

AGAINST LEGAL PLURALISM

SOME REFLECTIONS ON THE CONTEMPORARY ENLARGEMENT OF THE LEGAL DOMAIN

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All collective human life is directly or indirectly shaped by law.
Law is, like knowledge, an essential and all-pervasive fact of the
human condition. (Luhmann 1985: 1)

Whatever Niklas Luhmann might say now about the enormous claim with which he opened his *Sociological Theory of Law* (first published 1972), it then foretold and today characterises the contemporary expansive mood of legal scholarship. The last three decades have seen both a progressive enlargement of the social field which academic lawyers aspire to keep under observation and a significant broadening of the theoretical resources upon which they are prepared to draw. In the crudest terms this transformation has involved: (1) shifting attention from the institutions of state law to those of a wide range of normative orders; and (2) abandoning a commentary mode adhering to discursive conventions largely shared with practitioners in favour of eclectic resort to the theoretical resources of the social sciences.

Surely all this must for the most part be welcomed. Law journals, at least in the common law world, now seem richer and more exciting places than they were in, say, 1960. But there have been problems too. This mood of expansion has coincided with a period of turmoil within the disciplines to which lawyers were looking for enriched theoretical resources. As we turned to Marx, Durkheim and Weber, social scientists were losing confidence in the capacity of classical social theory to offer exhaustive means of understanding modernity. More troubling still, the whole social scientific project was coming to be seen as problematic. Deepening suspicion began to surround the idea of any 'meta-narrative'. At the same time, a growing preoccupation with long-recognised difficulties surrounding 'perspective' appeared

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to leave the positions of viewer and viewed inextricably entangled, casting doubt upon the status of the ethnographic record.

Attempts to move forward have taken a number of directions. Notable among these has been the development of an eclectic 'post-modernism', under which a virtue is made of 'interpretive' licence (of the kind for which Clifford Geertz was roundly criticised earlier on), apparently leaving us free to say 'anything' at all. At the same time, the austerity of systems theory has acquired a renewed attraction. Notwithstanding a common concern with 'paradox', these must seem at first sight opposed approaches; but Luhmann (1995) has now cast in doubt any radical opposition between them.

Shifting attention from state law to a range of other normative orders has become widely visible in the writings of academic lawyers, well beyond the boundaries of the anthropology and sociology of law. Within contemporary legal theory, adoption of what may loosely be described as 'pluralist' positions has even become fashionable. In the writings of main-stream jurisprudence it has been possible to find, for more than a decade, cautious approval for a conceptualisation of law which goes beyond 'lawyers' law' or 'state law' (e.g. Cotterrell 1983). Well before that, the assault upon thinking about 'law' exclusively in the context of centralised political authority, initiated by Malinowski with such panache in the 1920's, had led to a flourishing anthropology of law. Over the last couple of decades this anthropology of law has become so pre-occupied with pluralist concerns that this subject area has effectively been re-identified as 'legal pluralism'.

Beyond that, legal pluralism has been embraced by exponents of both theoretical directions mentioned earlier. A leading theorist of post-modernism, De Sousa Santos, identifies legal pluralism as "the key concept in a post-modern view of law" (1987: 293). Among the more eclectic proponents of neo-systems theory, Teubner (1992) has shown enthusiasm for legal pluralism.

It would be absurd to diminish the very considerable gains which the legal pluralist project has brought with it. The move away from 'legal centralism' (Griffiths 1986), from according privileged attention to the state and its attendant legal arrangements, represented an enormous release for legal scholars. The very focus of lawyers' attention on a wider slice of the social world, the new openness to social theory, had a liberating and invigorating influence even on the traditional task of commentary, enabling them to draw back from what they were doing and then return to it with new vigour. Law could no longer be treated as unproblematically determinative of social forms; nor could 'order' be claimed as the exclusive product of a top-down, centre towards periphery movement, the skilled achievement of those in power. Again, the shift of focus towards 'boundary' questions, which legal pluralism

inevitably involved, prompted a range of important discussions. These conversations articulated 'difference' in a range of terms - normative order, social field, domain, system and discourse - but all centred around questions of change and permeability.

Preoccupation with pluralism also led to a re-appraisal of earlier discussions around ideology. Here, Teubner was right to underline the importance of De Sousa Santos' insistence that "legal pluralism rediscovers the subversive power of suppressed discourses" (Teubner 1992: 1443). This rediscovery enforces a reconsideration of any one-way, top-down view of ideology as simply operating to justify hierarchy or to mask its reality from the disadvantaged. It thus encourages further reflection on Althusser's account of ideology (1977) and Bloch's corresponding discussion of ritual (1974).

Despite these gains, the contemporary entrenchment of a specifically 'legal' pluralism is bringing some familiar conceptual problems back into focus as well as raising some new ones. First, there is the agonized return to problems of definition. Second, once we start to think about social space in terms of co-existing fields/domains/orders/discourses/systems, the question of conceptualising the relationship of such pluralities becomes central. Third, legal pluralism must encourage reflection on the very nature of the comparative project.

The Claim to a Specifically 'Legal' Pluralism

Among the concerns recently articulated by Tamanaha (1993), it is necessary to foreground the implications of legal pluralism's provenance in the law school and its consequent self-conscious privileging of the folk categories of Western law.

Legal pluralism is unambiguously a creature of the law school: it is something that academic lawyers do; a lawyerly way of looking at the social world. The label itself came into common use during the 1970's as legal scholars began to take an interest in the governmental arrangements developed at a local level in former colonial territories across Africa, Asia, the Caribbean and the Pacific during and immediately following the colonial period. Before that, local institutional arrangements and normative understandings in the colonial world had long been a focus of interest for anthropologists, but seldom for academic lawyers. Within anthropology, 'the problem of order' had been addressed as much in general ethnographic studies as in work we might now label 'legal anthropology'. 'Legal pluralism' has been the term by which lawyers label their own activities, marking out a sub-discipline of academic law, and identifying a new, wider area of the social world for their professional operations.

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The imperial nature of this venture was registered through the formation of an international professional association under the title of “The Commission on Folk Law and Legal Pluralism”. The journal *African Law Studies* re-emerged as the *Journal of Legal Pluralism and Unofficial Law*; a conference was held at Bellagio in 1981, providing an imprimatur for the new field, around which a considerable literature has now developed (see specially, Griffiths 1986; Merry 1988; Allott and Woodman 1985).

Inaugurating an explicitly *legal* pluralism, lawyers have done more than register their interest in a particular field of study: they have marked some rather varied forms with the distinctive imprint of ‘law’. Law, long so garrulous about itself, is now, in its contemporary enlargement, graciously embracing others in its discourse, seeking to tell those others what *they* are. The pluralist project certainly offers an apparent route of escape from a pervasive (if sometimes unconscious) tendency, trenchantly criticised by Said (1973; 1993), to fall into a ‘tradition’ / ‘modernity’ opposition. The level playing field of pluralism appears to avoid the hastily assembled sketch of the ‘other’, drawn in to provide the necessary background for self-satisfied contemplation of modernity. But an equally serious distortion is substituted: ‘formerly suppressed discourses’ are identified, appropriated, re-presented in a particular way - as law. The recovery of previously marginalised spheres is welcome; it is the mode of recognition that is problematic - their recovery within the discourse of *law*.

The problem of invoking law as a category of analysis is that it stands out in terms of both its provenance and its confident self-definition when we use it to gain purchase on adjacent forms of ordering. So much of our sense of what law ‘is’, is bound up with, and has been created through, law’s association with a particular history - early on, the emergence of secular government in Europe; later, the management of colonial expansion. The specialised, differentiated character of law, its constitution of itself as a discrete bounded region - whatever the sceptical observer may make of this self-description - creates enormous difficulties. I claim no novelty in making this old point; simply that ‘legal pluralism’ insufficiently addresses it.

The costs entailed in “melting it all together as ‘law’” have been recognised for a long time. Way back in 1973, Moore reminded us with characteristic understatement that “recognising the existence of and common character of binding rules at all levels, it may be of importance to distinguish the sources of the rules and the sources of effective inducement and coercion” (Moore 1973: 745, 1978: 81). The loss of sociological understanding involved once we attempt to impose the imprint of law

across plural fields is again sensed by Merry when she reflects upon the boundary problems and renewed struggles for definition which a specifically 'legal' pluralism involves:

Why is it so difficult to find a word for nonstate law? It is clearly difficult to define and circumscribe these forms of ordering. Where do we stop speaking of law and find ourselves simply describing social life? Is it useful to call these forms of ordering law? In writing about legal pluralism, I find that once legal centralism has been vanquished, calling all forms of ordering that are not state law by the term law confounds the analysis. The literature in this field has not yet clearly demarcated a boundary between normative orders that can and cannot be called law. (1988: 878-879)

These sober reflections have not prevented continuing, agonized attempts to secure the boundaries of an enlarged legal domain. Recent among these is Teubner's invocation of systems theory in a renewed effort to clarify the relationship of 'law' to other social practices. Anxious to embrace the pluralist project, but emphasising the importance of being "meticulous in defining the legal proprium" (1992: 1452), he points to one 'privileged delineation':

[...] this is the line which the discursive practice of law draws between itself and its environment. If we are interested in a theory of law as a self-organising social practice, then it is not up to the arbitrary research interests to define the boundaries of law. Boundaries of law are one among many structures that law itself produces under the pressure of its social environment. And only a clear delineation of the self-produced boundaries of law can help to clarify the interrelations of law and other social practices. (1992: 1452)

For the key to this self-proclaimed boundary, Teubner follows Luhmann in looking to the code in which legal communications are expressed: "the binary code of legal/illegal" (Luhmann 1992). So for Teubner:

Legal pluralism is then defined no longer as a set of conflicting social norms in a given social field but as a multiplicity of diverse communicative processes that observe social action under the binary code of legal/illegal. (1992: 1451)

One would not want to quarrel with Luhmann and Teubner's determination to locate

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the 'social' in the sphere of communications, rather than in institutions and processes; this shift of focus is entirely congruent with the welcome increase in attention given to language in the social sciences from the early 1970's. Nor could one fault Teubner's concern to listen to law's own account of itself. An understanding of the sharply differentiated arrangements which we find in the contemporary West can properly begin with a recovery of lawyers' self-understandings and descriptions, their conventions of communication. But there is perhaps something of a surprise, a "paradox" in Teubner's terms, in his readiness to accept law's self-determination, law's 'folk' or 'native' view of itself as the basis for marking out scientifically an enlarged legal domain inclusive of adjacent normative 'systems'. It is one thing to be attentive to the folk categories within a particular social field, another to invoke this native code in realising Teubner's explicit ambition to enclose a broader legal realm.

Leaving aside this general methodological worry, it is easy to forecast that definitional struggles are likely to surround the identity of the binary coding legal/illegal, which Luhmann and Teubner propose should mark the legal domain. It is not altogether clear which 'systems' might be seen as observing this code. What is it about the code that distinguishes it from other categories of normative discourse?

While normative understanding, by definition, revolves around *some* sort of binary coding, we must here be talking about something more than the element approved/disapproved inherent in any mode of normative understanding. Is it the imperative, categorical nature of the opposition, a feature apparently closely bound up with law's provenance as an instrument of command - a link which elsewhere Teubner seems determined to get away from? Has it to do with the nature and availability of sanctions? Do we see the code as circumscribed by the particular linguistic forms within which the opposition is expressed in state law? Both Luhmann and Teubner make it clear that they see a range of normative systems falling within this definition: "the binary code legal/illegal is not peculiar to the law of the State" (Teubner 1992: 1451). But can it have application outside the bounds of functionally differentiated society, within which Luhmann's schema was conceived? The whole burden of Teubner's argument is that it can; but the very conception of legality upon which the opposition rests seems specific, if not to a particular culture, at least to functionally differentiated society. Can we, to take a familiar ethnography (Gulliver, 1963), see Arusha communications as observing the code legal/illegal?

This particular attempt to pin a notion of the legal to a broad canvas seems to founder, not as others have done, with the boundary between the legal and the social dissolving in our hands, but because sharp divisions, inherent in the self-description of a particular sub-system of functionally differentiated society are given too wide an

application.

Conceptualising the Plural Scene

'Legal pluralism' presupposes a certain way of thinking about social space - as divided into a number of co-existing, more or less discrete compartments. Once we adopt this compartmentalisation, the question is immediately posed: how can we best conceptualise the relationship between these different orders/fields/discourses, etc? The question is there whether we are contemplating adjacent fields within the metropolis, or between the 'secretariat' and the localities in the colonial context.

A number of shots have been made at characterising the relationship between adjacent normative fields. Everyone seems agreed about the naivety of what Kidder (1979) has vividly labelled 'the static hypodermic model'. This involves a vertical, top-down, command view of the operation of law; rules enacted by government at the centre are transmitted to the localities, where they produce direct, matching changes in behaviour. 'Law', made at the centre, inundates and supersedes existing local regimes; there is hardly room for 'pluralism' at all.

Pospisil, in his early work, *Kapauku Papuans and their Law* (1958), rejected this extreme positivism. For him 'law' should rather be seen as located at different points in the social world, wherever 'authorities' can be found imposing normatively based decisions. Accordingly, whether you look at the metropolis, or at colonised territories, 'law' should be seen as residing at a number of hierarchically ranged, more or less discrete, 'legal levels'. In so far as these levels are connected, the linkage is still seen to be vertical with change being transmitted down from the top. But Pospisil's rejection of an exclusive focus upon state law is important, conceding balanced attention to different normative 'levels'.

A more flexible approach was proposed by Moore in her seminal essay, "Law and social change: the semi-autonomous social field as an appropriate subject of study" (1973). Here, Moore substitutes the concept of 'social field' for that of 'legal level'. Normative orders, including that presented by the national legal system, are best seen as partially discrete, but nevertheless overlapping and interpenetrating social fields, within which meaning is communicated on a two-way, interactive basis. The social field is identified in terms of its "semi-autonomy", by "the fact that it can generate rules and customs and symbols internally, but [...] is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded" (Moore 1978: 55). Moore was careful not to talk exclusively about 'law', but rather about 'normative fields' in general. She depicts change as a fluid,

interactive process, full of imponderables and unintended consequences.

Teubner revisits this question, approaching it from a systems theory perspective which postulates normative closure, radically at odds with the motif of 'permeability' which founds Moore's depiction of the relationship of adjacent fields. His insistence on normative closure requires us to see movement in the environment of a system as 'turbulence' or 'noise', invoking an internally shaped response from the system. While this gets away from the difficulties inherent in the older generation of systems theory, which portrayed movement across the boundaries of systems in terms of 'input' and 'output' - suggesting a rather static, hypodermic process under which a message transmitted in one region would be received more or less intact in another, the new account is impoverished in another way. The metaphors of 'turbulence' and 'noise' imply too little in terms of interchange and penetration taking place across boundaries. The obvious image of the pressurised aircraft passing through adverse weather conditions, with everyone inside getting shaken up but no-one falling out and nothing getting 'in' from outside, conveys too little. While messages are inevitably transformed in their transition from one discourse to another, 'something' passes across the boundary, if in garbled form. The notion of normative closure is inimical to the idea of 'permeability'. Anyone sitting in the local courts of the post-colonial world will pick up snatches of discourse, absorbed into the vernacular, but revealing unmistakably their biblical or legal provenance.

Luhmann and Teubner's way of putting things conveys helpfully the important truth that 'change' in the context of 'contact' needs to be thought about in terms of internally shaped responses - each 'system' will respond to its 'environment' in its own way - but a concept of normative closure diminishes too radically the nature of the interchange that takes place. The analogy of system and the language of the machine is unhelpful in suggesting that precious little of a normative character actually crosses the boundary, moves from one field to another; that nothing normative is 'exchanged'.

The Nature of the Comparative Project

These imponderables surrounding the enlargement of the legal domain, which an explicitly 'legal' pluralism must underline, revive old questions about the very nature of the comparative project. These worries were there at the very birth of a modern anthropology of law, underlined in the way Malinowski formulated the aspirations of the ethnographer. For Malinowski, he was a man of science ("the competent ethnographer"); but his understanding also required a direct, empathetic engagement with those he went to study ("the plunge into native life"). This feat

required of the objective scholar at once rendered problematic the line between observer and observed, even if the potential difficulties surrounding the route into that 'other' world remained for the moment unexamined.

The post-war period, when the now classic ethnographies of dispute processes were written, began with a superficial consensus as to what sociological understanding involved. Description and analysis remained separate, important elements; but the problems which our own deeply inscribed understandings posed in trying to grasp other peoples' quickly surfaced. Prompted by a reading of Gluckman's *Judicial Process among the Barotse* (1955), Bohannan began his monograph on the Tiv by setting out explicitly his own operational procedure. This involved identifying distinct parallel tasks, designed to keep some different elements in place. One task was to recover and present, as best as the observer could, a picture of the social world concerned as members experience it, so far as possible through the 'voices' of those members, consciously privileging *their* account of what they were up to. This, Bohannan labelled the "folk system" (1957: 6). This task is never perfectly realised; but we just have to do our best. The other step involved establishing some sort of framework (the 'analytical system'), enabling the observer to examine what he/she had recovered and to participate in comparative discussion. Here the imperative is to avoid an analysis that draws too intimately upon the "folk system" of either the observer or the world under observation. In this context, we lawyers are perhaps particularly beset by the central problem which Bohannan identified for his own discipline: "The anthropologist's chief danger is that he will change one of the folk systems of his own society into an analytical system, and try to give it wider application than its merit and usefulness allow" (Bohannan 1957: 5).

The common sense division between description and analysis, and the self-conscious attempt to distinguish 'folk' and 'observer' understandings which Bohannan's operational proposal sought to entrench, quickly proved controversial. First, it landed him in a protracted debate with Max Gluckman whose work had originally prompted Bohannan's methodological reflections (for the background and purported resolution of this dispute see Nader 1969). A more fundamental challenge to the ethnographic project as Bohannan outlined it was soon provided by Geertz. In a number of essays Geertz emphasised the interpretive element of ethnographic writing, which he saw as constituted of "our own constructions of other people's constructions of what they and their compatriots are up to" (1973: 9). This at once cast doubt upon the integrity of a 'folk' model, as inevitably 'just' one outsider's attempt to get a handle on what was going on. Geertz at the same time problematised the comparative part of the anthropological project: "Theoretical formulations hover so low over the interpretations they govern that they don't make much sense or hold much interest apart from them" (1973: 25).

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In another shift of focus, Geertz emphasised the importance of 'meaning'. At first sight, this emphasis reinforces Bohannan's stress upon actor's understandings. But it quickly becomes clear in Geertz' own ethnographic writings that his primary attention was upon another level of meaning, one not fully embraced in Bohannan's folk/analytic opposition. Geertz was interested in the unexamined, underlying meaning of pattern and regularity unremarked by the actors. This turn again called into question the provenance of the conceptual resources to be called upon in the ethnographic project. The clarity which Bohannan sought in establishing a separate identity for viewer and viewed, and in distinguishing their perspectives, falls away. Commenting critically on Geertz' discussion of Balinese cock fighting (1973), Crapanzano notes "a continual blurring of Geertz's understanding and the understanding of the Balinese as he describes them" (1986: 72). Geertz confidently labels the cock fight as "art form"; but we have no sense that this is the way the Balinese see it. The call implicit in Bohannan's formulation for a line between the Balinese reading of the cock fight and the ethnographer's interpretation is unheeded.

The shift in perspective moves a stage further with post-modernism's exploration of the entanglement of viewer and viewed, and particularly with the associated problematisation of author/observer status. But, rather than treating this work as cautionary, the drift of much subsequent scholarship has been to cut loose entirely. Amid suspicion of any 'meta-narrative' and doubt as to the possibility of evaluating competing accounts, old understandings of the relation between description and analysis have tended to be abandoned in an eclectic search for the striking vignette and telling metaphor. Along with this there has been a forlorn readiness to accept that "investigating another legal culture is inevitably a matter of tacking backwards and forwards between the culture(s) of origin and that being studied" (Nelken 1995).

Arguably, we need now to feel our way carefully back to a steadier position, in which the problems of ethnography and of any comparative project are openly recognised, but which leaves less of the skein so comprehensively unravelled. A tentative beginning might be along the following lines. We must start from a modest, self-conscious recognition of the qualified extent to which we can maintain a critical distance from our own arrangements, let alone acquire an unclouded understanding of another culture. Conscious of that frailty, we should formulate an analytic framework which is at once suited to the objective in hand and at the same time as little as possible implicated in the parochial scene. If the focus is upon another culture, the objective must be to approach it through an understanding of the 'folk' categories which furnish the lifeworld of the actors. Once that understanding has been - inevitably imperfectly - acquired, we can sketch in regions which remain for the actors unexamined, and look for meaning on an analytic level. Moving inevitably

between different levels of meaning, we must make sure we mark the transition.

Interest in a specifically 'legal pluralism', self-consciously privileging the folk categories of Western law, has flowered in an unstable epistemological and methodological climate. Overall, my feeling is that it is inevitably problematic to attempt to fix a conception of law going beyond the robust self-definitions of state law. Where the project is to recover formerly 'suppressed discourses', we should begin that process in their own terms, not by telling them what they 'are'. This means resisting the temptation to co-opt them into that enlarged domain that an explicitly legal pluralism implies. Further, we must remember whose understandings we are working with when we conceptualise social space in terms of plural fields/domains/discourses/systems; actors on the ground may not experience or articulate the repertoire of norms available to them in that way at all. Lastly, if we must embark upon a comparative project, we should be very clear about what we are trying to do. Whatever the specific objective, its execution must involve a self-conscious attempt at the impossible - the establishment of a framework of analysis distinct from the 'cultures' compared.

References

- ALLOTT, Antony and Gordon R. WOODMAN (eds.)
1985 *People's Law and State Law*. Dordrecht: Foris.
- ALTHUSSER, Louis
1977 'Ideology and the ideological state apparatus.' in *Lenin and Philosophy and Other Essays*. London.
- BLOCH, Maurice
1974 'Symbols, song, dance and features of articulation.' *European Journal of Sociology* 15: 55-81.
- BOHANNAN, Paul
1957 *Justice and Judgement among the Tiv*. London: Oxford University Press.
- COTTERRELL, Roger M.B.
1983 'The sociological concept of law.' *Journal of Law and Society* 10: 241-255
- GEERTZ, Clifford
1973 *The Interpretation of Cultures*. New York: Basic Books.
- GLUCKMAN, Max
1955 *The Judicial Process among the Barotse*. Manchester: Manchester University Press.
- GRIFFITHS, John
1986 'What is Legal Pluralism?' *Journal of Legal Pluralism* 24: 1-55.

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GULLIVER, Philip H.

1963 *Social Control in an African Society*. London: Routledge.

KIDDER, Richard L.

1979 'Toward an integrated theory of imposed law.' in S. Burman and B. Harell-Bond (eds.), *The Imposition of Law*. New York: Academic Press.

LUHMANN, Niklas

1985 *A Sociological Theory of Law*. London: Routledge. (Translation of *Rechtssoziologie*. Opladen: Westdeutscher Verlag. 1972)

1992 'The coding of the legal system.' *European Yearbook in the Sociology of Law (1991/1992)* 145.

1995 'Systems theory and post-modernism'. Lecture delivered at the London School of Economics, 17 March 1995.

MERRY, Sally E.

1988 'Legal Pluralism.' *Law and Society Review* 22: 869-896.

MOORE, Sally F.

1973 'Law and social change: the semi-autonomous social field as an appropriate subject of study.' *Law and Society Review* 7: 719-746; reprinted, pp. 54-81 in Sally F. Moore, *Law as Process*. London, etc: Routledge & Kegan Paul.

NADER, Laura (ed.)

1969 *Law in Culture and Society*. Chicago: Aldine Publishing Co.

NELKEN, David

1995 'Disclosing/invoking legal culture: An introduction.' *Social and Legal Studies* 4: 435.

POSPISIL, Leopold

1971 *The Anthropology of Law*. New York: Harper and Row.

SAID, Edward

1985 *Orientalism*. Harmondsworth: Penguin.

1993 *Culture and Imperialism*. London: Chatto & Windus.

SOUSA SANTOS, Boaventura de

1987 'Law: A map of misreading: Toward a post-modern concept of law.' *Journal of Law and Society* 14: 279.

TAMANAH, Brian Z.

1993 'The folly of the "social scientific" concept of legal pluralism.' *Journal of Law and Society* 20: 192-217.

TEUBNER, Gunther

1992 'The two faces of legal pluralism.' *Cardozo Law Review* 13: 1443.