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The Case of Legal Pluralism

Franz von Benda-Beckmann*

* Franz von Benda-Beckmann is Professor and Head of the Project Group in Legal Pluralism at the Max Planck Institute for Social Anthropology at Halle, Germany.

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In the roughly thirty years during which the concept 'legal pluralism' has been used in legal and social scientific writings, the concept has become a subject of emotionally loaded debates. The issue mostly addressed in these debates, and the one distinguishing it from the common discussion over the concept of law, is whether or not one is prepared to admit at the conceptual level to the theoretical possibility of more than one legal order within one socio-political space, based on different sources of ultimate validity and maintained by forms of organization other than the state. Though originally introduced with modest ambition as a "sensitising" concept, drawing attention to the frequent existence of parallel or duplicatory legal regulations within one political organisation, the discussion is increasingly dominated by the exchange of conceptual ´a priori´s´ and stereotypes, as well as by cliches over those who use them. Rather than looking at the heuristic value of the concept in use for describing and analysing complex empirical situation, the conceptual struggles seem to create two camps, effacing the many differences in assumptions and approaches to law in society that can be found in both these camps. Starting with Roberts' review of the Bellagio papers (1986) and even stronger in Tamanaha's paper on the folly of legal pluralism (1993), one can even observe the emergence of a bogeyman called "the legal pluralists", the "legal pluralist movement" or a "legal pluralist project" (Roberts 1998: 96). This is associated with the Commission on Folk Law and Legal Pluralism and the *Journal of Legal Pluralism*, and accused of engaging in some ill-conceived enterprise of irresponsibly broadening the concept of law and equalising normative orders that are fundamentally different. It is argued that calling normative orders other than state law, or not recognised as law by the state, nevertheless "law", is ethnocentric and obscures the fundamental differences in form, structure and effective sanctioning between state law and other normative orders [1].

In my paper I want to continue the ongoing discussion (F. von Benda-Beckmann 1994, 1997, Fuller 1994, Woodman 1998, Roberts 1998, Tamanaha 1993, 2000). I shall analyse the reasons given for and against the concept of "legal pluralism" and clarify my own views on its value and limitation, building on earlier ideas. I found it more useful to dissociate the concept of law from the state. I consider legal pluralism a useful sensitising concept and analytical tool. It is not a theory or explanation (see also Geertz 1983, Rosen 1999), but only a starting point for looking at the complexities of cognitive and normative orders, and the even more complex ways in which these become involved in human interaction.

Preliminary questions

We all know that in most societies, and probably in all contemporary societies, there is a great complexity of cognitive and normative conceptions that constitute forms of legitimate social, economic and political power and organization; provide standards for permissible action and for the validity of transactions, as well as ideas and procedures for dealing with problematic situations. Such multiplicity of conceptions may extend to claims to give meaning and regulate a whole social universe; they may also be limited to specific social domains such as marriage or property transactions or even more limited rule complexes. These may operate in socio-political and geographical spaces of different size, within the boundaries of nation states, in infra-statal social fields or in transnational ones. We also know that in many parts of the world, such complex situations – for instance the co-existence of religious and non-religious conceptions in Indonesia- antedate the establishment of a colonial or modern state.

While social and legal scientists' perceptions of such complexity and its implications for further conceptual, methodological and theoretical ideas vary significantly, we do not have to prove to anyone that it is there. The question is: How do we get to grips with this complexity? With which categories and concepts can we make sense of it, conceptually and theoretically? This raises four major sets of questions.

1) How far can we get with the concept of law? Which criteria should given social phenomena the quality of being "legal" and how do we distinguish such legal phenomenon from other, non-legal ones? [2]
2) How do we deal with difference? Since law, however narrowly or broadly defined, will encompass some variation of social phenomena, how do we indicate the sets of criteria in which these phenomena vary (dimensions of variation)?
3) What type of legal complexity do we call legal "pluralism"? Does this concept, or other frequently used terms like "multiplicity" or "plurality", suffice for dealing with the complexity we are confronted with? Does legal pluralism require the existence of more than one legal system or order, or are "legal mechanisms" sufficient? (see Woodman 1998).
4) And perhaps the most important yet least discussed question: what does "existence" or "co-existence" mean

These questions are important. But whatever our answer will be, their reach is limited. While our conceptual choices concerning law and legal pluralism are based on a number of methodological and theoretical assumptions, these must be supplemented by a more encompassing social theoretical understanding of the social world. The concepts of "law" or "legal pluralism" are simply a part of our wide conceptual and analytical tools. Neither will these concepts alone adequately capture fully one's research interests. I mention these self-evident points here because many conceptual discussions (whether they concern law, property, or social security) are carried out as if these concepts stood for the whole of theoretical understanding or research interest.

Law and the state

One of the crucial issues here is whether the link with the state should be built into the concept as a constant criterion for law. In the literature, there are a number of reasons for or against the link between law and state. While they are based on different arguments, they often intermingle in

authors' argumentations. As I said earliest, they can lead authors to deny the desirability of using law as an analytical concept, or to demand that in analytical and descriptive terms law be coupled to the state. In the following, I shall try to capture the major modes of writing and argumentation.

Evolutionist assumptions

Many anthropological and sociological and legal science understandings of the evolution of social and political organisation saw law and legal systems as the most advanced and civilised form of normative ordering and rational rule-guided decision-making. Against the background of social and political organisation, which had no clear hierarchically organised (state-like) political systems, where no courts or clearly recognisable third party institutions were clearly institutionalised, which had no written rule systems and in which normative knowledge was not sharply differentiated, the question of whether such societies had "law" presented problems to many European observers. Many thought that these societies had not yet reached the state of political and normative organisation that could be called state and law. They developed evolutionist typologies of norms and decision making which continue to influence social scientific thinking about norms. The crucial criterion used for making the distinctions between such law and earlier forms of normative ordering was the differentiation and institutionalisation of rule making and sanctioning institutions that would sanction the infraction of rules in the name of the societal whole, usually in it s highest form, the state. We then see an evolution from unsanctioned custom, to diffusely sanctioned social norms, early forms of near-law to the state legal systems as they had developed in Europe. This evolutionary scheme is used to distinguish different types of rules.

In many earlier anthropological and sociological writings, this political orgnisation need not necessarily have the character of a state, nor the "pro tanto officials" the character of a state court. Functional equivalents were sufficient, for instance for Hoebel 1954, Pospisil 1971. But the logic of definition, the dependence of law or the legal from organised sanctioning, was the same (see F. von Benda-Beckmann 1981, 1986; see also Tamanaha 1993, 2000). It is characteristic for the writings of Austin or Hart[3]. But perhaps with the exception of Pospisil, these authors did not consider conditions of pluralism, and it is uncertain what they would have concluded when a "real" state institutions would co-exist with third parties which otherwise would have fulfilled their criteria for legalness.

But we should also note that this conceptual usage for evolutionary sequences is not necessarily the general picture in evolutionist writings. In much of the evolutionist legal anthropology around the turn of the 19th century, for instance, the distinction law –non-law was a non-issue. Henry Maine (1861) spoke of Ancient Law, Bachofen (1861) of *Mutterrecht,* and also the German scholars like Post and Kohler did not find it difficult to use law in relation to the normative systems of the societies discovered in Africa and Asia. Differences between evolutionary types of law in their view could be marked by adjectives (ancient, tribal, and primitive) that charactersied the specific nature of these laws. Methodologically, their structuralist-functionalist assumptions brought with it the danger of reductionism, the assumption of a general congruence between social, economic and political structures and their normative regulations. But these authors saw dramatic changes and evolution of legal systems within the overall category of law, aware of a dramatic range of variable empirical manifestations of law through time and space.

Ethnocentricity

Another, yet related, argument against defining law without a connection to the state, or against developing law into an analytical comparative category is the ethnocentricity argument. According to Roberts (1979, 1998) using the concept of law for comparative purposes "means remaining implicated in the parochial scene. For so much of our sense of what law 'is', is bound up with, and has been created through law's association with a particular history – early on — the emergence of secular government in Europe; later, the management of colonial expansion" (1998: 98). By using the word law for normative orders different from state law, one imposes the western Eurocentric concept of law on them, jamming other peoples' normative ideas/systems into western categories and thereby distorting them. Such statements are mostly apolitical and unsupported by an analysis of the work of scholars who allegedly, by using law, incorporate ethnocentric understandings into their writings. It is by no means the case that researchers during the past 30 years would usually have translated certain characteristics of "western laws" – such as their ideologies of court decision making (rules determine outcomes), the functional differentiation of adjudication, the differentiation between law and politics – into their reading of normative orders in the non-western world. Moreover, attempts to develop such comparative analytical frameworks – as I have done not just for law, but also for other domains such as property or social security, and as others have done for marriage, economics, politics, and religion – are usually not discussed, although and even they are sensitive to the "danger that one will change one of the folk systems of his own society into an analytical system, and try to give it wider application than its merit and usefulness allow" (Roberts 1998).

The ethnocentrism reproach is not a convincing argument. Because proponents of a wider analytical concept of law explicitly formulate the properties of the concept in a way that does not include ethnocentric British, Minangkabau or Barotse elements into the definition of law but sees them as variation. In fact, it is only the help of analytical concepts of similarity and differences that allow us to perceive, analyse and attempt to explain the similarities and differences between British, Minangkabau or Barotse normative orders. Such accusation of ethnocentricity in my view is a case of projection, for such writers do exactly what they accuse others of. They impose their ethnocentric legal ideology on other peoples' normative orders and exclude anything that is not conforming to that ideology from being "legal"[4]. It certainly is the case that such ethnocentric interpretations and distortions of other peoples' legal system, or of single institutions, such as marriage or property relationships, have occurred. Much of the literature in the 1970s has deconstructed such transformations, going so far as to speak of a "creation" of customary laws. In more sophisticated analyses, this has led researchers to distinguish between the kinds of law interpreted and used in local settings and for instance in colonial courts, drawing attention to the contextuality[5]. It must also be admitted that in naming concepts, such as law but probably "normative ordering" as well, one cannot escape completely from ethnocentric biases. Some bias may be inevitable (F Von Benda Beckmann 1979: 17; Giddens 1984-294). Yet it would also be naïve to maintain that social scientists could not take distance from the meanings which have been developed in their own society, and that they would necessarily be forced to adopt (or keep running after) those definitions provided by powerful or hegemonic agents (see also F. and K. Von Benda Beckmann 1994). Why should one argue like this at all? Why should one treat law so much differently from other categories we use for comparative purposes: religion, politics, marriage, property? Why is it so impossible to take distance from the parochial understanding of law and develop it into a wider category useful for looking at differences and similarities between different

historical manifestations of law? Isn't it Roberts himself who first imprisons the word law in this parochial, eurocentric and unhistorical way, so much that it would not even encompass all historical manifestaions of "state law", and then points the finger at this ethnocentric prison?[6] Apparently, they cannot, or do not want to escape that prison by distinguishing a concept as a scientific device characterized by properties from descriptions of cultural, social, political phenomena. As I have written earlier (1991, 1997), this is a refusal to take analytical distance from the dominant legal ideology in which law and state are directly connected conceptually.

The melting down of different argument

Related to the ethnocentricity argument is the often heard argument, that by embracing the notion of legal pluralism the concept of law would become too wide and could comprise "anything" (Merry 1988), and that crucial differences between legal phenomena or systems would be "melted down" (Moore 1978: 81). In my view, this argument confuses the discussion about the theoretical possibility of legal pluralism with the question of what criteria make (any) normative ordering "legal". Obviously, as Moore (2001:106) says, "the agglomeration of the whole normative package.. has to be disaggregated, identifying the provenance of rules and controls". But this certainly can be done, and for more distinctive features than provenance and control. The dimensions of variation, which I have discussed earlier, show that an analytical concept of law does not mean that crucial differences between legal phenomena or systems would be "melted down" or that "anything" would be law, or anything called law would be "the same". On the contrary, it is the strength of an analytical concept that it provides a starting point for looking at similarities and differences in several dimensions of variation in a consistent way, and therefore provides a much better perspective on differences in form and function than the state-connected concept. In particular, it also allows the description and analysis of differences within state law, which also exhibits considerable variation in terms of degrees of institutionalization or mandatoriness. These differences are obscured rather than brought to attention by the implicit homogeneity of law as state law.

Last but not least, logical considerations argue against the state-law nexus. Using a concept of law in which the direct connection to the state is a constitutive element means ending up with a tautologous concept of law. The typological models of law which link law directly to political organization or sanctioning power are more or less all based upon the ideas of Austin's analytical jurisprudence. In this model, as already Maine has shown (1914:342, 353, 362), the concepts of law, rights and duty are logically dependent upon the concept of the sovereign. In Austin's construction, the sovereign itself was not constituted by law but was characterized by its 'immunity from control of every other human superior; its restrictions are not of a legal kind but of 'positive morality'. Later authors replaced the rules that constituted sovereignty and sanctioning power by (constitutional) legal rules, but retained the logical dependence of the concept of law on the power of sanctions [7]. The rules pertaining to the power of sanction therefore are not covered by the concept of law; they become 'legal rules per se' (Geiger 1964: 161). The consequences is circular reasoning: Rules are legal if issued/sanctioned by a legal institution; a legal institution is one which issues or sanctions legal rules (F. von Benda-Beckmann 1986: 106)[8]. What is "legitimate" is not covered by the definition[9].

The arguments advanced against a conception of law that can encompass non-state legal forms thus are not convincing. This does, of course, not answer what the properties of the concept should

be; it only makes clear that legal forms can be generated and legitimated by reference to other organisational legitimations [10].

Variations in existence and significance of law

Such concept may still be underdetermined and in need of refinement, but is highly questionable whether more attributes or properties that refer to the empirical significance or substantive content of legal forms should be incorporated into the concept. As I have argued elsewhere, by which agents or authors and by which activities laws are generated, by whom and for which purposes law is used, nay by who, and how law is socially reproduced are empirical questions to be answered by research. They are not definitional questions to be answered by jurisprudential or sociological dogma: (F. von Benda-Beckmann 1983:238, 1979: 11). Specific functions or degrees of functional importance in social life cannot determine the conceptual issue in a consistent way (1983, 1997). It does not make much sense to debate at the conceptual level whether law does indeed function as social control, whether it resolves conflicts or whether it creates conflicts (see Turk 1976), when obviously it can do (and frequently does) both, to varying degrees in different empirical situations. The same goes, more narrowly, for the extent to which social practices to which the law in question pertains and/or is used according to its own directives in processes of decision making, the conventional efficiency criterion. Such simple insights only tell us that at the analytical and conceptual level we better not incorporate any such function as a constant property into the concept, but treat functional possibilities as variation: and for doing this, we have to clarify what it is that may have such functions. At the empirical level, it must lead us to distinguish between the normative attributes which are inscribed into (many) legal phenomena, or which are attributed to it in different theories or common sense discourses, and the functions empirical legal phenomena actually have, and for whom [11]. The same goes for moral considerations, standards of morality, ethics or justice. Whether or not the substantive content of law is "just" in relations to certain general standards, or in relation to feelings of justice of a majority of the population, is an empirical question.

The great emphasis that is frequently given to such criteria in definitions of law, notably 'realist' definitions of law, make it difficult to assess the significance of legal forms for social life, within and outside the domains of behaviour to which the legal forms refer (F.von Benda-Beckmann 1983, 1977, 2001). It also detracts attention from the exploration of the different ways in which legal forms 'exist' in social life and the different ways in which legal forms exert influence on social practices.

In the first place, law has many forms of existences: It may be embodied in written and spoken texts. It can exist in the knowledge of people, even if the knowledge is limited to the understanding 'that there is law'. And it exists when involved in social processes, if persons orient their (inter) actions at law (in the Weberian sense). This does not necessarily mean that they overtly use law in social interaction; people can act in the shadow of legal pluralism (to echo Galanter 1981).

Secondly, there is a variety of social processes in which law can be involved. Most known and dogmatically privileged are those interpretations and restatements of law occurring in formalized processes of validation of rules and decisions, which involve representatives of the organized public such as judicial and administrative decision- makers who have to decide 'according to law'. These can be court proceedings or processes of 'preventive law care' in which trouble-less social

or economic transactions are validated in formalized processes through public institutions such as civil registrars or notaries public. But reproduction of law may also take place 'out of context' in many different ways [12]: in processes such as the socialization of children, in the reproduction of law in universities or in the media, and last but not the least in the use of legal forms and orientation at law and in 'everyday life' where it also can be used as a means of rationalization and justification of claims in everyday processes and transactions.[13

Third, processes that (re)state law can reproduce legal rules in different ways. Much law is reproduced in processes in which general concepts, rules, principles, or standards are (re)stated in their generality, without relating them to any concrete problematic occurrence. This is for instance the case in general description or teachings of law. But law can also be reproduced in processes in which general rules and principles are related to concrete problems and are used to rationalize and justify specific problematic conditions or occurrences, for making evaluative statements and for justifying claims and counterclaims, verdicts or compromises in decision-making processes in administrative and judicial institutions. Also in ordinary life interactions, concrete situations, occurrences, and claims can be rationalized and justified with the help of general rules, concepts, and standards. In such processes general rules and principles are reproduced, too, but in addition they produce 'concrete law' by giving concrete legal evaluations with respect to a situation image (F.von Benda-Beckmann 1986,1989).

Fourth, there are also considerable differences in the amount of law, which is explicitly reproduced in single processes. In official legal processes, usually several rules or rule complexes are explicitly restated for establishing the relevant set of facts (the relevant situation image), the standards of evaluation for their relevance in terms of permissibility or validity and for the determination of the consequences of such evaluation. In everyday life interactions, references to law may be less systematic and more selective, depending of the legal knowledge of the persons concerned.

The reproduction of (whatever) law, however, is usually not limited to explicit verbal statements. Generally, single rules and concepts are rarely thought of in isolation but as part of wider rule complexes, and, at the most general, of 'law' or 'the legal system'. The extent to which 'more law' is reproduced by implication depends on the structure of the normative system and on the intention and knowledge of the participants and others who interpret such statements [14]. It also depends on what under the given circumstances can be regarded as self-evident (Berger and Luckmann 1967, Giddens 1979, 1984).

The processes of the reproduction of law usually are more explicit under conditions of legal pluralism, when people are aware of alternative normative repertoires and/or procedures in which these can be used. Of course also in the context of legal pluralism, different participants and decision-makers may refer to the same law. But they often mobilize different legal repertoires against each other (folk law against state law, religious law against folk or state law etc.)[15] They may also accumulate elements of different systems or compound them to create hybrid forms. But generally the condition of legal pluralism challenges the exclusiveness and self-evidence of any single normative system. One is no longer concerned with the question of whether or not to reproduce elements of 'the' law as against non-legal modes. Choices between legal systems are thinkable. Orientation at and invocation of one of the alternatives therefore require an explicit

justification. References to the rules of one system, in Indonesia for instance of adat over Islam or state law, then often get the character of a political and ideological statement. One not only opts for a limited number of rules that should apply to a problematic situation, but for the whole (sub) system of which these rules form part. And through this reproduction of one subsystem in view of alternatives, also the relationship between the subsystem is reproduced.

This also in my view answers the question raised by Vanderlinden (1989) and Woodman (1998) where law and legal pluralism is to be found – in a society, in semi-autonomous social fields, in the context with which individuals are confronted in which they interact. It will depend on what one is interested in –whether one selects a politico-geographic space such as Indonesia or Germany, structural places like households, an analytically conceived functional domain (Goldschmidt 1966, von Benda-Beckmann 1979, F. and K.von Benda-Beckmann 1994, 1999), or a semi-autonomous social field (Moore 1973; see F. and K.von Benda-Beckmann 1991). It is these choices that determine what kind of events or sequences/processes one studies and where the 'presence' of (elements) of more than one legal order has to be looked for. Of course it is important to study how individuals fare in their interactions in the context of legal pluralism, as Vanderlinden (1989) has urged us to do. But there is no reason why equal attention should not be given to the constructions of plural legal structures by politicians and lawyers. Moreover, in order to study the role of plural legal orders in and for the life of individuals, we need to study the social processes through which the plural legal orders in which they interact is reproduced in other contexts of interaction. Only then can be seen to what extent, and in which socio-political or geographical spaces, legal forms are plural, individuals are 'multi-legal' and objects and social relationships 'multi-normative' (F. and K. von Benda-Beckmann 1999).

The bogeyman of the legal pluralists

Beyond the threshold of the yes or no to legal pluralism, there is little uniformity in the conceptualisation of law, or legal pluralism, about the possible relations between such plurality and social organisation and interaction. The creation of two camps, one of so-called pluralists and one of state law adherents does not make much sense in my view.[16] While there is widespread agreement, that social scientific concepts of law should not be taken over from the normative and ideological self-descriptions of one's own legal system. Authors as different as Griffiths, Roberts, Tamanaha, Moore, Merry or myself would agree on this. The further consequences drawn, as on the conceptualisation of law and/or legal pluralism differ widely. Also, authors whose theoretical understanding would permit legal pluralism, end up with widely divergent concepts of law, see for instance Griffiths, Woodman, Posipisil or myself.

The positive acknowledgement and use of the concept of legal pluralism also cannot be associated with one specific social science or legal science. In law, in anthropology and sociology there are many who use it, and many who do not use it, and the use or non use tells us very little about their diverging methodological and theoretical preoccupations. [17] This division of minds cross-cuts the boundaries between anthropology of law, sociology of law and legal science. The use of the concept no longer tells us much about the disciplinary background of academics. Obviously, we would need a closer look into the social history of the concept of legal pluralism, and the different meanings they give to it.[18] In my view, the true intellectual ancestors are those writers who did not take the normative claims to the legal monopoly of the state for granted in theoretical principle.[19] Nowadays, the concept of legal pluralism is used, and criticized, by many, in

anthropology, sociology and political and legal science. It certainly no longer is an exclusive identity marker for legal anthropologists [20]. I certainly protest Roberts' position on what legal pluralism in the academic world is about. In his view, the provenance of legal pluralism is unambiguously a creature of the law school (Roberts 1986, 1998).[21] This seems to be rather far-fetched and empirically questionable. While there are academic lawyers who have discovered the concept of legal pluralism and use and write about the term, the majority of legal academics certainly do not really use it.[22] Even among legal sociologists, sociologists interested in law or lawyers interested in the workings of law, its use is rather the exception than the rule.[23]

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The Case of Legal Pluralism -II

Franz von Benda-Beckmann*

* Franz von Benda-Beckmann is Professor and Head of the Project Group in Legal Pluralism at the Max Planck Institute for Social Anthropology at Halle, Germany.

Final comment

In the discussion of the concept of legal pluralism, much time has been devoted to conceptual, sometimes rather scholastic argumentations. Such discussion are important for creating analytical clarification, and for laying bare the many ideological and theoretical assumption that are often implicit and hidden in certain conceptual usages. But the discussions easily become sterile unless they are rooted in the analysis of empirical situations and historical processes, and unless they are made part of a more comprehensive social scientific understanding of the social world of which law and legal pluralism, however defined, are only one aspect and part. Much more attention therefore should be given to empirical research and to the theoretical understandings of the many variations we find in the empirical constellations of legal pluralism and of the ways in which these different constellations influence the actual social, political and economic conditions in the areas and for the people concerned.

1. Tamanaha (1993), Roberts (1998) or in Germany Von Trotha (2000) are good illustrations for such submission to the state-law ideology and the consequent downright rejection of legal pluralism conceptualisation

2. The principal decision for or against a concept of law linked to the state by definition – important as it is – does not relieve us from the necessity to elaborate the properties that define law and can distinguish "legal" from social phenomena, for instance distinguish between

"social" and "legal" norms. This is required for any concept of law, pluralist or state-connected (see also Cotterell 1995).

3. On Austin, see already Maine 1883. On Austin, Galloway 1976. See F. von Benda-Beckmann 1981, 1986.

4. Another weakness of this line of thought is that it is based upon 'false comparison' (van Velsen 1969). The measuring stick for description and analysis is taken from ethnocentric legal ideology. This means that such a concept would not even be sufficient for a description and analysis of the functioning legal system from which the ideological descriptive elements are taken.

5. Clammer 1973, Chanock 1981, 1985, Synder 1981. See the special issue of the Journal of African Law on this problem. For Minangkabau, see F. von Benda-Beckmann 1979, K. von Benda-Beckmann 1982, 1984, F and K vin Benda-Beckmann 1985. See also Woodman's distinction between lawyers' customary law and sociologists' customary law. Long before these discussions emerge in Anglo-American legal anthropology; the point had been made by the Dutch scholars of adat law in Indonesia who distinguished between "adat fold Law" and "Lawyers" adat law.

6. Snyder's critique is similar. Comaroff and Roberts (1981) assume that any conception of law is necessarily based, ultimately, on concepts of western legal theory (snyder (1983:8). Presuming that any conception of law is inevitably Western, they rightly criticise the misapplication of Western legal tgheory but unnecessarily exclude the possibility of a more adequate comparative sociology of law (1983:9)

7. Also Hart's (1961) attempt to distinguish legal from nonm-legal societies by means of secondary rules is based upon the uncritical acceptance of the Austinian premise. Hart's secondary rules are nothing other than primary rules pertaining to one domain of socio-political life, the institution and processes of adjudication. Fuller (1964: 143) and Galloway (1978:82) convincingly characterize Hart's ideas as a "mild transformation of Austinian doctrine".

8. The tautology is evident when Geiger who has elaborated the probably clearest typology of norms, writes: "This only seems to be an exception from the basic principle just elaborated. For how could rules with such content [i.e. pertaining to the constitution and procedures of courts/sanctioning institutions] be something other than legal rules – as their subject matter only emerges with the development of a legal order" (1964: 161).

9. Compare the similar construction given by Hoebel: "The essentials of legal coercion are general social acceptance of the application of physical power, in threat or in fact, by a privileged party, for a legitimate cause in a legitimate way, and at a legitimate time" (1954:27)

10. The alternative at the analytical level is whether or not one wants to operate with a statist definition or not. There is little to be gained in ambivalence at this level. Cotterell, for instance, opts for a modified approach in which the possibility of legal pluralism is not excluded yet

clear analytical primacy be given to state law in contemporary societies (1995:31). "My view, then is, that the kinds of institutional concepts of law discussed earlier which avoid both exclusive concern with state law and also pure juridical pluralism, and treat state law as central to but not the exclusive concern of analysis of law in contemporary Western societies, are potentially fruitful: (Cotterell 1995:37). Why it should be more central analytically, is not understandable. At the level of conceptual discussion, this should be irrelevant. Primacy may be in research interests but analytically there is equivalence. Whether or not state law is central politically, obviously is an empirical question. If the dominant concept of law in contemporary sociology of law remains the state law concept the danger is that the problems of lawyers' law may be seen as analytically distinct from those of other actual and potential regulatory systems (Cotterell 1995: 34).

11. See Tamanaha (2000: 318 and 239) for a similar approach: "The degree of actual influence in a given social arena can be determined only following investigation.. No presuppositions are made about the normative merit or demerit of a particular kind of law, or about its efficacy or functional or dysfunctional tendencies or capacities".

12. While I do not want to efface the difference between uses of laws in those interaction contexts that are dogmatically and politically privileged as 'legal' by legal science, such as court decision making in which the reproduction of law gets a particular 'currency' (Wickham 1990), everyone interested in the ways in which law is maintained needs also be interested in the other social processes in which this occurs. While such processes may not have the same significance in legal doctrines and for the definition of law, they certainly contribute to the maintenance of law See also K. von Benda-Beckmann 1985; F. von Benda-Beckmann 1984; F. and K. von Benda-Beckmann 1988b.

13. The Dutch adat law scholar Van Vollenhoven (1918, 1931, 1933), writing about the processes through which adat laws in Indonesia were maintained, already distinguished these different forms of transmission and maintenance of law. But see Galanter 1981, De Sousa Santos 1985. See also Sarat and Kearns (1995) on 'law in everyday life'.

14. However, the participants in a process reproducing law, as well as other and later interpreters of these events, cannot control the consequences of these events. In the course of time, the original meaning may be lost. And while in later contexts, a case may be rediscovered, its meaning may have become very different, devoid of its earlier contextualized meaning. A case from our researfh on Ambon (F. and K. von Benda-Beckmann 1994:230, 231) may illustrate this. Hasan Suleiman, the village head of the village in which we did our research in the mid-1980s, in the year 1700 had made a written testament in which he appointed several persons as his heirs, and granted them the use of all his dati lands and the use of four slaves. The properties and slaves were not specified by name, because, as the testament says ' the testator does not deem it necessary to specify land and slaves by name in his testament because they are sufficiently known by own descendants as well as by the people of Hila'. This may have been so at the time. But nearly 300 years, the testament itself and the land testated has been a issue of dispute between the many branches of his descendants. The once self-evident context had been erased.

15. In our study of the relationships between adat, Islam and state law in Indonesia we have shown that the ways in which these relationships – with respect to inheritance law – are reproduced in different spatial and socio-political contexts varies widely (F. and K. von Benda-Beckmann 1988a).

16. Tamanaha (1993), who besides Roberts bas been rather instrumental in creating the bogeyman of legal pluralists, is nice example because he, besides Roberts, was among the creators of that group, and now has entered it.

17. Different importance given to the issue (see Moore 2001 or Geertz 1983).

18. For reconstructions of the history of 'legal pluralism', see Griffiths 1986, Merry 1988, Vanderlinden 1971, 1989, de Sousa Santos 1987, F. von Benda-Beckmann 1992b, 1994, 1997, Fuller 1994, Tamanaha 1993, 2000, Gotsbachner 1995, Snyder 1991, Woodman 1998.

19. A good case could be made, for instance, for Max Weber, rarely quoted in this context (but see Kidder 1983). Weber was of course one of the many who conceptualised law, and the difference of legal norms from non-legal norms and rules, through sanctioning mechanisms, a staff action for the larger social whole. But this law was not necessarily connected to the state, and it was not necessarily exclusive. 'It does not constitute a problem for sociology, Weber wrote (1964:23) 'to recognize [acknowledge the possibility of] the co-existence of different, mutually contradictory, valid orders', so for him there was no conceptual exclusivity of law for state-linked and supported normative order (1956:25).

20. See on the one hand Von Trotha's radical denial of the usefulness of the concept, and on the other hand Cotterell's moderate view from legal sociology. In his discussion, Cotterell concludes that sociology of law may be best served at the present stage of its development by a plurality of approaches to the problem of the concept of law (1995:33). He is not convinced that lawyers' law need be the concept of law but is also wary of fully embracing notions of legal pluralism. Yet to widen the concept of law beyond the lawyer's view of it is to assert the sociological necessity of considering the possibility that legal thought or legal processes in various empirically analysable forms may be a relatively pervasive feature of social life rather than isolated phenomena of a narrow professional sphere (Cotterell 1995:33). If the dominant concept of law in contemporary sociology of law remains the state law concept the danger is that the problems of lawyers' law may be seen as analytically distinct from those of other actual and potentioal regulatory systems (Cotterell 1995:334)

21. Roberts refers to Tamanaha (1993) who allegedly had said so. This simply cannot be said this way. The social history of the concept is a) more complicated, and b) Tamanaha had argued that 'strong legal pluralism is the product of social scientists' (1992:25), outing Malinowski as the true intellectual father of the notion (1993:192,203).

22. See also Woodman (1998:40) "Lawyers have preferred to ignore the subject since it challenges their accepted ideologies'

23. At the recent 2001 Law and Society meeting in Budapest, hardly any attention was focussed on legal pluralism.

References

Benda-Beckmann, F.von (1970) Rechtspluralismus in Malawi-Geschichtliche Entwicklung und heutige problematik eines ehemals Britischen Kolonialgebiets. Munchen: Weltforum Verlag.

Benda-Beckmann, F.von (1979) *Property in Social Continuity: Continuity and Change in the Maintenance of Property Relationships Through Time in Minangkabau, West Sumatra.* The Hague: M. Nijhoff.

*Benda-Beckmann, F.von (1983) "Why Law Does not Behave: Critical and Constructive Reflections on the Social Scientific Perception of the Social Significance of Law", pp. 232-262 in H. Finkler (comp.) P*roceedings of the Symposium on Folk Law and Legal Pluralism, XIth IUAES Congress, *1983, Vancouver.*

Benda-Beckmann, F.von (1984) "Law out of context: A Comment on the Creation of Customary Law Discussion". *Journal of African Law* 28:28-33

*Benda-Beckmann, F.von (1986) "*Anthropology and Comparative Law", pp. 90-109 in K.von Benda-Beckmann and F. Strijbosch (eds.) *Anthropology of Law in the Netherlands.* Dordrect: Foris

Benda-Beckmann, F.von (1988) "Comment on Merry". *Law and Society Review* 22:897-901.

Benda-Beckmann, F.von (1989) "Scape-goat and magic charm: Law in development theory and practice". *Journal of Legal Pluralism* 28; 129-148.

Benda-Beckmann, F.von (1991) "Unterwerfung order Distanz: Rechtssoziologie, Rechtsanthropologie und Rechtspluralismus aus rechtsanthroplogischer Sicht", *Zeit-schrift fur Rechtssoziologie* 12:97-119

Benda-Beckmann, F.von (1992a) "Introduction: Understanding agrarian law in society", pp. 1-22 in Benda-Beckmann, F.von and M. van der Velde (eds.). *Law as a resource in agrarian struggles.* Wageningen:Pudoc.

Benda-Beckmann, F.von (1992b) "Changing legal pluralisms in Indonesia". *Yuridika* 4: 1-23.

Benda-Beckmann, F.von (1993) "Le monopole d´état de la violence dans la perspective de l'anthropologie jurisdique", pp. 35-57 in E. Le Roy et T.von Trotha (eds) *La violence et l´etat*. Paris: Harmattan.

Benda-Beckmann, F.von (1994) "Rechtspluralismus: Analytische Begriffsbildung oder politisch-ideologisches Programme?" *Zeitschrift fur Ethnologie* 119: 1-16
Benda-Beckmann, K.von (1981) "Forum shopping and shopping forums". *Journal of Legal Pluralism* 19:117-159.

Benda-Beckmann, K.von (1984) *The broken stairways to consensus: Village justice and state courts in Minangkabau.* Dordrecht: Foris.

Benda-Beckmann, K.von, C. Flinterman and T. Oostenbrink (1994) "Human rights and indigenous peoples: How the Netherlands could contribute", pp. 155-66 in P.Morales (ed.) *Indigenous peoples, human rights and global interdependence.* Tilburg: International Centre for Human and Public affairs.

Benda-Beckmann, F.and K. von (1985) "Transformation and Change in Minangkabau", pp.235-278 in L. Thomas and F. von Benda-Beckmann (eds.) *Change and Continuity In Minangkabau*. Athens: Ohio University Monographs in International Studies.

Benda-Beckmann, F.and K.von (1988) "Adat and Religion in Minangkabau and Ambon", pp. 195-212 in H. Claessen and D. Moyer (eds.) *Time Past, Time Present, Time Future*. Dordrecht: Foris.

Benda-Beckmann, F.and K. von (1991) "Law in society: From blind man's-buff to multilocal law", pp.119-139 in *Living Law in the Low Countries*. Special issue of *Recht der Werkelijkheid.*

Benda-Beckmann, F.and K. von (1993) "Islamic law as folk law", pp. 19-37 in H. Slaats (ed) *Liber amicorum Mohammad Koesnoe.* Surabaya: Airlangga University Press.

Benda-Beckmann, F.von T. Taale (1992) "The changing laws of hospitality: guest labourers in the political economy of legal pluralism", pp.61-87 in F.von Benda-Beckmann and M.van der Velde (eds.) *Law as a resource in agrarian struggles*. Wage-ningen:Pudoc.

Berger, P.L. and Thomas Luckmann (1967) *The social Construction of reality*. Harmondsworth: The Penguin Press.

Chanock, M. (1978) "Neo-traditionalism in customary law in Malawi". *African Law Journal* 16:80-91

Clammer, J.1973 "Colonialism and the Perception of Tradition in Fiji", pp.199-220 in T. Asad (ed.) Anthropology and the Colonial Encounter. Atlantic Highlands: Humanities Press.

Cotterell R., (1995), *Law's Community,* Oxford: Clarendon Press.

Fuller, L. (1964) *The morality of law*. New Haven: Yale University Press.

Fuller, C. (1994) Legal anthropology, legal pluralism and legal thought. *Anthropology Today* 10:9-13.

Galanter, M. (1981) Justice in many rooms. *Journal of Legal Pluralism*, 19:1-47.

Galloway, D.C. (1978) "The axiology of analytical jurisprudence: a study of the underlying sociological assumptions and ideological predeliction", pp. 49-98 in W.Th. Bechter (ed.) *Law in social context.* Deventer:Kluwer.

Geertz, C. (1983) *Local knowledge.* New York: Basic Books.

Geiger, Th. (1964) *Vorstudien zu einer Soziologie des Rechts*. Neuwies: Luchterhand.

Giddens, A. (1964) *Vorstudien zu einer Soziologie des Rechts*. Neuwies: Luchterhand.

Gotsbachner, E. (1995) *Informelles Rechts: Politik und Konflikt normativer Ordnungen*. Frankfurt am Main: P. Lang.

Griffiths, J. (1986) "What is legal pluralism?" *Journal of Legal Pluralism* 24: 1-50

Hart, H.L.A. (1961) *The concept of law*. Oxford: Clarendon Press.

Hoebel, E.A. (1954) *The law of primitive man*. Cambridge: Harvard University Press.

Kidder, R.L. (1983) *Connecting law and society: An introduction to research and theory*. Englewood Cliffs: Prentice-Hall.

Maine, H. (1914) *Lectures on the early history of institutions.* 7th ed. London: Murray.

Merry, S.E. (1988) "Legal Pluralism". *Law and Society Review* 22:869-896.

Moore, S.F. (1978) *Law as process.* London: Routledge and Kegan Paul.

Pospisil, L. (1971) *Anthropology of law: A comparative perspective.* New York: Harper and Row.

Roberts, S. (1998) Against legal pluralism: Some reflections on the contemporary enlargement of the legal domain. *Journal of Legal Pluralism* 42:95-106.

Snyder, F. (1981) "Colonialism and legal form: The creation of 'customary law' in Senegal". *Journal of Legal Pluralism* 19:49-90

Sousa Santos, B.de 91987) "Law: A map of misreading: Toward a post-modern conception of law". Journal of Law and Society 14:279-299.

Tamanaha, B.Z. (1993) "The folly of legal pluralism". *Journal of Law and Society* 20:192-217.

Tamanaha, B.Z. (2000) A non-essentialist version of legal pluralism. *Journal of Law and Society* 27:296-321.

Turk, A. (1978) "Law as a weapon in social conflict", pp. 213-232 in Ch. Reasons and M.M. Rich (eds.) *The Sociology of Law: A conflict perspective*. Toronto:Butterworth.

Vanderlinden, J. (1971) "Le pluralisme jurisdique: essai de synthése", pp. 19-56 in J. Gillissen (ed.) Le pluralisme jurisidque. Brussels: Université libre de Bruxelles.

Vanderlinden, J. (1989) Return to legal pluralism". Journal of Legal Pluralism 28:149-157.

Velsen, J. van (1969) "Procedural informality, reconciliation, and false comparisons", pp.137-153 in M. Gluckman (ed.) *Ideas and procedures in African customary law.* London: Oxford University Press.

Weber, M. (1956) Wirtschaft und Gesellschaft. Koln: Kiepenheuer und Witsch.

Woodman, G.R. (1998) “Ideological combat and social observation: Recent debate about legal pluralism” *Journal of Legal Pluralism* 42:21-59.