rights are acknowledged; in fact however every moment only testifies to the creativity and flexibility of the dominant legal system that forces the local law to undergo transformation, only enriching itself by way of cases or attaining a new stage in its own development. Seen this way, legal pluralism is merely a confirmation of the prevailing dominant legal system at a higher level, conceived of within its own development and its own terms.\(^7\)

If then I am to trace the development of the recognition of Aboriginal law, I would do better to describe it in terms of the regular - i.e. Anglo-Australian - development and evolution of the law than in the light of some potential future legal pluralism.

I would like to take this opportunity to discuss in detail an important episode in the development of the Anglo-Australian legal system.

In the 1980s the notion still prevailed of unifying the rules of the different States and large-scale study was carried out with the aim of instituting a land rights law - a single law that would be valid for the whole Commonwealth. Due to a change of government and a sharp clash of interests, this draft legislation was never taken up. The case for the recognition of Aboriginal land rights would seem to be closed. That was until the beginning of the 1990s when it unexpectedly came on the agenda again. The Anglo-Australian legal system felt obliged to set things right within its own ranks. The Australian High Court blew the whistle on the government of Queensland that had hoped in one swoop to dispossess all its Aboriginal population by claiming the land for the state of Queensland via legislation. This action would have forced a breach in the continuous use of the land by Aboriginals. (Queensland thought that it could infer this juridical route from previous decisions in the courts and use it as a means for keeping land out of the hands of Aborigines.) The High Court judges decided that such a step would be in conflict with the Racial Discrimination Act (1975), a product of the International Convention on the Elimination of All Forms of Racial Discrimination (1965). The judges came to this conclusion because the Aborigines would be dispossessed without any right to compensation - a right that any other dispossessed person or group has automatically. In this case, known as the Mabo case, the judges also declared that the Aborigines have a title to the land - a native title that is deemed by the Crown to be respected, while retaining sovereignty over the land.\(^8\)

In the end, this amounted to an official acknowledgment that the land wasn’t empty when the English set foot there in 1788 but that it was in the hands of the Aborigines. Not only was Australia taken aback by this


\(^8\) Mabo v The State of Queensland. Because the High Court of Australia took the question ‘native title or not’ seriously, the second verdict, favourable to the Aboriginals, was only delivered four years later. They were represented amongst others by Eddie Mabo, a highly respected campaigner for Aboriginal rights who died shortly before this subsequent verdict. In the literature therefore one comes across the Mabo II case (1992) 175 CLR 1, as well as the Mabo I case (1988) 166 CLR 186. Cf. Schreiner (1997a, pp. 112-114).
unexpected decision, the same was true of Anglo-Australian law. In order to continue to exist as a system, Anglo-Australian law was obliged to incorporate this ‘new’ title to the land and to decide what place this title should assume with regard to other existing titles - such as freehold, usufruct, rent and leasehold - and what retroactive power it should have. The legislators confirmed the juridical decision in the Mabo case - that the land was the property of the Crown but saddled with a title, the native title, so that the crown could not freely dispose of it or engage in practices such as grants or leases of any of it. In a manner of speaking, the Crown does not have full ownership, only an empty title.

In 1993 this important episode in Anglo-Australian legal history was sealed with the passing of the *Native Title Act* (Cth).

Due to its capacity for incorporation, Anglo-Australian law may have emerged stronger from the struggle and capable of facing the next stage with confidence. 9 What is the situation however with Aboriginal law, not to mention everything comprising the context in which those rights are or were realized? What is the best way of getting you to look at the world of the Aboriginals?

A comparison with the world of literature may offer some possibilities. The Aboriginal view of the land is in a certain sense in the same relation to the Australian law after the *Native Title Act* as that of an original text and a version or translation of it in another language. Take Dante’s *Divina Commedia* and a translation into English. The translation may be a superb text in English, better than any other translations; it may even be better as a poem than some poetic masterpieces in the original language - nonetheless, the translator is all too aware that no word or line is equal to the original. He has done his best, according to his lights, and enriched the National Library with a Divine Comedy. The English are surely delighted to have it, but are no less delighted by the fact that the original version of Dante’s Commedia remains, inviolable for any rendition or translation into any language whatever, so that one cannot conceive of the Italian cultural heritage without it. 10 Besides Dante’s *Commedia* - and very probably as a result of it –

the Italian language has numerous other masterpieces. If we draw a parallel with the world of the Aboriginals, we can state that, despite the attempts at translation that Anglo-Australian law has undertaken or is preparing, the Aboriginal view of the land within the Aboriginal cultural heritage remains as self-evident and inviolable as before; this fact also implies that new trends have emerged in Aboriginal culture and will continue to do so. 11

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9 The first test was the *Wik* case. The High Court decision has proven to be in line with the Act (*Wik Peoples and Ors v State of Queensland and Ors* (1996) 141 ALR 129). This line however had too much consequences to the opinion of Prime Minister Howard and the majority of the members of parliament. In 1998 the Ten Amendments were passed. Now the route to claim Native Title through Court has become a more difficult one.

10 Only total destruction or extermination could put an end to Dante's *Divina Commedia*, as book or in human memory.

When we start looking for the words to describe the Aboriginal concept of land, we realize that their heritage of rights and culture is an undoubted contribution to our own language. Just think of expressions such as ‘dream places’, ‘dreaming-tracks’, ‘songlines’, ‘Footsteps of the ancestors’. They are all words or expressions waiting to be included in the dictionary. Each of them comes to us in a translation of something that in itself was a translation of the Aboriginal fact – the whole English literature not the least Bruce Chatwin’s celebrated travelogue The Songlines. In it he learns about, ‘... the labyrinth of invisible pathways which meander all over Australia and are known to Europeans as ‘Dreaming-tracks’ or ‘Songlines’, to the Aborigines as the ‘Footprints of the Ancestors’ or the ‘Way of the Law.’ (1994:2). He is told ‘... how each totemic ancestor, while traveling through the country, was thought to have scattered a trail of words and musical notes along the line of his footprints, and how these Dreaming-tracks lay over the land as ‘ways’ of communication between the most far-flung tribes. A song (...) was both map and direction finder. Providing you knew the song, you could always find your way across country.’(1994:13) ‘The man who went ‘Walkabout’ was making a ritual journey. He trod in the footprints of his Ancestor. He sang the Ancestor’s stanzas without changing a word or note - and so recreated the Creation. Aborigines could not believe the country existed until they could see and sing it - just as, in the Dreamtime, the country had not existed until the Ancestors sang it.’ (1994:14)

I should leave the describing of the Aboriginal perspective to this point and go back to the Anglo-Saxon Law, for it is the purpose of this paper to trace the moments where the law is loosing sight of the actual differences. It turns out to be the very moment law tries to deal with them under the use of a concept such as legal pluralism. I give you as promised another example which I took from a criminal case: the case R v Walker of 1994. In it an Aboriginal man was put on trial for stabbing another Aboriginal to death during a fight.

The Australian judge found that Walker was indeed liable to punishment, but in imposing his penalty he took into consideration the fact that Walker on returning home would in all probability be ‘speared’ according to Aboriginal custom. To protect Walker from being punished twice, he imposed a conditional bond. Should it turn out that on returning home the Aboriginal spear punishment was not imposed on him, he would have to go to prison instead.

The Aboriginal response to criminal behaviour, known in Aboriginal English as ‘payback’, is now recognized in official Australian criminal law. Criminal law has accorded it a place in the series of existing alternative punishments and sanctions under the heading of ‘Aboriginal punishment’, thus promoting it to the status of multicultural series. The inclusion of an Aboriginal legal custom in what is deemed to be official law would seem to be a step in the direction of legal pluralism. But just


13 In his note to the verdict, Zdenkowski describes the acceptation of Aboriginal penalties as ‘a weak version of cultural relativism’ (1994, p. 27). The Australian press, reporting on the verdict, stated that the idea was that judges should retract and allow local law to take its course. It sees it as a ‘stronger’ form of pluralism that goes further than the weak form by which the dominant legal system does not retract but allows the local system room within its own order. (For the difference between weak and strong pluralism, see also note 4.)
as in the cases of ‘traditional ownership’ or ‘native title’, ‘payback’ is a device that only serves to demonstrate the flexibility of the dominant legal system; it is an important contribution to the tendency that prevails in many modern legal systems towards more alternative forms of punishment and fewer unconditional imprisonments. 14 In this case the judge with his device of translating the Aboriginal spear punishment into an ‘alternative punishment’ aims also to safeguard himself against a potential breach of the ne bis in idem principle that prevents a double punishment for a committed crime. It is ironic that, with this translation, the judge has unintentionally jeopardized the same principle that makes it unlawful for an offender to be tried twice for the same offence.15

The judge in the Walker case who thought he was simply delegating the punishment, was in fact committing the Aboriginal to what in an Aboriginal context can be regarded as a trial. The practice in Aboriginal law is for a deliberately prepared and properly organized duel to be held shortly after the incident has occurred. In it, the contending parties - the offender and a close relative of the victim - challenge each other with javelins or spears. This is done in the presence of the Aboriginal community that witnesses the deeds of both parties and passes judgement. The outcome is determined by the course and protocol of the combat.16

What the judge did in the R v Walker case was to devise a translation for the Aboriginal procedure. It was one which fitted in with the juridical vocabulary and did not offer any problem for the prevailing legal system, but which has turned out to be an inadequate if not downright erroneous translation, now that we have more knowledge of the Aboriginal background. Even so, the question remains of whether the criminal judge was aware that he was being publicly confronted with this blunder, when the Aborigines informed the press that in this Walker case they would not set the Aboriginal procedure in motion. They said with some emphasis that they had entrusted the trial to the Australian legal system and that it was no longer any ‘right time’ for their own proceedings - it was ‘not appropriate’.17 The right moment to institute a trial by their own legal system had already passed. If the law was to take its course, Walker would have to do time in prison once his parole has

14 Fewer prison sentences also helps to solve the problems of the shortage of cells, the high number of Aboriginal detainees and the suicide rate which is higher among Aborigines compared with other prisoners (cf. The report of the Royal Commission into Aboriginal Deaths in Custody 1991).

15 To prevent cases of double punishment and double prosecution an Australian judge will rely on the International Covenant on Civil and Political Rights (1966) art 14(7): “No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.” (Vgl. Flynn 1996, pp. 57-58) In Holland there is no question whether the prevention of double prosecution is governed by the ne bis in idem principle. The question whether the prevention of double punishment is governed, however, is usually answered in the negative with the argument that in some cases the law specifically permits an accumulation of penalties. The prevention of a double punishment should therefore be governed by a different principle - that of proportionality, that judges need to take into account in deciding on the extent of the sentence (cf. NJB-special Samenloop van Sancties: Brenninkmeijer et al. 1992, p. 1325; Corstens et al. 1992; 1343). In Australia too emphasis is placed in fixing the sentence on ‘the principle of equality of impact’ (cf. Ashworth 1983, pp. 277-278; Löfgren 1997, p. 22).

16 Once again I can only touch on the subject. For more about legal duels and sanctioned single combat, cf. Schreiner (1997b, p. 844 ff.).

17 In de TVdocumentary Payback by Liz Jackson, produced by Ray Moynihan, shown on Australian TV as part of the ABC series, 4 corners on 12 September, 1994.
I have tried to give an extract of the developments concerning both the recognition of Aboriginal land rights and Aboriginal criminal law practices as they answer to legal pluralist tendencies. In both cases, my conclusion is that it may be useful - from the standpoint of the politics of law - for the dominant Anglo-Australian legal system to use the term legal pluralism in cases where the law has made allowances for local Aboriginal law. In doing so, Anglo-Australian law at least testifies to its good intentions by acknowledging the existence of other legal cultures besides its own.

From a juridical standpoint however, it is not useful to speak of legal pluralism and the Anglo-Australian legal system would do better to avoid the term. As we have seen, the notion of pluralism only disguises the juridical potential for remodeling the local law, so as to assimilate components of it that are acceptable to the dominant legal system. The pluralist perspective will erroneously continue to speak of plural legal forms, where Anglo-Australian law has simply reduced these forms to one - that is, its own - while enriching it with concepts such as ‘payback’, ‘traditional ownership’ and ‘native title’.

With regard to legal anthropology that aspires to observe Aboriginal legal practices, my conclusion is that it is better to avoid the term legal pluralism completely, because as we have seen any conjuring with the notion of pluralism only serves to confine us within the framework of the dominant legal system and its evolution. In the end, the framework of legal pluralism deprives us - and not only us, but also Australian judges or legislators - of a clear view of the framework of local Aborigine law and the steps that the Aborigines take.

I would like to put it in another, more general way. Law sets the trap for us, into which we inevitably fall as soon as we start talking in terms of differences and bringing them under the law; in doing so, we lose sight of the differences. Pluralism makes no difference. It focuses on a plurality, but it is assigned to conceptualize the plurality of all kinds of systems and forms, to measure them up and to keep them in place, even if this place is that of being different. In doing so pluralism is so absorptive as a concept that it can incorporate every existent plurality of all kinds, while at the same time liquidating them. It is the character of every pluralism to reduce the plurality that it aims for to a unity - a unity that creates order in a plurality of similarity and difference. Pluralism and Law may with a certain pride state that they can embrace a great deal; at the same time they have to admit that they are the only thing left at the end. In this sense the trap they set proves to be their own pitfall.

So what to do then to keep up the differences? One should not try and confront a difference with a similarity, but with a difference, nor the irreducible with what can be reduced, but with what is irreducible. Only then is one faced with a dizzying quantity of particulars, each of which calls for separate attention. The extraordinary character of an autonomous legal system arouses our curiosity, causing us to wonder about the oddities of every other legal system, whether familiar or strange. The extraordinary character of one culture sets us straightway on the trail of the specific qualities of other cultures - with the result that we will inevitably be confronted with the oddities of our own. It is similar to the delight we feel in discussing the peculiarities of our own language and cultural

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18 During the period of the bond Walker was convicted of other offences, and was brought before the Court to be dealt with for his non-compliance and convicted.
background, when conversation turns to the difference between certain languages. Isn’t it fascinating to discuss the difference between Italian and English, and then to turn to subjects like the opera and thatched cottages, Casa Nostra and the Third Way, Titian and Turner, Lido near Venice and Bath? Just think how much time one can spend on a single word in Dante’s *Divina Commedia* that we can succeed in describing but which we have no equivalent for in our own language. Semantic peculiarities, idiosyncrasies of syntax and striking rhythms are fascinating for us. Had we the time to do so, we’d look at even more languages to highlight the difference still more. Take Chinese, for instance...

I’m sure you will agree that a pluralist view of languages is to be found among those who think of language mainly as a vehicle for communication, for instance, the advocates of Esperanto - although I would imagine that among the latter, there are also many people who are intrigued by the different languages and who would propose Esperanto as yet another variant of language, one with peculiarities all its own.

Despite my exercise in legal pluralism I hope that I have provoked your curiosity for certain peculiarities of the Australian continent, for Australian judges and the footsteps of the ancestors, for the Commonwealth - or rather for the separate states - and for the labyrinth of Dreaming-tracks or Songlines, for Australian leaseholders and their sons and for the Aboriginal nephews who appear as inheritors, for modern punitive measures and for the judicial duel.

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