

## **Flying Kites in Pakistan: Turbulences in Theory and Practice**

Werner Menski<sup>13</sup>

### **Introduction**

This article focuses on global legal theory in the twenty-first century and explores where we stand today in relation to legal theorising that should be globally applicable rather than serving eurocentric agenda, state-centric positivist orientation, or some other type of myopic vision to the exclusion of other forms of law. Some wider comments link this to identity construction and illustrate the complexity of Pakistan's current struggles to come to terms with plurality, diversity and difference. The article then shifts focus specifically to connect theory and practical application, culminating in the model of a kite, a familiar image in Pakistan, which people may not immediately associate with law.

I am not alone in writing about Pakistani law using the kite image and linking this to identity. Several decades ago, Professor J. N. D. Anderson (1967: 139), a late colonial expert on Islamic law, South Asian Muslim law and specifically what he called Anglo-Mohammedan law, examined to what extent Pakistan was an Islamic state. Notably, he concluded his assessment by comparing the people of Pakistan with boys flying a kite on a misty day: 'They cannot see it; they cannot tell where it is going; but they certainly feel the pull'. Except that Pakistan has now grown into a rather patriarchal adult and could no longer be depicted as a crowd of children, the identity crisis continues, and the role of Islam in the legal system of Pakistan remains of much scholarly and practical interest (Lau, 2006). The present article picks up this kite image and uses it for the central argument that without skilful legal kite flying, the still rather young nation and Islamic Republic of Pakistan will crash rather than prosper. Carefully considered recognition and acknowledgement of legal pluralist methodology in today's global context, rather than simplistic and now outdated reliance on Western-style positivist methodology or religiously underpinned reliance only on Qur'an and Sunna, thus becomes a critical survival skill for the entire nation, its leaders as much as its common people.

According to many assessments the skies over Pakistan have become more clouded and the recent massive floods led to further questions about good governance and the role of law.<sup>14</sup> I link such debates here particularly with the task of a nation and its people to find their own culture-specific identity, which the Japanese scholar Chiba (1989) called 'identity postulate'. Legal theory, this illustrates, can certainly teach us important lessons about the crucial ongoing challenges for Pakistan and offers sustainable suggestions for remedial action. But it will undoubtedly and necessarily be a kite journey with lots of turbulences.

---

<sup>13</sup> Professor, School of Law, SOAS, University of London, UK.

<sup>14</sup> See e.g. 'How to fix flood-hit Pakistan', BBC News South Asia 7 September 2010. <http://www.bbc.co.uk/news/world-south-asia-11200179?print=true>.

### **The Need to Find One's Identity**

In Pakistan the kite is now a banned symbol. This is really sad and quite short-sighted. But the ban may have the opposite effect, as it makes more people realise that banning something does not actually make it non-existent, it only changes the legal status of what is being banned. A simple example of the limits of law, it is also an illustration of the lack of plurality consciousness that has characterised much of legal development in Pakistan. The banned kite image exists now in people's minds as a cultural symbol and a localised memory in an agrarian society, rather than being seen in Pakistan's skies at certain times of the year when people used to enjoy flying kites.

It is somewhat bad timing that I now equate flying kites with thinking about law, especially after having earlier worked in Pakistan over ten years until 2001. I always encourage my students to explore the rich pluralities of legal analysis. Banning something through strategic use of law and power could lead to more open discussions of how damaging a symbolic ban on anything, whether *burqas* in France and other places, or kite flying in Pakistan, may actually become. Do law makers really think about the consequences of their actions, or do they just enjoy the prerogative of making law? Specifically in a big nation like Pakistan that still struggles to find its identity after more than 60 years of independence from colonial and other subjugations, this kind of ban is a crucial legal intervention with many potential consequences. If France is afraid of *burqas* now, and Pakistan of kites, these are indications of deeper crises of identity, above all of unease about recognising socio-cultural pluralism as a fact of life.

Anywhere in the world, pluralism is not a new phenomenon, or simply a consequence of globalisation. It has ancient roots, as Muslims know from the early history of Islam itself. In the early twenty-first century, we seem to have become so fixated on certain powers of law that many people blindly believe that outlawing something will make it non-existent and will help to influence a whole nation's identity formation. From a legal theoretical perspective, doubts are in order whether such legal interventions are constructive, in other words, if they are 'good law'.

Globally we are everywhere facing theoretically similar issues over acceptance of diversity, of 'the other' in more fashionable scholarship terminology. Muslim 'others' are rightfully but perhaps too aggressively claiming a place in European identity today and I have started talking about *Eurosharia* and *Eurodharma* recently to remind my European colleagues that we have not only clear evidence of *angrezi shariat* in the UK (Pearl and Menski, 1998), but also other multiple manifestations of hybridisation among Asian and African migrant populations in Europe. These are different from place to place, with certain 'glocal' and 'ethnic' key elements in them. But if Muslims in Europe and other migrants and their descendants rightly question various assimilationist forces within Europe, and it is still not easy being British, as Tariq Modood (2010) now posits forcefully (see earlier Modood, 1992), then questions also need to be asked about pluralist co-existence in Muslim countries, where 'others' often have a much older history of sharing a common space. In today's interconnected world, where accounts of new atrocities travel worldwide within seconds, we cannot have one form of recognition or accommodation without the other. While every country should have the right to determine its own identity, the various people(s) in those countries also have a voice; relevant claims need to be exercised with circumspection and in a spirit of plurality-consciousness (Menski, 2006).

Chiba (1986) taught us persuasively that law is everywhere a combination of ‘official law’, ‘unofficial law’ and ‘legal postulates’, the latter being various kinds of value systems, including religion, which are critical in identity formation. The general pattern appears to be that if a country is at ease with its identity and its people respect others and acknowledge various forms of difference, everybody has a higher chance to lead a peaceful life together and the nation, no matter how large, will prosper. In a scenario of fierce struggles over identity, even in a small group, there will be tensions, much stress at all levels, even forms of ‘honour killing’ and, at a larger scale, civil war. If things get out of hand, a country may turn against itself and self-destructs.

When Pakistan and Bangladesh divorced in 1971, one found precisely such a scenario. After this acrimonious break-up, the former West Pakistan, which certainly saw itself as the dominant partner in that failed marriage of convenience, had to find its own identity as Pakistan, minus those Bengali ‘others’. Suddenly it became even clearer that not all Pakistanis are Panjabis. East Pakistan as Bangladesh also continues to face turbulences over the modalities of acknowledging its own internal diversities as another Muslim country with significant non-Muslim minorities.

Chiba (1989) stressed that every country has to develop its own identity postulate, which may be a painful journey. One observation seems obvious for a German (for I am not a former colonial officer of the Raj like Professor Anderson, but a global scholar with central European origins), namely that any country that tries to find its identity by abusing law in various forms instead of recognising the realities of social, cultural, religious and also legal pluralism, may bring on itself and its people a violently turbulent scenario.

If a state does not get the balance right in managing the various conflicting pulls on the kite of law, there is bound to be trouble not only in national identity formation, but we also find much violence in communities, on the streets and even in homes. Horrid dramas of that kind are increasingly visible in case law that few people read and are aware of. Such fallout is far too superficially discussed as political turbulences by political scientists, and as social strife by various social scientists who tend to blame ‘culture’, ‘tradition’ and patriarchy, while lawyers seem to claim innocence about the consequences of their interventions. Not only lawyers, but all social scientists had better learn that their respective field of study is actually a vast plurality, an interdisciplinary arena in which all kinds of normatively competitive entities constantly make conflicting claims. Social scientists like to think that they are better at theorising this than lawyers, and they may be correct. In practice all fields of academic analysis remain marred by theoretical confusions and politicised turbulences, and we all struggle with handling the troublesome phenomena of diversity and difference.

Sadly, since the field of law is damagingly often seen as a separate entity altogether, especially by social scientists, the cherished power to simply make one law for all does not get challenged with sufficiently robust interrogation. Legal uniformity is a fake axiom, even in Britain (Pearl and Menski, 1998). While social scientists are not automatically wiser than lawyers, lawyers are not more powerful simply because they know how to throw their rule books at problems. A pattern of bad management of law and of social sciences, and of their interactions, significantly contributes to stresses in a state’s identity construction, which then often directly generate disturbing consequences

at regional and local levels, creating individual mental turmoil that leads to much further violence and self-destruction. Huge loss of life, unhappiness and selfish fights over property arise in scenarios where people often desperately need each other's support to survive on a day-to-day basis. Pakistan cannot afford such destructive wastage.

Current scholarship worldwide is now beginning to recognise that boundary crossing between state law and non-state laws (Hinz and Mapaire, 2010), private and public spheres (also for Pakistan see Yilmaz, 2005), formal and informal types of law (Mehdi et al., 2008; Grillo et al., 2009; Foblets et al., 2010), and law and religion (Ferrari and Cristofori, 2011) is a hugely important area of legal analysis. The boundaries of public law and private law are now seen to be crossed in many more ways than was earlier imagined. An important multi-volume global *Encyclopedia of Legal History* emphasises the multiple links between law and culture (Katz, 2009). Acknowledging this already represents one important step forward, since interdisciplinary and comparative area studies have simply not received enough sustained attention. Following up such studies requires what Muslims might call scholarly *ijtihad* of various types, since that technical term also denotes a plurality of pluralities and is not merely a reference to the exertion applied by religious scholars.

A pluralist methodological approach in law requires from lawyers and social scientists, first of all, an ability to distinguish between different kinds of law that frequently operate in competition with each other. Law is not just law, then, it is a plurality of pluralities in itself. Today we are learning again that we need to be engaged much more seriously in complex theoretical discussions about the basic nature of law. Too much emphasis has been given to selfish boundary drawing, verbose protection of the cabbage patches of law, ascertaining what is – and what is not – law. More attention needs to be focused on the actually quite predatory tendency of law to colonise other entities when it suits a particular legal player. How far can law go? Religion, ethics and morality often claim legal force; society and culture assert their power as law; today's states are struggling to protect their cherished legal authority against international conventions and various regional legal arrangements. Everywhere, thus, law is inherently plural, is its own 'other', easily corrupted by power and skilful in avoiding accountability. Often there is too little awareness of the scope for sustainable compromises that allow various diversities to co-exist. Power, of course, is tempting, not only in patriarchal social contexts or for lawyers. However, if life itself is plural, legal approaches that seek to deny plurality will have to resort to dodgy techniques like symbolic official bans of *burqas* or kites to achieve highly questionable objectives of excluding certain forms of diversity. The key issue then becomes what should be our criteria in law for making certain choices, but not others. At the start of the new millennium, global legal scholarship on legal pluralism has become increasingly aware that more academic attention to interdisciplinary practical application is a really tough testing ground for legal scholarship of the highest quality.

This article is thus also an urgent plea for countries like Pakistan to improve and update legal education systems. Whether we like it or not, law is a critically important superstructure (in a non-Marxist sense) that impacts on all our lives every single moment of our existence. If even lawyers do not understand this internally plural phenomenon of law properly, as it manifests itself at global but also at glocal, local and even individual level, neither they nor the people or bodies they work for or interact with will

comprehend the world around them. Nor will they understand themselves as individual agents that are at the same time a legal, social, religious, cultural and psychological entity. Lack of awareness of such internal pluralities, coupled with abuses of power and privilege by those who do know, but unfairly exploit this advantage, could be major reasons why the Pakistani kite still faces serious turbulences regarding identity formation. It is not good enough to blame colonial interventions for present troubles. Too few lawyers today are well-educated; everyone plays politics with law, causing multiple havocs. As individuals, members of families and local communities or as citizens, people in Pakistan will continue to face disorientation and massive confusions, ultimately unable to lead a good life if the basics of pluralist legal management are not understood and are not exercised responsibly. For law is about life, as much as it seeks to regulate life; the two are interconnected. This, I am increasingly convinced, is a globally valid message that an ageing law professor who seems to have turned into a rambling philosopher or, as some now say, a psychologist, should share before it is too late. I find myself concurring in this regard, too, with my much-respected colleague An-Na'im (2008: vii) who speaks explicitly as a Muslim, while I address closely related issues more from the perspective of global legal theory.

### **The Phenomenon of Global Law and Our Deficient Knowledge**

So let us open our eyes widely, wherever we are and scrutinize the world around us and look inside ourselves as well. Law is everywhere manifestly not simply state law, though we seem to be living in the age of state-centric positivism, whether we think of the Anglophone concept of Austin's law as 'the command of the sovereign', or the civil law image of Napoleon making his code by candlelight. There are different cultural patterns of *mentalité*, as Pierre Legrand (1996: 237-238) calls this. In late modernity, the realisation that legal positivism is itself an internally plural concept and needs other types of law to succeed as good law is finally striking home, reaching a stage which may well be called post-modernity. Whatever we call it, this phase of pluralist re-awakening builds on the past, but is also our own lived presence, and lays foundations for the future. We are then, as thinking humans, ultimately equal interconnected beings, travelling together on a slow train of history. Looking out of the window, we perceive the world around us and those stratified connectivities in different culture-specific ways. We often call this perception 'religion', because matters of belief and conviction are involved, not just simple visions or social practices. While more is said about religion as law below, the key point here is that lawyers, the legal passengers on that train of history, like to think that they control the world and their interventions can cover and dominate the entire field. In its extreme form of positivist hubris, this becomes legocentric fantasy and potential terrorism in the name of law. Lawyers have hijacked the global train, it seems, and wear different masks.

Similar risks of impaired vision of complex theories and deliberate distortions when it comes to legal scholarship and its day-to-day application arise from the current global fashion of viewing law increasingly just through the lenses of international law and human rights. This perspective now dominates many law schools (Cane and Conaghan, 2008), but is by itself also not a feasible method to understand and manage law's complexity worldwide. Some scholars are beginning to realise that international law is itself a plurality of pluralities (Wagner and Bhatia, 2009). Like in Chiba's (1986; 1989) case, one should wonder why there are always significant Asian voices in this plurivocalisation of legal discourse.

Acknowledging the inherent limits of a legal mono-perspective regarding state law and international norms, however, we then also need to realise and admit that looking at law only through the lense of religion cannot be feasible, either. It is just as unfeasible as perceiving law only bottom up, from the chthonic perspective (Glenn, 2006), through the lense of social norms at micro levels. More dangerously, regarding religion, the risk of confusing the Holy Qur'an with state-made legislation needs to be raised here. Many scholars of Islamic law, Muslims and non-Muslims, lack clarity on this particular crucial point in their writing. For Muslims, this would mean an inbuilt necessity to be conscious and honest about the fact that Allah, as the power centre of this system of global connectivity, is not merely some kind of power-hungry Napoleon, but laid down, as received by the Prophet, an entirely different kind of law, which is ultimately all-encompassing, but thus also internally plural. God's law, this means, is a different kind of law than state law. Good Muslims themselves taught me that this should certainly be seen as a form of natural law. Natural law, every law student knows, is not the same as positive law. Many scholars and Muslims, however, seem to ignore the consequently cogent basic message that a good Muslim, at the end of the day, is then of necessity a pluralist (Menski, 2006: 281).

The worldwide so-called resurgence of religion and 'fundamentalism' takes many forms today. It does not only reflect the growing prominence of Islam but also the emergence of Islamisation as one specific form of globalisation (Glenn, 2006), competing with others. This competitive scenario simultaneously challenges the concepts of state-centric positivism and of international human rights, leading to huge debates and tensions about past and future alike (Hallaq, 2009; An-Na'im, 2008). The input of religion as a perennial manifestation of natural law is now taken more seriously again by global legal scholarship, and 9/11 may have something to do with that. It seems that we have now digested a little better the consequences of the Enlightenment. Jürgen Habermas, it appears, speaks in the context of Critical Theory of the 'unfinished project of modernity' (Borradori, 2003: 15). But do lawyers care to read Habermas? Notably, this discourse takes the same direction as taken by Jacques Derrida, who famously stated that justice is always in the making (*à venir*), a position acknowledged recently by Amartya Sen, too. The modern world has not become a rich paradise, but is a globe full of gloom and poverty. Various ambitions, famously fixed into Millennium Goals, lie partly shattered by the forces of nature and unscrupulous mismanagement of increasingly scarce resources.

Renewed pessimism about global development needs to be seen in conjunction with the rising recognition of the power of religion as law. The state-centric promises of linear progressive development were ambitious, quite often fake. Poverty eradication and good governance cannot be decreed by legal dictates; there are limits to what law can achieve (Allott, 1980); morality and ethics remain relevant to legal processes. This reluctant awakening to the inherent pluralities of law involves also an acknowledgement, in secular post-colonial but still Western-dominated times, that religion is not irrelevant, but of course faith itself cannot feed people. In these same times, also the age of post-modernity, we discover now that Eurocentric post-Enlightenment secularism has silently turned into another form of religion that sought to dominate the globe in a different way than before. If colonialism was partly about some Christian 'civilising mission', modernist secular globalisation was supposed to promote 'good governance' through law as a tool of social engineering. Obviously, various 'others' were going to protest about such new colonising game plays. As the world experienced the end of the colonial era,

the slow-moving train of history slithered like a snake in new skin into an era of post-colonial reconstruction that has now turned out to be yet another conflict scenario. So it is not surprising that today's fashion industry among lawyers is post-conflict reconstruction. The question still remains why those conflicts arose, and whether we actually know a sustainable way forward. Offering cheap solutions remains a speciality of dodgy positivist legal advisers on fat fees, a form of leakage. Poorly developed legal theorising feeds intellectually impoverished lawyering that promises global uniformity, but leads us all into new forms of conflict, which in turn require more human rights plumbing. The major beneficiaries, always lawyers and policy makers, often act also as politicians and all become rich in the process, while many Pakistani children remain behind, illiterate and underfed.

We see the awful consequences of such circuitous abuses of resource allocation, power and knowledge all around us. We do not seem to agree on anything anymore and confusion generates more legal profit. Some players resort to prophetic promises and appeal to religion; others stubbornly rely on rule of law concepts and the secular religion of positivist power. Serious conflict analysis through pluralist methodology frightens many people, including remarkably many human-rights activists. Rather simplistic allegations that pluralism allows anything without moral limits are advanced to frighten keen enquirers. Deep pluralist methodology is, however, seriously concerned to identify what, in any particular and specific situation, may be 'the right law'. This is what irritates lawyers who prefer uniformity and precedent. Pluralist methodology works from case to case; it is not based on submission to a universal decree from above or a permanently binding rule. This is why religious fundamentalists of all types loathe it, too, since it highlights especially the situation-specificity of *shari'a*, while not actually undermining belief in God. Plurality-conscious forms of legal *ijtihad* seek to empower the glocal, the local, the group, and ultimately the final unit of accountability, the individual, but this approach runs the risk of being given *kafir* status. There is deficient recognition – and much self-serving reluctance to admit - that none of these entities and legal players can actually ever operate without awareness of the interconnectivity of all aspects of human life.

Since this particularistic pluralist approach also often tells the state to respect the informal law-making powers of various allegedly 'extra-legal forces', we realize in addition that legal pluralist methodology comprehensively interrogates and undermines the exclusive authority claims of legal positivism. Legal pluralism, then, seriously challenges any form of mono-vision of law. That is why, among other reasons, talking of legal pluralism – and of kite flying - upsets so many lawyers. They are put in a tight corner when abuses of power in the name of law become apparent for all to see, but still find verbose explanations to justify legal monism.

The fears that 'anything goes', regularly thrown as wild allegations at even preliminary attempts to cultivate pluralist analysis, therefore really just mask the speaker's fears of losing power and control over something that cannot be fully controlled but may be easily misused. The hidden agenda is often desire to drive development, even of the whole world - an entirely unrealistic but rather common human ambition. Deep down, many lawyers are like missionaries, then, wanting to impose their own values on all others. Claiming to be right, they simply occupy the moral high ground. Tony Blair, notably a trained barrister, was evidently a master of this strategy.

Politicians like Blair rejected claims for a role of Islamic law in English law while introducing Islamic finance regulations around the same time. Public allegations that pluralist methodology leads to confusion and terror distract us from noticing self-interested use of pluralism when it suited the state's agenda. Other fraught discourses simply mask disappointment with the uncomfortable fact that global universality would actually mean a monstrous threat to individual human rights and a refusal to recognize such basic truths (Menski, 2006: 13). There are few academic Pakistani voices telling us explicitly that state intervention is perceived as potentially monstrous (see excellently Chaudhary, 1999). We urgently need more plurality-conscious scholarship that analyses justice in practice.

In South Asia, as in some other parts of the globe, under banners of 'War on Terror' or *jihad*, people are killing each other, even closest kith and kin, in the name of so-called 'honour' (Welchman and Hossain, 2005) or some other ideology. It seems as though we have learnt no lessons from history other than that power is powerful, knives and fire can be used for all kinds of purposes, and the biggest bombs are likely to cause the most massive damage. Mutual accusations of being totally misguided and evidence of directly clashing Truth claims have precipitated the world into a spiral of violence and poisonous rhetoric, causing havoc also in Pakistan. Self-seeking symbolic actions such as the recent threat to burn the Holy Qur'an in some little American church will of course generate further violence at street level in Pakistan and Afghanistan, or lead to other foolish symbolic action, now reported from South Africa,<sup>15</sup> where skilled legal kite flying has evidently become a tool in national reconstruction and pluralist re-balancing.

While desperately outraged depictions of violence have become big media business, among academics and policy makers mere descriptions and critiques of horror and terror dumb braincells and darken the horizons of hope. They also reflect and reinforce a victim mentality that fails to offer sustainable solutions for pluralist compromises; it is actually another form of seeking refuge on the moral high ground. Insufficient intellectual and policy attention is given to analysing why and how such conflicts arise out of competing perspectives in the first place. Instead of reflecting in more depth on how to manage those various competing perspectives, acrimonious complaints are often really just verbal attempts at blacklisting and banning 'the other'. Since that 'other' will not simply go away because someone protests about their existence, we seem to be running around in circles and everyone is getting more stressed by Islamophobia, communal riots and related violence all over the world.

We also seem to ignore at our peril the need for what one of my brightest PhD students, a deeply religious secular young Turkish Muslim, simply calls 'altruism', an ultimately self-interested recognition that one needs to leave room for various forms of 'the other' if one wants to live in peace with oneself. This goes for entities like the Turkish state as much as for individuals anywhere in the world. In many British and other courtrooms, harrowing cases of asylum seekers disclose that this basic message is lost on far too many people, who engage in mindless interpersonal violence, even within closely knit families, and seem to push the limits of cruel sophistication of terror rather than

---

<sup>15</sup> Apparently, according to the *Weekend Argus*, a man called Mohammed Vawda wanted to declare 11 September 'Burn the Bible Day', but was stopped by another Muslim who as attorney for 'Scholars of the Truth' won a court injunction to the effect that freedom of expression in South Africa is limited.



exploring possibilities for the peaceful management of pluralist co-existence. Here, too, the public/private boundary is a major arena of conflict.

### **The Necessity of Pluralist Legal Analysis and its Relevance for Religious Discourse**

This is why the image of the kite has become so instructive in analysing global legal theory. Law is not just state law or religious law, viewed in a closed box (Twining, 2000). Rather it is a vulnerable dynamic structure that floats in the air or moves in water,<sup>16</sup> constantly subject to turbulences and strains, both in theory and practice. The inherent dynamism of law is confirmed by such images and models. Refusing to acknowledge this, anywhere in the world, amounts to refusing the presence of pluralist lived reality. Law is indeed, everywhere and in many forms, a powerful tool and a wonderful means of manipulating all kinds of processes. Being so dynamic, it remains slippery and subtle, constantly challenged to prove its worth in terms of feasibility and sustainability, easily subject to devious manipulation and abuse in the name of power, religion, or simply some pig-headed egoism.

In all of this turmoil lawyers - and also many judges therefore - have too easily forgotten that law is also a social science and that there are now billions of people on this globe, their lives vicariously affected by how we handle global legal theory. If we fly the kite of legal theory wrong, it may crash. Far worse, many individual kites will face destruction, because we are simply all kites ourselves, subject to predictable and unpredictable turbulences at any moment of our own interconnected lives. We exist on strings that may become invisible. We are not, as the Enlightenment purported to claim, ever totally autonomous individuals. Everywhere on the globe, in their own culture-specific ways, people as individuals, within their families and societies, continue to make and apply laws, every single moment of their lives, quietly and often peacefully sailing along like kites on a nice day. This constant process of applying law goes largely unnoticed and is not being picked up by legal radars, mainly because we programmed those radars to distinguish the legal from the non-legal, and did so far too narrowly. To dismiss most of the reality of 'living law' as 'extra-legal' turns out to be a rather dim-witted denial of the massive presence of non-state law as an inevitable part of human existence. We may indeed know that, but the practical implications of such recognition have somehow been kept off our mental radar screens.

So we are forced to re-learn in this post-modern age that law is plural and has definite limits if we think of it primarily as a state-centric tool of social engineering or a technique to make loads of money or to rule over others. The most wonderful book on this topic, in my view (Allott, 1980) is sadly out of print.

We have more popularly learnt to speak of alternative forms of dispute settlement and have coined fashionable acronyms for this like ADR, or speak of the contrast of SLS and NSLS, state legal systems and non-state legal systems. We juggle with such concepts, but fail to apply them properly and are simply not radical enough in discussing non-state laws, which impact so directly on everybody's daily lives. The reason for this deliberate silencing is not far to see: Talking about the critical importance of non-state law further challenges positivist indoctrination and questions various 'rule of law'

---

<sup>16</sup> Intriguingly, I found that the Japanese word for kite, *tako*, also means octopus, so a kite in water.

mythologies, which provokes again those frightful images of ‘anything goes’. In reality, however, we all are subject to the ubiquitous phenomenon of ‘living law’ (Cotterrell, 2008; Melissaris, 2009), which is much more than the old concept devised by Eugen Ehrlich (1936), a local bureaucrat who realised that ‘his’ people in some backwater area of the Habsburg empire at the early part of the twentieth century (Ehrlich first wrote in 1913 in German) did not simply follow state law, but constructed their own ‘living law’ as a hybrid.

As this takes place largely invisibly, law indeed becomes a matter of psychology and of informal, invisible self-regulation in many cases. The kite flies silently, just as construction of *shari’a* as the right path is an ongoing process in the individual believer’s brain as well, invisible to the outside world. Seeking to understand the interaction of the various types of competing law that dynamise the movements of the kite or the construction of that path, we cannot ever shut out any of those four competing elements that have been identified above. But we are simply not told by most legal and religious scholars that this is what law and religion are all about. DIY law would certainly be bad for the legal fraternity. DIY religion raises other eyebrows. It is not the case that we do not know how internally plural and ever-present law and religion are. We are simply not supposed to know, so that lawyers and politicians can manipulate our lives and fly our kites for us, and religious scholars can do similar things and enjoy elevated power and status in a religion that likes to claim that everybody is equal. So much for democracy and empowerment, endangered ideals in relation to law as well as religion. In a country with a democratic deficit, the reverberations of such deviations from the ideal are magnified.

Law and religion are everywhere seen under pressure to achieve various ideals of justice and to help find the right path, a concept which Muslims call *shari’a*, and for which there are many equivalent terms in the world. Understanding this inevitability of plurality is actually not at all difficult for Muslims. It is part of Muslim identity and of *fiq* construction itself, the development of Muslim jurisprudential thought, particularly if one highlights *ikhtilaf*, the concept of ‘tolerated diversity’ with its sobering explicit recognition that no human can ever fully understand God’s intentions, as evidence of Islamic legal pluralism. The concept of *ikhtilaf* does not challenge God, but rightfully questions all human interpretations. Clear-cut realisation of the limits of human understanding in fact continues to save Islam from self-destruction and has allowed it to grow globally in very different socio-cultural contexts. Internal plurality despite belief in one God is at the same time amazingly simple and yet has been made so immensely complex and confusing that it could be readily politicised. Abused as a form of positive law, the foundations of Islamic natural law have become turbulence generators operated by some dark forces that now cause havoc in the name of religion and seem to oppose law. But at the same time these forces use law to achieve their objectives. One should not be surprised that the Pakistani state itself feels now challenged by such potentially violent and destructive forces.

There are many other reasons for such dangerous turbulences, many of them now involving international relations, of course a field closely connected to law and legal theorising. It may well be that law as a global science, driven largely by Western theorems, as though others did not think about the same issues in their own times and places, has forgotten to remain global and to fully include the non-Western ‘other’.

Earlier talk of ‘families of law’ gives that particular game away (see de Cruz, 1999), showing that even comparative lawyers remain Eurocentric and get away with it. Law beyond the Bosphorus is, from a Eurocentric perspective, just not known (Menski, 2007) and this restricted *mentalité* continues despite globalisation.

Boxed into certain patterns (Twining, 2000), which helps those who claim the right to rule, parochial narrow-minded law is thus often and all too easily misused as a tool of terror and exploitation. The biggest abusers of law, not only in South Asia, are actually states themselves. Despite well-sounding constitutions, they seem to have no real interest in telling people how to hold their rulers accountable. It fits this pattern that legal pluralism is widely dismissed as a dirty subject, or irrelevant social science talk. Apparently even our own students are not supposed to learn how to question the superiority claims of any of the four major law-making entities to steer the various kites to the exclusion of all the others. How, then, do we even begin to understand ourselves and our own role as legal kite flyers?

Waking up to the reality of global legal pluralism becomes an interdisciplinary challenge. Teaching about global legal pluralism asks questions about oneself, one’s own identity and position in relation to everything in the world. Studying law is clearly not just learning to fix some leaking pipe, which of course law schools must also teach to fulfil professional requirements. Studying law properly as a science, however, leads almost inevitably to holistic appreciation of the complexity of human life and of pluralist forms of co-existence in the global world of the twenty-first century. Notably, it also re-connects law and religion.

Some people continue to insist that this pluralist approach to law throws the baby out with the bathwater. Even the most recent writing from that corner remains hostile to legal pluralism and quite sarcastic about the reality of dynamic ‘living law’ (Tamanaha, 2010). The troublesome key issue here becomes simply the old trick question: where is the boundary of law? But do we really need to answer that particular unanswerable question to live peacefully and successfully? Or should we rather analyse which kinds of law we are actually using when we play particular legal games to make money, or when we live our daily routine lives? Starting from the presumption that law is something fixed and defined is problematic when in fact it is a really fluid and dynamic plurality of pluralities. Law may be a rule, or a whole system of rules, or a physical concept (Allott, 1980), but law is also a process, a combination of lots of different things, just like a kite is not just made from one kind of material. For Muslims, there is God’s law, but that is not the whole picture. Human application of the law is a daily necessity, so in fact one could say that kite flying is an Islamic obligation. The ban on kites, seen in this light, is a futile attempt to rid the skies above Pakistan from polluting cultural baggage that might have attached itself to the Islamic kites that are crowding the skies.

In Pakistan, there remains much need for plurality-conscious management of competing pulls of legal theory, as I see it now between four corners of the legal kite, namely traditional *shari’a* law as natural law, the socio-cultural normative systems of local societies, hence *riwaj* and all that comes with it, the state and its various manifestations of *qanun*, and now also the expectations of international law and human rights as new natural law in competition with all these the older systems. I have already shown that lack of depth of understanding ‘law’ as an internally plural phenomenon leads

to continuing dangerous turbulences for the legal system of Pakistan and for its people. It is evident that more honesty and openness is required to construct a successful legal order.

### **Jurisprudence as Flying Kites**

Asking what kite flying is about, we find very different perceptions. Khaled Hosseini's (2003) *The Kite Runner* focuses on Kabul in troubled Afghanistan. Here kite flying is portrayed as a deadly contest involving much pride and *izzat*. The aim appears to be that at the end of a specific day of kite flying, there should be only one kite left in the air over an entire city. This is hardly a reflection or celebration of pluralist co-existence, but a brutal image of a violent contest, cutting the strings of all other kites in a macho show of strength to gain power, esteem and status. This method seems to breed violence rather than encourage skilful and plurality-conscious navigation, as the novel shows when the 'wrong' person wins the contest. So much is sure, however: There is simply no one way of flying kites.

Legal theory links into our dynamically lived experience and highlights what the great Austrian jurist Ehrlich (1936) called 'living law'. The fact that Brian Tamanaha (2010) now claims that he wants to rescue Ehrlich from his own theory is a rather bad example of scholarly politicking driven by US-centric legal reasoning that should have been overcome in this day and age. In real life, all over the globe, there is constantly much need to navigate, to find solutions to problems and answers to questions, visible and invisible. The ongoing private and public manipulations of legal, socio-economic, ideological and political systems suggest that the image of kite flying, subtle navigation of a quite vulnerable structure in a potentially turbulent atmosphere, helps to illustrate in all its troublesome diversity what we are constantly doing while using law and legal processes as individual people, members of social groups, citizens of a state or foreigners, or as office bearers in official positions.

The global skies, then, are full of kites of different shapes and sizes, with many colours and culture-specific ornaments. Assuming that there are no invisible boundaries in the sky, to avoid massive collisions and crashes of kites we have to be hyper-sensitive about pluralism and extremely skilled in handling competing pulls from different corners of the kite.

My earlier critical analysis of comparative law (Menski, 2006) emphasised that people teaching and studying law are everywhere wasting precious time trying to define what law is and what it is not, while there is manifestly no globally agreed definition (Menski, 2006: 32; Katz, 2009. IV: 17-23). Since 'law' can mean so many different things in various contexts, to make sense of it as a globally valid phenomenon and to devise a globally applicable model turns out, on closer inspection, to be a feasible task in principle and theory, but an impossible challenge in practice. Law, then, is not just Austin's famous 'command of the sovereign' or the Qur'an virtually understood as God's *Code Napoleon*. It is indeed limitlessly plural, and comprises all aspects of life, in the same way that Muslims tend to argue that the Qur'an as God's word reflects an effort and an expectation to regulate the entirety of existence.

I suggest that a major task for comparative legal studies in today's globally plural religious-cum-secular environment is simply to find the right balance between competing

pulls of different types of law. This expectation, at any moment of our lives, is the critically relevant key element of the challenge to be human and to be accountable, at the end of the day, to Judgement Day. The image of trying to keep a kite flying in the air even in wind or rain fits that expectation of the constant challenge. If one does not manage this journey or path – for which Islam knows the word *shari'a* – well and properly, the kite may crash. Individuals may fail to handle specific problems and then kill themselves, or may turn violently against other people. A state may not function properly and become what is termed a 'failed state'. Finding the right balance of individual self-regulation, social control or governance at the level of states and even international law is clearly also a constant challenge. A country like Pakistan could never ignore Islam and its expectations, but one also has to acknowledge that the country is not only composed of Muslims, a fact that will need to be reflected in the management of the entire legal system. If law is at the same time natural law AND positivism, AND socio-legal norms AND international norms, then these four competing and internally plural entities need to be constantly balanced. None of the four elements in pure form is 'the right law' by itself. This illustrates that one does not manage diversity by denying it; one needs to address the problems by applying pluralist methodology.

My pluralist model of law, presented in 2006 as a simple triangle (Menski 2006: 185-9), therefore turned out to be a productive development of seminal discussions about the nature of law by the Japanese jurist Masaji Chiba (1986, excerpted in Menski 2006: 119-28). But thinking about the practical challenges of legal pluralism has significantly developed since then. The kite model is simply a visual representation and refinement of this strong recognition of the reality of legal pluralism. The basic principle, namely that all four voices of law in the semi-autonomous social or legal field should be heard and recorded in some form, and that no one type of legal theory can totally exclude all the other types, is the key to understanding global legal pluralism. Readers of Menski (2006) will understand that this realisation helped me to add a fourth corner to the structure of the original triangle. International law, then, is clearly also a form of law that needs to be built into this pluralistic model, and cannot be left outside it.

Given the paucity of space, I thus swiftly conclude this section by adding two models, an illustration of the older triangle (Figure 1) and the new kite model (Figure 2). Readers who are not clear about this recent progression of the intricacy of pluralist legal analysis are referred to the main study in which this was first explained (Menski, 2006), and in which a number of graphic models are found to assist comprehension. Figure 1 here is designed to convey that the internally plural field of law has everywhere porous boundaries that connect law to life in all its various aspects.

**Figure 1:**

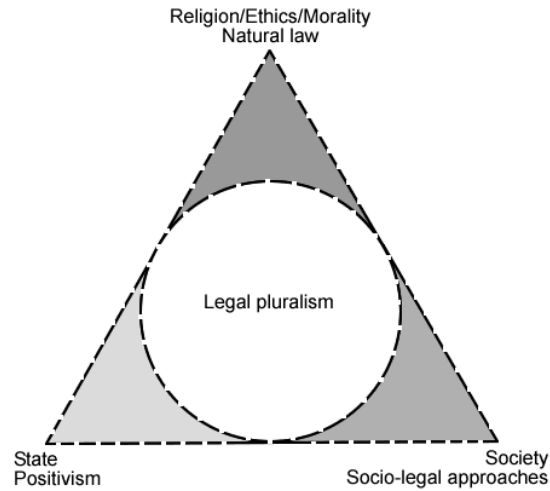
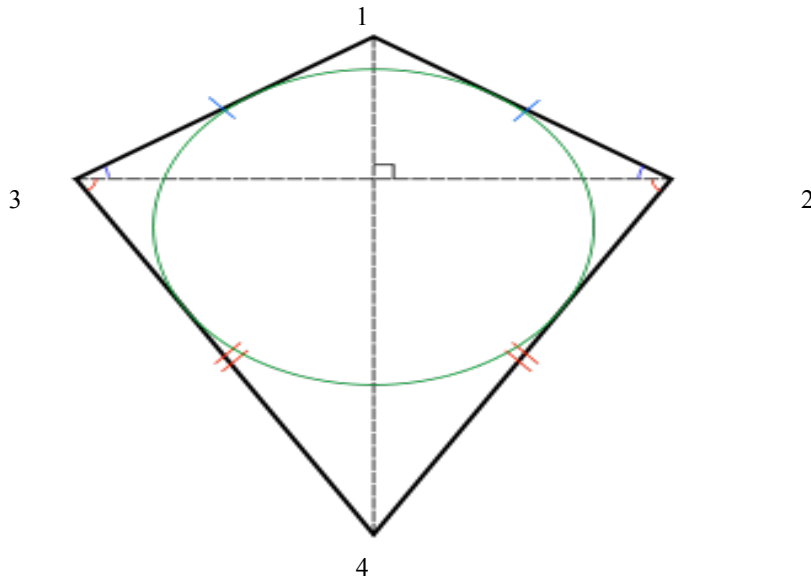


Figure 2 is still at this moment a model in the making and seeks to convey that law everywhere is composed of four major, but always internally plural elements, namely (1) natural law perceptions, (2) socio-cultural approaches, (3) state-centric regulation, and (4) various forms of international norms, perceptions and ideals that might clash especially with corner (1), but also signify tensions with the other power points at the periphery of the model.

**Figure 2:**



## Conclusions

As a legal theorist with a realist's eye for practical implications, I thus see and argue that legal pluralism and 'living law' will remain contested everywhere, but also remain everywhere prominent in practice and absolutely critical in countries' identity formation. Simple bans of one element or entity do not work, as law constantly needs to be re-negotiated between competing perspectives. Every individual has not only the right, but a human obligation, to make sense of this pluralist challenge. Pakistan urgently needs to teach itself to imbibe such basic global lessons from legal theory while retaining an Islamic identity. Managing this under the umbrella of *siyasa shariyya* is indeed a pluralist challenge, part of the task of constructing 'living law' and finding *shari'at* for individual Muslims. All of these are complex pluralities of pluralities. It seems God wanted things to be like that. This could be read as a global message as much as a very clearly Islamic concept. There is no contradiction, at the end of the day, only conflicts of competing perceptions.

One can see clearly, thus, where the key problems lie for Pakistan as an Islamic Republic, but Pakistanis themselves must learn to manage those issues. The key requirement will be to develop respect for the respective 'other', as much in terms of jurisprudential theory as of daily practice. Neither religion, nor social forces of patriarchy, nor the state law, let alone international intervention, can dominate the future trajectory of Pakistan to the exclusion of the other voices. For a successful kite journey, elements of all four sub-pluralities are required, and they need to be managed by Pakistanis themselves as responsible navigators of their own future.

## Bibliography

Allott, Antony N. (1980) *The Limits of Law*. London: Butterworths.

An-Na'im, Abdullahi Ahmed (2008) *Islam and the Secular State. Negotiating the future of Shari'a*. Cambridge, MA: Harvard University Press.

Anderson, J.N.D. (1967) "Pakistan: An Islamic State?." in R.H.C. Holland and G. Schwarzenberger (eds.), *Law, Justice and Equity*. London: Sir Isaac Pitman and Sons, pp. 127-36.

Borradori, Giovanna (2003) *Philosophy in a Time of Terror. Dialogues with Jürgen Habermas and Jacques Derrida*. Chicago and London: The University of Chicago Press.

Cane, Peter and Joanna Conaghan (2008) *The New Oxford Companion to Law*. Oxford: Oxford University Press.

Chaudhary, Muhammad Azam (1999) *Justice in Practice. Legal Ethnography of a Pakistani Punjabi Village*. Oxford: Oxford University Press.

Chiba, Masaji (ed.) (1986) *Asian Indigenous Law in Interaction with Received Law*. London and New York: KPI.

- Chiba, Masaji (1989) *Legal Pluralism: Towards a General Theory Through Japanese Legal Culture*. Tokyo: Tokai University Press.
- Cotterrell, Roger (2008) *Living Law. Studies in Legal and Social Theory*. Aldershot: Ashgate.
- De Cruz, Peter (1999) *Comparative Law in a Changing World*. 2nd ed. London and Sydney: Cavendish.
- Ehrlich, Eugen (1913) *Grundlegung der Soziologie des Rechts*. München and Leipzig: Duncker & Humblot.
- Ehrlich, Eugen (1936) *Fundamental Principles of the Sociology of Law*. Cambridge, MA: Harvard University Press.
- Ferrari, Silvio and Rinaldo Cristofori (eds.) (2011) *Law and Religion in the 21<sup>st</sup> Century: Relations Between States and Religious Communities*. Farnham: Ashgate. [Forthcoming]
- Foblets, Marie-Claire, Jean-François Gaudreault-Desbiens and Alison Dundes Renteln (eds.) (2010) *Cultural Diversity and the Law. State Responses from Around the World*. Brussels: Bruylant and Éditions Yvon Blais.
- Glenn, H. Patrick (2006) *Legal Traditions of the World. Sustainable Diversity in Law*. 3rd ed. Oxford: Oxford University Press.
- Grillo, Ralph, Roger Ballard, Alessandro Ferrari, André Hoekema, Marcel Maussen and Prakash Shah (eds.) (2009) *Legal Practice and Cultural Diversity*. Farnham: Ashgate.
- Hallaq, Wael B. (2009) *Shari'a. Theory, Practice, Transformations*. Cambridge: Cambridge University Press.
- Hinz, Manfred O. and Clever Mapaire (eds.) (2010) *In Search of Justice and Peace. Traditional and Informal Justice Systems in Africa*. Windhoek: Namibia Scientific Society.
- Hosseini, Khaled (2003). *The Kiterunner*. London: Bloomsbury.
- Katz, Stanley N. (Editor-in-Chief) (2009) *The Oxford International Encyclopedia of Legal History*. Volumes 1-6. New York: Oxford University Press.
- Lau, Martin (2006) *The Role of Islam in the Legal System of Pakistan*. Leiden and Boston: Martinus Nijhoff.
- Legrand, Pierre (1996) "How to Compare Now", *Legal Studies*, vol. 16, no. 2, pp. 232-242.



- Mehdi, Rubya, Hanne Petersen, Erik Reenberg Sand and Gordon R. Woodman (eds.) (2008) *Law and Religion in Multicultural Societies*. Copenhagen: DJØF Publishing.
- Melissaris, Emmanuel (2009) *Ubiquitous Law. Legal Theory and the Space for Legal Pluralism*. Farnham: Ashgate.
- Menski, Werner (2006) *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*. Second ed. Cambridge: Cambridge University Press.
- Menski, Werner (2007) 'Beyond Europe'. In Esin Örüćü and David Nelken (eds.) *Comparative Law. A Handbook* (pp. 189-216). Oxford and Portland, OR: Hart Publishing.
- Modood, Tariq (1992) *Not Easy Being British*. Stoke-on-Trent: Trentham Books.
- Modood, Tariq (2010) *Still Not Easy Being British*. Stoke-on-Trent: Trentham Books.
- Pearl, David and Werner Menski (1998) *Muslim Family Law*. Third edn. London: Sweet & Maxwell.
- Tamanaha, Brian Z. (2010) 'A Vision of Socio-Legal Change: Rescuing Ehrlich From "Living Law"'. *Washington University in St. Louis, school of Law. Legal Studies Research Paper Series*. Paper No. 10-10-05. (Electronic copy at <http://ssrn.com/abstract=1689669>).
- Twining, William (2000) *Globalisation and Legal Theory*. London: Butterworths.
- Wagner, Anne and Vijay K. Bhatia (eds.) (2009) *Diversity and Tolerance in Socio-Legal Contexts. Explorations in the Semiotics of Law*. Farnham: Ashgate.
- Welchman, Lynn and Sarah Hossain (eds.) (2005) *'Honour'. Crimes, Paradigms, and Violence Against Women*. London: Zed Books.