

# WHO'S AFRAID OF LEGAL PLURALISM?<sup>1</sup>

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## 1. Introduction

In the roughly thirty years in which the concept legal pluralism has been used in legal and social scientific writings, it has become a subject of emotionally loaded debates. The issue mostly addressed in these debates, and the one distinguishing it from the common discussions over the concept of law, is whether or not one is prepared to admit the *theoretical possibility* of more than one legal order or mechanism within one socio-political space, based on different sources of ultimate validity and maintained by forms of organization other than the state. Though originally introduced with modest ambition as a 'sensitising' concept, drawing attention to the frequent existence of parallel or duplicatory legal regulations within one political organisation, the discussion is increasingly dominated by the exchange of conceptual *a priori's* and of stereotypes over those using them. Rather than looking at the heuristic value of the concept for describing and analysing complex empirical situations, the conceptual struggles seem to create two camps, effacing the many differences in assumptions and approaches to law in society that can be found within both these camps. Starting with Roberts' review of the Bellagio papers (1986) and appearing even more strongly in Tamanaha's paper on the 'folly of legal pluralism' (1993), one can even observe the emergence of a bogeyman called 'the legal pluralists', the 'legal pluralist movement' or a 'legal pluralist project' (Roberts 1998: 96). This is associated with the *Commission on Folk Law and Legal Pluralism* and the *Journal of Legal Pluralism* and its members are

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accused of engaging in some ill-conceived enterprise of irresponsibly broadening the concept of law and equalising normative orders that are fundamentally different. It is argued that calling normative orders other than state law, or not recognised as law by the state, nevertheless 'law', is ethnocentric and obscures the fundamental differences in form, structure and effective sanctioning between state law and other normative orders (see Tamanaha 1993; Roberts 1998; Von Trotha 2000).

In my paper I want to continue the ongoing discussions. (See Vanderlinden 1971, 1989, 1998; Fitzpatrick 1983; J. Griffiths 1986; Moore 1978a; Merry 1988; F. von Benda-Beckmann 1983, 1988, 1994, 1997; De Sousa Santos 1987; C. Fuller 1994; Woodman 1998; Roberts 1998; Tamanaha 1993, 2000, 2001; K. von Benda-Beckmann 2001a, b; A. Griffiths 2002.) I shall analyse the reasons given for and against the concept legal pluralism and clarify my own views on its value and limitation, building on earlier ideas (F. von Benda-Beckmann 1979, 1983, 1986, 1988, 1992a,b,c; 1994, 1997, 2001a). In my view, the discussions are too strongly fixated on the law-state link and give too little attention to other aspects of the definition of law that are equally important. There is insufficient attention to the question of the kind of concept one tries to develop or use, and for what reason, and what one understands as 'analytical' concepts. I shall therefore discuss these issues before I review the arguments for and against the state-law linkage. In conclusion I shall come back to the division of legal and social scientists into a pluralist on non-pluralist camp and show how little useful such division is.

### 2. Preliminary questions

We all know that in most societies, and probably in all contemporary societies, there is a great complexity of cognitive and normative conceptions. These constitute forms of legitimate social, economic and political power and organisation and provide standards for permissible action and for the validity of transactions, as well as ideas and procedures for dealing with problematic situations, notably the management of conflict and disputes. Such multiplicity of conceptions may extend to claims to give meaning and regulate a whole social universe; they may also be limited to specific social domains such as marriage or property transactions or even more limited rule complexes. They may claim to, and may actually operate in socio-political and geographical spaces of different size, within the boundaries of nation states, in infra-statal social fields or in transnational ones (Merry 1992; K. von Benda-Beckmann 2001; A. Griffiths 2002). We also know that in many parts of the world, such complex situations antedate the establishment of a colonial or modern state, as does for instance the

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

- 1) How far can we get with the concept of law? Which criteria should give social phenomena the quality of being 'legal', and how do we distinguish such legal phenomena from other, non-legal ones?
- 2) How do we deal with difference? Since the concept of law, however narrowly or broadly defined, will have to encompass some variation of social phenomena, how do we indicate the sets of criteria in which these phenomena vary?
- 3) What type of legal complexity do we call legal 'pluralism'? Does this concept, or other frequently used terms like 'multiplicity' or 'plurality', suffice for dealing with the complexity we are confronted with? Does legal pluralism require the existence of more than one legal system or order, or are 'legal mechanisms' sufficient, and can one speak of legal pluralism within one legal order? (see Woodman 1998).
- 4) And, perhaps the most important yet least discussed question: what does 'existence' or 'co-existence' of law or legal orders mean (F. von Benda-Beckmann 1979, 2001)?

These questions are important. But I would like to point out right from the beginning that whatever our answers will be, their reach will be limited. While our conceptual choices concerning law and legal pluralism are based on a number of methodological and theoretical assumptions, these must be supplemented by a more encompassing social theoretical understanding of the social world. The concepts of 'law' or 'legal pluralism' are only a part of our wider conceptual and analytical tools. Neither will these concepts alone fully adequately capture our research interests. I mention these self-evident points here because many conceptual discussions are carried out *as if* these single concepts stood for the whole of theoretical understanding or research interest.

#### *Approaching the conceptual issue*

There is another preliminary point I would like to emphasise. Words and concepts have no claims to an inherent truth. They must be measured against their ambitions and evaluated for their usefulness for the enterprise actors are engaged in. I shall therefore briefly clarify my own position and reasons for choosing my

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own conceptual approach.<sup>2</sup> Like many anthropologists and, I would assume, many legal historians and comparative legal scholars, I am concerned with concepts that are useful for looking at similarity and difference in cross-societal and diachronic comparison. My concern is to work with a concept that is broad enough to capture simple and complex legal configurations. I am interested in understanding and, if possible, explaining different legal configurations and the interdependence and social significance of their elements. I would retain this comparative perspective also when looking at situations or processes of change in one rather small-scale spatial and temporal setting. For these purposes I find a concept of law that is not linked to the state by definition and that is broad enough to include 'legal pluralism' a useful sensitising and analytical tool. I do not see it as a theory or explanation (see also Geertz 1983; Greenhouse 1998; Rosen 1999), but only as a starting point for looking at the complexities of cognitive and normative orders, and the even more complex ways in which these become involved in human interaction.

But I am perfectly aware that others dealing with law may need a different concept of law for different purposes. Those working as guardians and operators of a single normative universe, such as academic or practical lawyers, judges, religious or traditional authorities, mostly do not and cannot accept the notion of legal pluralism, because it is their job to teach or to apply 'the law' as defined in the normative logic of their own law discourses. 'Their' law will probably be, and have to be different from mine. Judges, for instance, have to make choices through which the complexity of legal pluralism is reduced to 'the' law for producing the rationalisation and justification of a court decision. I also appreciate that those engaged in formulating what the law should be or become – legal philosophers or legal politicians – will often claim an exclusive status for the law they propagate, and that this will lead them to a conceptualisation of law quite different from the one I prefer.

I want to emphasise that these are different academic and professional ways of dealing with law, which are also reflected in different conceptual and theoretical

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<sup>2</sup> When I submitted my PhD thesis in 1970, I called it "Legal pluralism in Malawi". This book was still written from a lawyer's perspective, and it left the question open whether one could speak of legal pluralism only if state law, via legislation or court decisions, recognised non-state law, or also independent of such recognition (1970:22, 46). When I later metamorphosed into an anthropologist and thought about conceptualising "law" for historical and intercultural comparison, I found it more useful to dissociate the concept of law from the state (1979, 1983, 1986).

assumptions. While the subject matter, law, law application etc. does not distinguish legal anthropology from legal science, the way in which legal anthropology conceives law as variable, the questions it asks about law, and the methodology on which research is based, do distinguish it from legal science, at least from the normative and dogmatic sciences of law, which elaborate correct interpretations of general legal abstractions with respect to concrete problematic situations and philosophical reflections on what and how law should be.<sup>3</sup>

These differences in objective and approach should be kept apart, however great the shared interest in the subject matter may be, and however much one can learn from the other. But it does indeed require “the disaggregation of ‘law’ and ‘anthropology’ as disciplines so as to connect them through specific intersections rather than hybrid fusion” (Geertz 1983: 232).

Many debates and misunderstandings between legal scientists and legal anthropologists, including the one over legal pluralism, have suffered from the tendency to bring these different objectives and resultant concepts down onto a one-dimensional level of discussion, in which authors look for ‘the one’ correct or useful concept for both lawyers and social scientists, without appreciation of the fact that the other is engaged in a different enterprise.<sup>4</sup> It is particularly under the name of ‘theory’ that many scholars claim universal value for their concept in an absolutist manner, struggling for conceptual hegemony. This not only is an obstructing block on the road to good legal anthropology; it also makes dialogue and mutual learning difficult.<sup>5</sup> In their mutual relations and discussion, lawyers

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<sup>3</sup> A qualifier should be added. The category of legal science is potentially wide. It may include studies such as history of law, sociology of law, or legal theory, and of course also a comparative social scientific anthropological study of law. See also F. von Benda-Beckmann 2001b.

<sup>4</sup> In the second chapter “Lawyers and anthropologists” of her recent book, Laura Nader (2002:73) very emphatically makes the same point and criticizes “the cacophony in legal and anthropological scholarship on law and society”. In his discussion of legal pluralism and the polycentricity of law, Zahle (1995:197) shows a clear awareness of these differences. This is, however, comparatively rare.

<sup>5</sup> Admittedly, many misunderstandings also derive from a too limited knowledge and insight into what the other is doing, and from the stereotypes which both have of the others’ assumptions and subjects. Much anthropology has been informed by legalistic concepts and assumptions. This has been the price anthropologists have paid for disregarding law, and delegating it to the domain of legal science,

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and legal anthropologists should take more seriously the job in which the other is engaged. If it is one's job to maintain the state law ideology, one cannot in the same action of political relevance regard non-recognised law as law. If one has to choose 'the' correct law as a judge, one cannot 'apply' legal pluralism. And if one is engaged in comparisons of law across time and societies, one cannot have one's comparative perspective blinkered by the dominant legal ideology.<sup>6</sup> So before one enters into conceptual debates, one should be clear in one's appreciation of the different academic and professional enterprises and their limitations and implications, and take them into account when promoting one's own understanding or criticising that of others.

### *Analytical concepts for comparative purposes*

For intercultural and historical comparison one needs analytical concepts.<sup>7</sup> In earlier legal anthropology, the reasons for trying to develop such comparative analytical frameworks have been explicated rather clearly as a result of what has been called the Bohannan-Gluckman controversy (see Nader 1969: 4; Bohannan 1969). In order to avoid the dangers of direct translation and 'jamming into categories', one needs an analytical framework that can encompass a variety of empirical legal phenomena, different legal folk (or emic) systems and/or folk-theories about these folk systems. In an analytical sense, such diverse phenomena are 'similar' in as much as their empirical manifestations match the properties of the category, however different they may be in other respects. This basic category

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consequently living off their own stereotypes about law within which they had been socialised.

<sup>6</sup> This is not a problem confined to the relation between legal anthropology and legal science. Rather, it is just one example of the relationships between a social science and a normatively oriented science – to which much legal science would belong, but also much political theory and even more economic theory. The same problem has been diagnosed for the relation between anthropology of religion and religious studies or theology (Laubscher 1998, or by Berger 1973 for the sociology of religion). As the anthropology of religion does not entail the incorporation of theology into anthropology (but an interest in it) or as economic anthropology does not entail a hybrid with economic theory (but a critical interest in it, see Nader 2002:108), so the anthropology of law does not entail dogmatic legal science. Rather, legal science is part of the empirical reality which legal anthropologists (should) study.

<sup>7</sup> On analytical theorizing, see Turner 1987.

then has to be supplemented by analytical criteria that indicate dimensions of difference and variation.<sup>8</sup>

That anthropology (and any comparative social science) needs this kind of concept for comparative inquiry is undisputed, whether or not scholars think that legal pluralism is a useful concept.<sup>9</sup> The initial crucial question thus is whether and under what conditions the concept of law could be usefully fashioned into a cross-cultural comparative concept at all, state-related or not. If the answer is negative, this means that 'state law' (in whatever definitional refinement) also does not qualify as an analytic concept. In case of an affirmative answer, the next question is what the properties of the concepts should be, and whether the law-state link is to be a constant property or is just to point at one type of variation. If here the answer is 'yes' for the state-law link, the discussion is resolved for the concept of law, because by definition other normative sets of meaning and regulation are excluded and given a different conceptual status as normative, rule systems, social norms and values, informal rules and the like. The discussion is not fully resolved yet, however, for the concept of legal 'pluralism', for several authors also want to capture 'pluralism within state law' with the concept (Woodman 1998).

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<sup>8</sup> This comparative logic has inspired me (and Keebet) in my/our own attempts to develop such analytical comparative categories, for law (F. von Benda-Beckmann 1979, 1986, 1997), property (F. von Benda-Beckmann 1979; F. and K. von Benda-Beckmann 1999) and social (in)security (F. and K. von Benda-Beckmann 1994). The first major inspiration were the ideas of Leach 1961 and Goldschmidt (1966) on comparative analysis.

<sup>9</sup> Roberts, for instance, says that

if we must embark upon a comparative project...its execution must involve a self-conscious attempt at the impossible - the establishment of a framework of analysis distinct from the 'cultures' compared (1998:105).

For this

[w]e 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 analytical 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 (1998:104).

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Both questions have been and remain contested, much more so than was/is the case with other concepts, such as the 'family', 'property', 'religion', or 'economy'.<sup>10</sup> The answers given to them often given get intermingled. The arguments given for linking law to the state may lead authors to both outcomes; that is, insisting that for analytical purposes law needs to be linked to the state, or to denying the usefulness of defining law analytically. Before I turn to the different reasons for and against the state-linked concept of law, I want to address the question of what we are actually talking about when we speak about law or legal pluralism as analytical concepts.

### *The implications of law as an analytical concept*

The character of an analytical conceptualisation of law has been well expressed by Pospisil:

Law as a theoretical and analytical device is a concept which embraces a category of phenomena (ethnographic facts) selected according to the criteria the concept specifies. Although it is composed of a set of individual phenomena, the category itself is not a phenomenon – it does not exist in the outer world. The term 'law' consequently is applied to a construct of the human mind for the sake of convenience. The justification of a concept does not reside in its existence outside the human mind, but in its value as an analytical, heuristic device. (Pospisil 1971: 39)

I have adopted this as a point of departure as well, although it led me to a conceptualisation quite different from Pospisil's (F. von Benda-Beckmann 1979: 25).

It is important to spell out the implications that follow from such conceptual understanding. As analytical concepts, law and legal pluralism only point at the *theoretical possibility* that what we capture with the concept *may* exist empirically. Such concepts of law, or for that matter of legal pluralism, do not tell us anything

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<sup>10</sup> Geertz also remarked that while

the problematic relationship between rubrics emerging from one culture and practices met in another has been recognised neither as avoidable nor fatal in connection with 'religion', 'family', 'government', 'art' and even 'science', it remains oddly obstructive in the case of 'law'. (1983:168)



about law or its social significance in any society. They do not carry with it the assertion that all societies have law. They are only a means to see whether they have such phenomena as specified by the concept. In the discussions on legal pluralism, these implications are rarely taken up consistently, and there is a frequent failure to distinguish analytical from empirical legal configurations.<sup>11</sup> This has led to many misunderstandings.

1. Some authors directly identify desirable or undesirable empirical constellations of legal pluralism with the concept.<sup>12</sup> But the concept of law or legal pluralism cannot be blamed for empirical conditions that are abhorred or found attractive for political or moral reasons, just as other concepts such as economy or political system cannot be identified with a specific empirical economic or political system (see F. von Benda-Beckmann 1997). Analytic distance, towards state and other law, avoids a scientific justification of partisan views on *whatever law*. Such justifications

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<sup>11</sup> Tamanaha's recent call for a non-essentialist, analytical definition thus is not as original as he pretends. He critiques definitions that conceptualise law either as abstractions from lived practices or as institutionalised norm enforcement, stating that the extent to which law enforcement is institutionalised, to which law is or is not congruent with social practices, and to which it has those functions that functionalist definitions incorporate into the concept, should be treated as variation in law rather than a constitutive element. Law should be characterised by a set of criteria; concepts that specify what law is, and what legal pluralism entails, are not testable or falsifiable: they are more or less useful, and their use value is a function of the purposes for which they are constructed (2000:300). His point is that most concepts of law explicitly or implicitly assumed by "legal pluralists" – and for that matter, one may add, of most writers conceptualising law, pluralist or not – are essentialist in nature (2000:299). This may be true for some authors, but certainly not for myself (1979, 1983, 1986).

<sup>12</sup> Sack (1986:1) had said that legal pluralism involves an ideological commitment. Like Woodman (1998:48), I do not see this flowing out of the conceptual discussion. But it should be seen that in many instances the idea of legal pluralism is instrumentalized for moral and political purposes. This is partly done for the purpose of achieving more recognition for legal orders not recognized by the state (see e.g. Hellum 1995:25; Sinha 1995: 48,49; Sheleff 2000:172). In other cases, however, legal pluralism is seen as a symbolic recognition that mutes more radical political and economic claims of oppressed population groups (see Jackson 1992, Williams 1992). Legal pluralism may at the other hand also evoke negative connotations because it implies the recognition of socially or morally repugnant values such as caste or gender differences.

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should be based on political and moral, but not analytical grounds. An analytical approach is different from ideological or religious points of view; different from the views shared and propounded by the dominant legal ideology, but different also from those of the champions of traditional law or the rights of indigenous peoples. To give moral or political value to some law, to state law hegemony or to plural legal situations, is a different 'profession' from creating and using analytical conceptual schemes (F. von Benda-Beckmann 1997: 31).<sup>13</sup>

2. A variant of this argumentation is the often heard critique that studies of legal pluralism would imply the existence of distinct unconnected legal systems and/or neglect power differences between them.<sup>14</sup> Apart from the fact that this statement is not true empirically, it points at an unwillingness or inability to distinguish political (in)equality of empirical normative orders from analytical equality or equivalence of a concept that can, and has to, accommodate variation in political significance of empirical normative orders. Analytical equivalence (calling such social phenomena law or legal) will always be different from empirical variation and (possible) morphological, functional and political differences or equivalences, whether one reduces law to state law or not (F. von Benda-Beckmann 1979: 8,9; see also K. von Benda-Beckmann 2001b).
3. Misunderstandings also arise when the distinction between empirical phenomena and analytical concepts is treated as one between different empirical phenomena, notably between ideology or normative phenomena (the Ought) and 'real' phenomena (the Is). This seems to be the case in J.

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<sup>13</sup> This view is also shared by Tamanaha in his recent publication in his plea for a distanced, unsentimental view towards different forms of law (2000: 319).

<sup>14</sup> This critique is then also directed against the concept of pluralism rather than the conception of law.

Both words, pluralism and dual, carry connotations of equality that misrepresent the asymmetrical power relations that inhere in the coexistence of multiple legal orders. Various legal systems may coexist, as occurs in many colonial and postcolonial states, but the legal orders are hardly equal. .... The above terms also imply that coexisting legal systems evolve independently after coming into contact with each other, a notion that misrepresents...that coexisting legal orders evolve together. (Starr and Collier 1989:9).

See also Fuller 1994:10; A. Griffiths 2002.

Griffiths' attack on the ideology of legal centralism and the contrast between such ideology, including the 'weak' legal pluralism constructed in state law, and 'strong' legal pluralism (see F. von Benda-Beckmann 1983, 1988; also Tamanaha 1993). Such realist perspective runs into the danger of not taking normative phenomena seriously as 'real' or 'empirical' and so limiting the understanding of the social significance of such phenomena. Moreover, pointing at the existence of other normative ordering or forms of social control cannot 'disprove' the ideology of legal centralism or state law exclusivity. Many adherents of such centralist ideology would willingly concede this, and may even agree that they are sometimes more important than 'law', but they would not call them 'legal'. The 'legal' character of such other normative forms can only become visible once the criteria for 'legal' are explicated. If one reduces 'law' to 'social control' (J. Griffiths 1984, 1986, Woodman 1998) one does not answer to a hegemonic conceptual challenge.

4. Another implication is that one cannot expect that empirical phenomena would fit into analytical categories in a one-to-one manner.<sup>15</sup> One can devise analytical categories in a relatively clear manner, but empirical data will not always fall squarely and exclusively within only one analytical domain. Property rights, for instance, would qualify as legal, but they are obviously also economic, social and often political. But that does not mean that no useful analytical distinctions could be made between the legal, economic and political. It only shows that these categories are not mutually exclusive. This is also important for the discussions of the interrelations between different legal forms within a plural legal whole. Whether or not different elements, such as folk law or state law, are clearly and distinctly discernible, whether, how and in which contexts of social practices they become interrelated or compounded in hybrid forms, cannot be inferred from the concept. These are empirical questions. In order to come to a differentiated account, analytical distinctions have to be developed that indicate the dimensions of variation in plural legal configurations (see below section 6).

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<sup>15</sup> So I cannot agree with Woodman's statement that "to invent a dividing line which did not accord with a factual distinction would be irrational and unscientific" (1998: 45).

### 3. Law as an analytical category

If law is to be an analytical concept, the general shared properties of the concept have to be clarified as well as the dimensions within which social phenomena sharing these properties vary.

*Conceptual properties: What kind of social phenomena are 'law'?*

This fundamental question is rarely addressed in discussions of legal pluralism, although it has many consequences for one's conceptualisation of pluralism and the relations between law and social organisation. In the literature, there seems to be a general understanding that law consists of rules and/or norms. In addition, we are drowned in emphatic or matter-of-fact statements about law as social control, law as culture, law as discourse, law as power, law as process. Such statements can be useful. They point at qualities and functions that law, or at least much law, may have in actual life and which may have been not sufficiently been taken into account by others. But if one wants to avoid the reductionistic trap of identifying law with process, culture, or social control, one has to say what is this presupposed law that is *also* culture, process, power, social control, or what specific manifestation or kind of power, process etc law is.

*Law as objectified conceptions*

I see law as a dimension of social organisation, rather than a specific domain. Law is the summary indication of those objectified cognitive and normative conceptions for which validity for a certain category of people or territory is asserted. Conceptions are objectified or objectivated, once the externalised products of human activity attain the character of objectivity (Berger and Luckmann 1967: 78). Cognitive conceptions state how things are and why they are what they are; normative conceptions state how things ought to be, must be or may be. I use the term 'conceptions' as a collective term that encompasses rules, principles, categories, concepts, standards, notions, schemes of meaning (see Berger and Luckmann 1967; 1986: 96). Legal phenomena are cognitive and normative conceptions that are qualified by a number of specific criteria (see F. von Benda-Beckmann 1979, 1986, 1997). The main criteria I use are the following, indicated most briefly here: In the most general sense, these conceptions recognise and restrict society's members' autonomy to behave and construct their own conceptions. All legal phenomena, including the cognitive conceptions, are normative in this sense. 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 definite consequences are attached to and rationalised by reference to the legal categories and their evaluation. There are three major categories of relevance: a) permissibility, b) validity, and c) simple relevance. 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.

*Dimensions of variation: Morphological variation*

Such concept of law obviously cannot be more than a cover term that indicates the legal quality of social phenomena and encompasses a wide variety of empirical phenomena.<sup>16</sup> However, its important properties are clear and allow for the elaboration of dimensions in which empirical manifestations of law vary in structure, form, content and significance in social life, between and within legal systems. The following morphological dimensions are rather obvious:

- The extent to which general legal cognitive and normative conceptions have been institutionalised and systematised; the scope of institutionalisation (Berger and Luckmann 1967: 97). This concerns differences in the internal differentiation of bodies of rules conceived as sub-systems, for instance the development of public and private, civil or criminal, procedural and substantive law. It also concerns differences in their external differentiation, the extent to which law is differentiated from political, religious or economic ideas or systems.
- 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 (see Berger and Luckmann 1967). It is here, that the concept of ‘folk law’ is often appropriate where knowledge of law and procedures is largely shared by most people and not entrusted to specialised experts.

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<sup>16</sup> See F. von Benda-Beckmann 1979, 1983, 1992a:2, 6. If Tamanaha states that differently from most approaches, his approach suggests that the label law is applied to what are often quite different phenomena, sometimes involving institutions, sometimes not (2000:315), this is certainly not new. My definition did not involve a multiplicity of one basic phenomenon, as Tamanaha imputed to his legal pluralists (2000:315), but variable phenomena that shared the same analytically constructed criteria.

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- The basic underlying legitimation of legal systems ranging from theoretical constructions of a *Grundnorm* (Kelsen) or secondary rules (Hart) to fictions such as the social contract, the politically organised will of the people, divine revelation, tradition, or customary practice recognized as having normative character.
- The extent to which legal rules are defined as mandatory, and how the normative relation between rules and decision makers' relative autonomy towards general rules is expressed. This concerns the differences between prescriptive, facultative and optional rules and principles, as well as differences in the dogmatics of decision making.
- The technology of transmission, oral or written, and the extent to which law is written.
- The social and/or geographical scope for which validity is asserted.
- Last but not least, differences in substantive content. This goes for notions of procedure as well as for substantive criteria used in the procedure (for evaluations etc.). It also pertains to differences in the cognitive conceptions of legal rules and principles.

These variable properties can be used to create typologies of different ideal-typical legal forms. More importantly, they can and should be used in combination to characterise empirical legal forms. It is clear that no reader could conclude that all phenomena called law would be 'the same'. As I mentioned earlier, one cannot expect that empirical legal forms would fall squarely into one of the typological categories. Many legal forms may be combined (compounded, hybridised) in ad hoc processes of interpretation and decision or in newly institutionalised forms. Their complex character can be made visible with these multidimensional characterisations.

*Dimensions of variation: Functional variation*

Such concept may still be underdetermined and in need of refinement. It is, however, highly questionable whether more attributes or properties that refer to the empirical significance, political weight or substantive content of legal forms should be incorporated into the concept.

Specific functions or degrees of functional importance in social life cannot convincingly determine the conceptual issue (F. von Benda-Beckmann 1983,

1997). It does not make much sense to debate at the conceptual level whether law does indeed function as social control<sup>17</sup>, whether it resolves conflicts or whether it creates conflicts, when obviously it can and frequently does both, to varying degrees in different empirical situations. The same goes, more more generally, for the extent to which law is effective in the sense that people conform to the normative boundaries set by law. Laws, whether state law, religious or customary, at all times exhibit considerable differences in the extent to which they are efficient. Such simple insights only tell us that at the analytical and conceptual level we better not incorporate any such function as a constant property into the concept, but treat functional possibilities as variation; and for doing this, we have to clarify *what* it is that may have such functions. At the empirical level, it must lead us to distinguish between the normative attributes which are inscribed into (many) legal phenomena, or which are attributed to them in different theories or common sense discourses, and the variable functions empirical legal phenomena actually have, and for whom.<sup>18</sup> The same goes for moral considerations, standards of morality, ethics or justice (see F. von Benda-Beckmann 1997). Whether or not the substantive content of law is ‘just’ in relation to certain general standards, or

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<sup>17</sup> If one sees law as social control, either as a specific form or generally, as Griffiths (1984, 1986) and recently Woodman (1998) do, one should start clarifying what “social control” is. If the criteria for social control or “legal” ordering as its substitute are not specified, an elaboration of legal pluralism does not seem to make sense at the analytical level. Nor does it provide arguments against ideological state-centred definitions of law whose proponents will gladly concede that there are many diverse forms of social control. I therefore disagree with Woodman when he writes

It does not seem possible [to define] law as a distinct form of social control which is clearly distinguishable from the others. .... A more defensible answer is that, if there is no empirically discoverable dividing line running across the field of social control, we must simply accept that all social control is part of the subject matter of legal pluralism. (1998:44-5)

<sup>18</sup> See Tamanaha (2000) for a similar approach:

The degree of actual influence in a given social arena can be determined only following investigation...

No presuppositions are made about the normative merit or demerit of a particular kind of law, or about its efficacy or functional or dysfunctional tendencies or capacities. (2000:318, 239)

in relation to feelings of justice of a majority of the population, is an empirical question.

#### 4. Law and the state

Most of these considerations are relevant, whether or not one defines law in connection with the state. But they reappear in the discussions on whether the link with the state should be built into the concept as a constant criterion or be regarded as one variation. In the following, I shall try to capture the different argumentations.

##### *Evolutionist assumptions*

Many anthropological, sociological and legal science understandings of the evolution of social and political organisation saw law and legal systems as the most advanced and civilised form of normative ordering and rational rule guided decision making. Regarding social and political organisation discovered in the 19<sup>th</sup> and 20<sup>th</sup> centuries which had no clear hierarchically organised (state-like) political systems, where no courts or clearly recognisable third party institutions were clearly institutionalised, which had no written rule systems, and in which normative knowledge was not sharply differentiated, the question of whether such societies had 'law' presented problems to many European observers.

In much evolutionist legal anthropology around the turn of the 19<sup>th</sup> century, the distinction law – non-law was a non-issue. Maine (1861) spoke of Ancient *Law*, Bachofen (1861) of *Mutterrecht*, and also the German scholars like Post and Kohler did not find it difficult to use law in relation to the normative systems of the societies discovered in Africa and Asia (see also Schott 1982 for German ethnological jurisprudence). Differences between types of law in their view could be marked by adjectives (ancient, tribal, and primitive) that characterised the specific nature of these laws. These authors saw dramatic changes and evolution of legal systems *within* the overall category of law, aware of a wide range of variable empirical manifestations of law though time and space.

Later evolutionist writers adopted a different approach. They held that these societies had not yet reached the state of political and normative organisation that could be called state and law. They developed evolutionist typologies of norms and decision making processes. The crucial criterion used for making the distinctions between such law and earlier forms of normative ordering was the differentiation and institutionalisation of rule making and sanctioning institutions.



We then see an evolution from unsanctioned custom, to diffusely sanctioned social norms, early forms of near-law to the state legal systems as they had developed in Europe (see Diamond 1935; Von Trotha 2000).

Many later anthropological and sociological writings about law retained the evolutionist assumptions, but in a watered-down fashion. Functional equivalents were sufficient, for instance for Llewellyn and Hoebel (1941), Hoebel (1954) and Pospisil (1971). Law remains directly tied to political organisation, but this political organisation need not necessarily have the character of a state. Nor did the ‘pro tanto officials’ need to have the character of a state court. But the logic of definition, the dependence of law or the legal on organised sanctioning, was the same (see F. von Benda-Beckmann 1986; see also Tamanaha 1993, 2000).<sup>19</sup> It should be noted, though, that, perhaps with the exception of Pospisil, these authors did not consider conditions of overt legal pluralism. It is uncertain what they would have concluded when ‘real’ state institutions co-existed with the type of third parties which otherwise would have fulfilled their criteria for legalness. I am therefore not certain that Malinowski and other early legal anthropologists who accepted ‘primitive law’ as law should be regarded as the intellectual ancestors of the concept legal pluralism (Tamanaha 1993). In my view, the true intellectual ancestors are rather those writers such as Weber<sup>20</sup> and Ehrlich (1913) who did not take the normative claims to the legal monopoly of the state for granted in theoretical principle (see also J. Griffiths 1986).

#### *Ethnocentricity*

Another, yet related, argument against defining law without a connection to the state, or against developing law into an analytical comparative category, is the ethnocentricity argument. According to Roberts (1979, 1998) using the concept of law for comparative purposes “means remaining implicated in the parochial scene.

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<sup>19</sup> It is characteristic for the writings of Austin or Hart. On Austin, see already Maine 1883. See also Galloway 1976, F. von Benda-Beckmann 1986.

<sup>20</sup> A good case could be made, for instance, for Max Weber, rarely quoted in this context (but see Kidder 1983). Weber conceptualised law through sanctioning mechanisms, a staff acting for the larger social whole. But his law was not necessarily connected to the state, and it was not necessarily exclusive. "It does not constitute a problem for sociology", Weber wrote (1956:23) "to recognize [acknowledge the possibility of] the co-existence of different, mutually contradictory, valid orders". For him there was no conceptual exclusivity of law for state-linked and -supported normative order (1956:25).

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For so much of our sense of what law 'is', is bound up with, and has been created through, law's association with a particular history – early on, the emergence of secular government in Europe; later, the management of colonial expansion" (1998: 98). By using the word law for normative orders different from state law, Roberts argues, one would impose the western Eurocentric concept of law on them, jamming other peoples' normative ideas/systems into western categories and thereby distorting them. I do not think that this is a convincing argument.

It certainly is the case that many such ethnocentric interpretations and distortions of other peoples' legal system, or of single institutions such as marriage or property relationships, have occurred. Much of the literature in the 1970s has deconstructed such transformations, going so far as to speak of a 'creation' of customary laws. In more sophisticated analyses, this has led researchers to distinguish between the kinds of law interpreted and used in local settings and for instance in colonial courts, drawing attention to the contextuality of law in society.<sup>21</sup> It must also be admitted that in naming concepts such as law, one cannot escape completely from ethnocentric influences. Some bias may be inevitable (see Goldschmidt 1966: 93; F. von Benda-Beckmann 1979: 17; Giddens 1984: 284). Yet it would also be naive to maintain that social scientists could not distance themselves from the meanings which have been developed in their own society, and that they would necessarily be forced to adopt (or keep running after) those definitions provided by powerful or hegemonic agents. Why should one argue like this at all? Why should one treat law so very differently from other categories we use for comparative purposes: religion, politics, marriage, and property? Why is it so impossible to take distance from the parochial understanding of law and develop it into a wider category useful for looking at differences and similarities between different historical manifestations of law? Isn't it Roberts himself who first imprisons the word law in this parochial, Eurocentric and unhistorical way, so much that it would not even encompass all historical manifestations of 'state law', and then points the finger at this ethnocentric prison?<sup>22</sup> Apparently, such

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<sup>21</sup> Clammer 1973, Chanock 1985, Snyder 1981. For Minangkabau, see F. von Benda-Beckmann 1979, K. von Benda-Beckmann 1982, 1984. See also Woodman's distinction between lawyers' and sociologists' customary law (1987). Long before these discussions emerged in Anglo-American legal anthropology, the point had been made by the Dutch scholars of adat law in Indonesia who distinguished between "adat folk law" and "lawyers adat law". Van Vollenhoven 1909, F.D. Holleman 1938. See also J.F. Holleman 1981.

<sup>22</sup> Snyder's critique is similar. Comaroff and Roberts (1981) assume that any conception of law is necessarily based, ultimately, on concepts of western legal theory (Snyder 1993:8). Presuming that any conception of law is inevitably

authors cannot, or do not want to escape that prison by distinguishing a concept as a scientific device characterized by properties from descriptions of cultural, social, political phenomena. As I have written earlier (1997), this is a refusal to take analytical distance from the dominant legal ideology in which law and state are directly connected conceptually.

Moreover, statements condemning the use of law and legal pluralism on these grounds are frequently apodictically and unsupported by an analysis of the work of scholars who allegedly, by using law, incorporate ethnocentric understandings into their writings. It is by no means the case that researchers during the past 30 years would usually have translated certain characteristics of 'western laws' – such as their ideologies of court decision making (rules determine outcomes), the functional differentiation of adjudication, the differentiation between law and politics – into their reading of normative orders in the non-western world. Proponents of a wider analytical concept of law explicitly formulate the properties of the concept in a way that does not include ethnocentric British, Minangkabau or Barotse elements into the definition of law but sees them as variations. In fact, it is only with the help of analytical concepts that allow us to perceive, analyse and attempt to explain the similarities and differences between British, Minangkabau or Barotse normative orders. But such attempts to develop comparative analytical frameworks are usually not discussed at all. Accusing them of ethnocentricity in my view is a case of projection of the writers' own biases, for they do exactly what they accuse others of. They impose their ethnocentric legal ideology on other peoples' normative orders and exclude anything from being 'legal' that does not conform to that ideology.<sup>23</sup>

#### *The melting down of difference argument*

Related to the ethnocentricity argument is the often heard argument, that by embracing the notion of legal pluralism the concept of law would become too wide and could comprise "anything" (Merry 1988), and that crucial differences between

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Western, they rightly criticise the misapplication of Western legal theory but unnecessarily exclude the possibility of a more adequate comparative sociology of law (1983:9).

<sup>23</sup> Another weakness of this line of thought is that it is based upon 'false comparison' (Van Velsen 1969). The measuring stick for description and analysis is taken from ethnocentric legal ideology. This means that such a concept would not even be sufficient for a description and analysis of the functioning legal system from which the ideological descriptive elements are taken.

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legal phenomena or systems would be "melted down" (Moore 1978a: 81). In my view, this argument confuses the discussion about the theoretical possibility of legal pluralism with the question of what criteria make (any) normative ordering 'legal' (see also De Souza Santos 1987). Obviously, as Moore (2001: 106) says, "the agglomeration of the whole normative package...has to be disaggregated, identifying the provenance of rules and controls". But this certainly can be done, and for more distinctive features than provenance and control. Obviously, a conceptualisation of law open to legal pluralism widens the range of legal phenomena.<sup>24</sup> But the dimensions of variation, which I have discussed earlier, show that an analytical concept of law does not mean that crucial differences between legal phenomena or systems would be 'melted down', that 'anything' would be law, or that anything called law would be 'the same'. On the contrary, it is the strength of an analytical concept that it provides a starting point for looking at similarities and differences in several dimensions of variation in a consistent way, and therefore provides a much better perspective on differences in form and function than the state-connected concept. In particular, it also allows the description and analysis of differences *within* state law which also exhibits considerable variation in terms of degrees of institutionalization or mandatoriness. These differences are obscured rather than brought to attention by the implicit homogeneity of law as state law (see also A. Griffiths 2002).

### *Logical problems*

Last but not least, *logical considerations* argue against a state-law nexus. Using a concept of law in which the direct connection to the state is a constitutive element means ending up with a tautologous concept of law. The typological models of law which link law directly to political organization or sanctioning power are more or less all based upon the ideas of Austin's analytical jurisprudence. In this model, as already Maine has shown (1914: 342, 353, 362), the concepts of law, rights and duty are logically dependent upon the concept of the sovereign. In Austin's construction,

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<sup>24</sup> Tamanaha's recent (2000) turn of mind is rather ironic. "This may be unpalatable to socio-legal scholars because it threatens a proliferation of kinds of law in a social arena, and because it grants remarkable authority to social actors to give rise to the existence of law" (2000: 319,320). But wasn't it just the consequence of conceptualising law in a way that allowed for legal pluralism that there was more than just state law in a social arena, and that it indeed granted remarkable authority to social actors, while it was Tamanaha himself (1993) who was so afraid that thinking in terms of legal pluralism would lead to a proliferation of too much law?

the sovereign itself was not constituted by law but was characterized by its “immunity from control of every other human superior; its restrictions are not of a legal kind but of ‘positive morality’”. Later authors replaced the rules that constituted sovereignty and sanctioning power by (constitutional) legal rules, but retained the logical dependence of the concept of law on the power of sanctions.<sup>25</sup> The rules pertaining to the power of sanction therefore are not covered by the concept of law; they become “legal rules per se” (Geiger 1964: 161). The consequence is circular reasoning: Rules are legal if issued/sanctioned by a legal institution; a legal institution is one which issues or sanctions legal rules (F. von Benda-Beckmann 1986: 106).<sup>26</sup> What is ‘legitimate’ is not covered by the definition.<sup>27</sup>

## 5. Conceptual alternatives

The arguments advanced against a conception of law that can encompass non-state legal forms thus are not convincing. The alternatives in any case seem to be much less convincing.

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<sup>25</sup> As L. Fuller (1964: 143) and Galloway (1978: 82) have convincingly argued, also Hart's (1961) attempt to distinguish legal from non-legal societies by means of secondary rules is a “mild transformation of Austinian doctrine”. These secondary rules are also primary rules, pertaining to one domain of socio-political life, the institutionalisation of the exercise of political power through the interpretation and application of primary rules. See also Bohannan's (1967) similar notion of “double institutionalisation”.

<sup>26</sup> The tautology is evident when Geiger who has elaborated probably the clearest typology of norms, writes

This only seems to be an exception from the basic principle just elaborated. For how could rules with such content [i.e. pertaining to the constitution and procedures of courts/sanctioning institutions] be something other than legal rules as their subject matter only emerges with the development of a legal order (1964: 161).

<sup>27</sup> Compare the similar construction given by Hoebel:

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

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At the analytical level, the alternative would be whether or not one wants to operate with a statist definition. There is little to be gained in ambivalence.<sup>28</sup> Cotterell, for instance, opts for a modified approach in which the possibility of legal pluralism is not excluded yet clear *analytical primacy* be given to state law in contemporary societies (1995: 31). He states that

[i]f ... the dominant concept of law in contemporary sociology of law remains the state law concept the danger is that the problems of lawyers' law may be seen as analytically distinct from those of other actual and potential regulatory systems (Cotterell 1995: 34),

and concludes:

My view, then, is that the kinds of institutional concepts of law discussed earlier which avoid both exclusive concern with state law and also pure juridical pluralism, and treat state law as central to but not the exclusive concern of analysis of law in contemporary Western societies, are potentially fruitful (Cotterell 1995: 37).

Why state or lawyers' law should be more central analytically, is not understandable. At the level of conceptual discussion, this should be irrelevant. Whether or not state law is central politically, is an empirical question. Primacy may be in research interests but analytically there is equivalence.

If one decides that it is not useful to develop the word law into an analytical concept, it can only be retained as ethnocentric folk category in the sense that law is what the people, or a subset of people, such as lawyers, call law in a given society and in a given period of history. This has been Roberts' view since 1979. It is also Tamanaha's most recent position (2000, 2001). Here Tamanaha has switched from his earlier ethnocentric-lawyer definition, 'law is law as defined by us' (1993) to a multi-ethnocentric folk definition, in which "law is whatever people identify and treat through their social practices as 'law' (or Recht, or droit, and so on)" (Tamanaha 2000: 313; 2001).<sup>29</sup> Tamanaha (2000) has taken an ironic

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<sup>28</sup> Also Merry (1988) remains somewhat ambivalent. See F. von Benda-Beckmann 1988; A. Griffiths 2002. See also Norrie (1999) in his critical discussion of ambivalent attempts to transcend the formal/informal dichotomy.

<sup>29</sup> What law is is determined by the people in the social arena through their own common usages, not in advance by the social scientist or theorist (2000:314).

and somewhat paradoxical turn and has put the cart before the horse. On the one hand, he advocates analytical and non-essentialist definitions. As he himself says, “typologies and categories are analytical devices that are designed to meet the purposes of the social scientist or theorist who constructs them” (2000: 315), and he consequently argues in his 2000 paper for what he calls a conventionalist, ‘non-essentialist’ definition of law. “Usage cannot dictate the construction of analytical categories nor appoint their membership” (2000: 315). Yet once he comes to ‘law’, he reverts to exactly such usage, and only wants to develop analytical categories (of what?) to analyse these various folk categories.<sup>30</sup> But analytical categories and assumptions should precede and guide empirical investigation rather than following them (see also Woodman 1998; Vanderlinden 1998; Roberts 1998). Subject-generated accounts of law whether given by law makers or judges, religious authorities, village elders or farmers however instructive they may be, are the empirical stuff to be described and analysed and compared, but they do not provide the scientific categories through which such scientific work takes place.<sup>31</sup> However thin the dividing line between social actors’ conceptualisations of social reality (and law) and the scientists’ categories through which they try to understand such conceptualisation may be, it is this distinction that is constitutive of the social practice called science. This does not mean that there is some inherent truth in the scientists’ conceptualisations: their value should be demonstrated, as Tamanaha, many others and myself demand.

## 6. Legal pluralism

So far I have discussed the advantages and disadvantages of an analytical concept of law that would be useful for cross-cultural and historical comparisons and have argued that in such conceptualisation of law, the link to ‘the state’ should not be a constant constitutive criterion. The next question then is what a useful conceptualisation of ‘pluralism’ would be, and whether and how it should be distinguished as a specific form of complexity or diversity. This involves a number of issues. First, what should be understood as ‘pluralism’? Second, what

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<sup>30</sup> In this case, categories of kinds of law can be formulated following an investigation of the various social practices and the phenomena to which people conventionally attach the label “law”. These social phenomena can be abstracted from, and their distinctive features identified, then placed into broader categories based upon complexes of shared features.

<sup>31</sup> Tamanaha is correct in assuming that “social scientists often reject conventionalist, subject generated accounts of law as unscientific or insufficiently analytical” (2000: 315).

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constitutes 'difference'? Third, 'how much different law' has to be involved, a rule, a mechanism, an order or system? And fourth, what is meant by 'co-existence'?

### *Pluralism*

The idea of legal pluralism was an extension from the analysis of dualism/pluralism in colonial societies where it indicated asymmetrical power (and race) relationships between the white minority and the indigenous majority. Used first for characterising colonial economies, it was extended to cultural and social pluralism (Boeke, Furnivall, Smith).<sup>32</sup> Talking about 'legal pluralism' in a sense was a simple extension of this conceptual usage. However, in the first systematic treatment (Vanderlinden 1971), the implicit complementary, even if asymmetrical, character of such pluralism and its assumed or legally prescribed one-to-one relation between law-culture-ethnicity<sup>33</sup> was gradually broken up, by focussing on the *parallel* or *duplicatory* nature of legal pluralism. This drew attention to the fact that a same situation (and implicitly the same people) could be subject to or be confronted with more than one legal order or mechanism, and that people's actions could not be simply subsumed under 'their' law.

I think that it is useful to reserve the concept to the duplicatory, parallel character of legal forms or mechanisms, to distinguish it from more general and encompassing terms such as complexity or multiplicity. The question is: duplicatory to what? Vanderlinden originally (1971: 20) had stated that it would be useful to reserve 'pluralism' to a situation "where different legal mechanisms pertained to the same situation" (see also Van den Berghe 1973). This conceptualisation had been criticized by J. Griffiths (1986), saying that reference to a 'same situation' was not useful because the notion of 'the same' was constructed by normative categories. While this certainly is the case, the criticism

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<sup>32</sup> Van den Berghe (1973) gives a good account of this intellectual history of "pluralism", as well of as the other intellectual history rooted in American political theory where pluralism refers to an organizational plurality of relatively autonomous (independent) organizations within the domain of the state" (Dahl 1982:207). Starr and Collier's strange critique of other writers' assumptions about legal pluralism seems to refer to that tradition (see F. von Benda-Beckmann 1997: 14).

<sup>33</sup> See Greenhouse's critique of the "corollary relationships between the organisation of legal orders and an on-the-ground schema of cultural identities (1998:65).



is misconceived. It results from Griffiths' particular understanding of the difference between law as objectified normative meaning (ideological, and therefore not counting as 'real') and 'real' law/legal pluralism (see F. von Benda-Beckmann 1988, 1997).<sup>34</sup> Moreover, it seems to confine law/legal pluralism to those aspects of law which attach consequences to 'facts'. But constitutive and cognitive categories are also part of law. Geertz's (1983) 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 as I have said (1979, 1986), 'situation images', are established.<sup>35</sup> Legal pluralism should be seen to extend to all elements of law, to conceptualisations of legally constructed situation images, to standards of relevance and to consequences.

Take the instance of 'killing' as 'the same' situation. Different legal systems may, of course, have different consequences attached to such a situation image. But the way in which such situation image itself is constructed with (a.o.) legal assumptions about causality and evidence can also be different. Just think of deaths caused by witchcraft. Contrariwise, what in one body of legal thought is 'killing' may be 'accidental death' in the other. But we can also envisage that 'killing' and 'consequences' are more or less identical in two different legal systems, yet different because they are elements in different systems, having different bases of legitimation and often, through not necessarily so, different authorities for dealing with such cases. Or take the legal treatment of kinship obligations. The nature of obligations may vary between legal systems, but so may the definition of what kinds of persons are 'kin'. Or take the instance of 'land rights'. Rights may not only differ in character and distribution over right-holders, also what 'land' is, may be defined differently in different legal systems. With Woodman (1998) I would see no reason why all such situations should not be treated as instances of legal pluralism. But it tells us that in order to see pluralism as duplicatory in relation to 'the same', we must *ultimately* relate

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<sup>34</sup> Woodman (1998: 35, 37, 38) seems to make the same point, although he, similarly to Griffiths, seems to hold that in order for rules to be observable as social fact some extent of significance is required, rather than a form of existence as I have argued before. But I would hold that also rules not at all followed are social facts.

<sup>35</sup> See F. von Benda-Beckmann 1979. Barkun 1968, Cancian 1975, Von Wright 1974 also emphasise the cognitive elements in law/rules. This should not let us forget that legal conceptions also provide standards of evaluation of permissible and valid action and transaction, and that others indicate what should or must (not) be or be done, rather than imagine what has been or is being done.

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legally constructed sameness or difference to our own construction of 'analytical sameness'. Such analytically demarcated fields or instances, functions or social problems, provide the basis for the question whether 'situation', a human 'person', a 'natural resource' or form of legitimate cohabitation/marriage are similarly or differently defined and made subject to the same or different legal rules.<sup>36</sup>

Marriage is a good illustration. In West Sumatra (and many regions in Indonesia) for instance, marriage is institutionalised in three legal systems: in adat, Islamic law and state law. They all have, sometimes different, notions about proscribed or preferential spouses, the authority of elders/groups over such marriage, different procedures for establishing a legitimate union and different rules for dissolving them. In order to see similarity and difference, one has to go back to an analytical conceptualisation of marriage, or legitimate cohabitation (or a bundle of rights, see Leach 1961).

### *Difference*

This brings us to the question of what sameness and difference means, and in how many different ways these words are used in such discussions. In some instances, difference is primarily rooted in the location of (similar or different) rules in different legal orders or systems. In others, it is substantive difference, possibly also within one order. This leads into two questions recently raised by Woodman (1998) and earlier by Vanderlinden, of whether one can speak of legal pluralism within the order of state law, and, whether one can speak of distinguishable 'legal systems' at all?

Starting with the first point, Woodman (1998) has argued that pluralism within one order should also be recognized as legal pluralism. Also within one legal order there may be more than one legal mechanism 'regulating the same'. For J. Griffiths, however, this would not be sufficient, since difference for him has to be rooted in different legal orders.<sup>37</sup> I see no reason why one should not be able to speak of duplicatory institutions or mechanisms for 'the same' within one legal

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<sup>36</sup> We have tried to develop such analytical understandings for "property" (F. and K. von Benda-Beckmann 1999) and "social security" (F. and K. von Benda-Beckmann 1994).

<sup>37</sup> Griffiths speaks of different legal orders that co-exist in one semi-autonomous social field, but he nowhere makes clear what a legal order is or where difference resides.

order as legal pluralism. One legal system may have alternative forms of marriage (civil, religious). If an analytical definition of marriage/legitimate cohabitation is employed, there may be a ‘common law’ marriage and/or publicly acknowledged and registered forms of co-habitation different from the formal so-called legal marriage. Why not see this as one possible manifestation of legal pluralism as well? As in the case of law, legal pluralism is never ‘the same’ empirically (in empirical rules and practices), and as with law, one should clarify what form or configuration of legal pluralism one talks about. In order to avoid confusion, one can distinguish system-internal pluralism and pluralism of systems (von Benda-Beckmann 1979: 23).

*Systems, orders, mechanisms, interpretations*

This leads to the other question discussed by Woodman, whether when looking at empirical situations one can speak of a legal order or system at all? He agrees with J. Griffiths that it is better to avoid speaking of a legal system since one should not imply that one would assume that the bodies of law one calls system would be logically coherent and systematized (1998: 52, 53). As Woodman says (and I would expect most authors would agree with him<sup>38</sup>), the totality of state law, or for that matter non-state legal orders, are rarely if ever coherent in this manner. This then leads him to conclude that “systems of law do not exist”, that “a straightforward distinction between unitary and plural legal situations will not be possible”, that legal pluralism “exists everywhere”, and that “legal pluralism is a non-taxonomic conception, a continuous variable” (1998: 54).

I find it difficult to follow this logic, and several comments need to be made. One is that the term system is used here in a very specific way. There are certainly other conceptual usages that do not imply internal logical coherence and systematicity but simply interdependence or connection. System can also refer to a body of legal rules and regulations that is conceived of as a totality, a “taxonomic collectivity” (Harrée 1980), and as such it is used by many writers.<sup>39</sup> Speaking of systems thus can refer to a body of law which is represented as a bounded

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<sup>38</sup> I would not agree with Woodman’s statement that “the usual conceptions of deep legal pluralism assume that state law is a well-defined, consistent whole which can be one, clear part of a plural situation” (1998:52).

<sup>39</sup> Different conceptions of system are used in the system-theoretical approach of Luhmann and Teubner. Different again would be Giddens’ concept of system (1979) as interdependent social practices. See F. and K. von Benda-Beckmann 1998: 101, 102.

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symbolic universe (and for which often, but not necessarily the claim of internal systematicity is made). Woodman here, contrary to what he does elsewhere, seems to revert to the distinction between 'ideology' (system claims) and 'reality', rather unsystematized elements of law. As Berger and Luckmann have said, "great care is required in any statements one makes about the 'logic' of institutions. The logic does not reside in institutions and their external functionalities, but in the way these are treated in reflection about them. Put differently, reflective consciousness superimposes the quality of logic on the institutional order" (1967: 82). Systems, or elements attributed to systems, thus can be distinguished as empirical phenomena. And in many societies, such legal systems do exist as 'law' or 'state law', 'Minangkabau adat', or 'Islamic law'. This does not mean, however, that all law is seen as (part of ) such system. There may be rules (having all criteria of 'law') which are not treated as part of any system, and which I have called 'unnamed law' (1992b: 9). Nor does it mean, that in order to speak of legal pluralism, always whole systems need to be involved (see Vanderlinden 1971, 1989, 1998; see also Woodman 1998). Systems can be involved, or single institutionalised rule complexes, or legal mechanisms.

A further, and more difficult question is, whether the notion of legal pluralism should also extend to different interpretations of the same rule or system? It is well known and documented, that interpretations of customary laws in colonial and post-colonial states, given by academics, administrators or judges, often transform and distort the local legal notions considerably by interpreting them in terms of their own ethnocentric or bureaucratic legal categories or political motivations, or both. This may occur in ad hoc decisions; it may also lead to a rather new and standardized and institutionalised bodies of 'lawyers' customary law' (Woodman 1987) quite different from local people's interpretation and applications.<sup>40</sup> The same phenomenon is also common in the realm of religious law, where religious experts may interpret customary law in their own terms, but where it may also be interpreted and transformed by customary law experts and/or state law agents (see F. and K. von Benda-Beckmann 1993). Usually last if at all, but theoretically certainly not least are reinterpretations and transformations of state law by non-state legal actors (F. von Benda-Beckmann 1984). This then leads to some extent of pluralism within the same legal system (seen as named taxonomic collectivity), of sets of interpretations different in their substantive and procedural form.

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<sup>40</sup> See already Van Vollenhoven 1909 and the distinction between adat folk law and adat lawyers's law. See Clammer 1973, Chanock 1985 and many others. For Indonesia, see F. von Benda-Beckmann 1979, K. von Benda-Beckmann 1982, 1984.

What these discussions show, is how evasive the word ‘different’ is. They also tell us that just talking, not to speak of theorising about ‘legal pluralism’ as such will often remain meaningless. Dissolving its meaning in a continuous variable as such is not very helpful. Just as in the case of law, analytically conceived, where not all law is ‘the same’, empirically ‘legal pluralism’ appears in different degrees of institutionalisation and constellations. One must specify its characteristics and its most interesting dimensions of variability, and its locus in social organisation and the scale of its operation, seen from its own claim to validity and actual existence and significance. If its characteristics are specified, there is little room for misunderstandings.

### 7. Legal pluralism in society: Where ‘is’ legal pluralism? What is ‘co-existence’?

So far, I have been concerned with clarifying analytical issues at the level of concepts that refer to law and legal pluralism as more or less complex bodies of objectified conceptions. It should be obvious that by locating law in the realm of objectified meaning I do not wish to follow or propagate an empirical approach to law like the ones that have been called the “ideological method” (Llewellyn and Hoebel 1941; Hoebel 1954; Pospisil 1971) or the “rule centred approach” (Roberts 1979). If one is interested in ‘legal pluralism in society’, one wants to explore the emergence and change of plural legal conditions, the dynamics of the interrelationships of their elements, and their significance in social, political and economic life. But if we wish to study law and legal pluralism in society and relate law to social practices and its social significances, law as objectified meaning must be conceptually divorced from the human activities which generate it, use it, and maintain it through time, and from the activities to which it refers (F. von Benda-Beckmann 1983: 237, 238). This presupposes an understanding of what we understand under the ‘existence’ of law or ‘co-existence’ of legal orders, where we have to look for it.

#### *Variation in the ‘existences’ of law*

Law has many existences (see also Thompson 1978). Firstly, law may be embodied in written and spoken texts. This may be different forms of rule statements or decisions, but also contracts or other legal documents such as testaments (see already Ehrlich 1913). In plural situations, there thus may be quite a variety of such texts.

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Secondly, law can exist in the knowledge of people. One can, following Ryle (1970) distinguish different kinds of legal knowledge. One useful distinction is between general knowledge and concrete knowledge. With general knowledge I mean knowledge of general legal conceptions; with concrete knowledge I mean knowledge of how such general legal conceptions have been concretised in relation to a concrete situation. Another useful distinction is between ex-ante, prospective and ex-post, retrospective knowledge. Ex-ante knowledge is the general knowledge and concrete knowledge of earlier decisions. This difference is relevant in relation to concrete problematic (problematized) situations. Ex-ante knowledge is usually vague and only allows more or less educated guesses of what the general conceptions would mean in relation to a concrete problematic situation (see Wickam 1990, Cotterell 1989). Ex-post knowledge is knowledge that has been produced in relation to a concrete situation, often in a lengthy process of finding the law with which to rationalize and justify decisions. These different types of knowledge are all what Ryle (1970) would call "knowing what" knowledge, knowledge of law as general abstract conceptions (rules, principles etc.) and/or as concretised in actual decisions. It should be distinguished further from 'knowing how', from the tactical knowledge of how mobilize such general legal knowledge in social interaction (see F. von Benda-Beckmann 1991, Wickam 1990). 'Knowledge' of course is relative. It may reach from a profound knowledge of legal materials to the basic understanding 'that there is law'. Under plural legal situations, many people are likely to be "multi-legal, know some law of different legal systems" (F. and K. von Benda-Beckmann 1991).

Thirdly, law may be inscribed into the statuses of persons, resources and organisations as well as into social relationships and institutions, giving them a legal status, usually with wide-ranging legal consequences. Under conditions of legal pluralism, there is a wider repertoire of different and potentially contradictory conceptions which may be employed. This legal cloth of statuses and relationships thus is potentially 'multi-normative' (F. and K. von Benda-Beckmann 1999 for property relations). Whether or not this is the case in empirical situations, whether certain (categories) of actors do use conceptions of one system, or mobilise conceptions against each other, or accumulate conceptions from different systems to give meaning and legitimacy to persons, objects and relationships and attach to the respective legal consequences, is, of course, an empirical question.

Fourthly, and most importantly, law may be involved in social processes/social interaction. I speak of law involvement if persons orient their (inter) actions at law (in the Weberian sense) and are constrained or enabled by law, seen through the general methodological perspective of an 'actor-structure' framework

(Giddens 1979, 1984).<sup>41</sup> We can distinguish two major modes of law involvement. Law may also be used as a resource in social interaction, as a means to rationalize and justify actions, occurrences, interpretations, claims or decisions (Turk, 1976, F. von Benda-Beckmann 1983, 1992a). It may also be used as a legitimate modality for reaching certain objectives such as the making of a testament, or a contract or rule making at whatever level of social organisation (see F. von Benda-Beckmann 1983, 1989). But we have also to assume that human interaction is always potentially to some degree and besides other factors *influenced* by the totality of (plural) law when people consider what actions to engage in or to abstain from. In many social processes, both modes of law involvement occur. A brief illustration from my research in West Sumatra (1979). Many fathers made testaments, usually for the benefit of their children. They were influenced by Islamic law, according to which the making of a testament (governing up to one third of the inheritance and not in favour of the Koranic heirs) is recommended. They were also influenced by the rules of Minangkabau adat, according to which a man's inheritance used to be inherited by his matrilineal relatives. Although this had changed recently, the legal situation was far from clear. So fathers wanting to get their property into the hands of their children without too much fuss felt a need to make sure. Written testaments, they knew, would also fare well if a dispute came before the state court. State courts would accept the making of a testament as being in line with the 'new Minangkabau adat law' which had been promoted by state court interpretations since the 1930s, and gradually had also been recognized by large segments of the village population as adat law. The testaments would not have been valid in the scholarly legal interpretation of Islamic law; yet the new rules of inheritance and a persons` s freedom to testate were also treated as Islamic law by some segments of the population. This little example shows us that, and how, a) human interaction is potentially and usually amongst other factors *influenced* by law through the testator's reflection on old Minangkabau adat and Islamic law. We b) also see how one legal form or modality, the testament, is used as a resource for attaining a goal, the property transfer to his children.

This does not necessarily mean that people overtly refer to or use (one type) of law in social interaction; people can act 'in the shadow of law' (Mnookin and Kornhauser 1979, Galanter 1981) or rather in 'the shadow of legal pluralism' (F.

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<sup>41</sup> Some variation of an actor-structure methodology has become commonplace in the social sciences in general. The extended case studies of Gluckman and the Manchester anthropologists are early examples. For an explicit actor-structure approach, see Comaroff and Roberts. See F. von Benda-Beckmann 1983, 1992a, 2001. See for legal pluralism also the recent contribution by A. Griffith 2002.

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von Benda-Beckmann 1992: 15c, 2001) or 'interlegality' (De Sousa Santos 1987). While actors have some (and of course different, depending on their social, economic and political power) room for manoeuvre in interpreting or transforming elements of this legal context in their interactions, the persons interacting in a given situation have no or little influence on that wider context of legal pluralism which is maintained and changed independently from, and simultaneous to their interaction in many other, time and space bound interaction processes (F. von Benda-Beckmann 1992c: 15).

### *Law and involvement and reproduction*

As I have argued elsewhere, by which agents or authors and by which activities laws are generated, by whom and for which purposes law is used, and by whom and how law is socially reproduced are empirical questions to be answered by research. They are not definitional questions to be answered by jurisprudential or sociological dogma (F. von Benda-Beckmann 1983: 238, also 1979: 11). There is a variety of social processes in which law can be involved. Best known and dogmatically privileged are those interpretations and restatements of law occurring in formalized processes of validation of rules and decisions which involve persons or organisations representing the public, such as judicial and administrative decision makers who have to decide 'according to law'. These can be court proceedings or processes of 'preventive law care' in which trouble-less social or economic transactions are validated in formalized processes through public institutions such as civil registrars or notaries public (see Holleman 1986). But reproduction of law may also take place 'out of context' in many different ways in processes such as the socialization of children, in the reproduction of law in universities or in the media, and last but not least in the use of legal forms and orientation at law in 'everyday life' where it also can be used as a means of rationalization and justification of claims in everyday processes and transactions (Moore 1973; F. von Benda-Beckmann 1984, 2001a; De Sousa Santos 1985).<sup>42</sup> I do not want to efface the difference between uses of law in those interaction

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<sup>42</sup> The Dutch adat law scholar Van Vollenhoven (1918, 1931, 1933), writing about the processes through which adat laws in Indonesia were maintained, already distinguished these different forms of transmission and maintenance of law. One of first Anglo-American legal anthropologists to break out of the straightjacket of the trouble case methodology was Moore (1978a). See also F. Von Benda-Beckmann 1979; Galanter 1981. De Sousa Santos (1985) distinguishes four particularly relevant "structural places". See also Sarat and Kearns (1995) on "law in everyday life".



contexts that are dogmatically and politically privileged as ‘legal’ by legal science, such as court decision making in which the reproduction of law gets a particular ‘currency’ (Wickham 1990) and those which are not so privileged, but everyone interested in the ways in which law is maintained needs also be interested in the other social processes in which this occurs. While such processes may not have the same significance in legal doctrines and for the definition of law, they certainly contribute to the maintenance of law.

Conditions of legal pluralism usually broaden the scope of social processes in which the idea of law or certain legal elements are reproduced. They also affect the extent to which legal forms are explicitly invoked (F. von Benda-Beckmann 2001a). The invocation of law, as a rationalising and justificatory scheme, largely depends on what under the given circumstances can be regarded as self-evident (Berger and Luckmann 1967, Giddens 1984; F. von Benda-Beckmann 2001a). The self-evidence decreases in particular when alternatives are given. Then it has to be clarified which alternative has been chosen, and the pressure to justify the chosen one becomes bigger (see Comaroff and Roberts 1981, 1977). For that reason, processes of the reproduction of law usually are more explicit under conditions of legal pluralism, when people are aware of alternative normative repertoires and/or procedures in which these can be used. But generally the condition of legal pluralism challenges the exclusiveness and self-evidence of any single normative system. One is no longer concerned with the question of whether or not to reproduce elements of ‘the’ law as against non-legal modes. Choices between legal systems are thinkable. Orientation at and invocation of one of the alternatives therefore require an explicit justification.<sup>43</sup>

Of course also in the context of legal pluralism, different participants and decision-makers may refer to the same law. But they often mobilize different legal repertoires against each other (folk law against state law, religious law against folk or state law etc.). They may also accumulate elements of different systems or compound them to create hybrid forms. Even in a very small-scale interaction situation (or small semi-autonomous social field) much variation is possible. Take an inheritance dispute in West Sumatra. The parties know that there is adat and Islamic inheritance law. This is part of their individual knowledge and part of the wider context in which they interact. In one case, they both quarrel and argue in

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<sup>43</sup> Reference to the rules of one system, in Indonesia for instance of adat over Islam or state law, then often get the character of a political and ideological statement. One not only opts for a limited number of rules that should apply to a problematic situation, but for the whole (sub)system of which these rules form part.

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terms of adat law. In another situation, they mobilize adat and Islamic rules against each other in the rationalization and legitimation of their opposing claims. In the third situation, they use adat rules and Islamic rules to settle different aspects of the inheritance issue. In the fourth situation, although aware of other people's or courts' interpretation of the differences between adat and Islam, they state that they see no difference, that adat and Islam is actually the same.

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

There are also considerable differences in the *amount* of law which is explicitly reproduced in single processes. In official legal processes, usually several rules or rule complexes are explicitly restated for establishing the relevant set of facts (the relevant situation image), the standards of evaluation for their relevance in terms of permissibility or validity and for the determination of the consequences of such evaluation. In everyday life interactions, references to law may be less systematic and more selective, depending on the legal knowledge of the persons concerned. There may also be simply general specified references to 'the law' or 'the legal system' as a whole. The idea of law then is used as a totalling (summary, umbrella) concept, a 'taxonomic collectivity' (Harrée 1980). But also such processes uphold and reproduce the 'idea' of law (or a specific kind of law) and by this deny alternative, non-legal rationalization and justification schemes.

'Co-existence' thus can mean many different types of interrelations and social practices. Elements from different systems may be fused in one context, and reproduced as distinct 'pure' systems in the other – theoretically by the same people, in the same village, all on the same day (see F. von Benda-Beckmann 1988 for *zakat* rules). Through any single process contributing to reproduction of one subsystem in view of alternatives, the relationship between the subsystems is reproduced as well. What can be generalised from any such single process,

however, is limited. For simultaneously and through time, a multitude of such single processes occurs, in many different contexts, with different outcomes, and different further consequences. These complexities defy easy generalisations on the existence and actual configuration of plural legal orders at macro-level, macro understood as large scale socio-political space (F. von Benda-Beckmann 2001a).

*Where is legal pluralism? Or better: what should we study?*

This brings me to the last point, the questions raised by Woodman (1998) and Vanderlinden (1998) as to *where* law and legal pluralism is to be found, or, better, to be looked for – in society, legal systems, in semi-autonomous social fields, in the context with which individuals are confronted and in which they interact, in the books or in action?

To pose the question in such terms seems to be strange (see also Woodman 1998). Just as with the study of law, the study of legal pluralism can be done with different questions in mind. It will depend on what one is interested in – whether one selects a politico-geographic space such as Indonesia or Germany, structural places like households (De Sousa Santos 1985), an analytically conceived functional domain (Goldschmidt 1966, von Benda-Beckmann 1979, F. and K. von Benda-Beckmann 1999), a semi-autonomous social field (Moore 1973) or an ‘arena’ (Tamanaha 200, 2001). It is these choices and their descriptive and theoretical ambitions that determine what kind of events or sequences/processes one has to research and where the ‘presence’ of duplicatory legal elements – of different or within one legal order has to be looked for.

Some may focus on the constellation within the totality of legal bodies and their historical development, for instance the history of legal pluralism in the Roman Empire, in medieval Europe, in West Sumatra before and after colonisation, in the contemporary global context. One may aim at generalising accounts of the social processes that shaped the emergence and maintenance of such complex constellations, the interrelations of their major constituting bodies (see e.g. Fitzpatrick 1983; De Sousa Santos 1987, 1995). But there is no reason why attention should not be given to an account of the constructions of plural legal structures by politicians and lawyers, including the different juridic constructions of their relative spheres of validity. That one cannot infer much about the relative significance of the different systems in various domains of social, economic and political life does not make such research less interesting; it only shows its limitations. Others will want to (and many do) study how individuals fare in their interactions in the context of legal pluralism, as Vanderlinden (1989) has urged us to do. But again, there is no justification for declaring this the only relevant

research focus. Moreover, in order to study the role of plural legal orders in and for the life of individuals, we need to study the social processes through which the plural legal orders in which they interact become involved and are reproduced in other contexts of interaction.

Concluding, one should make clear that one should clarify at which layer of social organisation or which moment in processes of structuration one speaks: of legal pluralism as an outcome of social processes, as a context for social interaction, as being reproduced in interactions in different interaction settings and locales, etc. Only then can be seen to what extent, and in which socio-political or geographical spaces, legal forms are plural, individuals are 'multilegal' and objects and social relationships 'multi-normative' (F. and K. von Benda-Beckmann 1991,1999), and to what extent one can generalize from any such layer or interaction setting for the wider existence and significance of plural legal constellations (F. von Benda-Beckmann 2001a).

## 8. The bogeyman of the legal pluralists

Beyond the threshold of the yes or no to legal pluralism, there is little uniformity in the conceptualisation of law, or legal pluralism, or about the possible relations between such plurality and social organisation and interaction. While there is widespread agreement, that social scientific concepts of law should not be taken over from the normative and ideological self-descriptions of one's own legal system authors as different as Griffiths, Roberts, Tamanaha, Moore, Merry or myself would agree on this the further consequences drawn, as to the conceptualisation of law and/or legal pluralism differ widely. Also, authors whose theoretical understanding does allow for legal pluralism, end up with widely divergent concepts of law: see for instance Griffiths, Woodman, Pospisil, Tamanaha or myself.<sup>44</sup> There are also considerable methodological and theoretical differences across the legal pluralism line.

The positive acknowledgement and use of the concept of legal pluralism also cannot be associated with one specific social science or legal science. Whatever the intellectual history of the concept may be,<sup>45</sup> nowadays, it is used, and

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<sup>44</sup> Tamanaha (1993), who besides Roberts has been rather instrumental in creating the bogeyman of legal pluralists, is a nice example because he, besides Roberts, was among the creators of that group, and now has entered it.

<sup>45</sup> Obviously, we would need a closer look into the social history of the concept of legal pluralism, and the different meanings given to it. For reconstructions of the

criticised, by many, in anthropology, sociology and political and legal science, and the use of the concept no longer tells us much about the disciplinary background of academics. In legal science, anthropology and sociology there are many who use it, and many who do not use it, and the use or non-use tells us very little about their diverging methodological and theoretical preoccupations.<sup>46</sup> This division of minds crosscuts the boundaries between anthropology of law, sociology of law and legal science. The use of the term legal pluralism certainly no longer is an exclusive identity marker for legal anthropologists.<sup>47</sup> I certainly protest Roberts' position on what legal pluralism in the academic world is about. In his view, "the provenance of legal pluralism is unambiguously a creature of the law school" (Roberts 1986, 1998; Fuller 1994).<sup>48</sup> This seems to be rather far-fetched and empirically questionable. While there are academic lawyers who have discovered the concept of legal pluralism and use and write about the term, the majority of legal

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history of 'legal pluralism', see Griffiths 1986, Merry 1988, Vanderlinden 1971, 1989, 1998; de Sousa Santos 1987; F. von Benda-Beckmann, 1994, 1997; C. Fuller 1994; Tamanaha 1993, 2000; Snyder 1993; Woodman 1998; K. von Benda-Beckmann 2001b; A. Griffiths 2002.

<sup>46</sup> Different importance is given to the issue, anthropologists usually being less given to lengthy conceptual discussions, see Geertz 1983; Moore 2001 or Nader 2002.

<sup>47</sup> See on the one hand Von Trotha's evolutionist denial of the usefulness of the concept, and on the other hand Cotterell's (1995) moderate view from legal sociology. In his discussion, Cotterell concludes that sociology of law may be best served at the present stage of its development by a plurality of approaches to the problem of the concept of law (1995:33). He is not convinced that lawyers' law need be the concept of law but is also wary of fully embracing notions of legal pluralism. Yet to widen the concept of law beyond the the lawyer's view of it is to assert the sociological necessity of considering the possibility that legal thought or legal processes in various empirically analysable forms may be a relatively pervasive featute of social life rather than isolated phenomena of a narrow professional sphere (Cotterell 1995:33). If the dominant concept of law in contemporary sociology of law remains the state law concept the danger is that the problems of lawyers' law may be seen as analytically distinct from those of other actual and potential regulatory systems (Cotterell 1995: 34)

<sup>48</sup> Roberts refers to Tamanaha (1993) who allegedly had said so. But Tamanaha had argued that "strong legal pluralism is the product of social scientists" (1992:-25), outing Malinowski as the true intellectual father of the notion (1993: 192, 203).

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academics certainly do not really use it.<sup>49</sup> Even among legal sociologists interested in law or lawyers its use is rather the exception than the rule. The creation of two camps, one of so-called pluralists and one of state law adherents therefore does not make much sense and only detracts attention from the really interesting methodological questions.

### 9. A final comment

In the discussion of the concept of legal pluralism, much time has been devoted to conceptual, sometimes rather scholastic argumentation. Such discussions are important for creating analytical clarification, and for laying bare the many ideological and theoretical assumptions that are often implicit and hidden in certain conceptual usages. But the discussions easily become sterile unless they are rooted in the analysis of empirical situations and historical processes, and unless they are made part of a more comprehensive social scientific understanding of the social world of which law and legal pluralism, however defined, are only one aspect and part. I reiterate here that such conceptual and analytical clarifications are useful, but they do not amount to 'theory'. Given the wide variety of what is called law or legal pluralism, it would be pretty awkward to treat them as 'one factor' in theoretical understandings or explanations of actual social situations and (microor macro-) historical processes. Different constellations of legal pluralism – at whatever time and spatial scale – have to be explained by theory (see also Greenhouse 1998: 3). Much more attention therefore should be given to empirical research and to the theoretical understandings of the many variations we find in the empirical constellations of legal pluralism and of the ways in which these different constellations influence the actual social, political and economic conditions in the areas and the lives of the people concerned.

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<sup>49</sup> See also Woodman (1998:40) "Lawyers have preferred to ignore the subject since it challenges their accepted ideologies".

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