

WHAT IS LEGAL PLURALISM?

John Griffiths

Author's note: This article was written at a time when the concept of legal pluralism, as here defined and distinguished from other concepts, was in its combative infancy[1]; to this it owes its programmatic character. As the conception of legal pluralism for which I argue here became widely accepted and used, those who knew of the article had occasion from time to time to refer to its ideas and arguments and it came to lead a subterranean existence, occasionally cited but nowhere regularly available. The time has come to put an end to that state of affairs. It does not, in the circumstances, seem appropriate to pretend that the article is anything other than what it always has been. I have therefore not encumbered it with references to and treatments of the extensive literature which has been published on,[2] or makes use of, the concept of legal pluralism since 1981.

Synopsis: In this article I seek to establish a descriptive conception of legal pluralism. By 'legal pluralism' I mean the presence in a social field of more than one legal order.

The article begins with a treatment, in part 1, of the difficulties for the analysis of legal pluralism posed by the dominant position in legal thought and also in social scientific studies of law, of the ideology of 'legal centralism'. This ideology is shown to reflect the moral and political claims of the modern nation state and to be unsuitable and obfuscatory as far as the social scientific study of legal pluralism is concerned. One use of the expression 'legal pluralism' - namely, in connection with the juristic analysis of situations of reception of 'customary law' in colonial and post-colonial settings - is shown to refer to a situation which is defined in terms of the ideology of legal centralism and not, as is often supposed, a situation inconsistent with that ideology.

WHAT IS LEGAL PLURALISM?
J. Griffiths

The article then turns, in part 2, to an examination of some legal scholars who give explicit definitions of legal pluralism: Hooker, Gilissen and Vanderlinden. All of these are shown to rely, ultimately, upon legal centralist presuppositions.

There follows, in part 3, an analysis of implicit descriptive theories of legal pluralism. It is argued that a number of descriptive theories of the place of law in social structure contain within them a latent theory of legal pluralism: Pospisil's theory of "legal levels", Smith's theory of "corporations", Ehrlich's theory of the "living law" and Moore's theory of the "semi-autonomous social field". While the conceptions of legal pluralism implicit in the work of these writers are all shown to be inadequate in one way or another, the exercise does put us in a position to construct an adequate descriptive conception of legal pluralism.

The article concludes with a definition of 'legal pluralism', conceived of as a concept suitable for a descriptive theory of law.

The relative pluralism of their legal aspect is one dimension in on which social fields vary: some are more pluralistic than others. It is the purpose of this essay to develop a conception of 'legal pluralism' suitable for a descriptive theory of this sort of variability. For present purposes we can define 'legal pluralism' as that state of affairs, for any social field, in which behavior pursuant to more than one legal order occurs.[3] Since legal pluralism in this sense obtains in all but the most extreme cases of social fields, the descriptive conception to be constructed will concern itself with a kind of continuous variability in social organization, not with the specification of a taxonomic criterion for a distinct type ('pluralistic') of social situation.

1. The Intellectual Context of a Descriptive Conception of Legal Pluralism

An important part of the ideological heritage of the bourgeois revolutions and liberal hegemony of the last few centuries is a complex of ideas concerning the nature of law and its place in

social life. According to what I shall call the ideology of legal centralism, law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions. To the extent that other, lesser normative orderings, such as the church, the family, the voluntary association and the economic organization exist, they ought to be and in fact are hierarchically subordinate to the law and institutions of the state.

In the legal centralist conception, law is an exclusive, systematic and unified hierarchical ordering of normative propositions, which can be looked at either from the top downwards as depending from a sovereign command (Bodin, 1576; Hobbes, 1651; Austin, 1832) or from the bottom upwards as deriving their validity from ever more general layers of norms until one reaches some ultimate norm(s) (Kelsen, 1949; Hart, 1961). In either case, while the various subordinate norms which constitute 'law' carry moral authority because of their position in the hierarchy, the apex itself - the sovereign or the grundnorm or the rule of recognition - is essentially a given. It is the factual power of the state which is the keystone of an otherwise normative system, which affords the empirical condition for the actual existence of 'law'. Hence the necessary connection between the conception of law as a single, unified and exclusive hierarchical normative ordering and the conception of the state as the fundamental unit of political organization.

Precisely because it is an ideology, a mixture of assertions about how the world ought to be and a priori assumptions about how it actually and even necessarily is, legal centralism has long been the major obstacle to the development of a descriptive theory of law. As Smith (1974:114-126; see also van den Bergh, 1986) has shown, the political and legal philosophy of the nation state has provided the descriptive conception of law which social scientists have tried to put to empirical use. They have adopted the legal centralist conception of law either wholeheartedly (e.g. Radcliffe-Brown, 1952; Black, 1976) or with reservations and modifications to accomodate marginal or 'pathological' states of affairs (Hart, 1961:114ff.) such as the primitive circumstances of ancient or exotic societies where something of the distinctively 'legal' is thought to be lacking (e.g., Radcliffe-Brown, 1940:xiv). The consequence has been a series of attempts to build an empirical theory of law directed not toward a phenomenon conceived of in general terms but rather toward one defined directly or indirectly in terms of the hegemonic claim of the modern state. Conceptions of what law is have reflected a particular idea about what it ought to be. [4]

WHAT IS LEGAL PLURALISM?

J. Griffiths

The ideology of legal centralism has not only frustrated the development of general theory, it has also been the major hindrance to accurate observation. It has made it all too easy to fall into the prevalent assumption that legal reality, at least in 'modern' legal systems, more or less approximates to the claim made on behalf of the state. Lawyers, but also social scientists, have suffered from a chronic inability to see that the legal reality of the modern state is not at all that of the tidy, consistent, organized ideal[5] so nicely captured in the common identification of 'law' and 'legal system', but that legal reality is rather an unsystematic collage of inconsistent and overlapping parts, lending itself to no easy legal interpretation, morally and aesthetically offensive to the eye of the liberal idealist, and almost incomprehensible in its complexity to the would-be empirical student.

Furthermore, the theory of law in 'primitive' society has also suffered indirectly, by way of 'false comparisons' with the idealized picture of law in 'modern' society. Special explanation has been sought, for example, for social cohesion in societies lacking the "irresistible force" (Fortes, 1940:271) supposedly characteristic of law in the "strict sense" (Evans-Pritchard, 1940:293), while at the same time the eminent resistibility which in fact is typical of 'modern' law has provided a never-ending sense of shock to those engaged in investigating the 'gap' between law and behavior. Such tension between the nature of reality as presented by the ideology of legal centralism and the actual state of the empirical world has led to the inelegant spectacle of social research on law characterized, as Galanter puts it, by a

repeated rediscovery of the other hemisphere of the legal world ... [of the fact] that law in modern society is plural rather than monolithic, that it is private as well as public in character and that the national (public, official) legal system is often a secondary rather than a primary locus of regulation. (1981:20)

Legal pluralism is the fact. Legal centralism is a myth, an ideal, a claim, an illusion. Nevertheless, the ideology of legal centralism has had such a powerful hold on the imagination of lawyers and social scientists that its picture of the legal world has been able successfully to masquerade as fact and has formed the foundation stone of social and legal theory. A central objective of a descriptive conception of legal pluralism is therefore destructive: to break the stranglehold of the idea that what law is, is a single, unified and exclusive hierarchical normative ordering depending from the power of the state, and of

the illusion that the legal world actually looks the way such a conception requires it to look. In short, part of the purpose of this article is simple debunking, as a necessary prolegomenon to any clear empirical thought about law and its place in social life.

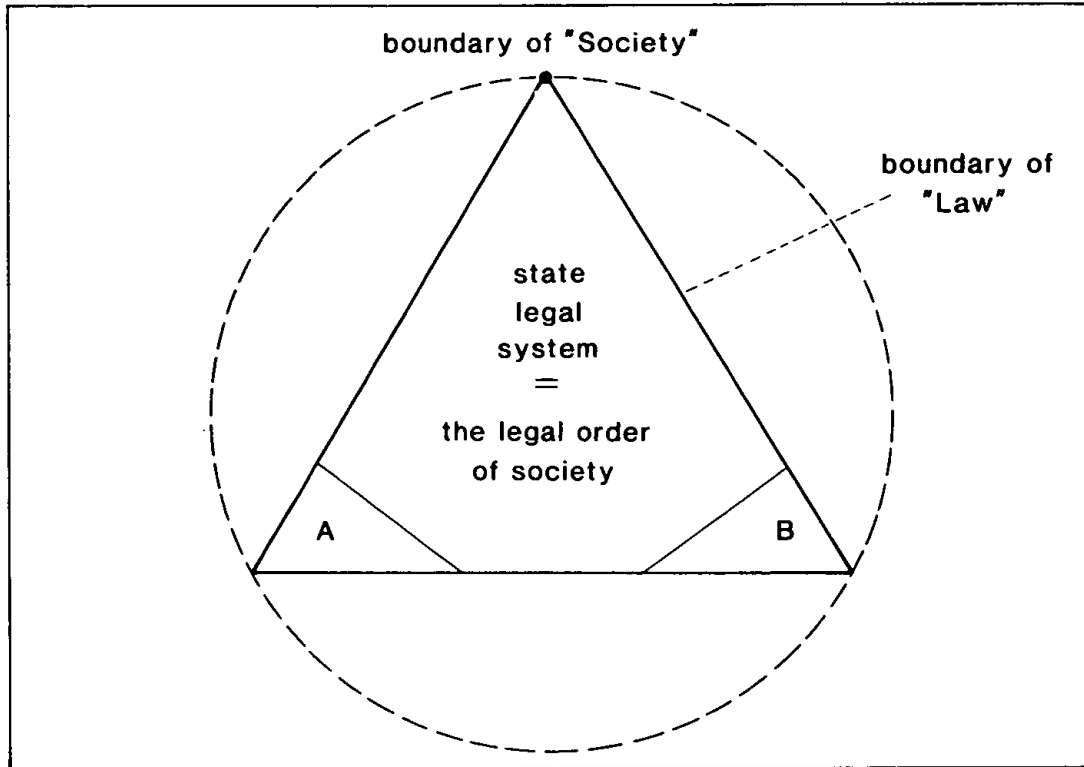
In addition to this general intellectual context within which a discussion of the concept of legal pluralism takes place, there is a more specific context which is important. 'Legal pluralism', besides referring (in the 'strong' sense which is the subject of this article) to a sort of situation which is morally and even ontologically excluded by the ideology of legal centralism - a situation in which not all law is state law nor administered by a single set of state legal institutions, and in which law is therefore neither systematic nor uniform - can also refer, within the ideology of legal centralism, to a particular sub-type of the sort of phenomenon regarded as 'law'. In this ('weak') sense a legal system is 'pluralistic' when the sovereign (implicitly) commands (or the grundnorm validates, and so on) different bodies of law for different groups in the population. In general the groups concerned are defined in terms of features such as ethnicity, religion, nationality or geography, and legal pluralism is justified as a technique of governance on pragmatic grounds.[6]

(See Vanderlinden, 1971.) Within such a pluralistic legal system, parallel legal regimes, dependent from the overarching and controlling state legal system, result from 'recognition' by the state of the supposedly pre-existing 'customary law'[7] of the groups concerned. While such pluralism is not limited to the colonial and post-colonial situation, that is certainly where it is best known. The model of socio-legal structure implicit in this weak, juristic sense of legal pluralism can be represented as shown in figure 1. (In this and the following figures, a heavy line indicates the boundaries of the legal order, a broken line those of the society as a whole, and a thin line those of social fields within a society.)

In figure 1, 'A' and 'B' are marginal pockets of 'recognized' customary law. The legal order of the state exhausts the legal ordering of society, and legal order is not congruent with social structure. 'Society' is here depicted as more inclusive than 'law', but in some contexts - such as the instrumentalist model of legislation - 'law' is implicitly conceived as the more inclusive social space: compare figure 4.

WHAT IS LEGAL PLURALISM?
J. Griffiths

figure 1: the juristic conception of legal pluralism



The modern history[8] of legal pluralism in this weak sense begins at least as early as 1772 when a regulation for the new judicial system established in the territories administered by the East India Company provided:

In all suits regarding inheritance, marriage, caste and other religious usages and institutions, the laws of the Koran with respect to the Mohamodans and those of the Shaster with respect to the Gentoos shall invariably be adhered to. (Hooker, 1975:61.)

Since then every European expansion at the expense of a non-European society seems to have been accompanied by something similar.[9] Legal pluralism in this sense has been a fixture of the colonial experience. Furthermore, it has generally persisted beyond the moment of formal 'independence', proving one of the most enduring legacies of European expansion and characterizing at the present day the larger part of all of the world's national legal systems.

There is a considerable technical literature on the subject (see generally, Hooker, 1975)[10], mostly concerning a small number of fairly standard problems arising from the recognition of customary law. When the state turns the 'customs' of various sub-groups of the population into 'law' that in specified circumstances is allowed to supplant the uniform general law, it finds it necessary to formulate rules which determine which sub-group's law applies to a given transaction or conflict. These include rules concerning group membership (defining who is a 'native', or a 'Mohammedan', or how a person can change the law applicable to him, e.g. by voluntary subjection, renunciation, marriage or conversion), and choice of law rules for relationships involving parties belonging to different groups. Likewise, the state must decide on which subjects (in particular, family law) and in what circumstances (for instance, particular geographical areas) it will accept regulation according to sub-group norms, and when, on the other hand, it regards the lack of uniformity that that would entail as intolerable (e.g., criminal law). Recognition brings special problems concerning the ascertainment of legal rules whose validity and content cannot be established in the ways habitual to the operatives of state legal systems (with the consequence that recognition of bodies of written law - Jewish law, Hindu law, Islamic law - has always been less problematic than that of unwritten law). Decisions must be made concerning the possible 'recognition' of indigenous tribunals applying local or group custom, and the review of their decisions by the state courts or other authorities. There is also the question of acceptability: some rules which otherwise meet the criteria for recognition will be so offensive to the moral and legal sensibilities of the representatives of the state that an escape-valve rule is required whereby enforcement can be refused (a so-called 'repugnancy clause' - see Allott, 1970:158-175; cf. also Derrett, 1963). Finally, provision needs to be made for adaptive and reformative change in the body of recognized customary law, by means of legislation, delegated legislation (e.g., by 'houses of chiefs'), and judicial precedent.

Formal acquiescence by the state in a situation of legal pluralism in this weak sense adds a formidable layer of doctrinal complexity on top of the complexity normally incident to a supposedly uniform state legal system. The resulting state of affairs is regarded by almost everyone concerned as profoundly defective. It is the messy compromise which the ideology of legal centralism feels itself obliged to make with recalcitrant social reality: until the heterogeneous and primitive populations of ex-colonial states have, in the process of 'nation building', been smelted into a homogeneous population of the sort which 'modern' states are believed to enjoy, allowances must be made. But unifi-

WHAT IS LEGAL PLURALISM?
J. Griffiths

cation remains the eventual goal, to be enacted as soon as circumstances permit. While law ought not to and cannot depart from local expectations so quickly and radically that it ceases to 'function', upsets expectations, and unsettles the social order, it should nevertheless exercise a constant pressure in the desired direction. Uniform law is not only dependent upon, but also a condition of progress toward modern nationhood (as well as of economic and social 'development').^[11] In one form or another, the literature of and about legal pluralism, in the weak sense primarily associated with colonial and post-colonial societies, is almost all written under the sign of unification: unification is inevitable, necessary, normal, modern and good.

It would be a complete confusion to think of 'legal pluralism' in the weak sense as fundamentally inconsistent with the ideology of legal centralism. It is merely a particular arrangement in a system whose basic ideology is centralist. (Compare Humphrey, 1980.) The very notion of 'recognition' and all the doctrinal paraphernalia which it brings with it are typical reflections of the idea that 'law' must ultimately depend from a single validating source. 'Legal pluralism' is thus but one of the forms in which the ideology of legal centralism can manifest itself. It is, to be sure, by the terms of that ideology an inferior form of law, a necessary accommodation to a social situation perceived as problematic.^[12] But it is nevertheless only intelligible as an expression of that ideology. It is the fact that 'legal pluralism' is defined as an imperfect form of law by the very ideology which gives it meaning as a concept, that accounts for the low opinion of 'legal pluralism' held by so many of those who write within and about it, and it is thus not surprising that even lawyers and scholars who live in states whose legal systems are formally pluralistic take a dim view of that state of affairs.

'Legal pluralism' in the weak sense has little to do with the concept of legal pluralism which is the subject of this article. We are here concerned not with the ideology which is presupposed by and is manifest in particular arrangements of state legal systems, but rather with the analysis of an empirical state of affairs, namely the coexistence within a social group of legal orders which do not belong to a single 'system'. 'Legal pluralism' in the weak sense - the designation of a possible legal policy within the internal discourse of state law - has only a confusing nominal resemblance to legal pluralism as the designation of an empirical state of affairs in society.

2. Existing Descriptive Conceptions of Legal Pluralism

There are practically no explicit definitions of legal pluralism, in the descriptive sense with which we are concerned, to be found in the literature. What there does exist is not generally of great use.

Two recent books by lawyers purport to address the question. Hooker's Legal Pluralism defines "legal pluralism" as the existence of "multiple systems of legal obligation...within the confines of the state".(1975:2) Hooker observes of the idea of law "as a set of consistent principles, valid for and binding upon the whole population and emanating from a single source" (i.e. the state and its institutions) that, while it

may be a proper view in a culturally and economically homogeneous society...such societies are the exception rather than the rule. An undue emphasis on this view of law is often a distortion of reality and not uncommonly a downright misrepresentation in many states. The official or state legal system may not in fact be effective for a number of reasons. (1975:1-2)

We can pass by a number of peculiarities in this passage since it quickly appears that Hooker's only quarrel is with the claims to uniformity and state-origin made on behalf of state-law, not with the basic legal centralist idea that all law properly speaking is of the state. (Compare Timasheff, 1939.) In short, his definition of 'legal pluralism' is a definition of the deviant situation in which state law 'recognizes' some body of 'customary law'. This becomes unmistakably clear when he says that 'legal pluralism', however it has come about, generally exhibits three features:

(1) "the national legal system is politically superior, to the extent of being able to abolish the indigenous system(s)";

(2) "where there is a clash of obligation...the rules of the national system will prevail and any allowance made for the indigenous system will be made on the premisses and in the forms required by the national system";

(3) "in any description and analysis of indigenous systems [presumably he means, here, by lawyers and other agents of state-law] the classifications used will be those of the national system". (1975:4)

"Indeed", he says, "we may speak of 'dominant' and 'servient' laws." (ibid.) The sources of information about these laws are the statutes, law reports, administrative minutes, and the like which...make up the legal record. These documents illustrate the ways in which the various systems

WHAT IS LEGAL PLURALISM?
J. Griffiths

of obligation coexist in the legal administration.
(ibid.)

Any pretense that the discussion which follows will concern itself with "multiplicity of obligation" in a descriptive sense - a sense free from the claims and illusions of the state - has been dropped. No definition of 'legal pluralism' as an empirical phenomenon is being offered. On the contrary, we are offered a conceptual analysis, in doctrinal legal terms, of a feature of state-law in particular circumstances. The rest of the book conforms to this introductory statement of a juridical rather than an empirical intent. While it is undoubtedly a valuable contribution to the literature of comparative law, it is useless for our purposes.

The second recent book in which legal pluralism is discussed from the lawyer's perspective is a collection of essays edited by Gilissen, Le Pluralisme Juridique. Gilissen's introduction confronts "la conception moniste...du droit" (1971:7) with the facts of legal history, with the role of custom as a source of law, with the internal "droit disciplinaire" of professional, employment and voluntary associations, and with the simultaneous presence of "droits traditionels et droits européens" in many countries, especially of Africa and Asia. "La conception moniste" he identifies with continental legal theorists such as Von Jehrung and Carré de Malberg: it is our old friend the ideology of legal centralism. But "le pluralisme juridique" is defined only by negative implication: Gilissen apparently wants the reader to infer that it is a state of affairs (or is it likewise an ideology?) which does not conform to "la conception moniste".

Inference is assisted by Gillisen's examples of the state of affairs he has in mind. Soldiers are subject to a dual legal order not merely in the sense that, in addition to the general penal law, a special disciplinary law applies to them, but more radically as the result of incorporation, through reference in that disciplinary law to 'behavior inconsistent with military discipline', of "la coutume du milieu social militaire, née de la répétition d'actes propres à ce milieu et répondant à sa fin." (1971:10) So far, Gilissen seems to have nothing other than 'recognition' in mind. But when he proceeds to note the internal discipline of professional groups, of the employment relation and of religious, political, cultural and sport associations, it begins to seem that he is thinking of the maintenance of internal legal order which in fact takes place, not merely that which is recognized as such by the state. This impression is strengthened by his reference to enforcement "par des admonestations, des amendes et surtout l'exclusion" (1971:11). But just when the reader hopes he is in possession of a distinct (if unstated)

conception of legal pluralism in the strong, descriptive sense, Gilissen mentions in one breath, as it were, two supposed examples of "le pluralisme juridique", one of which is purely a doctrinal manifestation, the other of which is an empirical instance, and the two of which have nothing apparent in common with each other. The first (the special rules and procedures applicable to commercial transactions) is not even an example of pluralism in the sense of 'recognition' (although it may once upon a time have been) but merely of the obvious fact that every legal system, no matter how unitary its law, provides different rules for different situations. The second (popular 'vigilante' justice in rural villages) is an example of the strongest possible sense of 'legal pluralism' (the behavior in question being forbidden by state-law).

The same confusion of legal diversity and legal pluralism pervades Gillisen's discussion of the inapplicability of "la thèse moniste" to European law until the nineteenth century. He begins by observing that uniform national, or even provincial, law hardly existed on most questions for the greater part of European history. He asks himself whether this situation would properly speaking be one of "pluralisme juridique" if it were merely the result of the existence of a large number of local jurisdictions, each of which had a unitary local law. But the lack of a general legal order at the national or provincial level was combined with a lack of inter-personal uniformity at the level of local legal jurisdictions. Various groups of the population held privileges which entitled them to the application of special rules to their affairs; the various sorts of legal regimes applicable to property entailed a variety of legal rules with respect to transfer and succession. One might object that such examples are merely of a diversity of rules within a single legal order. But his last example seems definitely one of legal pluralism in the strong sense:

L'ancien régime est par excellence le régime des corps intermédiaires, au sein desquels des règles normatives propres s'élaborent coutumièrement ou sont imposées par l'autorité du corps. Non seulement noblesse et clergé ont leur propre droit, mais surtout les corporations de métiers, si nombreuses dans les villes, régissent les rapports économiques et sociaux, créant un véritable droit économique. (1971:13)[13]

The lessons to be learned from Gilissen are negative. The existence of different rules for different classes of the population does not constitute legal pluralism in the strong sense so long as it is provided for or recognized by one legal order. We will

WHAT IS LEGAL PLURALISM?
J. Griffiths

see shortly, in fact, that it would be impossible for a descriptive theory to define the underlying ideas of 'difference' and 'sameness' in relation to rules and situations, since that is a legal-doctrinal and not an empirical distinction. Similarly, the existence of different rules in different geographical areas (within a larger jurisdiction about which the question is posed whether it exhibits 'legal pluralism') does not entail legal pluralism; legal pluralism in the strong sense is not, we shall see, an attribute of geographic areas at all. Finally, and here is the point on which Gilissen remains confused throughout, 'recognition' or some other form of incorporation or validation by the state is not a prerequisite to the empirical existence of a legal order, and it is therefore wrong to identify legal pluralism with that kind of arrangement in state law. A conception of legal pluralism which takes off from the way in which the state deals with a situation of normative heterogeneity is off on the wrong foot from the beginning: it can only produce a contribution to the theory of legal centralism, not a contribution to the descriptive theory of law.

Le Pluralisme Juridique also contains a second and more ambitious attempt to analyze the concept of legal pluralism, by Vanderlinden. This time we are given an explicit definition:

[L]e pluralisme juridique est 'l'existence, au sein d'une société déterminée, de mécanismes juridiques différents s'appliquant à des situations identiques'.
(1971: 19, underlined in original)

Tracking Vanderlinden, I want to comment on the several elements of this definition.[14] First, legal pluralism is an attribute of a specified social group. This simple observation goes a long way toward cutting through the masses of confusion which have surrounded the concept. 'Legal pluralism' is the name of a social state of affairs and it is a characteristic which can be predicated of a social group. It is not the name of a doctrine or a theory or an ideology; it is not an attribute of 'law' or of a 'legal system'; nor does it have a necessary connection to territorial or other non-social entities.

Second, legal pluralism does not require the presence of more than one entire legal system. Multiple legal "mechanisms" are enough - single rules or clusters of rules or institutions. Again, this is an important analytic advance: if the word 'system' in this sense is ever properly applicable to legal phenomena despite its overtones of completeness, orderliness, institutionalization, and static equilibrium, it is obvious that it is applicable to few if any of the ordinary component parts of a pluralistic state of affairs.[15]

It is with the third element of Vanderlinden's definition that problems arise. Legal pluralism consists, he says, in different legal mechanisms applicable to the same situation. There is an essential distinction between different legal mechanisms applicable to different situations ("pluralité de droit") and legal pluralism, where "la diversité des règles a pour object de résoudre des conflits de nature identique....". (1971:20) Situations which are essentially identical, but to which different legal mechanisms apply, are, for example, sales transactions performed by businessmen or by ordinary persons, crimes committed (in the middle ages) by clerks or by laymen, marriages entered into (in ancient Rome) by patricians or by plebians, private legal affairs (in colonial and post-colonial Africa) of Africans or of Europeans or Europeanized Africans, injuries caused by a diplomat with 'immunity' or by an ordinary resident, daily transactions of social life performed on behalf of the state or by private individuals. (1971:21)

This list of examples prompts two observations. First, despite Vanderlinden's initial definition of legal pluralism in terms of a social state of affairs - the strong sense - he is quickly slipping back into the legal centralist conception of legal pluralism as a feature of the arrangement of state law. This lapse into the weak sense plagues the whole rest of his essay.

Second, the list reveals that the concepts of 'difference' and 'sameness' are not empirical, but reflect a particular juridical value, namely that differences of person ought in general not to be taken account of. There is nothing in the nature of the world or of social life which requires anyone to agree with Vanderlinden that the acts of an ordinary person and of a businessman, of a clerk and of a layman, of a patrician and of a plebian, etc., are really the same. During most of world history men have thought quite the contrary. The 'sameness' of situations lies in the ways in which the "categorizing concepts" of a particular normative order (Fallers, 1969:20) arrange social facts, not in the facts themselves. The cases of diplomatic immunity and of governmental acts ought to make it obvious that a definition of legal pluralism in terms of the sameness of situations will lead only into a miasmic swamp of doctrinal and ideological squabbling, and that operationalization for empirical purposes will remain forever impossible.

Quite apart from these two objections, a definition of legal pluralism in terms of different rules for identical situations cannot be applied to the very common circumstance that concurrent normative orders within a society complement rather than conflict with one another even when applicable to the same persons and

WHAT IS LEGAL PLURALISM?
J. Griffiths

situations. If a church requires or forbids X of its members, while state law is indifferent to X (has no rule at all concerning it), Vanderlinden would apparently not regard this as a situation of legal pluralism. Similarly, his definition excludes one of the most interesting and important forms of interaction between normative orders, the meshing of the facilitative institutions of one order (e.g., testamentary disposition) with mandatory institutions of another (e.g., matrilineal inheritance) so that the mechanisms of the one carry out functions prescribed by the other. (Cf. F. & K. von Benda-Beckmann, 1984). This seems an indefensibly narrow view. It is furthermore subject to the practical objection that it would be difficult if not impossible to determine what conflict - difference of legal mechanisms - is and when it is present.

The remainder of Vanderlinden's treatment of legal pluralism is concerned with its origins, with variation in its scope and types, and with its possible ultimate disappearance. The confusion we saw in Gilissen, and which has already been adumbrated by Vanderlinden's explication of his definition of legal pluralism, is characteristic of the entire discussion. Most of the time this merely concerns non-uniform law (sometimes resulting from 'recognition' and sometimes from the state's own initiative) within a single system of state law. There are a few acknowledgements in passing that there might be another way to approach legal pluralism - one on "le plan de l'appréciation des faits" (1971:48) - which did not adopt for scientific purposes the ideological claim of the (self-described) "principal" legal order. But the essential objectives of the discussion are the typification, explanation and justification of non-uniformity within state legal systems. The problem Vanderlinden addresses is defined by and within the ideology of legal centralism. Since his essay is by far the most interesting and careful of those which set out explicitly to define and analyze the concept of legal pluralism, its radical inadequacy for empirical purposes is particularly instructive.

3. Theories of Legally Pluralistic Social Structure

By contrast with the lawyers whom I have discussed so far, anthropologists, defining law not in terms of the state but of 'authority' or 'institutions' (see Griffiths, 1984a), have no difficulty in recognizing legal pluralism in the strong, empirical sense as a feature of the social groups with which they are concerned. Without devoting much further thought to the subject, they describe a village or tribe as a social field with its own 'law', located within the larger context of the state and its

'law'. Attempts to analyze the conceptual aspect of the phenomenon of legal pluralism, however, are rare. I want to turn now to several anthropologists who have made such attempts: who have addressed themselves to the question how the legally pluralistic social structure of a society can be captured in a descriptive conception. (The discussion that follows deals with the authors concerned not in chronological order but in order of increasing sophistication of their conceptions of pluralistic socio-legal structure.)

Pospisil's theory of "legal levels"

Pospisil's conception of "legal levels" is a reaction against the legal centralism implicit in most would-be descriptive theories of law. "Traditionally", he observes, "law has been conceived as the property of a society as a whole." (1971:99) This has had two consequences. For societies without an overall political organization, it requires the conclusion that they have no law, even though, were one to address one's attention to the society's politically-organized sub-groups, one would have no difficulty recognizing legal phenomena. Thus societies are misleadingly described as having no law just because they do not have it on the level of the whole society. Second, for a society which does have an overall political organization, the idea that law is a property of the whole society leads to descriptions of its law "as an expression of a well-integrated single legal system". A "smooth, relatively static and simple picture of legal structure has been presented." (1971:98,106; see also Pospisil, 1978)[16]

Pospisil argues that such an approach to law ignores the complex societal structure within which legal phenomena occur:

Society, be it a tribe or a 'modern' nation, is not an undifferentiated amalgam of people. It is rather a patterned mosaic of subgroups that belong to certain, usually well-defined (or definable) types with different memberships, composition, and degree of inclusiveness. Every such subgroup owes its existence in a large degree to a legal system that is its own and that regulates the behavior of its members....

This multiplicity of legal systems, whose legal provisions necessarily differ from one to another, sometimes even to the point of contradiction, reflects precisely the pattern of the subgroups of the society - what I have termed 'societal structure' (structure of a society). (1971:125)

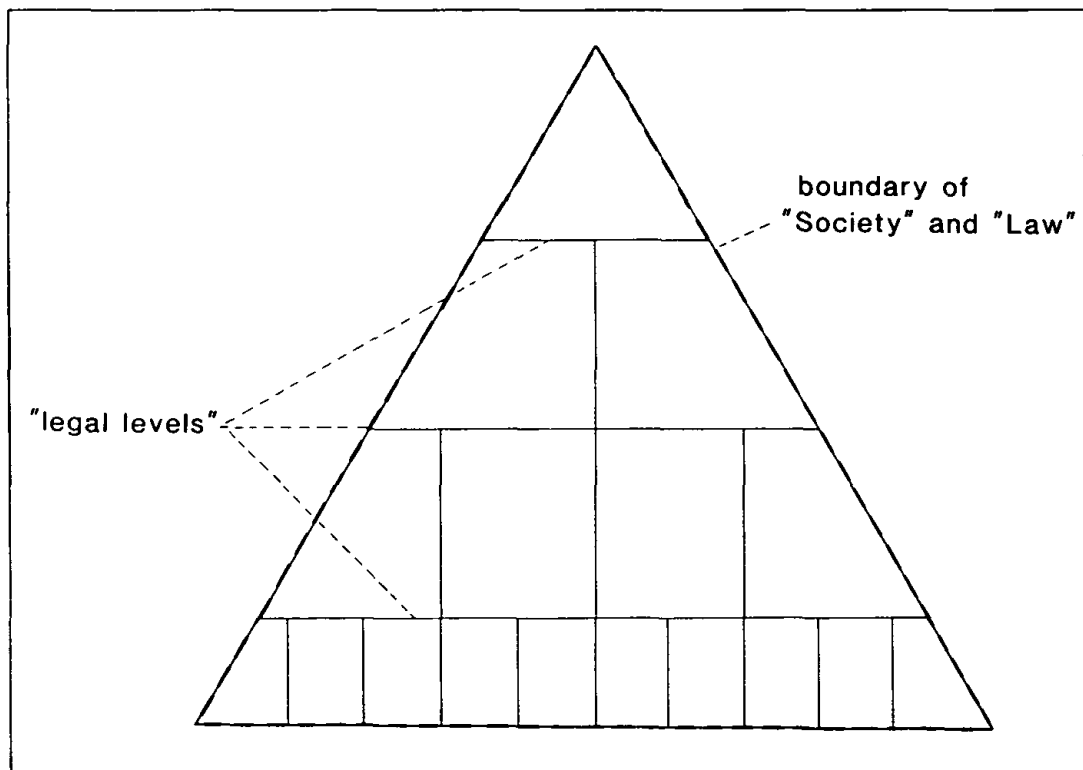
WHAT IS LEGAL PLURALISM?
J. Griffiths

No society, he argues, has "a single consistent legal system, but as many such systems as there are functioning subgroups" (1971:9-8). Pospisil's model of the particular way in which legal pluralism manifests itself in society he calls "legal levels":

Since the legal systems form a hierarchy reflecting the degrees of inclusiveness of the corresponding subgroups, the total of the legal systems of subgroups of the same type and inclusiveness (for example, family, lineage, community, political confederacy) I propose to call legal level.

... [L]egal systems can be viewed as belonging to different legal levels that are superimposed one upon the other, the system of a more inclusive group being applied to members of all its constituent subgroups. (1971: 107,125)

figure 2: Pospisil's implicit model of socio-legal pluralism



The suggestion here of a societal structure as a hierarchical, segmentary affair, might have been regarded as a slip of the pen,

except that so much of the rest of Pospisil's discussion reinforces the impression. The most prominent example he gives of the analysis of socio-legal structure in terms of "legal levels" concerns a Kapauku society built up out of households, organized in villages, grouped in sub-lineages, lineages, sub-sibs, and finally sibs. (1971: 108-109) His other examples, similarly, are mostly of hierarchical, segmentary situations such as federations, decentralization of administrative tasks to lower governmental units, etc.[17]

Despite all the cogent objections he himself has made against it, Pospisil's analysis thus remains implicitly dominated by the whole-society perspective. His "legal levels" within which the self-regulating subgroups of a society are arranged are conceived of as an orderly - one is tempted to say, an idealized - structure of the whole society, and the subgroups are conceived of as more or less inclusive building blocks within that structure.[18]

The legal order is - by contrast with the weak, juristic conception of legal pluralism illustrated in figure 1 - congruent with social structure, and the empirical existence of group law is not dependent on its recognition by the state. This is, in short, a conception of a legally pluralistic state of affairs in the strong sense, and the problem with it is simply that that conception is far too limited and idealized to do justice to social reality. How could one deal, within such a model of socio-legal structure, with the laws of groups within a society which are not a part of an overall hierarchical arrangement and cannot be assigned to a particular "legal level" - groups such as clubs, guilds, churches, factories, and gangs? Pospisil plainly wants to regard their internal self-regulation as 'law', but he does not give us any other, more accurate and useful instrument than the concept of "legal levels" for doing so.

Another weakness in Pospisil's conception of "legal levels" would have to be remedied before it could serve as the basis for a strong, descriptive conception of legal pluralism: the absence of sufficient independent content for the concept of a "functioning social group". Every "functioning group or subgroup" has its own "legal system". Wherever there is "law" it must be the law of such a subgroup, and wherever there is a "legal" process all the actors must belong to the same group. "Law thus pertains to specific groups with well-defined membership; it does not just 'float around' in a human society at large." (1971:125) The qualifications "well-defined" and "specific" suggest a static, structural neatness which ought not to be presumed in descriptive theory. Furthermore, we are given no criterion for identifying the "specific groups" concerned. All Pospisil says is that all

WHAT IS LEGAL PLURALISM?
J. Griffiths

such groups regulate themselves internally and that all regulation is the internal activity of a social group. This tells us that for descriptive purposes well-defined, specific groups and law are definitionally inseparable, but it does not tell us how to recognize either one of them when we see it.[19]

Smith's theory of "corporations"

The implicit descriptive theory of legal pluralism in M.G. Smith's writings derives from an approach to matters legal which proceeds in an almost diametrically opposite direction from that of Pospisil (curiously, each of them writes, wittingly or not, as if the other did not exist[20]). Pospisil begins with the question, 'what is law?' and seeks to answer it in terms of the social groupings of which anything likely to be called a 'society' consists. Smith, on the other hand, begins not with law but with politics, for which he seeks a descriptive theory useable for comparative purposes. This concern leads him to the concept of a "corporation" as the basic unit of social structure and the locus of political action. It is for Smith one of the characteristics of corporations as parts of the social structure that an individual's corporate membership is the original and the fundamental source of his social rights and obligations. Corporations are the "sociological framework" (1974:128) of law in society, and, since there may be many corporations in any given society, Smith implicitly provides us with a concept of legal pluralism.

The concept of 'politics' refers, says Smith, to "public affairs, whatever these may be", and a "political organization" is an "organization which regulates these public affairs." (1974: 84-85) But a public is not a mere aggregation or category of people, such as mobs, mass-communication audiences, resident aliens, slaves, and the like:

By a public...I mean an enduring, presumably perpetual group with determinate boundaries and membership, having an internal organization and a unitary set of external relations, an exclusive body of common affairs, and autonomy and procedures adequate to regulate them....

When groups are constituted so that their continuity, identity, autonomy, organization, and exclusive affairs are not disturbed by the entrance or exit of their individual members, they have the character of a public. The city of Santa Monica shares these properties with the United States, the Roman Catholic Church, Bushman bands, the dominant caste of an Indian village,

the Mende Poru, an African lineage, a Nahuatl or Slavonic village community, Galla and Kikuyu age-sets, societies among the Crow and Hidatsa Indians, universities, medieval guilds, chartered companies, regiments, and such 'voluntary' associations as the Yoruba Ogboni, the Yakö Ikpungkara, and the American Medical Association. The units just listed are all publics and all are corporate groups; the governmental process inherent in publics is a feature of all corporate groups. (1974:94)

Corporations may be based on a variety of principles of membership, such as age, sex, ritual and belief, occupation and the like. Some corporations, such as the Catholic Church, "cut across a number of distinct and mutually independent publics" and individuals can be members of "several distinct corporations of differing constitution, interest and kind" such as an age-set, a ward, and a lineage.

The constitutional structure of a society is a structure of corporations. In the simplest societies all members share a common set of institutions. At the opposite extreme are societies which exhibit a "systematic institutional diversity". Many societies, including most modern ones, fall in between these extremes: [T]he entire population, or at least the overwhelming majority, share a common system of basic institutions, while being systematically differentiated at the secondary level of institutional organization in which alternative occupational, political, and religious or ethnic structures predominate. (1974:206)

Smith distinguishes three types of constitutional structure which correspond to three "ways in which...institutionally differentiated collectivities are incorporated to constitute a common society." (1969:434) Where individuals are incorporated "directly into the public domain on formally identical conditions of civic and political status ... [holding] ... their citizenship directly and not through segmental or sectional identifications, irrespective of similar or differing practices in other institutional spheres", he speaks of "uniform" incorporation. (1969:434-5) Where "a number of institutionally diverse collectivities [are] united in a single society as corporate units holding equivalent or complementary rights and status in the common public domain", and "citizenship presumes identification with one or the other of these primary collectivities", but without any "differences of civil status in the common public domain" attaching to members of different units, he speaks of "consociational" incorporation (1969:434-5). And where "society is constituted as an order of structurally unequal and exclusive corporate sections" so that "one institutionally distinct section dominates the others", and

WHAT IS LEGAL PLURALISM?
J. Griffiths

citizenship, derived from corporate identification, entails systematic differences of status in the public domain, he speaks of "differential" incorporation. (1969:434-5)

Parallel to these distinctions between types of social/constitutional structure, Smith distinguishes between three "levels or modes of pluralism." "Cultural pluralism," he says, "consists solely in institutional differences to which no corporate social differences attach". What he appears to have in mind here is the case in which the corporate boundaries determined by one sort of institution do not systematically correspond with those of other institutions so as to divide the society into more or less hermetically sealed-off segments, each with a whole set of congruent institutions. This interpretation is reinforced by the ensuing definition of "social pluralism" as "the condition in which ... institutional differentiations coincide with the corporate division of a given society into a series of sharply demarcated and virtually closed social sections or segments." Cultural pluralism is compatible with uniform incorporation. Social pluralism entails consociational incorporation but is not necessarily accompanied by cultural pluralism. Finally, "structural pluralism" "institutes or presupposes social and cultural pluralism together", and it entails differential incorporation (1969:440; but cf. 1974:212).

What is the relationship between the social-structural pluralism analyzed by Smith and legal pluralism? "Law" is the internal self-regulation by corporate groups of their public affairs.[21]

As units which are each defined by an exclusive universitas juris, corporations provide the frameworks of law and authoritative regulation for the societies that they constitute. (1974:97)

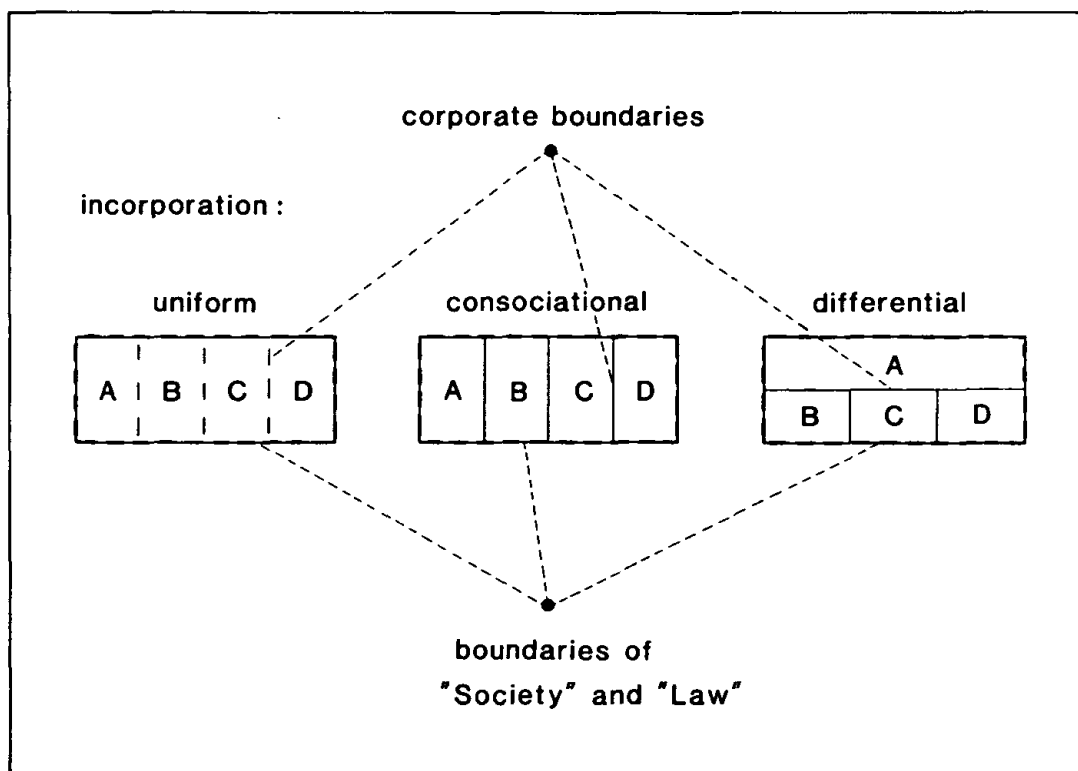
An individual "derives his jural status and rights from membership in some corporate ... group".

Legal pluralism is, it follows, a necessary concomitant of cultural, social or structural pluralism. Description of a situation of legal pluralism consists of a description of the various corporate groups, of their internal regulatory activity, and of their external corporate relationships with each other.

How adequate is the descriptive theory of legal pluralism which lies thus implicit in Smith's account of corporate social structure?[22] Smith, like Pospisil, seeks to avoid what the latter calls the "whole society" perspective for describing the legal organization of a society. He acidly criticizes the way in which sociologists and anthropologists have uncritically adopted the "emphasis on sovereignty and centralization" in the western

legal/political tradition - an emphasis which he argues results from the specific political needs of the European state as it emerged from medieval conditions (1974:116-126). Nevertheless, to a degree Smith himself seems to reflect the influence of the very same ideology. His descriptive theory starts with the public arena of a whole society and locates all other corporate groups in terms of their relationships to that central arena. He shows little interest in corporate groups which do not have a role in that arena (as in the case of what he calls cultural pluralism[23]), the internal pluralistic structure of those corporate groups which do have such a role, and horizontal relations between corporate groups.

figure 3: Smith's implicit models of socio-legal pluralism



Like Pospisil, Smith sees the legal order as congruent with social structure, but he often seems to be conceiving the socio-legal structure of society as a whole as constructed out of so many corporations, with every citizen a member of but one corporation and the various corporations structurally homologous. That is, he often seems to be contemplating something like the models

WHAT IS LEGAL PLURALISM?
J. Griffiths

of socio-legal pluralism shown in figure 3 (that some of his discussion is inconsistent with these models and not subject to the same objections will be clear to the reader by now).

A fundamental objection to Smith's theory of pluralism - really a collection of connected objections - concerns the ideal-typical form in which he presents it, and the consequent lack of attention to variability in the phenomena being analyzed. Features such as the permanence, autonomy, distinctiveness, etc. of corporate groups are treated as definitional attributes rather than as dimensions of variation. Such an approach leads easily to the problems of overstatement which are so characteristic of Smith's writing.[24]

An ideal-typical approach undermines the applicability of the theory, by making it unclear how its basic entities, corporations, can be identified in practice. Features such as permanence and distinctiveness, and the possession of public affairs, obviously vary continuously - they are not either present or absent - and furthermore are likely in any concrete setting to be precisely the focus of political strife and negotiation. Apart from these, however, Smith offers us only normative criteria dependent upon political and legal theory, such as 'citizenship' or 'public affairs', whose applicability in empirical research he leaves undiscussed.

A structural approach to pluralism need not lead to an overwhelmingly static theory, but it certainly seems to when combined with an ideal-typical treatment of the elements of social structure. Competition and interaction, the room for manoeuvre left open for individuals and the ways in which they make use of it, the changeability and negotiability of corporate boundaries and of structural relations between corporations - all of this is left unexamined. It is ironic that a political anthropologist should be so uninterested in the politics of a pluralistic social situation.[25] If anything is plain from the literature, it is that a static approach to the analysis of legal pluralism is radically inadequate from the start.

Finally, while I do not doubt the utility of Smith's identification of law with the internal regulatory activity of corporate groups, I do think that his ideal-typical approach to the phenomenon of corporate behavior leads him to an unacceptably narrow conception of a corporate group, one which emphasizes its boundaries and its distinctiveness and de-emphasizes the processes which occur within and between corporations. This leaves him open to Moore's criticism, that it is wrong to identify law solely

with corporations, to the exclusion of "less formally bounded action-arenas". (Moore, 1978:29). Moore observes that

[F]ormal corporate organizations and their reglementary activities are not the only patterners of social relations, nor the only agencies of stability or change. Personal networks, arenas of transaction, and arenas of competition also may be very durable and important fields of action. Though not necessarily corporate, they too, can be subject to, or generate, explicit rules. There often are in a society any number of incompletely corporate aggregations of persons whose collective weight is socially significant. The relation between the formal corporations and these more diffuse aggregates is extremely important in the analysis of the workings of any polity, as are the ways in which corporations form and dissolve. (1978:28)

So long as Smith's theory of corporations appears to be restricted to "formal corporations" and to exclude from the purview of a theory of legal pluralism such well-known social fields as, for example, the business communities described by Moore and by Macaulay (1963), it will remain subject to such an obviously well-founded objection.[26]

The shortcomings of Pospisil's and Smith's approaches to legally pluralistic social structure are connected with the concepts - "legal levels" and "corporations" - with which they identify the social locus of law within the constitutional/juridical structure of society. The central problem in both cases lies in their tendency to reify this social locus. Eugen Ehrlich and, more recently, Sally Moore deal with the matter in a different and more satisfactory way.

Ehrlich's theory of the "living law"[27]

The central contribution of Ehrlich (1936) to the sociology of law is a descriptive theory of law developed in reaction to the legal centralist ideology of his day (in the form of so-called 'legal positivism'). The key to his descriptive theory is a distinction between "rules for decision" and "rules of conduct". In the legal positivist conception, according to Ehrlich, law consists of "rules for decision": law is defined from the point of view of an official of the state as the "rule according to which [he] must decide the legal disputes that are brought before him". (1936:10) This positivist conception stands in the way of a real theoretical science of law, which must be independent of the practical concerns of the administration of state institutions.

WHAT IS LEGAL PLURALISM?
J. Griffiths

"Practical juristic science" is directed almost exclusively to the proper performance of the duties of a judge and the scientific study of law is stuck with the analytic apparatus appropriate to a quite different undertaking:

Juristic science has no scientific concept of law.... [T]he jurist does not mean by law that which lives and is operative in human society as law, but...exclusively that which is of importance as law in the judicial administration of justice.... Practically all modern juristic writing and teaching, within the sphere of private law at least, pretends to be nothing but a setting forth, as clear, as faithful, as complete, as is possible, of the content of statute law in its finest ramifications and its remotest applications. Such a literature and such teaching cannot, however, be termed scientific; in fact, they are merely a more emphatic form of publication of statutes. (1936:9-10,19)

A scientific conception of law, by contrast, must concern itself with rules of conduct. The practitioners of "practical juristic science" are inclined to describe the rules for decision with which they concern themselves as rules of conduct, but this is simply not true:

[I]t is true that a rule of conduct is not only a rule according to which men customarily regulate their conduct, but also a rule according to which they ought to do so, but it is an altogether inadmissible assumption that this 'ought' is determined either exclusively or even preponderantly by the courts. (1936:11)[28]

The compulsion which the judicial system provides is but one motive among the many which account for men's conduct:

The order of human society is based upon the fact that, in general, legal duties are being performed, not upon the fact that failure to perform gives rise to a cause of action....

The first and most important function of the sociological science of law, therefore, is to separate those portions of the law that regulate, order, and determine society from the mere norms for decision, and to demonstrate their organizing power. (1936:23,41)

Such considerations bring Ehrlich to the conclusion that: Three elements...must...be excluded from the concept of law as a compulsory order maintained by the state - a concept to which the traditional juristic science has clung tenaciously in substance, though not always in

form. It is not an essential element of the concept of law that it be created by the state, nor that it constitute the basis for the decisions of the courts or other tribunals, nor that it be the basis of a legal compulsion consequent upon such a decision. A fourth element remains, and that will have to be the point of departure, i.e. the law is an ordering. It is the deathless merit of Gierke that he discovered this characteristic of law in the bodies which he called associations (Genossenschaften).... And herein lies the germ of a true and great conception of the nature of law. Just as we find the ordered community wherever we follow its traces, far beyond the limits set by Gierke, so we also find law everywhere, ordering and upholding every human association. (1936:23-25)

The inner order of the association of human beings is not only the original, but also, down to the present time, the basic form of law. (1936:37)

A "social association" Ehrlich defines as
a plurality of human beings who, in their relations with one another, recognize certain rules of conduct as binding, and, generally at least, actually regulate their conduct according to them. These rules are of various kinds, and have various names: rules of law, of morals, of religion, of ethical custom, of honor, of decorum, of tact, of etiquette, of fashion. (1936:39)[29]

How, then, is law maintained in society? Here, too, Ehrlich looks in the first instance to the associations:

All of us...are living within numberless, more or less compactly, occasionally quite loosely, organized associations, and our fate in life will, in the main, be conditioned by the kind of position we are able to achieve within them. It is clear that in this matter there must be a reciprocity of services rendered. It is impossible for the associations to offer something to each one of its members unless each individual is at the same time a giver. And in fact all these associations - whether they are organized or unorganized, and whether they are called country, home, residence, religious communion, family, circle of friends, social life, political party, industrial association, or good will of a business - make certain demands in exchange for that which they give; and the social norms which prevail in these communities are nothing more than the universally valid precipitate of the claims which the

WHAT IS LEGAL PLURALISM?
J. Griffiths

latter make upon the individual.... [T]he social association, is the source of the coercive power, the sanction, of all social norms, of law no more than of morality, ethical custom, religion, honor, decorum, etiquette, fashion, at least as far as the outward observance of the precepts is concerned....

A man conducts himself according to law, chiefly because this is made imperative by his social relations. In this respect the legal norm does not differ from the other norms. The state is not the only association that exercises coercion; there is an untold number of associations in society that exercise it much more forcibly than the state. (1936:-63-64)

The empirical existence of a legal norm is only defineable in terms of the inner order of associations:

[Rules of conduct] are social facts, the resultants of the forces that are operative in society, and can no more be considered separate and apart from society, in which they are operative, than the motion of the waves can be computed without considering the element in which they move. (1936:39)

A norm...must be recognized in the sense that men actually regulate their conduct according to it. A system of law or of ethics that no one gives heed to is like a fashion that no one follows. Only we must bear in mind that what has been said about the rule of conduct must not be applied to the norm for decision; for courts may at any time draw forth a legal proposition which has been slumbering for centuries and make it the basis of their decisions. And we must not conceive of this doctrine...as implying that the norm must be recognized by each individual. The norms operate through the social force which recognition by a social association imparts to them, not through recognition by the individual members of the association. (1936:167)

Many of the essential elements of a descriptive theory of legal pluralism are to be found in Ehrlich's idea of "living law" - the "law which dominates life itself even though it has not been posited in legal propositions." (1936:493)[30] A descriptive conception of law must deal with rules of conduct rather than rules for decisions, because the actual use - the organizing function - of rules is more central to law than their role in dispute settlement. Rules of conduct are an aspect of the organization of social life in what Ehrlich calls associations: the concept of a social group and the concept of rules of conduct are inseparable from each other. The existence of a rule of conduct

in an association is a matter both of actual behavior and of what Ehrlich refers to as "recognition" by the association, that is, use of the rule as a standard within the group. Conforming behavior in the absence of the sort of physically coercive sanctions which the state has at its disposal is to be explained in terms of the dependence of the individual upon his place in the associations of which he is a member. The state is (for purposes of empirical theory) an association like all the others: it has no special position in relation to the others, nor does its law have some special attribute requiring a distinct descriptive treatment. Society is neither the homogeneous whole supposed by legal centralism nor the neat federative structure of segmentary associations supposed by institutionalist theory[31] and by writers such as Pospisil and Smith. It is rather a chaotic mess of competing, overlapping, constantly fluid groups, more or less inclusive, with entirely heterogeneous principles of membership, social functions, etc., and in a baffling variety of structural relationships to each other and to the state.

Nevertheless, there are considerable inadequacies in Ehrlich's idea of "living law". All of them are explicable in terms of Ehrlich's predominant concern, despite his "scientific" pretensions, with an essentially "practical juristic" problem (cf. Ziegert, 1979). His interest in the "living law" of social associations derived from, and was ultimately limited to the requirements of, a particular theory of legal reasoning, according to which judges ought in their law-finding function to take far more account of the rules of conduct in fact prevailing in society than was allowed for in his day by 'legal positivism'. Ehrlich's objective was a "scientific" theory of law which in the name of a more open approach to legal reasoning removed "rules for decision" formulated in "legal propositions" from the exclusive possession of center stage. His conception of law is restricted, thus, to legal rules. Furthermore, once he had what he needed in order to reform legal reasoning, he lost interest in the further implications of what he had said. Despite his observation that, according to his descriptive theory of law, the state is just another association, the state and its law in fact remained central to his discussion. The "legal proposition", which he identified with state law, is the terminus ad quem of a process of social and legal evolution of which the other end consists simply in the inner ordering of associations. (Ziegert, 1979:251; Ehrlich, 1936:72, 150-156, 211-212.) His theory therefore lacks an independent criterion of 'the legal'. He seems to take it as obvious which sorts of rules of conduct are legal in character. (cf. Nelken, 1984:163) One gathers that those rules are legal which deal with the same matters as state law and which therefore

WHAT IS LEGAL PLURALISM?
J. Griffiths

can be regarded as the source of, or resources for, the "rules for decision" which judges need.[32]

Ehrlich likewise does not discuss how an "association" might be identified, and the examples he cites seems to have virtually nothing in common. It would seem, again, that his ultimately juristic use for "living law" did not require him to be able to identify its locus in the abstract. All that he needed was that, in a given practical context, defined by the needs of judges, he would know where to look. Such a practical concern similarly accounts for his lack of interest in the associations and their inner ordering as such. Hence his peculiar identification of "rules for decision" and "legal propositions" with the state and its courts, whereas a moment's reflection reveals that these aspects of law are to be found in many other social associations as well, and that the 'inner order' of the state is certainly not adequately described in terms of "legal propositions".[33] For all his insistence that the basic form of law is the inner order of associations, Ehrlich manifests a curious lack of interest in processes within associations or in the differences between sorts of associational order. (Cf. Gurvitch, 1947:121-122.)

Ehrlich's ultimately juristic concern also results in a lack of interest in the relationships of non-state associations inter se, except insofar as this might be taken account of by a state judge considering the relevance of the "living law" for his decision. Ehrlich recognizes, of course, that the normative demands of the various associations to which a person may belong can be "diverse and perhaps conflicting" (1936:394, see also 128), but further than this by way of analysis of the situation of legal pluralism he does not go. He does observe concerning the manner in which the "living law" influences the "rules for decision" and the "legal propositions" that the "law of the stability of legal norms" ensures that the formal law resists superficial change while undergoing, because of continuous changes in the "living law" and in the resulting "facts of the law", radical changes in function (1936:132-135; cf. also 396 ff; compare Renner, 1949). But he offers little more than generalities about borrowing and imitation concerning the influences of state law on the inner order of other associations,[34] or the influences upon each other of the various non-state associations.

Finally, the fact that Ehrlich ultimately is only concerned with problems of the behavior of organs of the state leads him to ignore the question of individual behavior. Social control in associations happens, so far as one can tell, not only without internal institutions and specialization, but also without mobilization and manipulation by individuals. The aggregate normative

expectations and behavior of individuals in a pluralistic social setting gives rise to the "living law", thus opening up issues of individual behavior which are quite irrelevant within the framework of legal positivism. Nevertheless, Ehrlich does not even mention the relevance for the total legal order of the choices open to individuals in such a setting. He appears to be quite unaware of the fact that his conception of law implies a theory of individual legal behavior.

Moore's conception of the "semi-autonomous social field"[35]

A more recent analysis of the locus of law in a pluralistic social structure, one which has much in common with Ehrlich's conception of the "living law", is that of Sally Moore (1978). Her discussion begins not with the problem of the definition of 'law' (Ehrlich and Pospisil), nor with that of an adequate model of social structure (Smith), but with the question of an appropriate "field of observation" for the "study of law and social change in complex societies". (1978:55) She is in particular concerned to examine in this way the inadequacy of "instrumentalism"[36], that is, the notion that fundamental social change can readily be brought about by means of legislation. Her proposal is to take the "small field observable to an anthropologist" and to study it

in terms of its semi-autonomy - the fact that it can generate rules and customs and symbols internally, but that it is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded. The semi-autonomous social field has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance. The analytic problem of fields of autonomy exists in tribal society, but it is an even more central analytic issue in the social anthropology of complex societies. All the nation-states of the world, new and old, are complex societies in that sense. (1978:55-56)

Clearly she has quickly moved from the mere choice of a field of observation to the statement of a pluralistic conception of law-in-society and its relevance for the social working of legislation. This shift becomes explicit in her definition of a semi-autonomous social field:

The semi-autonomous social field is defined and its boundaries identified not by its organization (it may

WHAT IS LEGAL PLURALISM?
J. Griffiths

be a corporate group, it may not) but by a processual characteristic, the fact that it can generate rules and coerce or induce compliance to them. Thus an arena in which a number of corporate groups deal with each other may be a semi-autonomous social field. Also the corporate groups themselves may each constitute a semi-autonomous social field. Many such fields may articulate with others in such a way as to form complex chains, rather the way the social networks of individuals, when attached to each other, may be considered as unending chains. The interdependent articulation of many different social fields constitutes one of the basic characteristics of complex societies. (1978:57-58)

She has substituted, as it were, the concept of a semi-autonomous social field for that of a 'legal level' or a 'corporate group' or an 'association', as the fundamental social locus, the "sociological framework" (in Smith's phrase), of law. In doing so she has definitively left behind any remnant of the whole-society perspective, of a hierarchical conception of the relationship between the various normative orderings which can be present in a society, and of reified corporate groups as the locus of law in society. Like Ehrlich, she identifies the social locus of law in often rather amorphous, overlapping and competing, more or less autonomous social fields. A society consists of a chaotic tangle of "going social arrangements in which there are complexes of binding obligations...in existence". (1978:58)

Moore applies her conception of a semi-autonomous (or "self-regulating", 1978:79) social field to two concrete examples, the garment industry in New York City and the Chagga of Tanzania. Her purpose is

to show how a semi-autonomous social field works, some of the internal and external links it has, and how legal, illegal, and non-legal norms all intermesh in the annual round of its activities. (1978: 59)

In each case, her central point is that external legislation has not had, and could not be expected to have, the apparently intended effects, precisely because of the semi-autonomy of the social field in which it has to operate - the fact that the ties of "mutual obligation" there are frequently stronger than, and in any case deflect the operation of, external law.

The garment industry in New York City occupies a highly volatile market and consists of the interaction of a variety of persons and organizations (jobbers, contractors, union, trade association). This interaction is to some extent regulated by the general law, to some extent by contractual and similar arrangements

between the parties, and partly by unwritten customs and expectations. The industry is characterized by a very high degree of interdependency and the resulting network of mutual obligations is further strengthened by a system of extensive gifts and favors and by the fact that the parties tend to raise necessary working capital by loans from others in the same industry. Relations are, in short, multiplex and overlapping. Deviations from the pattern of behavior required by state-law are frequent, systematic, and regulated by the internally prevailing pattern of expectations.

Neither gifts, loans and favors (nor on the other hand consideration in the form of toleration of violations of externally valid norms) are "legally enforceable obligations":

One could not take a man to court who did not produce them. But there is no need for legal sanctions where there are such strong extralegal sanctions available....

Despite the symbolic ambience of choice, there are strong pressures to conform to this system of exchange if one wants to stay in this branch of the garment industry. These pressures are central to the question of autonomy, and the relative place of state-enforceable law as opposed to the binding rules and customs generated in this social field....

The penalty for not playing the game according to the rules - legal, non-legal, and illegal - in the dress industry is: economic loss, loss of reputation, loss of goodwill, ultimate exclusion from the avenues that lead to money-making. Compliance is induced by the desire to stay in the game and prosper. It is not unreasonable to infer that at least some of those legal rules that are obeyed, are obeyed as much (if not more) because of the very same kind of pressures and inducements that produce compliance to the non-legal mores of the social field rather than because of any direct potentiality of enforcement by the state. In fact, many of the pressures to conform to 'the law' probably emanate from the several social milieux in which an individual participates. The potentiality of state action is often far less immediate than other pressures and inducements. (1978:61-65)

Behavior in the garment trade is thus highly regulated, without there being an inclusive corporate group (in Smith's sense) to which such regulation could be referred. Hence Moore's preference for the concept of a semi-autonomous social field as the locus of regulation.[37]

WHAT IS LEGAL PLURALISM?
J. Griffiths

In the case of the Chagga, Moore shows how it came to pass that the effects of the abolition of freehold land tenure, the establishment of ten-house cells of the ruling political party, and the abolition of chieftaincy have been so marginal in their effects on Chagga society. What she says about the Land Tenure Act of 1963 summarizes her entire argument:

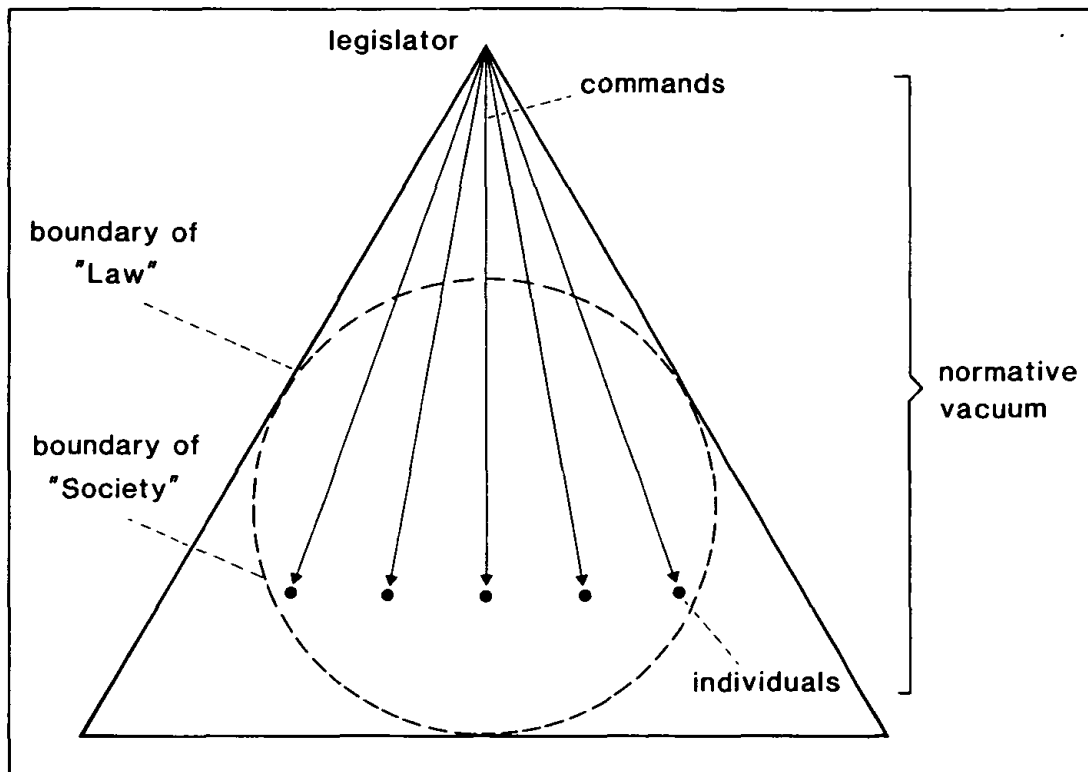
It is only in so far as law changes the relationships of people to each other, actually changes their specific mutual rights and obligations, that law effects social change. It is not in terms of declarations, however ideologically founded, about the title to property. Most Chagga are living where they lived before 1963 as they lived before 1963. The semi-autonomous social field that dominates rural Chagga life is the local lineage-neighborhood complex; that complex of social relationships having much to do with land rights continues intact and almost unchanged by the 1963 Act. (1978:70)

While the locus of Chagga regulation in the past was in formal corporate organizations of kinsmen, the semi-autonomous social field is today more amorphous:

[A]gnates...form a bounded unit of individuals closely connected through their contingent interests in one another's property as well as through ties of tradition, neighborly contiguity, and sometimes affection. In this loosely constituted aggregate, certain men are recognized as leaders, others as less powerful....The potential power of seniors to affect the lives of juniors through the allocation of land and through supernatural effects on their lives permeates all contact between them. The flow of presentations and services and deferential gestures toward these men is continuous. The locus of power is [regularly] acknowledged ceremonially....Woe to the son who displeases his father, or the nephew under an uncle's guardianship who does not accept his uncle's allocation of land with grace. There are more than economic sanctions involved. Kinsmen can have certain magical effects on one another. But even more potent, they can have profound social effects on one another. A man must rely on neighbors and kin for security of his person, his reputation, his property, his wife and his children, and for aid in the settlement of any disputes in which he may become involved. Thus the lineage-neighborhood complex is an effective rule-making and sanction-applying social nexus. (1978:71-72)

Since the Tanzanian legislation with which she deals did not succeed in rearranging the mutual rights and obligations in the Chagga social field - in Ehrlich's terms, in bringing about new rules of conduct - it had little effect there.

figure 4: instrumentalist image of social space as a normative vacuum



The importance of Moore's analysis can best be appreciated if we contrast it with the model of the social working of a legal rule which is implicit in the 'instrumentalist' approach. Instrumentalism characteristically reflects a rather naive positivistic conception of law, in which rules are seen as commands given by a legislator and received by an individual. Quite apart from philosophical objections to such a conception of law (see e.g. Hart, 1961; Dworkin, 1977), the implicit instrumentalist model of the social working of a rule pays no attention to the social medium through which such a command must travel to reach an individual.

WHAT IS LEGAL PLURALISM?

J. Griffiths

The social space between legislator and subject is implicitly conceived of as a normative vacuum (see figure 4).

Such a model implicitly assumes:

- that the legislator can be conceived of as external to (autonomous from) the social context in which the rule is to have its effects;
- that the subjects of the rule can be conceived of as atomistic individuals;
- that the legislator's command is received by the subject of the rule uninfluenced by the social medium through which it passes (from which it follows, among other things, that the causes of non-compliance must be sought in characteristics of the command or of the receiving individual).

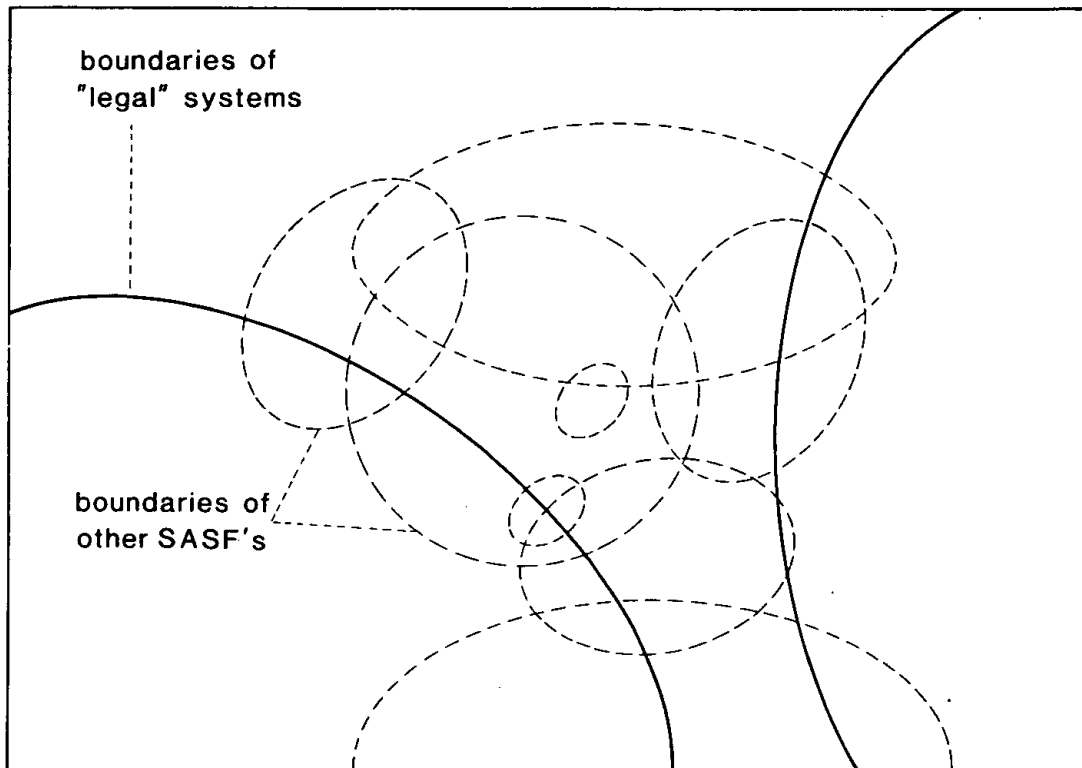
Moore uses the concept of a "semi-autonomous social field" to show that the social space between legislator and subject is not a normative vacuum. The social medium through which rules are transmitted and the social context within which they are operative is full of norms and institutions of varied provenance. The ineffectiveness (or the effectiveness in unexpected ways) of legal rules must therefore be explained primarily in terms of social structure.

For our purposes, Moore's contribution to an adequate theory of legislation is not of primary importance. It is the significance of her analysis for a descriptive theory of legal pluralism which concerns us. Like the other anthropologists of law discussed above, she rejects the idea that only the state can be considered a source of 'legal' rules. Any social field is full of normative material. Some originates within the field itself, some from fields external to it, and some from smaller social fields which are more or less included within it. All these sources of rules vary widely in characteristics such as formal organization, differentiation of the social control function, and whether they have segmentary or overlapping boundaries with other sources of rules. The descriptive theory of legal pluralism is, thus, the theory of the normative heterogeneity entailed by the fact that social space is normatively full rather than empty, and of the complexity of the working of norms entailed by such heterogeneity. (Compare Engel, 1980.) Moore's implicit model of social space within which the working of legal norms takes place is as shown in figure 5.

Moore's conception of socio-legal pluralism is similar to Ehrlich's, and the above figure applies equally to both of them (except insofar as the dynamic aspect of a pluralistic situation, emphasized by Moore, cannot be represented in such a way). Moore and Ehrlich share the weakness of an approach to legal pluralism

primarily from the perspective of state law (for Moore, legislation; for Ehrlich, adjudication). As a consequence, Moore, like Ehrlich, pays little attention to the relations between non-state 'semi-autonomous social fields', focussing as she does on the effectiveness of the law of the state within a 'semi-autonomous social field'.

fig. 5: the structure of social space according to Moore



Moore's concept of a 'semi-autonomous social field' is preferable to Ehrlich's concept of an 'association' in three respects. First, attention is emphatically directed by Moore's concept to both aspects of the characteristic of semi-autonomy. Second, all residue of the reification which still clings to the concept of an 'association' is absent: it is clear we are not concerned with things but with social loci, which can be perceived and defined in an endless variety of ways depending upon the perspective and purposes of the observer. No social group 'contains' any fixed number of distinct spheres of semi-autonomy, any more than it

WHAT IS LEGAL PLURALISM?
J. Griffiths

contains a fixed number of 'networks'.[38] That 'semi-autonomous social fields' are relative affairs does not mean that they are not operationalizable concepts. Moore defines a 'semi-autonomous social field' as an identifiable social group which engages in reglementary activities. This also provides her with a criterion of the 'legal' (which as we have seen is missing from Ehrlich's account): all reglementation by a 'semi-autonomous social field' is, for purposes of a theory of legal pluralism, 'law'.

In the third place, because she is concerned with how law works in practice, and because the 'semi-autonomous social field' is a locus of reglementary activity and not an entity, Moore does not treat the 'living law' of 'semi-autonomous social fields' as a mere given. She emphasizes the way in which individual behavior and the processes of interaction within and between 'semi-autonomous social fields' determine what the law effectively is at a given place and moment. Her theory draws attention to the dynamic aspects of a situation of legal pluralism (compare Collier, 1976), by contrast with Ehrlich who is inclined to see 'rules of conduct' as stable features of the social landscape rather than as the products of struggle, negotiation, and other forms of interaction.

The strength of Moore's approach, as compared with the others considered, lies in her appreciation of the complexity of the social situation in which law finds its working, in the freedom of her approach from hierarchical, centralist, whole-society preconceptions, and in her emphasis on the continuously variable autonomy of 'social fields'. Also important is her emphasis on the dynamic aspect of partial autonomy, that is, the tendency of a self-regulating social field "to fight any encroachment on autonomy previously enjoyed" (1978: 80),[39] and the way in which the structure of the whole society at any given moment can be seen as a pattern and network of "areas of autonomy and modes of self-regulation." (1978:78)

Because 'society' as such plays no key role in her descriptive theory, Moore's approach can be applied to the analysis of the internal legal pluralism of any social field at any 'legal level' and is not limited to the analysis of legal pluralism in a society as a whole. She does not identify the 'semi-autonomous social fields' which can be observed within a given social field as structural building blocks (hierarchical or segmentary) of the whole field, deriving their social significance from and only definable in terms of their various structural positions. Where Pospisil and Smith both have basically constructional conceptions of socio-legal structure and hence of legal pluralism, Moore's conception is one of interacting systems. [40] There is no a

priori reference-point in terms of which each system receives its definite and distinctive structural position. Socio-legal structure is manifest in the actual pattern of interaction of the various semi-autonomous fields which can be observed.

Moore's criticism of the narrow conception of a corporation in Smith's theory is that it is inadequate to the analytic task of locating law in society. She replaces it with a more fruitful concept which expressly addresses variability where Smith's approach was ideal-typical. But she does not seem to be aware that in doing so she has gutted Smith's theory by depriving it of a concept of 'law'. For Smith, 'law' is the internal social control of a corporate group and other instances of social control are not 'legal'. The concept of a semi-autonomous social field affords, by contrast, no basis for such a distinction. Some of the rules which Moore describes would be 'legal' in Smith's sense (e.g., those deriving from the internal control of a trade association) while, as she herself says, others would not:

[In the] classical anthropological opposition of moral to legal obligations [these are] 'moral' obligations, since they are obligations of relationship that are not legally enforceable, but which depend for their enforcement on the values of the relationship itself. They are all gifts or attentions calculated to induce or ease the allocation of scarce resources. The inducements and coercions involved in this system of relationships are founded on wanting to stay in the game, and on wanting to do well in it. (1978:62)

Moore does not make clear how she wants to restore to anthropological theory a concept of 'law'. She seems to want to call (some of) the regulatory activity of the semi-autonomous social field 'law', but her theory affords no basis for doing so. As a result, she tends to fall back into the legal centralist pattern of simply identifying law with the state. In that sense her theory therefore does not concern the interaction of "internal" and "external" law (Kidder, 1979) in such a field, but rather the impingement of 'law' on a field filled with non-legal social control. In short, the concept of a semi-autonomous social field provides us, for the first time, with an adequate descriptive tool for locating legal pluralism in social structure, but if it is to constitute an adequate basis for a descriptive theory of legal pluralism it will have to be complemented with a conception of the 'legal' to replace that which she has excised from Smith's theory of corporations.

WHAT IS LEGAL PLURALISM?

J. Griffiths

4. What is 'legal pluralism'?

Any sort of 'pluralism' necessarily implies that more than one of the sort of thing concerned is present within the field described. In the case of legal pluralism, more than one 'law' must be present. For reasons we have seen above, this cannot be conceived of as a situation in which more than one rule is applicable to the 'same' situation, for any such assertion is normative and not empirical. It identifies a situation in which law is non-uniform, not one of legal pluralism.

Legal pluralism is an attribute of a social field and not of 'law' or of a 'legal system'. A descriptive theory of legal pluralism deals with the fact that within any given field, law of various provenance may be operative. It is when in a social field more than one source of 'law', more than one 'legal order', is observable, that the social order of that field can be said to exhibit legal pluralism.

what is 'law'?

Pursuing Moore's analysis to its conclusion and rejecting her last-minute lapse into legal centralism, it follows that law is the self-regulation of a 'semi-autonomous social field'. The idea that only the law of the state is law 'properly so called' is a feature of the ideology of legal centralism and has for empirical purposes nothing to be said for it. Distinctions can, where appropriate, be made between more or less differentiated forms of law. The self-regulation of a semi-autonomous social field can be regarded as more or less 'legal' according to the degree to which it is differentiated from the rest of the activities in the field and delegated to specialized functionaries (see Griffiths, 1984a).[41] But differentiated or not, 'law' is present in every 'semi-autonomous social field', and since every society contains many such fields, legal pluralism is a universal feature of social organization.

what is 'legal pluralism'?

Legal pluralism is a concomitant of social pluralism: the legal organization of society is congruent with its social organization. 'Legal pluralism' refers to the normative heterogeneity attendant upon the fact that social action always takes place in a context of multiple, overlapping 'semi-autonomous social fields', which, it may be added, is in practice a dynamic condition.

A situation of legal pluralism - the omnipresent, normal situation in human society - is one in which law and legal institutions are not all subsumable within one 'system' but have their sources in the self-regulatory activities of all the multifarious social fields present, activities which may support, complement, ignore or frustrate one another, so that the 'law' which is actually effective on the 'ground floor' of society is the result of enormously complex and usually in practice unpredictable patterns of competition, interaction, negotiation, isolationism, and the like.[42]

Notes

1. This article is a revised version of a paper with the same title delivered at the annual meeting of the Law and Society Association in Amherst, Massachusetts, 12-14 June 1981. That paper was an expanded and reworked version of "The legal integration of minority groups set in the context of legal pluralism," delivered at the conference on Constitutional Law and Minority Groups held at Leiden University on 6 April 1979.

Innumerable friends and colleagues have wittingly or unwittingly contributed to this article over the years and I am probably not even conscious of most of their contributions. I could not begin to acknowledge all of my debts to them. I do, however, want to record the fact that Gordon Woodman's stern editorial pen saved me at the last minute from many infelicitities, errors and confusions.

2. Among the more interesting treatments of the concept is Galanter (1981), which is in many respects similar in approach to this article. Cf. also Allott and Woodman, 1985; von Benda-Beckmann and Strijbosch, 1986; Nelken, 1984; Fitzpatrick, 1983; Henry, 1983; Arthurs, 1985.
3. I do not agree with the view that 'legal' and 'non-legal' forms of social control are distinguishable types. I have argued elsewhere (Griffiths, 1984a) for a 'non-taxonomic' conception of law as a continuous variable: on this view all social control is more or less 'legal'.
4. Weber is an early, emphatic and too often forgotten exception:

[W]e categorically deny that 'law' exists only where legal coercion is guaranteed by the political authority. There is no practical reason for such a terminology. A 'legal order' shall rather be said to exist

WHAT IS LEGAL PLURALISM?

J. Griffiths

wherever coercive means, of a physical or psychological kind, are available; i.e., wherever they are at the disposal of one or more persons who hold themselves ready to use them for this purpose in the case of certain events; in other words, wherever we find a consociation specifically dedicated to the purpose of 'legal coercion.' The possession of such an apparatus for the exercise of physical coercion has not always been the monopoly of the political community. As far as psychological coercion is concerned, there is no monopoly even today, as demonstrated by the importance of law guaranteed only by the church. (1954:17)

[C]onflict between the means of coercion of the various corporate groups is as old as the law itself. In the past it has not always ended with the triumph of the coercive means of the political body, and even today this has not always been the outcome. A party, for instance, who has violated the code of the group, has no remedy against a systematic attempt to drive him out of business by underselling. Similarly, there is no protection against being blacklisted for having availed oneself of the plea of illegality of a contract in futures. (1954:19)

5. Things done in the name of the ideal do not always look very pretty in hindsight. The eye of the historian is generally more sensitive than that of contemporary would-be idealists to the group interests which underlie the suppression of one group's law in the name of 'the general interest'. See, e.g., Thompson, 1975.
6. Legal pluralism in this sense is often intimately connected with constitutional regimes such as indirect rule, federalism, apartheid, etc. Cf. Smith, 1969.
7. See Woodman (1969) on the concept of 'customary law' in this context of state-recognition. Cf. Fallers' observation:

Customary law is not so much a kind of law as a kind of legal situation which develops in imperial or quasi-imperial contexts, contexts in which dominant legal systems recognize and support the local law of politically subordinate communities. Like the peasant community with which it is so often associated, it is characterized by its relation to a wider, more learned, and politically more powerful system. (1969:3)

Snyder (1981) discusses the ideological origins and function of the concept of 'customary law'. Parallel to the myth that all real law is state-law is the myth that recognized 'customary law' is a mere continuation of the indigenous law which went before. Here as elsewhere, the ideology of legal centralism and its adjuncts serves to obfuscate and legiti-

mate the annihilation or usurpation of existing rights and the creation of new ones.

8. There are other histories of the phenomenon. Islamic law, for example, allowed for the recognition of local law. See Smith, 1974:110-114.

The relationship of classical Roman law to the bodies of local law in the Empire seems to have been different. The jus civile was law for Roman citizens wherever they were but for the population as a whole it made no pretense to legal exclusiveness and it provided no general and presumptively complete law to which recognized customary law was an exception. See van den Bergh: 1971; cf. the role of 'custom' in Hindu law, discussed in Derrett, 1968. In such a systems, local law is left undisturbed by the superordinate political power, and on the local level there is no 'legal pluralism' of the colonial and post-colonial variety.

9. See generally Hooker, 1975 (the English, French and Dutch colonies; South Africa; the United States; New Zealand and Australia). The conquest of an existing society does not in itself entail legal pluralism in the weak sense since - as in the case of most conquests within Europe - local law can simply be left intact (or it can be abolished altogether).
10. Nevertheless, in dogmatic legal literature the subject of 'legal pluralism' even in the juridical sense has had very little systematic attention, being usually regarded as an exotic specialty with little relevance to the rest of the law. The everyday phenomena of (implicit) reception of customary law in torts, contracts, etc. go largely unnoticed and unanalyzed. The unspoken assumption that 'legal pluralism' is a limited, exceptional and disappearing phenomenon presumably also accounts for the lack of attention paid to it in legal philosophy and in comparative law.
11. Within the context of such a vision of progress toward uniform, modern law, three sorts of strategies can be distinguished. These are of course ideal types, useful only for heuristic purposes: reality is messier, and continuously variable. The uniform law of the modern state can be imported more or less intact from a legal system which is by general consent 'modern', supplanting all indigenous law. (Hooker, 1975:360-409, discusses the examples of Turkey, Thailand and Ethiopia.) The general law of the colonial and post-colonial period can oust the indigenous legal orders after a period in which it has accorded them recognition (Hooker, 1975:427-443 deals with the Soviet policy in Central Asia in this regard). Or one or another system of indigenous law - or an amalgam, or a 'restatement' - with varying admixtures of colonial or foreign law, can be adopted as the uniform national law. (European codification is a

WHAT IS LEGAL PLURALISM?
J. Griffiths

good example of such a process - see Ehrlich, 1936: ch.xviii; cf. also Derrett, 1968, on the Hindu Code and the Indian Civil Code).

12. One would for instance not use the concept of 'legal pluralism' in this sense to describe a situation in which a superordinate system does not concern itself at all with local or indigenous law and in which the notion that 'lesser' orders are 'law' only if and to the extent that they are 'recognized' is wholly absent. The legal order of the Roman Empire (cf. van den Bergh, 1969) and of many pre-colonial 'conquest states' was in this sense not 'pluralistic' but merely multifarious.
13. It similarly remains unclear throughout Gilissen's discussion of his third example of the insufficiency of "la conception moniste" - colonial and post-colonial societies-whether 'legal pluralism' refers, for him, to one form which the state's legal system can take, or to a situation of plural legal orders. When he associates legal pluralism with the "statuts différents créés par les colonisateurs" and with the survival of colonial legal pluralism in the legal organization of post-colonial states, he seems clearly to have the first in mind; but there are hints of an approach which takes legal pluralism as an attribute of social organization rather than an attribute of the organization of the state's legal system.
14. My interpretation of Vanderlinden is in general rather free and I have left out of the recapitulation of his discussion some aspects which are, in my opinion, irrelevant or unfortunate--for instance, his insistence that legal pluralism be defined in terms of "mécanismes juridiques" and not of "règles de droit" because a definition of the latter sort would exclude the "pluralism" resulting from different interpretations of the same text (see 1971:20).

Stone's (1966:742-749) conception of the relation of "law" and "other social controls" is rather similar to Vanderlinden's conception of legal pluralism. Neither Stone nor Vanderlinden concerns himself with what Smith (1974:128) calls the "sociological framework" of legal pluralism, that is, the social groupings within which law is produced and maintained.
15. See note 40 on the relevance of systems theory for the theory of legal pluralism.
16. In this connection, Pospisil quotes Llewellyn and Hoebel's observation that:

What is loosely lumped as 'custom' [on the society's level] can become very suddenly a meaningful thing-one with edges - if the practices in question can be related to a particular grouping....

(T)here may then be found utterly and radically different bodies of 'law' prevailing among these small units, and generalization concerning what happens in 'the' family or in 'this type of association' made on the society's level will have its dangers. The total picture of law-stuff in any society includes, along with the Great Law-stuff of the Whole, the sublaw-stuff or bylaw-stuff of the lesser working units. (1971:105; quoting Llewellyn & Hoebel, 1941:53,28)

17. Only a few off-hand references to phenomena such as criminal gangs and guilds cannot be subsumed within a hierarchical, segmentary interpretation of the concept of 'legal levels'. Pospisil's discussion of the "dynamics of legal levels" (1971:119-124) is entirely cast in hierarchical/segmentary terms.
18. Pospisil does distinguish between the most-inclusive level of the hierarchy of 'legal levels' (that is, the level of the most-inclusive "group in the social sense" - 1971:118) and the "center of legal power". The latter is "that legal level whose authorities pass decisions that prevail in situations of conflict with similar judgments of authorities of groups from other legal levels". (1971:115) This "center of legal power" need not be the most inclusive 'legal level':

In our Western civilization we are accustomed to regard the law of the state as the primary, almost omnipotent standard to which the individual looks for protection and with which he tries to conform in his behavior. Only within the framework of this basic conformity, we tend to think, may there exist additional controls of the family, clique, association, and so on. In other words, in the West it is assumed that the center of power controlling most of the behavior of the citizens of a modern nation lies on the level of the society as a whole. (1971:115)

But for many societies this is not the case. Furthermore, the "center of legal power" is not static over the long term. (1971:115-119) These observations are well taken, but it is nevertheless essential to note that, empirically speaking, there is no reason to assume that there always is such a general-purpose center. The question of prevalence can be far more negotiable, and the pattern more chaotic, than the idea of "the center" suggests. And even in the case of a regular pattern, the center is likely to be different for different sorts of people and types of issue. The old-fashioned legal centralist notion of sovereignty seems, in short, to be rearing its ideological head here in a somewhat indirect way.

WHAT IS LEGAL PLURALISM?
J. Griffiths

19. To identify such a group in terms of the presence of a 'legal system' or an 'authority' or 'political organization', as Pospisil seems to do (1971:ch.4 passim), appears to be circular.
20. Pospisil (1971) makes no reference to Smith, nor Smith (1969, 1974) to Pospisil (or to Ehrlich, whose work I will consider shortly). Moore (1973) seems to be exceptional in drawing upon both lines of anthropological work on legal pluralism.
21. While regulation of its public affairs is a condition of existence of a corporate group, this regulation need not entail the specialization of public offices to carry it out. Nor need corporate regulation entail "the systematic application of the force of politically organized society" (1974:97, quoting Pound).
22. See also Moore (1978: 22-30) for a critical discussion of the adequacy of Smith's descriptive theory of legal pluralism. Cf. also van den Berghe (1973) on Smith's theory of pluralism generally.
23. Because his focus is on "plural" societies, with structurally unequal segmentary constitutions, Smith tells us little or nothing about the constitutional structure of the most common form of pluralism in modern societies, namely cultural pluralism - where the corporate units concerned do not constitute the political arena of the whole society. Even in conditions of differential or structural pluralism, where a few corporate units constitute the political arena of the whole society, many more will be present in a condition of cultural pluralism. Cultural pluralism, in short, must usually account, even in such societies, for far more of the totality of institutional variety than the institutions of the differentially or consociationally incorporated units themselves.
24. Thus for Smith a ruling corporate group in a situation of differential incorporation does not tend to limit the internal organization of the dominated corporate units in a society, it "paralyzes" them; hence differential incorporation seems to be defined in terms of the extreme form of one possible corporate structure of the dominated units. Similarly, cultural pluralism does not merely entail less congruency and therefore less structural salience at the level of the whole society of the various corporate groups present in society, by contrast with the "deep social divisions" of a segmentary structure based on congruent institutions characteristic of consociational or differential incorporation, it entails the absence of "corporate social differences". Such lack of attention to variability greatly reduces the usefulness of his theory. Compare the criticism

- of van den Berghe (1973:965,968).
25. There are a few exceptions to this generalization in the essays here under discussion. Smith suggests, for instance, that a "corporate category" is required to transform itself into a "corporate group" in the process of assaulting the position of the dominant group in a situation of differential incorporation (1974:233).
 26. In addition to the deficiencies deriving from static, structural, ideal-typical, characteristics, Smith's descriptive theory also appears to suffer from his belief in the structuralist fallacy that the inner logic of social structure in itself explains the course of social events. He is critical of what he calls "marxist" theory, apparently because it looks to factors outside social structure as explanatory variables (see, e.g., 1974:218). But surely even if 'structure' could be regarded as an autonomous given, structures by themselves explain nothing. No amount of analysis of the structure of an automobile engine will explain the movements of the automobile - which, of course, is not to say that an account of the properties of gasoline, or of the 'will of the driver', will do that either.
 27. Like Ehrlich, Gurvitch (1947:ch. 2) sees law as a product of social groups. He attempts a classificatory theory of types of law in terms of a two-dimensional typology: horizontal classification of the "forms of sociality" and the corresponding kinds of law; and vertical classification of the "layers of law" depending on the "degree of organization" and the "mode of acknowledgement". Unlike Ehrlich, Gurvitch almost never descends below the level of classificatory abstraction (he distinguishes in principle 167 kinds of law simultaneously present in a society!) to come to grips with dynamic reality. Gurvitch's classificatory effort has therefore proven sterile as far as further development of a theory of legal pluralism is concerned.

See Nelken (1984) for a very perceptive discussion of the differences between Pound's distinction between "law in books" and "law in action" and Ehrlich's views: Pound was an instrumentalist/legal-centralist interested in the effectiveness of state law.
 28. Ehrlich argues that a variety of doctrinal confusions also derive from the failure to distinguish rules of conduct from rules for decision: the postulate, for example, that statutes (and cases) are the predominant sources of law, and that customary law is of negligible importance in a modern state (1936: 12-13); the doctrine of error of law ("A juristic science which conceives of law as a rule of conduct could not consistently have laid down a principle that men are bound by the law even though they do not know it; for

one cannot act according to a rule that one does not know. On the contrary, it ought to have discussed the question how much of a given legal material is known as a rule of conduct and is followed as such, and, at most, what can be done to make it known"--1936:12); and the doctrine of the "perfection and completeness of the legal system" (which "makes it perfectly obvious that practical juristic science...does not purport to be anything but a system of norms according to which the judge must render his decisions; for surely no man has ever entertained the preposterous thought that the law in its entirety is a complete system of rules which regulate in advance all human conduct in all possible relations"--1936:19-20).

29. Ehrlich suggests that, to the extent that a human group shares a rule of conduct, it is an association. Because the norm of respect for life, liberty and property is in general everywhere accepted, "To this modest extent, the whole human race has already become a vast legal association." (1936: 81)

This identification of law with associations is not circular (as it is in Pospisil's case - see note 19) because rules of conduct and associations are not defined in terms of each other.

30. The emphasis on legal documents (e.g., contracts) as sources of the "living law" is especially characteristic of Ehrlich's approach - as, for instance, in the following continuation of the passage quoted in the text:

The source of our knowledge of this law is, first, the modern legal document; secondly, direct observation of life, of commerce, of customs and usages, and of all associations, not only of those that the law has recognized but also of those that it has overlooked and passed by, indeed even of those that it has disapproved. (1936:493)

There are obvious parallels between Ehrlich's conception of the "living law" and Fuller's conception of law as a "language of interaction" (see Fuller, 1969).

31. See Stone (1966:ch. 11) for a discussion of institutionalist theory. Only the "empiricist" version of institutionalism represented by Romano is of relevance for a descriptive theory of legal pluralism. Romano rejected the notion that there must be a built-in harmony between social institutions, or that the state's legal order enjoys any empirical preëminence:

He observes...that there are institutions which, differently from the international community, and the Church, are generally not regarded as legal orders at all, and may even be considered unlawful (illegitimate) by

the state. Even then, in his view, they may still constitute real legal orders; their "unlawfulness" is only vis-à-vis the order which so qualifies them. This is so even when the unlawfulness is by state law, for to assume that the state legal order is the only legal order would be an ethical judgment, which he refused to accept. Nor is the result affected by considerations of efficacy; for even if the state order is efficacious, the order considered unlawful by the state may also be efficacious, and vice versa....

The question is always, according to Romano, not which legal order is the legal order, but what are the relations between the various legal orders, so that we can better understand the problems thrown up from the viewpoint of one order or another. (Stone 1966:530)

As far as one can judge from Stone's account of his theory, however, Romano's discussion restricts itself to relations on the normative level, that is, to relations between systems of norms.

32. The following quotations illustrate the problem of interpretation of Ehrlich's conception of 'the legal':

The legal norm, therefore, is merely one of the rules of conduct, of the same nature as all other rules of conduct. For reasons readily understood, the prevailing school of juristic science does not stress this fact, but, for practical reasons, emphasizes the antitheses between law and the other norms, especially the ethical norms, in order to urge upon the judge at every turn as impressively as possible that he must render his decisions solely according to law and never according to other rules. Where the state has not obtained a complete monopoly of lawmaking, this antithesis is not emphasized very much. (1936:39)

Not all human associations are being regulated by legal norms, but manifestly only those associations are parts of the legal order whose order is based upon legal norms. The sociology of law deals exclusively with these; the others are the subject matter of other branches of sociology.
(1936:40)

If we bear these characteristics in mind, it may be possible to give a more exact definition of the legal norm. Legal norms are those norms that flow from the facts of the law, to wit from usages, which assign to each member of the social association his position and function, from the relations of domination and subjection, from the relations arising from possession, from articles of association, from contracts, from testamen-

WHAT IS LEGAL PLURALISM?
J. Griffiths

tary and other dispositions; furthermore, those norms are legal norms that arise from the legal propositions of state and of juristic law. The opinio necessitatis is found only in connection with these, and therefore we may say there are no legal norms other than these. But this proposition is not convertible. Not all norms that arise in this way are legal norms....

[T]here are norms that flow from legal propositions and from facts of the law, which however do not belong to the sphere of law, but of ethics, of ethical custom (regulations as to clothing), of honor (compulsory dueling among officers). Even religious dogmas have been posited by statute....

Whether we can consider a norm which is socially valid but which violates a prohibition issued by the state a legal norm in the sociological sense, is a question of social power. The decisive question in this connection is whether or not it releases the overtones of feeling which are peculiar to the legal norm, the opinio necessitatis of the common law jurists. (1936:169-170)

See also pages 55-58 ("law is the order of state or political, social, intellectual, and economic life, but it is not the only order"--"extra-legal norms" are also essential to that order) and pages 167-170 (the "essential characteristics of law" by contrast with other norms include the "great importance" of the subject regulated, the "clear definite terms" in which the legal norm "can always be stated", the special "stability" which legal norms give to an association based upon them, opinio necessitatis with respect to the norm, etc.).

Ziegert (1979:257) asserts that for Ehrlich "law is the organizational specialization of norm-structures, i.e. society organizes legal norms separately from other norm structures and specializes legal functions as opposed to the functions of moral norms, religious norms, etc." From the text of Ehrlich's Fundamental Principles it is not so clear to me that Ehrlich in this way anticipates a concept of the legal as a question of degree of specialization in social control (compare Griffiths, 1984a). Although he does here and there indicate that the difference between law and other forms of social control is not a matter of essential characteristics but of difference of degree, he nowhere clearly says what it is that is thus continuously variable.

33. The rules for decision which a legal institution presents to the surrounding society are ultimately dependent upon its own institutional inner order, that is, on rules of conduct binding within the institution. Compare Hart, 1961; Dworkin,

- 1977; Simpson, 1973.
34. See, however, his discussion (1936:151-152) of the tendency of encompassing associations to impose a unitary inner order (e.g., uniform marriage law) on lesser included associations.
 35. Compare van Vollenhoven's concept of "rechtsgemeenschappen": see Griffiths, 1986, and K. von Benda-Beckmann, 1985.
 36. Compare Griffiths, 1979, on the instrumentalist ideology characteristic of modern legal and social-scientific thought.
 37. This complex, the operation of the social field, is to a significant extent self-regulating, self-enforcing, and self-propelling within a certain legal, political, economic and social environment. Some of the rules about rights and obligations that govern it emanate from that environment, the government, the marketplace, the relations among the various ethnic groups that work in the industry, and so on. But many other rules are produced within the field of action itself. Some of these rules are produced through the explicit quasi-legislative action of the organized corporate bodies (the union, the association) that regulate some aspects of the industry. But others, as has been indicated, are arrived at through the interplay of the jobbers, contractors, factors, retailers, and skilled workers in the course of doing business with one another. They are the regular reciprocities and exchanges of mutually dependent parties. They are the 'customs of the trade'. (1978:63)
 38. Boissevain's (1968) discussion of the continuum from "ego-centric interaction systems" through "quasi-groups" to "groups" is particularly useful in this connection.
 39. The dynamics of a semi-autonomous social field can, however, be more complicated than Moore suggests. Collier, 1976, shows how the dynamics of struggle for leadership within a group can make it tactically interesting, at some times and to some extent, for upcoming leaders to invoke external law. Compare Griffiths, 1985, on the patterns of interaction in circumstances of legal pluralism.
 40. Systems theory, too, regards social systems as defined in terms of the internal rules of interaction which they generate, as subject to penetration by rules of external origin, and as in constant, dynamic interaction with other systems. 'Systemness' is a matter of degree - social groups such as a semi-autonomous social field are not real entities but more or less organized collections of lower-level components. The whole - the 'system' - is a more or less permanent and more or less stable relationship of its parts. See Buckley, 1976; cf. Homans, 1950.

WHAT IS LEGAL PLURALISM?
J. Griffiths

41. To this suggestion, that 'legal' be regarded not as designating a taxonomically distinct sort of social control, but rather the dimension of variability in specialization present in all social control, van den Bergh objects in the previous issue of this Journal (1985:213-216) that the word 'law' is too freighted with normative overtones to be used in this way for empirical purposes. I do not understand him to take issue with anything more than the terminology in which my argument is presented. He may well be right, and in that case we should abandon it altogether and speak only of more or less specialized social control.
42. Some interesting recent studies of situations of legal pluralism and the interaction of legal systems from the perspective advocated here are, for example, Collier, 1976; Santos, 1977; Strijbosch, 1985; K. von Benda-Beckmann, 1985; van den Bergh, 1980.

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