

THE DEPENDENCE OF THE CONCEPT OF LAW UPON COGNITIVE INTEREST¹

Hubert Treiber

1. Introduction

Whoever shows some interest in a 'normative anatomy of society' should also read carefully the writings of Heinrich Popitz, in particular his *Die normative Konstruktion von Gesellschaft* (Popitz 1980)². One good reason for this is that Popitz explicitly dealt with 'the role of norms in our society and their interaction with the law', developing as a consequence some very far-reaching insights. This despite the fact of it having been said that he subscribed to the "ideology of legal centralism" (Griffiths 1986: 3)³, his concept of law being borrowed from Max Weber and Theodor Geiger. If, despite such accusations, his work remains of great interest, this seems first of all to point to the quite trivial circumstance that the suitability or utility of concepts depends on the cognitive interest at stake. But

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² This book is based on ideas that Popitz developed in the course of lectures which have now been published: Popitz 2011.

³ "According to what I shall call the ideology of legal centralism, law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions."

it is also quite possible that this criticism was made hastily, following some very selective reading. Accordingly, this essay represents an invitation to read once more those writers (Geiger, Popitz, Weber) who have come in for particularly critical attention from adherents of legal pluralism.

I will deal first of all here with the relevant works of Popitz, before then turning to Max Weber. A rather more thorough examination of Max Weber seems advisable here, since legal pluralists link his name with the idea that law is linked to the 'sovereign state', while one can also read that as far as theoretical conceptualisation is concerned, "Max Weber is one of the first social scientists in whose thinking something like legal pluralism was possible," although with the restrictive rider added: "whatever one might think of his concept of law" (F. von Benda-Beckmann 1994: 4).⁴ The section dealing with Weber will close by introducing some game-theoretic considerations, with the aid of which S. F. Moore's conception of the 'semi-autonomous social field' will be extended, using this to examine something that Weber himself could not have contemplated, that the law is not strictly ('as if by command') adhered to, but negotiated, as it was even during his lifetime. In conclusion the work of Theodor Geiger (Geiger 1964)⁵ and Christian Sigrist will be briefly introduced, in particular the manner in which Sigrist, in criticising Geiger's concept of law (Sigrist 1967: 106ff.), falls into the trap of "nostrification",⁶ "reading someone else in one's own terms" (Matthes 1992: 84). Nonetheless, the prime aim is discussion of the concept of law that Franz von Benda-Beckmann developed for comparative usage (F. von Benda-Beckmann 1981, 1986, 2002), since among other things this is associated with the claim that it presents legal pluralism with an instrumentarium suited to the avoidance of the 'trap of nostrification.'

⁴ In this context we can cite Weber as follows: "Sociology has no difficulty with the idea of a variety of co-existing, contradictory orders within a given human group" (ES: 32; WuG: 16, § 5.3). (For a list of the abbreviations used in references in this article, see list of References). See also Weber 1924: 40f., where among the "range of groups to which the individual belongs", he includes: the domestic group, the clan, the magic group, the village and market group, the political group. See also Weber 2011: 119f. (MWG III/6); and Weber 1927: 26-7.

⁵ For a critique of Geiger see Lübke 1990.

⁶ "Nostrifizierung" (nostrification) is a neologism introduced by J. Matthes (1992: 84), drawing upon a formulation used by J. Stagl (1981: 284) in a different context. Since it is a technical term (coined word) it must be translated by its literal English equivalent, but its meaning is explained in the text.

2. Heinrich Popitz and his “Normative Construction of Society”

Popitz’s outline of a general sociological theory certainly takes its conceptual point of departure from Theodor Geiger’s preliminary studies (Popitz 1980: III), but it is all the same indebted to the (Kantian) question posed by Simmel: “How is society possible?” (Simmel 1992b: 42-61). In fact, the question is posed by Simmel rather more exactly as “How is societisation (*Vergesellschaftung*) possible?”,⁷ since this is an easier way of answering the question. It is nonetheless striking that this minor reformulation of the concept of society made in the title plays a rather marginal role in the book itself,⁸ and so to some extent this can be compared to the way that Weber himself conceived of a “sociology without ‘society’” (Tyrell 1994). My reformulation of Simmel’s initial question presents us with manageable and comprehensible processes of societisation, opening up for examination the basic determinants of societisation, and also of social order. At stake here are basic questions of sociology, which with the aid of basic sociological concepts (among which norms assume prominence as “the basic fact of human social existence” (Pohlmann 2006: 31)) can be discussed within the framework of a theory of action. Just as Max Weber’s sociology of *Verstehen* “deals with the isolated individual and his action as the most elementary unit” (WL, 439; Weber 2012a: 280; Treiber 2011b; see further Treiber n.d.), this same basic element is the point of departure for Popitz’s “anthropo-sociological theoretical conception” whose range can be explored with the aid of a catalogue of “universal constructs of social norming (*Normierung*)” (Popitz 1980: 69ff.) which invite examination. Following Weber, Popitz contrasts the “hypostasisation of ‘society’ which implies the existence of a unitary ‘collective subject’ ... with a perspective oriented to an experienced reality” (Dreher and Walter 2010: 289) where generalisation is anchored to given

⁷ To render *Vergesellschaftung* as the English ‘socialisation’ violates Weber’s own distancing from Simmel’s use of the term, and has entirely the wrong connotation in modern English usage, which follows Simmel’s contrast of individual and society. ‘Association’ is also not available, since we need this word to distinguish *Verein* from *Gesellschaft*. There is an argument for the use of ‘sociation’ as a translation of *Vergesellschaftung*, as Lawrence Scaff does successfully in Scaff 1998, especially at 64, citing a passage from the 1906 essay on ‘Churches’ and ‘Sects’. However, to use this translation in relation to Weber 1978: Ch. 1, § 9., would undermine the arguments made in Lichtblau 2011.

⁸ Implicit is a concept of society in the sense of “every closed social group that to some extent recruits members biologically and socially integrates the new born” (Popitz 1980: 70).

concrete actions. The “universal compositional principles of social norming” prove to be “basic conditions of social order” governed by “a socio-cultural variety of norm-contents” which express the “social plasticity and productivity of human beings” (Popitz 1980: 16f.; Pohlmann 2006: 33).

For Popitz, the concept of society, or societisation, relates to the “reciprocal orientation of the behaviour of participating actors”, and so implicitly to the norming of behaviour. “By organising what we do in respect of the expected behavioural regularities of others, this orientation assuming a desiderative⁹ and sanctionable necessity, we norm the behaviour of others, we mutually norm our behaviour” (Popitz 1980: 11). The regularities of social behaviour that can be expected in turn depend upon a capacity to abstract from actions, situations and persons, that is, construct typifications.¹⁰ Norming is also connected to the “implementation of sanctions”, as is shown by the definition of norm chosen, which observes “the Durkheimian rule of the great possible ‘externality’ of the criteria for sociological concepts” (Popitz 1967: 22). There here emerges an orientation to Theodor Geiger, who connected the definition of the norm to the sanction (and not to the expectation), and sought to establish the *degree* of commitment to (legal) norms with “measurable magnitudes” in the frequencies of conformity and sanction (Geiger 1964: 70ff.); and this of course also relates to a specific problematic to which Weyma Lübke has drawn attention. Geiger’s “ordering of the concept of commitment and behavioural ratios depends upon interpretative acts” (Lübke 1990: 588) derived from general empirical rules, with the aid of which we make “objective judgements of probability” (Weber) and “causal imputations”, which in turn enable us to make statements regarding the validity of norms.

Popitz only employs a concept of law turning on the state in his little 1968 study on the “preventive effect of non-knowledge”, which includes an unconventional attempt to quantify the implementation of selected norms in criminal law (Popitz 2003).¹¹ As indicated in the quite precise title of a pamphlet that remains worth

⁹ “Desiderative” means a social imperative independent of the willingness of sanction or their implementation: “We cannot deal with each other without forming interests in the behaviour of others: and with this comes the bacillus of the Imperative, the expectation that something should happen.” (Popitz 1980: 26).

¹⁰ On typification Simmel (1992b: 45ff.) is still worth reading; see also Popitz 1967: 22.

¹¹ For praise of the “quantitative orientation of (Geiger’s) concept formation” see

DEPENDENCE OF THE CONCEPT OF LAW UPON COGNITIVE INTEREST
Hubert Treiber

reading for its style alone, at issue is the exculpating effect of unknowns (Dunkelziffer), that is, the failure of state sanctioning agencies to detect infringements of norms, which failure “plays a significant part in reducing the burden placed upon sanctioning agencies” (Popitz 1980:18). According to Popitz, “punishment ... can only maintain its social effectiveness so long as the majority do not ‘get what they deserve’. Even the preventive effect of punishment only works so long as the general preclusion of unknowns is maintained” (Popitz 1980: 23).¹² This empirically-informed statement, directed at Durkheim, Mead and Geiger among others, can be further generalised,

... that the three basic conditions of society – information on mutual behaviour, the disclosure of infringements of norms, and sanctions – ... would, if taken to extreme perfection, not make society possible, but put an end to it. The conditions of possibility of social being depend on a state of imperfection. (Pohlmann 2006: 36)

In fact Popitz employs two different concepts of society, and these need to be kept separate. First of all, he is interested in the principles of construction prevailing in all societies of which we know, understanding by society here “a bounded social unit with a certain degree of social interdependence” (Popitz 1980: 70). Defining the concept of society in this way thus does not relate it “to any particular society” (Popitz 1980: 13) and implies no territorial footprint. Secondly, in “demarcating legal norms” Popitz refers to “significant social entities” (Geiger), or “political organisations (politische Verbände)” (Weber) whose “political” order is guaranteed by central institutions, which itself indicates the existence of a “very

Popitz 2006a: 228.

¹² In this empirically-informed study the proportion of unknown cases (according to the norms of the Federal Republic’s criminal law) where norms are infringed is relatively high at 75% of all cases, the proportion of cases to which a sanction was applied being relatively low at 10%. Popitz comments on this finding as follows:

The implementation of norms normally depends on a significant proportion of failures of implementation disappearing as unknowns. The implementation of a sanction can play only a very limited part in the general validation of a norm, its capacity to support such validation by itself is very limited. (Popitz 1967: 67)

high level of institutionalisation” (Popitz 1980: 32, 33, emphasis ^{added}).¹³ Here there is a territorial reference,¹⁴ although the proposed legal concept is “not exclusively suited to the characteristics of the modern state”, even if it does remain bound to “specific political organisational forms with which we are familiar.” For him, legal norms are “social norms whose infringement is sanctioned by *agencies* ... which have monopolised particular sanctioning functions (conviction, determination of sanction, execution of sanction)” and by those central institutions which are guarantors of (“political”) order and from which they draw their power of enforcement (Popitz 1980: 32f.). Popitz does nonetheless guard against connecting the concept of law too closely to this “familiar context” since “relatively complex social structures can endure for a long time without those institutions which, in modern society, are thought necessary to the ‘rule of law’” (Popitz 1980: 33).

In the following we will concentrate on the universal principles of construction of society presented by Popitz, since these lend us insights “into the working of society”. Our point of departure is the fact that in all known societies norms can be shown to exist. The resulting “inevitability of norming (in lasting societalisations)” (Popitz 1980: 17) indicates for Popitz the presence of anthropological assumptions such as the “relative freedom from the constraint of instinct” of human beings (which they show by their open-mindedness and capacity to learn), their capacity for language, and also their creativity (Popitz 1980: 18).

The presumption that there is indeed a normative construction of society finds confirmation for Popitz in three inter-related structures: those of integration,

¹³ Popitz here distinguishes “different stages of institutionalisation of systems of norms”. It also seems relevant here to refer to the “stages of institutionalisation of power” that he outlined in his *Phänomene der Macht* (Popitz 1992: 232ff.), if only because this process of institutionalisation depends upon increasing “depersonalisation”, “formalisation” (= norming) and the “integration of the power relationship within a generalised order.” Of relevance here would be the stage of “the positioning of power”, or in other words, “the emergence and positioning of the ruling framework” (Popitz 1992: 244ff., 255ff.).

¹⁴ The state, as a “territorial society constituted as a national state”, and in respect of any comparison, as the existence of a tendency “to directly define the ‘units’ of ‘comparison’ spatially, or by analogy with a spatial confederation”, can be read out of Geiger’s definition of “society” as “the concept of a spatially unified living persons, or persons temporarily united in a particular place” (Matthes 1992: 86f.).

obligation and sanction. The *structure of integration* serves to integrate the new born, who are exposed to “basic normative experiences” (Maurer).¹⁵ The extent to which these three structures are inter-related is made clear by the following:

Normative orders form in social units into which children are born and brought up. This means that members of these units develop expectations regarding the behaviour of other members and which motivate them desideratively – they *want* something from each other – and they do not as a rule accept deviations without any reaction, but respond with sanctioning actions which state: this should not happen here. (Popitz 1995: 127)

Within these units children not only undergo their first “normative experiences”, but also their experiences of power,¹⁶ which secure “the universality of inequalities

¹⁵ Popitz (2000) deals with the origin and development of social norming in ontogenesis. Pohlmann accurately captures the intention of this essay as follows: “it outlines the effects the first time that the child is confronted with a social ‘no’, drawing thematically upon theories of norm, power, games and socialisation” (Pohlmann (2006: 32). In his essay “Das primäre soziale Gehäuse” Popitz examines the emergence of social norms in phylogenesis. His point of departure here is a more detailed treatment of the “way in which societisation works like cell formation” with nomadic hunters and gatherers, which reveals what “society” means: “The formation of social units and the creation of a boundary between those who belong and those who do not”; groups “formed of both genders, who brought children into the world, [in the ‘social uterus’ of the group], nurtured and socialised them” (Popitz 2006b: 187f.) This is the heart of what Popitz calls the “structure of integration”. See also Popitz 1995: 126ff., 129.

¹⁶ See in this connection a passage from Popitz:

Every child learns how to deal with power. It suffers from its vulnerability (Verletzungsanfälligkeit) – even if something is taken from it so as to protect it – it learns that its actions can have both good and bad consequences, and that others can bring about these consequences (...), it attaches itself to the attention and recognition of adults, it takes its place in a world made by others. (...) Where people care for and bring up children they intentionally and premeditatedly exercise power: the power of action (Aktionsmacht), instrumental power, the power of authority, the power of facticity (datensetzende Macht). (Popitz

of power in societies” (Popitz 1995: 129). Normative orders of this kind are characterised by social differences: those of age and gender certainly, where gender difference opens up the possibility of “a systematic differentiation and co-ordination of complementary yet dissimilar actions” (Popitz 1995: 128).

Hence the structure of integration also provides an initial acquaintance with the *structure of obligation*, which includes general and particular norms as artificial constructs. General norms are addressed to all members of a society, they allow belonging to be expressed as well as equality, whatever actual inequality there might be. Particular norms are by contrast for specific persons and groups; they draw attention to social differences (such as age and gender), to dissimilarity and otherness. This is especially true of non-reciprocal particular norms where the

(1992: 34f.)

Power relations arise according to Popitz because

relations between people are defined by their capacity to harm and the vulnerability to harm (power of action), by influence over their hopes and anxieties (instrumental power), from the compulsion and the capacity to set standards (authoritative power), from the compulsion and capacity to alter the world of objects (the power of facticity) (Popitz (1992: 33).

Unlike Weber, whose vague (“amorphous”) concept of power is related to the “diversity of forms of power”, Popitz seeks the common factor in the socio-historical phenomenal forms of power, their underlying anthropological presuppositions, so that he might identify basic “structural characteristics” of power. He does this by linking the way in which power gets things done to the constitutive human capacity for action and human dependency, which taken together can be traced back to “four quite elementary” basic assumptions that correspond to the four basic forms of power outlined above (Popitz 1992: 23). Even if the concept of the “vulnerability of the human being” is rather a broad one, violence does represent the fundamental form of power – as of a purely destructive “power of action” which can be exercised by absolutely everyone “just like that” (Popitz 1992: 25). Unlike Hannah Arendt, violence and power are related in such a way that violence becomes a “structuring element” (von Trotha 2000b: 35) in a comprehensive theory of power. This invokes upon “violence as an event that can create [and threaten] order” (Popitz 1992: 61ff.), in the past and in the present and, besides phenomena of power, has to do with phenomena of rule (Popitz 1992: 43ff., 233ff.). See Treiber 2012a: 136ff.; Breuer 2011.

DEPENDENCE OF THE CONCEPT OF LAW UPON COGNITIVE INTEREST
Hubert Treiber

addressees of the norm are not the same as the beneficiaries, both being mutually confronted with different obligations. Reciprocal particular norms on the other hand confront specific persons and groups with the same normative particular status with mutual obligations. This involves relations between equals “within a framework of dissimilarity” (Popitz 1980: 76). At the same time this is a common example of the way that norms attach themselves to each other (Popitz 1980: 46, 75f.), which can be observed more frequently with non-reciprocal particular norms (Popitz 1980: 47). From such bundles of norms “result the relationships and relational frameworks that are called role structures” (Popitz 1980: 74. See also: Maurer 2003: especially 1175-1180; Pohlmann 2006: 34).

Wherever structures of obligation can be found, *sanctioning structures* are not far away. “Without sanction regulations no primary system of norms can maintain itself – it would, so to speak, be unravelled from within by permanent conflicts over sanctions” (Popitz 1980: 86).¹⁷ As a rule sanctioning actions involve conflict, so the sanctioning subject has to be capable of prevailing.¹⁸ “Sanctioning subjects need to be able to do something extraordinary, and those who breach norms have to accept the extraordinary” (Popitz 1980: 49). Popitz goes on to discuss this in detail (Popitz 1980: 48ff.), but here we will restrict our attention to a brief consideration of the relevant sanctioning subjects. In respect of the basic form dealt with (“sanctions by affected beneficiaries, by the public of one’s own group, by a sanctioning agency [Sanktionsinstanz], and by the person who breaches the norm” (Popitz 1980: 57)) what Popitz understands by sanctioning agency, or by sanctions implemented without any such agency, is of particular interest. He considers that a sanctioning agency depends upon a shift in power towards a ‘place’ in the social structure that has not been created for a particular person, or persons (Popitz 1980: 54f., 87f.). Distinct from this is the case where “sanctions imposed by ‘group publics’ [Gruppenöffentlichkeit] play an especially important role, because no sanctioning agencies have developed, and decisions by the group

¹⁷ It has also to be said that the existence of deviations must be assumed, since “designs for order that do not envisage deviant behaviour are based upon a fiction” (Popitz 1992: 34).

¹⁸ As will be shown, the chance that the law will be empirically enforced is secured by the prospect of coercive enforcement. When the law gets in the space between order and conflict this principle is very persuasive, as ethnologists have shown us. For conflict will show up which normative ideas are valid. (Dilcher 2002: 120)

regarding sanctions are made by individuals possessing particular personal prestige ('condensations of the group public')" (Popitz 1980: 53). For Popitz, these are sanctions without agency (Popitz 1980: 55), including "solidarity groups" "which bring about shifts of power that undermine solidarity, and so tend to assume the function of a third party" (Popitz 1980: 89). In these "condensations of group public" (Verdichtungen der Gruppenöffentlichkeit) there are signs of the formation of sanctioning agencies, since the need for decisions on sanctions is a "mainspring of the institutionalisation of power structures" (Popitz 1980: 53f.). If one disregards the statements of definition, it becomes evident that Popitz deals only marginally with legal norms which, so it seems, are given a somewhat marginal role in the normative construction of society (Popitz 1980: 33). And when he for example writes that "we know of no societies in which no sanctioning agencies have formed and which, nonetheless, have made any sort of progress in overcoming the problem of applying norms to sanctions" (Popitz 1980: 88), he leaves the question open of whether one can here talk of 'law' at all.

Popitz gives a considered response to the question of 'how society works'. This response is anthropologically informed and is based upon the normative construction of society, although the concept of law here plays a minimal role. In all of the societies of which we are aware at least "three principles of normative co-ordination" can be observed: "co-ordination by general norms, by non-reciprocal particular norms, and by reciprocal particular norms" (Popitz 1980: 76). All societies have structures of integration, commitment and sanction. Together these make up the "basic conditions of societisation" that indicate "what holds society together at its core" (Popitz 1980: 15).

In developing his model of the affirmation structure (*Geltungsstruktur*) of legal norms Popitz introduces a concept of law centred upon the state when he turns to examine the norms of criminal law prevailing in the Federal Republic in 1962 (Popitz 1980: 64ff.). In truth, this model is organised around that aspect of the imposition of a sanction that requires information on behaviour, but which, like the imposition of a sanction itself, should not be pushed too far if the norm being protected is not itself to be destroyed. Following Geiger here, Popitz ties the definition of law to the intervention of sanctioning agencies (Sanktionsinstanzen). But he does discuss (referring also to studies in legal ethnology) a series of differing phenomena, all of which fall under the heading of "sanctioning agencies" and are at different levels of institutionalisation, among them "the very first signs of the formation of sanctioning agencies" ("condensations of group public") (Popitz 1980: 53). Even if in so doing Popitz manages to gather together and conceptualise a considerable variety of existing ways of reacting to deviant

behaviour, his “conceptual efforts” convey the enormous difficulties in the attempt to comprehensively define 'law' in such a way that it is also open to practical application. The demand for decisions on sanctions promotes the “institutionalisation of power structures” (Popitz 1980: 53f.) that (can) become guarantors of order, insofar as the orders which they guarantee “secure orientation” (Orientierungssicherheit) and over time endow the existing order with “ordered value” (Ordnungswert), inviting the numerous “subtenants of power” to 'invest' in it (Popitz 1992: 223ff.; see also Anter 2004: 100ff.).

More restraint should be exercised in accusing Popitz of the “ideology of legal centralism” (Griffiths 1986). Given his cognitive interest – he is of course interested in the “fundamental conditions of societisation” – he makes do with a concept of law which presumes a particular level of institutionalisation, and which is capable of distinguishing 'law' from other (normative) behavioural regularities. This concept of law is not suited to intra- and inter-cultural legal comparisons. Popitz does also make it plain that there is hardly any point in separating this legal concept from “the context with which we are familiar” (Popitz 1980: 33). His model of the affirmation structure of criminal law norms used in *Preventive Effect of Non-knowledge* demonstrates the advantages of distinguishing primary behavioural norms from secondary norms of legal enforcement, despite the existence of very many uncertainties, dealt with very elegantly through the discovery of the 'easing effect' (Entlastungseffekt) of the lack of affirmation of these norms (including the unknowns), with all the subsequent consequences.

3. Max Weber Reconsidered: Does Weber really have a 'State-centred' Concept of Law”?

The allegation is often made that Max Weber employs a “state-centred” concept of law, but he is also linked with Eugen Ehrlich as one of the earliest representatives of legal pluralism. This is a paradox that calls for investigation. Although such an investigation might also seem an audacious undertaking, since as a sociologist Weber stated that his methodology made use of “precise legal expressions” whose original meaning he then replaced with a sociological meaning (WL: 440; Weber 2012a: 281; Gephart 1990). It could be that this approach could run counter to Weber’s intention of “forming a concept of law which transcended as far as possible particular eras or cultural contexts” (Hermes 2004: 225).

3.1 Weber's Sociological Concept of Law in the Context of the Conceptual Architecture of the Basic Sociological Concepts

If we are to present Weber's sociological concept of law we need to spread our net rather widely, including not only the first chapter of *Economy and Society*, 'Basic Sociological Concepts' (ES: Ch. 1), but also the 1913 Essay on Categories, the often-neglected section of *Economy and Society* "Die Wirtschaft und die gesellschaftlichen Ordnungen", and the section known as the "Sociology of Law". (These last two have now been published as Weber 2010: 191ff., 274ff. (MWG I/22-3): see Treiber 2012b.). The conceptual architecture of 'Basic Sociological Concepts' is founded on the social relationship (ES: § 3; Gresshoff 2006: 258ff.), characterised by the manner in which multiple agents mutually coordinate their actions and in so doing orient themselves to each other. Since for Weber the law (the legal order) is a subclass of order, we need to briefly examine this concept. Weber calls the "substantive meaning" (Sinngelt) of a "social relation" an order if maxims can be formulated to which the actors orient themselves (ES: § 5.2). If orientation to these maxims occurs because they are considered "obligatory or exemplary", then the order is validated. Hence maxims are in Weber's sense – he also uses the expression "norm-maxims" (WL: 334; Weber 2012a: 210) – "ideas of the 'norm' that work as the '*reales Agens*' of action" (WL: 329; Weber 2012a: 207¹⁹). The meaning of the statement becomes completely clear if one refers to the concept of validation.²⁰ Validation (Geltung) means an empirically-ascertainable idea in the heads of actors regarding the obligatory nature (*Verbindlichkeit*) of an existing order. If this idea of being bound is present there is a chance that actors will in fact orient themselves to this order. If this is the case then the chance also increases that this order will be observed. Since it is only this fact of the 'orientatedness' of action to an order, and not its simple observance, that determines 'validation' (MWG I/22-3: 195; ES: 312f.; WuG: 182), this implies that valid orders (convention, law) do, or can, evince different degrees of commitment (*Verbindlichkeit*). Besides convention and law, purely factual regularities of attitude and action can develop – usage and custom (ES: § 4): "Custom would not in this sense be something 'validating': no one can 'require' its observance, that one conform to it" (WuG: 15, No. 2; ES: 29, No. 2). With the "validity of an order" Weber first introduces a value-oriented justification (WuG:

¹⁹ stating "... [his] empirical 'maxim' is the idea of the 'norm', which functions as a real motive of his action".

²⁰ The concept of validation already implies an "imperative": see Treiber 1998; Treiber n.d.

DEPENDENCE OF THE CONCEPT OF LAW UPON COGNITIVE INTEREST
Hubert Treiber

16, § 5.1 (the example of an official); ES: 31, No. 1) which increases the chance of an orientation to this order. This chance in any case appears to exist if an order is endowed “with the prestige of being considered exemplary or obligatory” – Weber here even speaks of 'legitimacy' (WuG: 16, § 5.2; ES: 31, No. 2). If one here takes account of § 6 in the 'Basic Sociological Concepts', Weber still seems to waver somewhat in the conceptual construction of legitimacy. But he is however certain that the stability of an order is “only to a vanishingly small degree the consequence of an orientation to ‘legal rules’” (MWG I/22-3: 221; ES: 324f.; WuG: 190).

The 'social relation' is also the point of departure for the 'concept of organisation' (Verbandsbegriff):

We will call a social relationship which is externally closed or limited an *organisation* (*Verband*) if the observance of its order is guaranteed by the behaviour of particular persons charged specifically with its implementation: by the behaviour of a managing *head* (*Leiter*) and, quite probably, of an *administrative staff* which normally also has deputising powers, where appropriate. (WuG: 26, § 12; ES: 49, No. 2)

In the absence of the “chance of this action” there is simply a social relationship (ES: § 12.2). This additional feature of the existence of a head or administrative staff is relatively easy to ascertain. Insofar as this involves the particular behaviour of particular people it is shown that the concept “administrative staff” initially means no more than a particular number of persons who are prepared to fulfil the tasks assigned to them, they are '*disposed*' to act in this way. (ES: § 12.2)

Weber makes 'organisation' (*Verband*) a high-level concept – a generic concept – that includes both the association (*Verein*) and the *Anstalt*.²¹ Both involve (rational) statutory orders (WuG: 28, § 15.2; ES: 52, No. 2): in an association they are voluntarily agreed, with an *Anstalt* they are imposed, so that in the first case

²¹ Cf. Weber's statement in a letter to Georg von Below (June 1914):

In the winter I will probably begin to send to the press a fairly lengthy contribution to the '*Grundriss der Sozialwissenschaften*', which treats the form of political organisation (politische Verbände) both systematically and comparatively (Weber 2003, MWG II/8: 723f.)

membership is voluntary, and compulsory in the second. Imposition (Oktroyierung) can ultimately be linked to physical and psychic coercion,²² something to which the definition of an *Anstalt* in the ‘Essay on Categories’ explicitly points (WL: 466; Weber 2012a: 296). To this extent an *Anstalt* enjoying powers of coercion is a ‘ruling organisation’ (*Herrschaftsverband*) (WuG: 29; ES: 53). In the case of both “organisation” and *Anstalt* it appears that, distinct from the ‘social relationship’ in which ‘orientation and actions’ are co-ordinated, here “structures of action” (Schluchter 2000: 131) and moves towards institutionalisation are involved, to which we could add the chance of imposing agreed (‘rational statutory’) orders. This also requires some element of established procedure (the application of particular rules). The state is then an ‘institutional political establishment’ (*politischer Anstaltsbetrieb*) laying claim to a monopoly of legitimate physical coercion for a specific area, with a qualification that is often overlooked: “Sociology has nothing to say about why a ‘state’ ‘exists’ only at a given time and place where the coercive means of the political community are in actuality stronger than those of any other” (MWG I/22-3: 202; ES: 316; WuG: 184. See also Colliot-Thélène 2007).²³ Besides referring to the state as an *Anstalt*, Weber also talks of the “state as validating idea” (Geltungsvorstellung), in order to avoid a ‘substantive view’ of this concept (WuG: 13, § 3.2; ES: 27, No. 2).²⁴ The

²² Here “can” expresses the fact that for Weber a majority decision also involves the sense of “coercion” (WuG: 27, § 13.1; ES: 51, No. 1).

²³ Weber refers several times to the “struggle between the coercive means of various organisations (Verbände)” for which, up until “today”, it has not always been the political organisation that has prevailed, even if “the modern political organisation ... has extensively usurped control over these coercive means” (MWG I/22-3: 207f.; ES: 318; WuG: 186). In his *Sociology of Law* the differing periods in which the “transformation of organisational forms into states” (Verstaatlichung des Verbandswesens) took place are identified as a major factor explaining the different course of legal development in England as compared with Continental Europe. (MWG I/22-3: 416; ES: 724; WuG: 435; see also Hermes 2007)

²⁴ See also the following comment of Weber, taken from a letter to Robert Liefmann, March 1920:

As far as sociology is concerned, the state is no more than the chance that particular forms of specific action occur, actions of particular individual men and women. And nothing else. (...) What is ‘subjective’ here is: that the action is oriented to particular ideas. And ‘objective’: that we, the observers, judge:

concept of *Anstalt* has a prominent role in Weber's writings in two respects. He does execute, in exemplary fashion, his methodological intention of using precise legal terms in the construction of sociological concepts, providing them with a different meaning (WL: 440; Weber 2012a: 281). Even if the sociological concept of *Anstalt* and its distinguishing features (some of them help to define the concept of state) appear to provide a significant substantive content detached from its historically specific conceptual source in law, we should recall that it still retains echoes of its previous legal origins. As Schoenberger has shown, the legal concept of *Anstalt*, constructed in the second half of the nineteenth century, clearly has a close connection to the principles of construction and actual features of the Prussian-German constitutional monarchy (Schoenberger 1997: 314ff., 53). Hence there is a great deal of plausibility in Hermes' supposition that the

... focus upon organisation and rule in the legal constructions of constitutional law [*Staatsrecht*] has a determining influence upon the semantic structure of the sociological parallel terminology. And this is because Weber also imports from jurisprudence, along with the legal concept [*der Anstalt*], the criteria of relevance with which the sociological object is constructed (Hermes 2006: 212).

Moreover, this model of the *Anstalt* seems to function as a comparative tool (within the occidental cultural space) – so we can see that Weber, if only sketching out his argument, uses this model to analyse the development of the English state, since he imputes a number of the features of the concept of *Anstalt* to the 'core properties' of the state (Hermes 2007: 87; Breuer 2011: 196-201, especially 198f.).

Weber's sociological concept of law first begins to take shape in the 1905 essay on Roscher and Knies (WL: 87; Weber 2012a: 56), as well as in his contribution to discussion following H. Kantorowicz's lecture at the first meeting of the German Sociological Society's 1910 Frankfurt meeting (Weber 2012a: 366).²⁵ There are

whether there is a chance that this, action oriented to these ideas, will happen. If this chance no longer exists, then the 'state' no longer exists. (Cf. Mommsen 1965: 137, fn. 12; Weber 2012b, vol. 2: 946ff.; for details see Treiber n.d.)

²⁵ The meaning, in sociological language, of the legal-dogmatic assertion that a legal rule with a certain content is 'valid' is

two aspects to note: first, his distinction between a legal and a sociological concept of validation; second, the claim “of an empirically efficacious conception of norm (Normvorstellung) in the empirical sciences to causal explanation” (Hermes 2004: 220). Since Weber introduces the empirical concept of validation he is forced to mark off a legal order from other normative orders, for it is possible that conceptions of obligation could be entertained even in respect of the latter. Weber selects as the means of making this demarcation a foreseeable “guarantee of obligation”: “‘Law’ is for us an ‘order’ with specific guarantees for their prospect (*Chance*) of empirical validation” (MWG I/22-3: 195; ES: 313; WuG: 182).²⁶ All that Weber is concerned about is the circumstance that “for the chance ... of the empirical validation” of a legal order, there are guarantors who remain prepared – whether an individual head (Leiter) or an administrative staff – for whom “a sufficiently strong chance of intervention exists ... even in cases where *only* an infringement of a norm as such has occurred” (MWG I/22-3: 200; ES: 315; WuG: 183f.).

This primarily concerns the individual, or staff, who hold themselves in readiness for such an intervention, and not the means of coercion (WuG: 18, § 6.2; ES: 35, No. 2). This is shown in the following passage:

The legal order and the conventional order are in no respects fundamentally opposed for sociology, since even convention is supported partly by psychic compulsion, partly even, at least indirectly, by physical compulsion. They can only be distinguished in the sociological structure of compulsion through the absence of people prepared to exercise coercive force (the ‘apparatus of coercion’) (MWG I/22-3: 225; ES: 326; WuG: 191).²⁷

simply the following: There is a certain *probability* that certain *actual* circumstances will lead to a certain compulsory intervention by the state.

²⁶ Both features of the sociological concept of law are consequently nothing but conceptual definitions. In this respect it is wrong to argue that Weber is a representative of a “coercive” theory of law, as happens in some textbooks on the sociology of law written by lawyers. See also Loos 1970: 104.

²⁷ The terms ‘coercive apparatus’ or ‘staff’ are often enough put in quotation marks, which suggests that there is here a notable proximity to the corresponding apparatus of the modern state, although this was in no way Weber’s intention. This

DEPENDENCE OF THE CONCEPT OF LAW UPON COGNITIVE INTEREST
Hubert Treiber

Apart from that, it is precisely this sociological concept of law, with these two features attached, which has made Weber a 'forerunner' of legal pluralism.

What this sketch of the conceptual architectonic should reveal is the often disregarded fact that Weber did not connect means of coercion and coercive apparatus to the state, but to *quite specific structures of societisation* (*Vergesellschaftung*), among which there is the organisation (*Verband*) in Weber's sense. One of the few to have understood this is G. Dilcher, a legal and medieval historian:

But Weber does not connect coercive means and coercive apparatus to the state. On the contrary: he starts with the slow historical development of the state²⁸ and so links the existence of law, which for him is an older phenomenon, with regard neither to origin, nor validation, nor enforceability, to the state, but to the forms of societisation. For him, law is an order with certain guarantees of its prospect (*Chance*) of empirical validation. (Dilcher 2002: 118)

We need here to recall that the law is a special order, which for its part relates to "social relationship ("the substantive meaning" of a "social relation") in much the same way that the state and the medieval occidental town (for a given era at least) each represent particular *structures of institutional societisation (anstaltsmäßiger Vergesellschaftung)*. In this regard Weber's concept of law gets around all of the difficulties that Tamanaha encountered in trying to distinguish 'state' and 'non-state' law (Tamanaha 1993: 206ff., including the schema on p. 207) (or what

is shown by the following passage, drawing upon ethnological research:

... with respect to any given behaviour, the prospect in the here and now of advantage or distress brought about through the use of magic, or of reward or punishment in the next world are, under given cultural conditions, frequently much more certain in their effects than a political coercive apparatus whose functioning is not always calculable. (MWG I/22-3: 202; ES: 316; WuG: 184. See also: MWG I/22-3: 208f.; ES: 318f.; WuG: 186; ES: 35; WuG: 18.)

²⁸ Regarding the improbability and contingency of the formation of the state in the Occident see Hermes 2003: 135ff., 138.

Weber calls *außerstaatlich* law (MWG I/22-3: 202; ES: 316; WuG: 184)). Thanks to the definition of law that he puts forward, the 'living law' of the *zadruga* is law in just the same way that the statutory law of the *anstaltsmäßigen Vergesellschaftung*. If one disregards the somewhat unfortunate expression "guaranteed law" (MWG I/22-3: 200; ES: 315; WuG: 183) and pays attention to what has just been said, then the intention of Weber's formal concept of law, observing the Durkheimian rule of the "greatest possible observability",²⁹ seeks the broadest possible approach to the question of whether a concrete order represents 'the law', or not. But one cannot nonetheless, as the above argument has shown, accuse Weber of having a 'statist' concept of law, despite the fact that this accusation is made repeatedly.

The fact that both the definition of an organisation (Verband) and that of law make use of a "staff" as a leading characteristic has often led to misunderstanding, a prominent example being Hans Kelsen (Kelsen 1928: 164f., 167). Organisation (Verband) and law in no way coincide exactly, as he assumes, but are nevertheless "mediated by the concept of rulership" (Hermes 2004: 229, for this and the following). Commands which demonstrate the exercise of rule (ES: 946; WuG: 544. Weber 2005: 135/ MWG I/22-4) can also be treated as "maxims", in the subjective sense of rules of behaviour that are regarded as obligatory (WL: 334f., 446, 470; Weber 2012a: 210, 285, 299; see Loos 1970: 95), which for Weber are "factual determinants of actual human behaviour" and hence "valid" norms (MWG I/23-3: 193; ES: 312; WuG: 181; WL: 331; Weber 2012a: 208). These are legal norms if the chance of their validation is guaranteed by the foreseeable chance of intervention on the part of those persons (the 'staff') prepared and ready for this. To this extent "the political organisation ... is not only the empirical zone of validation of normatively 'accepted' commands [i.e. rulership], but at the same time the empirical zone of influence of norms guaranteed by coercion [i.e. law]" (Hermes 2004: 229). If we go along this with Hermes here, then we can, in Weber's own words, "characterise the 'organisation' as the 'bearer' [*Träger*] of the law" (MWG I/22-3: 221; ES: 324; WuG: 190). This implies that law and

²⁹ Dilcher, prompted by Weber, poses "the question of law in the Middle Ages from the perspective of legal coercion":

The criteria of legal coercion has the advantage of providing a clear analytical point of departure. Here it is possible to approach the concept of law from an external, sociologically observable criterion, the cognitive aim being to learn more about the 'internals' of the law. (Dilcher 2002: 117f.)

rulership are not linked exclusively to the modern state, but were manifest historical entities before the appearance of the modern state. Examples of this would be in the form of the “numerous ‘legal communities’ whose autonomies³⁰ cut across each other and among which the political organisation – to the extent that it possessed any unity – was only one among many” (MWG I/22-3: 364f.; ES: 697; WuG: 418; Hermes 2003: 144). Among these there is the ‘hierocratic organisation’ which exercised psychic coercion (WuG: 29, § 17; ES: 53), like that of the Church, whose “‘Canon Law’ ... is ‘law’ where it comes into conflict with the ‘state’s’ law, which happens time and time again” (MWG I/22-3: 202f.; ES: 316; WuG: 184f.). The concepts that Weber develops (such as order, organisation, law) are intended to register these historical circumstances, including the fact that an organisation (Verband) can have several orders, although not all orders are legal orders (MWG I/22-3: 221; ES: 324; WuG: 190).

3.2 'Reference Points' in Conceptual Construction: the Medieval Occidental Town and the Upper Italian Trading Company

Weber had a wide and well-founded knowledge of legal history³¹ in which he could call in part upon his own studies,³² and which had a major influence upon the way in which he constructed his concepts. In this regard he was very familiar with the period dealt with in Tamanaha's 'Legal Pluralism in the Medieval Period' (Tamanaha 2008: especially 377-381), not only in respect of the medieval pre- and early history of statal relations, where he regarded vendetta and feuding as instances of 'coercively-secured law', emphasis being given to this by clans and

³⁰ On the concept of autonomy see MWG I/22-3: 360f.; ES: 695; WuG: 417; MWG I/22-3: 368f.; ES: 699; WuG: 419f.

³¹ Max Weber was a trained historian, or more precisely ... one of the last significant students of the Historical School of Law, given due recognition by the conferral of the *venia* as a specialist both in Roman and German Law. In this sense he was as much ancient historian as medieval or modern historian, since he was familiar with discussion of methods and problems in all of these areas, and wrote works ‘as a historian’. (Dilcher 2000: 120)

³² We can cite here: Weber 1999 (MWG I/22-5); Weber 2008 (MWG I/1). We could also note the section on “Canon Law” in the Sociology of Law (MWG I/22-3: 544-550; ES: 828ff.; WuG: 480ff.).

their supporters (the guarantors of law) (WuG: 18, § 6.2; ES: 35, No.2; MWG I/22-3: 209; ES: 318f., WuG: 186; Dilcher 2002: 116ff., 128ff. See also Kannowski 2002). For these periods his studies on the medieval town and his history of trading companies are especially relevant. They illuminate very clearly how Weber developed the concepts with which we are dealing here. Weber also had in view contemporary phenomena (MWG I/22-3: 202ff.; ES: 316ff.; WuG: 185f.), and he made even on occasion use of contemporary writings in legal ethnology.³³

Despite the extraordinary differences among medieval Occidental towns,³⁴ during the height of their autonomy (MWG I/22-5: 234; ES: 1323; WuG: 788) they were characterised by legislative autonomy and autocephalism, ie. with their own judicial and administrative authorities (MWG I/22-5: 236ff.; ES: 1325ff.; WuG: 789ff.; see also MWG III/6: 40, 350ff.). Weber characterises the 'typical medieval town' of the Occident using all of the central concepts we have so far introduced: as an "*anstaltsmäßig vergesellschafteten, mit besonderen und charakteristischen Organen ausgestatteten Verband von 'Bürgern'*" who as such are subordinated to a law which only they share in common, so that they possess the social rank of 'legal associates' (*Rechtsgenossen*) (MWG I/22-5: 107; ES: 1240; WuG: 743; MWG I/22-5: 107, 15; ES: 1248ff.; WuG: 748ff.).³⁵ It is plain that in creating the concept of organisation (Verband) Weber was thinking of the medieval Occidental town: its characteristic autonomy betrays this fact. This concept includes "the

³³ As a leaf through the Sociology of Law (MWG I/22-3) shows, he draws for the most part on J. Kohler (e.g. 464, 562, 564f.) and Post 1887 together with Munzinger 1864). See also Marianne Weber 1907 (79-81, the bibliography to the section 'Die Lage der Frau bei den kulturärmsten Völkern').

³⁴ On this great variety we can refer here to: Bruhns and Nippel 2000; Breuer 2006: the lengthy chapter "Stadtsoziologie", 149-239, especially 248-251, which provides a brief sketch of the most important variants of the medieval Occidental town, their variant initial conditions and divergent "paths of development". See also Dilcher 2000 together with his other writings on the medieval town given below; and also Meier 1994.

³⁵ Weber here uses the sociological concept of *Anstalt* (unlike Nippel in MWG I/22-5: 15). See: Hermes 2003: 217-230, 224; Bader and Dilcher 1999: 254f. 329. Also see: Dilcher 1996, especially: 'Rechtshistorische Aspekte des Stadtbegriffs' 67ff., 'Die mittelalterliche deutsche Stadt in ihrer Heraushebung aus der grundherrschaftlich-agrarischen Welt des Hochmittelalters', 95ff.

DEPENDENCE OF THE CONCEPT OF LAW UPON COGNITIVE INTEREST
Hubert Treiber

independent establishment of norms, linked to a concept of '*Verwillkürung*' (Dilcher 2000: 128, referring to Ebel 1953; Dilcher 1996: 195f., and WuG: 416f.) so important for the history of municipal law (Weber 1924:137; MWG III/6: 216, 474), i.e. with the ability to set one's own norms (as 'statutes') comes the thought of "law based upon a free decision, hence new law" (Dilcher 2000:130) which has the sense of newly-created law which is "created purposively-rationally in respect of the economic needs of citizen and town" (Dilcher 2000: 130; see also Dilcher 2008). We should also mention here urban merchant and artisan guild organisations, belonging as they do to the type of 'free association' (*freie Einung*), which could autonomously exercise a power to draw up statutes, even if the "division of the power to draw up statutes between municipal council and the guilds" was extremely unstable (MWG I/22-5: 236f.; ES: 1325; WuG: 789f.).³⁶

Max Weber's study of trading companies is of interest here for two reasons (Weber 1924:198-203, MWG III/6: 278-282). Firstly, Weber here examines

the development of normative rules from trade practices to customary law, from convention to ('*gewillkürten*') contractual relationships, their adoption in statutes and court procedure, and ultimately the reworking of this practice into a legal science in the attempt to integrate this practice into its concepts and structure. Here Weber followed ... a historico-genetic line from actual practice (we need only mention the community of '*stare ad unum panem et vinum*' which was so important to him) to contractual, judicial, legislative and ultimately scholarly norming. [For a brief overview see Rückert 1993.] In terms of the typology developed in the 'sociology of law', that is the path from custom to convention to law, from traditionally legitimated

³⁶ For details see:

As groupings of associates the merchant guilds and artisan guilds could, indeed had to develop their own law to regulate their own affairs. The use of oaths or vows to support these rules was the means used to secure commitment through formal *Verwillkürung* This strong commitment to the artisan guild, the limited scope for autonomy, seem to us to mark the difference between merchant guilds and artisan guilds, which are otherwise so structurally similar. (Dilcher 1999: 517f. See also Dilcher 1996: 241f.)

to rationally legitimated law. (MWG I/1: 67f.)

This study is also of interest because of the way that this line of development can be read as a study of 'living law' (in Ehrlich's term).³⁷ Weber does not trace the trading company back to the *societas* of Roman Law, but instead derives the "principle of the joint liability of all members and also the unitary nature of society property from the brotherhood of Lombardo-Germanic law" (Dilcher 2009: 40). In so doing Weber also made the discovery "that brotherhoods of this kind, and the trading companies arising from them, that is, family enterprises, can be found in the forms of contract and municipal statutes of late medieval upper Italy" (Dilcher 2009: 41). A "community marked by normative ideas of family and kin" developed further through practiced forms of living and working together. Only later were these brought together into a 'new legal form', which ultimately replaced the "strong connection to family and kin" (Dilcher 2009: 42). Such lived family and working relationships "thus correspond to living legal usage, it is not a written law, but a lived reality" (Dilcher 2009: 41).³⁸ Weber not only investigated 'living law',³⁹ he had also been aware of contemporary instances of 'non-state law', for instance the Austrian Slavic *zadruga* which Ehrlich himself mentioned several times (Ehrlich 1967: 129, 157, 403, especially 299),⁴⁰ "which not only ignored the state guarantee of law, but whose orders were even partly in direct conflict with official law" (MWG I/22-3: 203; ES: 316; WuG: 185; MWG I/22-3: 203, 437f., with fn. 17; ES: 756; WuG: 443).

Weber employed different legal concepts or 'ideal typical constructions' in his investigation of the law, depending on his given cognitive interest

³⁷ Ehrlich knew this book by Weber, having reviewed it, but he did not see that in it Weber was also inquiring into 'living law': Ehrlich 1891.

³⁸ See on this F. and K. von Benda-Beckmann 2007: 136: "Hence general business conditions or normative trade practices are not in general made by lawyers. They arise as normative orders within specific social organisations or interactive networks."

³⁹ Hertogh 2009, especially the contribution from Eppinger 2009. A contemporary example of the autonomous creation of law is dealt with by Weyrauch 2002.

⁴⁰ Weber's reading of Ehrlich is documented in MWG I/22-3 and in Treiber 2008: 231f. Since the *zadruga* had already been mentioned by Marianne Weber (1907: 81), and the first edition of Ehrlich's book was dated 1913, Weber's source is not Ehrlich.

(Erkenntnisinteresse) (WuG: 18, § 6.2; ES: 34f., No. 2). One instance is an exhaustive ideal-typical construction to determine the level of rationality attained in inter-cultural comparison, using postulates from conceptual jurisprudence (Begriffsjurisprudenz) (MWG I/22-3: 303f.; ES: 654ff.; WuG: 396ff.; Treiber 2008: 230ff). He is especially interested in a comparison of Anglo-Saxon and Continental European law; here the nature of the supporting strata (the form of legal doctrine, or the way in which those who apply the law are trained) plays a primary part, followed by 'extra-legal relations', the political and economic framework within which this operates. Taking up an idea of Ehrlich, Weber attributes the conditioning framework immanent to the law to the 'invention' of legal institutes, while the extra-juridical framework accounts for the chance of their diffusion (Ehrlich 1967: 328f; Treiber 2011a, 37-48, 49-58⁴¹). There is no 'statist concept of law' (etatistischer Rechtsbegriff) in this comparison, and within the 'extra-legal relations' the state is just one among several circumstances to which Weber ascribes responsibility for the differing pace of legal development (in England, the state "did not keep up with the Continental evolution to bureaucracy, ... but remained attached to a system of administration through political appointees (*Honoratiorenverwaltung*)" (MWG I/22-4: 180; ES: 970; WuG: 560; MWG I/22-4: 191f.; ES: 977; WuG: 564). The procedure adopted by Weber in this comparison retains much that would be of use to studies with a comparable cognitive interest, in respect of both the dimensions take into account and the concepts that are employed.

3.3 Weber's Understandable Lack of Interest in the Implementation of the Law

If one approaches Weber's analysis of legal rule with the Humean question: how do the few succeed in ruling over the many? – then one runs the risk of neglecting the role played by the implementation of administrative decisions, more exactly, the ideal type of the rational modern hierarchical bureaucracy equipped with the means to execute directives 'as if by command', and which today plays a leading part in the law of organisations (Organisationsrecht).⁴² It can however be supposed

⁴¹ In Treiber 2011a, Table 1, p. 29: 'irrational' belongs before the table, as with 'rational' in Table 2, p. 31.

⁴² Of fundamental importance here is Dreier 1991. It is no surprise that the first critical study of the dogmatic premises of law enforcement in the Federal Republic of the 1970s, which were taken for granted at the time, comes from a discipline that sees itself as empirical and analytical; and not from a dogmatic, normatively

that some phenomena, such as 'co-operative law', or a 'co-operative bureaucracy'⁴³ which does not rule ('command') but deals in norms, could be seen by Weber as “a turn to the irrational”,⁴⁴ if only because of the constructive logic which characterises the rationalisation process. Co-operative law is often related to the shortcomings of enforcement in the applying laws, although the fact that negotiation can enhance the effectiveness of the law is in no way ignored (among many sources see in particular Bohne 1981). However, it is a more than plausible assumption that it is the enforcement authorities themselves that lend a law its substance. Viewed in this way, the difference between the law as passed from legislator to administration, and what the latter ultimately makes of this 'in the shadow' of given legal norms, “is not a much-discussed deficit of enforcement, but one of the possible realisations of what was wanted – and what the administration actually wanted” (Ellwein and Wollscheid 1986: 320). It is possible to talk of 'selective ineffectiveness' matched against the proclaimed intentions of the legislature, but on the other hand the 'real autonomy' of the administrative authorities is of help to them in realising the 'selective effectiveness' of their own ideas. Here, 'real autonomy' means the capacity to 'wilfully' (*eigenwillig*) interpret law and develop one's own rules given the proviso that where there is a lack of agreement in negotiations⁴⁵ the authorities reserve to themselves the final

shackled discipline like jurisprudence.

⁴³ Co-operative administration was also known in Baden from 1878 onwards in respect of factory inspection - see Treiber 1995: 79ff. Weber could have been familiar with the everyday conduct of factory inspection in Baden since his doctoral student, Else von Richthofen, was for a short time the first female factory inspector in Baden.

⁴⁴ For Weber the emergence of the law of commerce and exchange (MWG I/22-3: 590; ES: 858; WuG: 495) points to preconditions which help deflect the possible consequences of a systematic scholarly rationalisation of legal thought and procedures (MWG I/22-3: 631; ES: 889; WuG: 509; Dilcher in MWG I/1: 63).

⁴⁵ This concerns “negotiations overshadowed by hierarchy”, an angle to which Moore pays too little attention. This involves a constellation in which “a formal hierarchical agency has to find an acceptable solution for pragmatic reasons, but where if, necessary, it would also be capable (although with reduced efficiency) of making the decision unilaterally. Here there is a reduction of risks involved in ruling on account of the need to seek acceptable solutions, while at the same time the transaction costs of negotiation are reduced by the potential threat of a unilateral decision which, while possible for both sides, would not be what they

right of decision. This amounts to the activation of a 'semi-autonomous social field' which has a significant influence upon the effects of law or of legislation (Moore 1978. See also F. and K. von Benda-Beckmann 2007: 121f.). But what Sally Falk Moore does not deal with in her well-regarded article on the 'semi-autonomous social field' is the fact that entry into negotiations is anything but unconditional. If one side signals a readiness to negotiate, even when there is a lack of trust, the side that is prepared to co-operate sees itself in a situation vis-à-vis the other side comparable to that of Prisoners' Dilemma (Benz 1995). The side that is prepared to be co-operative perceives itself as risking that the other side will decide not for co-operation, but for authoritative action (power), such that non-co-operation appears to each side to be a rational strategy.⁴⁶

4. Questions upon Questions: Does Geiger's Concept of Law involve a Circular Definition? What is "Nostrification"?

Theodor Geiger is often used to show the trouble that authors get into when they

replace rules relating to a competence to sanction with law, but retain the dependence of the concept of law on the competence to sanction, such that the rules relating to a competence to sanction are not covered by the concept of law" (F. von Benda-Beckmann 1981: 322, fn. 26; see also F. and K. von Benda-Beckmann 2007: 14, 190)⁴⁷

wanted." See Scharpf 1992: 25. Factory inspection in the Duchy of Baden practised precisely this kind of negotiation. By contrast, one of the communes that we investigated for years relinquished use of the law available to them so that a project for industrial investment might not be jeopardised. See Breunung and Treiber 2005.

⁴⁶ In the Prisoners' Dilemma non-co-operative behaviour leads to a collective minimum of utility, a minimax strategy seeming to be the individually-rational choice for both sides. Since non-co-operation allows an individual utility maximum to be achieved this also favours non-co-operation. The dominant strategy of non-co-operations points to a Nash equilibrium, a situation in which neither of the actors "has an incentive to depart from this condition and initiate a co-operative strategy." See Braun 1999: 93f.

⁴⁷ If agencies sanction then Geiger talks of law. He assumes that legal norms are

Geiger does ultimately specify that these rules are “legal concepts *per se*” (Geiger 1964:161). The tautology into which all who follow this procedure would slide would become clear in Geiger's case, since he himself admits: “How could rules with this content be anything other than legal rules – for their objects only appear with the creation of a legal order within social life itself” (Geiger 1964:161).

At first glance the accusation of tautology seems justified, but a second glance shows that things are more complicated. Initially Geiger makes it plausible that a “general, material (substantive) definition of the legal order in contrast to other ordered frameworks ... is unthinkable” or inconceivable (Geiger 1964: 161). For this reason Geiger favours a (formal) concept of legal order which make use of the general characteristics “the type of social body supporting the order” (Nos. 1-2) and the “structure of the order’s mechanism” (Nos. 3-6) (Geiger 1964: 161), in order to mark it off from “other socially-ordered structures.” According to Geiger, a legal order has six characteristics which he also uses as an ideal-typical standard: “A given, socially-ordered structure involves a higher degree of law the more complete the number of named features (characteristics) are represented in it” (Geiger 1964: 168). The following six characteristics are considered:

1. a “differentiated and structured *significant social body*” (Groß-Integrat) (with territorial integrity?),
2. managed “by a central power”,
3. which has monopolised “reactive activity” with respect both to imposition and execution,
4. “exercise of this monopolised reactive activity through judicial authority (richterliche Instanz)” who are either personally identical to the central power or are made upon of “particular organs commissioned by this power,”
5. “organisation and regulation of the reactive activity in part through the norming of a formal procedure in which reaction is imposed,
6. in part through the norming of the modes of reaction in relation to infringements of the norm” (principle of proportionality) (Geiger 1964: 168).

given statutory form by legislator Θ but it is only an enacted sanction by an agency Δ that contributes at the level of behaviour to the realisation of the claim to commitment of the legal norm. This means that Geiger seeks to establish the chance that a (legal) norm will be effective at the behavioural level.

The legal order specified in this way is the result of social development (Geiger 1964: 130ff.) in which the transfer of reactive activity from an 'unorganised group public' (Gruppenöffentlichkeit) to a particular 'agency' (Instanz)⁴⁸ is a decisive step in the structure of power (Geiger 1964: 158ff., 149ff., 348ff.). According to Geiger, at stake is "institutional separation out of the administration of law (Rechtspflege) as a particular social functional context" from the structure of a central power and which is the expression of social interdependence and which in turn seeks to influence this through its organs (Geiger 1964: 150, 169f.). Only when a central power of this kind has developed does Geiger talk of a 'legal order' in the above sense (Geiger 1964: 130). Like Popitz, he presupposes a particular level of institutionalisation (Geiger 1964: 133, 293f.). The few indications that he gives suggest a level that in Popitz is the 'stage' of the 'positioning of power' (Positionalisierung von Macht) as it transforms into the stage corresponding to the "formation of the positional structure of rule" (Popitz 1992: 232ff., especially 244ff., 255ff.; see Geiger 1964: 149f.). He is very reticent about the development of the central power, but tends towards an exogenous origin (Geiger 1964: 180, 130), in the same way that he talks of an original "relationship of pure power" that "in time develops into a legitimate relationship of rule" that to a certain extent practices regulated exploitation (Geiger 1964: 137). Without explicitly saying so, Geiger here implies that power "tends to promote order" while, on the other hand, order functions to limit power (Popitz 1992: 62ff.). Geiger's argumentation is for the most part ahistorical, historical references serving for illustration at the most. Accordingly, he often offers plausible assumptions, as with the original emergence of agency Δ , of which he says: "agency Δ (Instanz) must be thought as introduced by the central power as an act of rulership," also assuming that "the norm which is to be maintained through sanction is to be found partly in the prior exercise of the act of rule, partly in the inherited custom of the phase existing before the law" (Geiger 1964: 181).

"The transition from pre-legal to legal forms of reaction" (Geiger 1964: 131) is accompanied by regulations which "relate to the structure and function of the central power, especially to the formation and influence (or effectiveness) of the legal mechanism of order itself" (Geiger 1964: 121f., 190, 161).⁴⁹ Unusually, in

⁴⁸ Geiger enumerates those who in a society based on the rule of law "can be agency Δ ." Both "a chief and a Richterkönig" are included in this, from which it can be seen that Geiger's idea of a society based upon the rule of law is rather distinct from the normal usage. (Geiger 1964: 131)

⁴⁹ "Seen from the interests of those in power, all power seeks to impose norms"

this regulation Geiger gives a *substantive* definition of legal quality (“by virtue of its content and object”) which otherwise he excludes (Geiger 1964: 161), and calls these regulations “legal rules *per se*.” Geiger is aware of the related problematic (Geiger 1964: 220ff.) and discusses it, which prompts F. von Benda-Beckmann’s criticism. The following formulation points in the same direction: “So if one wants, one can in this case [that of constitutional and public law] speak of something which is in substance a legal norm, and yet is not binding in typical legal fashion” (Geiger 1964: 222). The binding nature of constitutional norms is not guaranteed in a typically legal manner, since in any threat or infringement of the “intercursive power relation” (Geiger 1964: 340ff.) at stake between ruler and ruled it is ultimately “part of the actual power of resistance of the ruled which provides the real guarantee for the maintenance of the constitution” (Geiger 1964: 375)⁵⁰ If then those norms (public law, constitutional law), which were the basis upon which norms were mobilised into statutes and sanctioned, were endangered or set aside, then it is possible that there could no longer be any reliance on conforming legal behaviour in respect of state agencies, so that the guarantee of commitment would be ‘transferred’ to the ruled.

In his well-regarded study of the ‘acephalous society’ Christian Sigrist has criticised and rejected Geiger’s conception of legal order (Rechtsordnung) (Geiger 1964: 168), citing its lack of suitability for his own investigative ends (Sigrist 1967: 107f.). But the steps of his proof, modelled on Geiger’s six characteristics and which establish which of them relate to segmentary societies,⁵¹ point to a fundamental problematic with which intercultural comparisons are often faced. As Matthes has shown,

The aporia of such a ‘comparative’ practice consists firstly in the fact that its *tertium* is not constructed as a meta-reflection, but

(Popitz 1992: 244).

⁵⁰ Geiger also deals briefly with the assumption of the guarantee of commitment by “ruling organs”, for example, brought about by the invocation of the “highest court” which establishes whether a disputed measure infringes the constitution. *This would be, although not in its full and real sense, a “sanctioning intervention by agency Δ”* (Geiger (1964: 222f., my emphasis).

⁵¹ According to Sigrist characteristics 2, 3 and 4 are absent in all segmentary societies; while 5 and 6 “can be found in more or less definite form” in all of the societies that Sigrist has studied (Sigrist 1967: 108).

forms it as a cultural projection. The other aspect of this aporia is *that a tertium gained through a cultural projection provides at the same time the standard for the search, for the identification of comparative phenomenon elsewhere*. The *there* for the substance (Sachverhalt) of this 'comparison' is detected with the aid of this projected *tertium* using the concept that the *here* of the content to be 'compared' has of itself – transposed into an abstraction unlimited with respect to time and space. What is presented as 'comparison' is performed, first, as an identification of what is 'like' (or on a 'par') according to its own standard, before comparison (Ver-gleichen) as an explicit operation begins. (Matthes 1992: 83; his emphasis).

As Matthes has outlined elsewhere, this involves a process of 'nostrification' (Stagl), "appropriating according to our own standard ... there is no 'comparison', but rather an 'other' reality is interpreted in 'familiar' terms" (Matthes 1992: 84).

The outcome of fieldwork related to 'legal pluralism in Indonesia' together with long-established ethnological discussion concerning a usable concept of law has prompted F. von Benda-Beckmann to sketch a 'comprehensive idea of law' capable both of including the regulatory spheres that Geiger excluded, and avoiding the distortions to which intra- and intercultural legal comparison of law are subject.

5. The (vain) search for "an abstract and analytically 'uniform' unit of comparison" (F. von Benda-Beckmann)

There follows a discussion of the "conception of law adequate for intercultural comparison" (F. von Benda-Beckmann 1981: 326; F. von Benda-Beckmann 1986) that F. von Benda-Beckmann, a specialist in legal ethnology, presented in an article of 1981. Although published a long time ago it remains relevant, Benda-Beckmann referring back to it frequently in his later writings. He opens up his 'general concept of law' with an analogy that is at first sight surprising: the three possible compositional structures of water molecules. In regard to this analogy, Benda-Beckmann states that

...I cannot include temperature as a factor in my definition (of the phenomenal form) if I assume that the concrete phenomenal

forms under comparison – ice, water and steam – are primarily determined by temperature (F. von Benda-Beckmann 1981: 315).⁵²

Ice is thus not “the phenomenal form of water that appears when the temperature is below freezing point,” but is instead to be characterised as “a *particular* relationship and combination of water molecules” (F. von Benda-Beckmann 1981: 316). Applied to the law, this approach aims (besides some marginal features) to grasp conceptually an 'essential core' of an object 'law' that can only be conceived in the form of a concrete phenomenon. The analogy is however somewhat imperfect because temperature is concealed, as a 'marginal condition' of the above definition of ice, in the adjective '*particular*'.⁵³

It seems that Benda-Beckmann arrives inductively at the properties that are supposed to enter into the legal concept, since he begins with concrete legal orders (F. von Benda-Beckmann 2003: 187). This inductively-established core of 'properties' is given a theoretical foundation at a relatively high level of abstraction, which I will briefly outline. For Benda-Beckmann, law is “a form of overcoming [working through] of social problems” and a way of “balancing interests” (F. von Benda-Beckmann 1981: 316). This approach to the phenomenon of law renders it as a “rational response to social problems” (Moore 2001: 97), but it remains too general (abstract) requiring further specification. Issues that constantly recur prompt a general patterned response which then becomes a reflex

⁵² The broadly-accepted definition of law, which connects law to the state, is the reason that he introduces temperature as a factor. See also F. von Benda-Beckmann 1981: fn. 26.

⁵³ If one wishes to go further than a simple description of the different phenomenal forms of water molecules and establish an explanation, temperature has to be taken into account:

the condition of fluid water does not of itself follow from the condition of ice; the change can be understood as a necessary one only through causal relations, it is not created by the thing itself. Hence that system of general statements that are supposed to express the *essential concept* of a changeable object of our perception do in this case contain causal relations which connect the conditions of the same object with external conditions. (Sigwart 1911, vol. 2: 469; emphasis added)

response, thus assuming an objective character, although it remains evident that this is an objectivity constructed by humans (Berger and Luckmann 1967, Ch. 2.1 where this process is described as “institutionalisation”). Benda-Beckmann provides in this fashion an answer to the question of how law 'came into the world'. The generalised form in which problems are dealt with gives rise to procedural rules, together with 'solutions' to these problems. Benda-Beckmann pulls together this general pattern, or set of rules, as 'social conceptions' (gesellschaftliche Vorstellungen) which have both a cognitive and a normative aspect, as knowledge and as normative demands.⁵⁴ They also possess the property of “limiting the autonomy of members of society ... while at the same time acknowledging it” (F. von Benda-Beckmann 1981: 317). This is of course still very abstract, while 'autonomy' is itself a relatively modern concept whose meaning is tied to the Occidental cultural space (Pohlmann 1971).

According to Benda-Beckmann, the law reveals itself in this social conception, while what is 'specific to the law' is expressed in the *manner* “in which the autonomy of the members of society is limited, while at the same time is acknowledged” (F. von Benda-Beckmann 1981: 317). Then, somewhat abruptly, 'situation images' (Sachverhaltsbilder) are introduced as “conceptions that one could form regarding an instance or a complex of events” (F. von Benda-Beckmann 1981: 317). References given at the end of the 1981 article (F. von Benda-Beckmann 1981: 324f.), as well as in a piece published in 2002, state that these situation images are established with the assistance of *legal* conceptions,⁵⁵

⁵⁴ In Berger and Luckmann 1967 the legitimation of institutional orders formed in this way have these properties.

⁵⁵ Through legal conceptions 'situation images' of (elements) of the social and natural world (of persons, organisations, natural resources, social relationships, behaviour, occurrences) are constituted and constructed as meaningful categories, evaluated and given relevance. Relevance means that definitive consequences are attached to and rationalised by reference to the legal categories and their evaluation. (F. von Benda-Beckmann 2002: 48f.)

Geertz's ... often quoted statement of 'law as one way of imagining the real' draws attention to the fact that law also consists of cognitive conceptions, and that with the help of legal conceptions 'facts', or I have said ... 'situation images' are established. (F. von Benda-Beckmann 2002: 61)

which are in turn evaluated in terms of the law, here with respect to 'further consequences' using 'three means of evaluation'. It would be good to know more about these 'situation images' – their emergence, their construction, their qualities – above all, whether one can assume there to be a connection between evident 'social conceptions' and 'situation images' (or what such a connection might look like) (F. von Benda-Beckmann 1981: 316f.).⁵⁶

The evaluation makes use of three criteria (standards):

1. the permissibility/impermissibility of (primarily) human action;
2. that of validity/invalidity;
3. and that of “simple relevance”, which, as “mere stimulation” (Reiz) is indifferent to “ideas of morality and value”, unlike the first two criteria (F. von Benda-Beckmann 1981: 318).

The second standard is exclusively applied to these kinds of 'situation images', or at any rate this is how the corresponding elaborations are to be understood where contracts (legal transactions) or laws (Gesetze) are involved. One can ask why the second standard is only (?) applied to the two 'situation images' that are identified. The third standard prompts the question of the extent to which that feature which satisfies the standard of 'simple relevance' is not incorporated in the situation image, or whether this could imply the status characteristic of an acting person (F. von Benda-Beckmann 1981: 324), as for example known in traditional law (for example, being the son of a chieftain by virtue of birth). As I read it there are, in the situational image, the evaluation employed here, and the possible consequences thence drawn, evince “specific properties of law”, which have a dual manifestation and constitute what Benda-Beckmann calls his “*general conception of law*” (F. von Benda-Beckmann 1981: 318). This duality is: firstly, as a “general rule” (Gluckman), or for Benda-Beckmann a “general law”, which is characterised according to the terms of conditional programming “that evaluates generalised situation images with a generalised standard and with which generalised

⁵⁶ These passages could possibly also be read in such a way that “the way in which autonomy is limited and (at the same time) recognised” is identical with the evaluation of situation images conveyed by the three evaluative standards, through which “specific qualities of the law” are expressed which are also manifest in the “general rules” and in the “concrete right of decision.” This would create a kind of deductive relationship.

consequences are associated” (F. von Benda-Beckmann 1981: 318); secondly, as a “concrete right of decision” (Gluckman),⁵⁷ in Benda-Beckmann “concrete law”, which relates to the decision of a judge and the associated reasoning.⁵⁸

This “*general conception of law*” is then differentiated internally in at least three dimensions (there are more in the 2002 essay). Within these dimensions the differing phenomenal forms of ‘*genuine law*’ vary, whose underlying properties are (supposedly) identified through the application of the “general conception of law” (F. and K. von Benda-Beckmann 2007: 189ff.).⁵⁹ The first dimension involves the extent to which ‘general law’ is institutionalised, hence empirically verifiable; the second dimension involves the extent to which empirically-verifiable ‘general law’ substantively limits the autonomy of members of the society; and finally, the third dimension involves the extent to which ‘general law’ is obligatory (involves therefore the question of how far in the evaluation of situation images reference should be made to ‘general law’). The problem of obligation raise the question of how this is ‘guaranteed’, and whether here for particular legal orders the ‘state’ might possibly come into play once more.

Linked with this is the claim that, using this approach, a systematic and consistent intra- and intercultural comparison of law becomes possible. The gradient (the ‘more’ or the ‘less’) within the three dimensions, combined with the relatively high level of abstraction of the related (general) conception of law favour in the process of comparison an outcome which, given the presence of gradual differences, detects ‘similarities’ rather than fundamental ‘differences’ (F. von Benda-Beckmann 1981: 325).⁶⁰

⁵⁷ For Gluckman’s (1973: 227, 325) two concepts see F. von Benda-Beckmann 1981: 319, fn. 18.

⁵⁸ Law becomes manifest in two major manifestations, a) as general rules and principles that evaluate typified situation images for typified consequences as conditional ‘if-then’ schemes, and b) as concrete law that evaluates concrete situation images for concrete consequences in terms of ‘as-therefore’ rationalisations. (F. von Benda-Beckmann 2002: 49).

⁵⁹ The analogy with water molecules can be recalled here: the properties are as fundamental as water molecules.

⁶⁰ In regard to the first dimension, general law in Western law shows an empirically higher level of institutionalisation and differentiation (in for example

Benda-Beckmann does ultimately demonstrate the utility of his basic “general conception of law”, the three dimensions that he introduces serving as a point of departure for possible variations (phenomenal forms) of law, as he claims.⁶¹ He demonstrates the manner in which differences in the possibilities of variation and so reveals “differences in the structure of general law”, differences conceived as differences “in the kind of elements that make up general law – situation images, evaluations, consequences, and their mode of connection” (F. von Benda-Beckmann 1981: 323). To this should also be added the point at which the if-then sequence is taken into account, and in what manner these (numerous) circumstances are to be introduced into the evaluation process (F. von Benda-Beckmann 1981: 323). This is illustrated by a comparison of Western general law (Wgl) with traditional law (t(g)l).

In Wgl there is a clear distinction between an “initial evaluation on *principle* of the situation image” which denotes the circumstances that “have any consequences”, and “statement concerning the nature and extent of the (envisaged) consequences” (F. von Benda-Beckmann 1981: 324), each step is closely connected to the other as regards sequencing (F. von Benda-Beckmann 1981: 325). Both on the if-side and the then-side there are numerous circumstances to be taken into account, a very great part of the relevant circumstances is nonetheless built into the evaluation on principle of the situation images in question – in such a way that there is an abstraction from “concrete circumstances of actions and actors” and general

criminal and civil law), whereas traditional law is characterised by a lower level of institutionalisation. Statements regarding the second dimension can only be made through actual investigation. As regards the third dimension, Western Law has a significantly higher degree of obligation for general law than traditional law (a general statement of this kind is possible only in respect of indefinite legal conceptions, blanket clauses and exercises of discretion).

⁶¹ See also the following remark on the favoured “analytical concept of law”,

... with which the law dominant in an investigated society appears as simply a variation of another *more comprehensive category*. The criteria which constitute a legal form dominant in a given society must then be translated into dimensions of variability. It is then these dimensions of variability, and not one specific variation, that forms the properties of the analytical concept of law.” (F. and K. von Benda-Beckmann 2007: 189, with a reference to F. von Benda-Beckmann 1981; my emphasis).

categories of action are formed (F. von Benda-Beckmann 1981: 324). These circumstances are also used for the “differentiation of situation images”, by means of which statements over the resulting consequences can be rendered more precise or more generalised, although this is gained through a “variety of general legal rules” to be taken into account rather than a variety of circumstances (F. von Benda-Beckmann 1981: 324). Since in addition the inclusion of a variety of circumstances in the situation image considerably relieves the consequence-side of relevant circumstances, those which remain can be more easily generalised and made precise.

By contrast, in the evaluation of situation images t(g)l⁶² assumes concrete circumstances for action and actor, associated with “potential relevance” (F. von Benda-Beckmann 1981: 324). Where there are statements about relevant consequences further circumstances are introduced whose number and lower level of abstraction does not allow them to be generalised without further qualification. In addition, evaluation and statement (relating to consequences) are less rigorously, or even not at all, separated from each other (F. von Benda-Beckmann 1981: 325). Benda-Beckmann makes clear using examples that considerable distortions arise in regard to the judgement of both typified legal orders, so that if for instance traditional general law is measured up against the “logical structure of Western general law” (F. von Benda-Beckmann 1981: 325) 'nostrification' occurs: the “appropriation of the other in one's own terms” (Matthes 1992: 84). But what Benda-Beckmann obviously did not realise in 1981 is the qualitative difference between Wgl and t(g)l in regard to their respective levels of systematisation; or in regard to whether the relevant circumstances have, as Weber put it, either a “meaningful-eidetic character” or are inferred “through logical interpretation of their meaning” (one could talk here of Geertz's (1987: 291) distinction of concepts that are 'experience-near' from those that are 'experience-distant'). Such a conclusion makes possible the extension of the “three dimensions of variation”, as then happens in the 2002 piece.⁶³ Of course, the addition of ever more complex

⁶² According to F. von Benda-Beckmann, there is general law in every society although at differing levels, according to the “problem domain” (F. von Benda-Beckmann (1981: 319)), which is why the abbreviation t(g)l is used, in which (g) stands for “general”.

⁶³ The extent to which knowledge, interpretation and application of law have been differentiated from every day knowledge; the extent of professionalisation and theoretisation and scientification ... (F. and K. von Benda-Beckmann 2007: 49, referring to Berger

dimensions no longer adequate to a simple grading leads to a long list from which no generally valid statements can be anticipated.

6. Concluding Remarks

The above confirms what is in itself a trivial finding, that the legal concepts discussed are dependent upon given cognitive interests, with all the advantages, disadvantages and consequences that necessarily result. If we adopt Geiger's position on observed behavioural regularities for instance, distinguishing law from social norm in relation to who discharges the sanction, then 'a lack of law' becomes part of the law ('*Unrecht fällt unter Recht*'). It has also become apparent that the authors dealt with here – Geiger, Popitz and Weber – have been read very selectively, in the case of Weber his supposedly 'etatist' concept of law leading to error. Our evaluation of Sigrist's attempt to apply Geiger's concept of 'legal order' (or incomplete law) to the segmentary societies that he studied points to a fundamental problem. This is made excessively clear by Benda-Beckmann's general conception of law following from his investigative purpose: to construct some kind of third party for the intercultural comparison of law "that does not result from the projection of *one* comparative magnitude read off one's own society" (Matthes 1992: 81).

The 'long shadow' cast by the problem of 'nostrification' also falls on Popitz's proposed definition, who on the one hand avoids fitting the concept of law "exclusively to the characteristics of the modern state", but on the other hand admits that his proposed definition "does not free the concept of law from the context of political organisations with which we are familiar" (Popitz 1980: 33). Even Weber's 'ideal type' raises the suspicion that he can border on 'nostrification' (and possibly here and there even crosses it). Even the comparison of Anglo-Saxon and Continental European law in respect of the level of rationality achieved in an ideal-typically constructed standard of an unresolved ('detached from reality') postulate of *Continental* conceptual jurisprudence (Begriffsjurisprudenz) verges dangerously on this kind of crossover: this standard is generated "by the projection of *one* comparative magnitude read off one's own society (or legal culture)" (Matthes 1992: 81, rephrased). All the same, casuistry and system are in respect of their materiality nonetheless both rational legal

and Luckmann 1967).

Here it is no longer a matter of gradual, but fundamental differences.

phenomena.

Even if law is by definition “coupled to the state” (F. and K. von Benda-Beckmann 2007: 190) there is in the case of intercultural legal comparison a tendency for sociology to generate a 'nostrification'. Because since Durkheim and nineteenth century evolutionism there has been a tendency to elevate projected comparative magnitudes “in such of their features as appear essential to a higher level of abstraction” from which “stages of development are retrospectively developed” (Matthes 1992: 81).⁶⁴ “This projected ‘theoretical’ comparative entity and the stages leading up to it are then employed as the standard for an ‘other’ (Matthes 1992: 81; see 79ff. for the reference to Durkheim).” Of course, it is an illusion to believe it possible to identify all the *genuine* properties of existing law through the use of a general concept of law, and with whose help intra- and intercultural comparisons of law can be made. (Any such search would be vain for the simple reason that this *fundamental* existence of the *genuine properties* of law does not exist, by analogy with water molecules).⁶⁵ The Benda-Beckmanns showed in their very first writings how we should proceed if we wanted to 'compare' without committing 'nostrification' (Matthes 1992: 96), and this has been emphasised above (F. von Benda-Beckmann 1979; K. von Benda-Beckmann 1984). Going back and forth systematically between their own and alien legal

⁶⁴ See also v. Trotha’s very readable essay (von Trotha 2000a). von Trotha had clearly demonstrated the utility of Popitz’s approach in a study on the “basic conditions of societisation”, dealing with youth in large American cities: von Trotha 1974.

⁶⁵ Here Simmel is of relevance; with “religion” in mind he wrote:

So far no-one has been able to establish a definition that tells us what ‘religion’ is, without being a vague generalisation covering all phenomena; identifying the ultimate defining essence common to the religions of Christians, South sea islanders, Buddhists and Aztecs (Simmel 1992a: 266).

There is also a lack of clarity in the purpose of the comparison being made, although it is this purpose that determine the selection of measures of differentiation and the conceptual instruments that are to be applied. Without stating the purpose of the comparison – to use the analogy once again – it is not possible to give special emphasis to one particular material composition (Aggregatzustand) (such as ice), since at the level of description each particular material composition (Aggregatzustand) is equivalent.

orders they have practised a research strategy that in principle helps us to avoid “that beyond (on the *one* side) the abstract projection of the process of 'nostrification' in the mould ('Gußform') of a (simple) comparative magnitude, (actual) 'nostrification' (on the *other* side) is wholly obscured, and itself disappears into the same mould” (Matthes 1992: 96). Nonetheless, the fact that we can only describe how to avoid 'nostrification' in a negative and abstract fashion indicates that this procedure is at best a 'regulative idea': we can strive to overcome 'nostrification', but it remains an aim to be approached, rather than achieved.

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Note: The following abbreviations are used:

ES: Weber 1978.
GSG: Simmel n.d.
WL: Weber 1988.
WuG: Weber 1976.

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