Can we do comparative sociological research without the first hand experience of the culture(s) we are studying; without, for example, being able to speak the language of, and see the world, at least momentarily, from the point of view of those we are investigating? What are the advantages and disadvantages of long-term engagement with the cultures we are studying? Such questions, which should ultimately be discussed in the light of the cultures of origin of the researchers, lie at the heart of comparative sociology of law. It also means that comparative sociology of law places the issue of methodology and its intimate relationship with theory at the centre of research. By doing this it makes a valuable contribution to the field of socio-legal studies, where it is relatively rare to find discussion of methodological issues.

15

Legal Pluralism

ANNE GRIFFITHS

LEGAL PLURALISM HAS generated a great debate about the meaning and scope of the concept of 'law' within the fields of sociology, anthropology, and legal theory. The term and the concepts it encompasses cover diverse and often contested perspectives on law, ranging from the recognition of differing legal orders within the nation-state, to a more far reaching and open-ended concept of law that does not necessarily depend on state recognition for its validity. This latter concept of law may come into being wherever two or more legal systems exist in the same social field. The two perspectives range along a continuum, which varies according to the degree of centrality that is accorded to state law. On the one hand, state law defines the conditions under which legal pluralism is said to exist. On the other, its centrality is displaced by the recognition that state law may be only one of a number of elements that give rise to a situation of legal pluralism. These differences in the scale and projection of legal pluralism derive from differing standpoints that to some extent depend upon the purposes for which its concepts are being invoked. In some instances, it is called upon to deal with ideological assertions about law; in others, it is used to promote a more social-scientific and descriptive theory of law based on empirical data, one of the hallmarks of which has been the production of a large, diverse, and rich ethnography that has developed out of fieldwork. To a degree these two approaches represent the product of differing historical, economic, and political factors that have conjoined to create different sites for study over time and space. Whatever the focus, legal pluralism raises important questions about power—where it is located, how it is constituted, what forms it takes—in ways that promote a more finely tuned and sophisticated analysis of continuity, transformation, and change in society. These are questions that have claimed and continue to claim the attention of both lawyers and social scientists. They are especially pertinent given the challenges presented by globalisation and the place of local communities within it when dealing with 'the accelerated flows of various commodities, people, capital, technologies, communications, images, and knowledge across national frontiers'.[1]

[1] N. Long, 'Globalization and localization: new challenges to rural research' in H. L. Moore (ed.) *The Future of Anthropological Knowledge* (London and New York: Routledge 1996) 37–59 at 39.

In this chapter, it is not possible to present a comprehensive account of legal pluralism with its many permutations; instead, it will highlight some of the main approaches that have generated so much debate about the meaning and scope of the concept.[2] The term, legal pluralism, is of relatively recent origin, generally attributed to a collection of papers published by Gilissen in 1971 titled *Le Pluralisme Juridique*. Since then John Griffiths[3] has mobilised debate around what he views as two different approaches to legal pluralism, one engaging with 'weak', 'juristic' or 'classic' pluralism (that he associates with a lawyers' view of legal pluralism), and the other with a form of 'strong', 'deep' or 'new' legal pluralism, (associated with a social science view of law). For John Griffiths, whose interest lies in establishing 'a descriptive conception of legal pluralism'[4] for comparative purposes, it is the social science perspective that embraces law as an empirical state of affairs that is key. This leads him to define legal pluralism as 'that state of affairs, for any social field, in which behaviour pursuant to more than one legal order occurs'.[5]

1. WEAK, JURISTIC OR CLASSIC LEGAL PLURALISM

Much of the earlier work associated with the weak, juristic or classic legal pluralism deals with indigenous law represented as a counterpoint to European or

[2] For an overview of the field see J. Vanderlinden, 'Le pluralisme juridique: Essai de Synthèse' in J. Gilissen (ed.) *Le pluralisme juridique* (Bruxelles Bruxelles Presses del'Université 1970), 'Return to Legal Pluralism: Twenty Years Later' (1989) 28 *Journal of Legal Pluralism and Unofficial Law* at 149–157; M. Galanter, 'Justice in Many Rooms: Courts, Private Ordering and Indigenous Law (1981) 19 *Journal of Legal Pluralism and Unofficial Law* at 1–47; J. Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism and Unofficial Law* at 1–55; A. Griffiths, *In The Shadow of Marriage: Gender and Justice in an African Community* (Chicago Chicago University Press 1997) at 28–38 and 211–240; S. E. Merry, 'Legal Pluralism' (1988) 22(5) *Law & Society Review* at 869–896; F. von Benda-Beckmann, 'Comment on Merry' (1988) 22(5) *Law & Society Review* at 897–901; K. von Benda-Beckmann and F. Strijbosch (eds) *Anthropology of Law in the Netherlands* (Dordrecht and Cinnaminson Foris Publications 1986); A. Allott and G. Woodman (eds) *People's Law and State Law: The Bellagio Papers* (Dordrecht and Cinnaminson Foris Publications 1985); C. Greenhouse, 'Legal Pluralism and Cultural Difference What Is the Difference? A Response to Professor Woodman' (1998) 42 *Journal of Legal Pluralism and Unofficial Law* at 61–71; C. Greenhouse and F. Strijbosch (eds) 'Legal Pluralism in Industrialized Societies', (1993) 33 *Journal of Legal Pluralism and Unofficial Law*; G. Woodman, 'Customary law, State courts, and the Notion of Institutionalization of Norms in Ghana and Nigeria' in A. Allott and G. Woodman (eds) *People's Law and State Law: The Bellagio Papers* (Holland and Cinnaminson Foris Publications 1985), 'Ideological Combat and Social Observations: Recent Debate about Legal Pluralism' (1998) 42 *Journal of Legal Pluralism and Unofficial Law* at 21–59; N. Rouland, *Legal Anthropology* (trans Phippe G. Planel London Athlone Press 1994); J. Belley 'Pluralimse juridique' in A. Arnaud (dir) *Dictionnaire encyclopédique de théorie et de sociologie du droit* 2nd edn (Paris Librairie Générale de Droit et de Jurisprudence 1993); W. Tie, *Legal Pluralism: Toward a multicultural conception of law* (Aldershot and Brookfield Dartmouth Ashgate 1999); L. Sheleff, *The Future of Tradition Customary Law, Common Law and Legal Pluralism* (London and Portland Frank Cass 2000).

[3] J. Griffiths, *supra* n. 2.

[4] J. Griffiths, *supra* n. 2 at 1.

[5] J. Griffiths, *supra* n. 2 at 2.

Western-style law.[6] An interest in this subject developed out of a combination of intellectual and pragmatic pursuits. Out of the Enlightenment came an interest in tracing the evolution of human development in which law played a key role because it was viewed as representing rationality over other forms of order, created, for example, out of self-interest or force. Thus, law became the index of a 'civilized' society, marking a transition for humanity and society from an irrational to a rational state of being. In charting this progress, which was conceived in universal terms, law became key because it provided the predominant feature which would distinguish so-called primitive from more civilised societies. Given the evolutionary and universal hypotheses underlying such an account of human development, it was necessary to engage in comparative research, to look at law in other societies. Both lawyers and anthropologists rose to the challenge—none more so than Sir Henry Maine,[7] credited as the key exemplar and impetus behind this universal search for law.

At the same time the development and growth of nation-states in Europe was reaching its zenith, marked by the acquisition of colonies and colonial subjects that required to be governed. Whether under direct or indirect rule, regulation took the form of law which, as Chanock,[8] among others has noted, was the cutting edge of colonialism in its attempt to control and govern its colonial subjects while bringing about their transformation and that of the societies in which they lived. In this context, while European or Western law was imposed on colonial subjects, it was also recognised that such law was inappropriate in certain cases, for example, in governing the family life of subrogated persons and that regulation of such matters should be left to the local, customary, or indigenous law of that group. It therefore became necessary to make a study of these forms of law to provide for its incorporation within the framework of the colonial state. In this way local, customary, or indigenous law was viewed as something 'other' than Western law, as a separate and distinct form of law. Under this model of legal pluralism, the state defines the parameters that mark the territories of legal systems within its domain, such as customary and Islamic law, in ways that depict them as separate and autonomous spheres. A prime example of this type of pluralism is provided by Hooker[9] who surveys plural legal systems in Asia, Africa, and the Middle East and who defines legal pluralism as circumstances 'in

[6] What to call law other than state law has generated a great deal of discussion. Terms such as local, folk, customary, informal, people's law and indigenous law have all been mooted, but the point has been made that there is no characterization which consistently follows any supposed distinction between state and folk law. For discussion of this issue refer to A. Allott and G. Woodman (eds) *supra* n. 2 at 13–20

[7] Sir H. Maine, *Ancient law: Its Connections with the Early History of Society and Its Relations to Modern Ideas*, 1st edn (London J. Murray Reprinted as no. 734 in Everyman's Library, London, J. M. Dent and Sons 1965).

[8] M. Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge Cambridge University Press 1985) at 4.

[9] M. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford Oxford University Press 1975).

the contemporary world which have resulted from the transfer of whole legal systems across cultural boundaries'.[10]

2. CRITIQUES OF THIS MODEL

Many scholars have rejected the above model of legal pluralism because it reflects a legal centralist or formalist model of law. It is too statist in its conception of law, which has consequences for the ways in which we perceive law. Under this model authority became centralised in the form of the state, represented through government, the most visible manifestation of which is the legislature. Law formed part of this process of government but was set apart from other government agencies, having its own specific institutions, such as courts and legal personnel who required specialist training. Law was conceived as gaining its authority from the state, and, increasing it by becoming part of the process of government. This authority, at its most basic level, was upheld through the power to impose or enforce sanctions.

While associated with government, law was at the same time able to develop relative autonomy both from the state and from society through the existence of its own institutions, which dealt exclusively with legal matters. Legal activity became set apart from other forms of social and religious activity, not just in terms of institutions, but also through the language that accompanied this development, which reinforced the need for specialist personnel. In this way law became established as a self-validating system, a system whose validity, authority, and legitimacy rely no longer on any external source such as morality or religion, but rather on internal sources which are self-referential for its regulation and perpetuation. These sources include written texts embodied in statutes and cases. They acquire recognition and derive authority through the institutional domains that give rise to them, namely, legislatures and courts, as well as through the personnel, judges and lawyers, who are instrumental in their creation.

The rules generated from these sources are 'legal' rules which are set apart from those rules created from other sources—for example moral or religious rules (which may be drawn from society at large)—and within the legal domain not only acquire precedence over other such rules, but are also used to define the parameters of discussion and to determine outcomes. To sum up, the characteristics of this model are that it promotes a uniform view of law and its relationship to the state,[11] one which places law at the center of the social universe and which endorses normative prescriptions for interpreting society. In this model legal norms are set apart from, and privileged over, social norms[12] and

[10] M. Hooker, *supra* n. 9 at 1.

[11] J. Griffiths, *supra* n. 2 at 3.

[12] S. A. Roberts, *Order and Dispute* (New York St Martin's Press 1979) at 25; M. Galanter, *supra* n. 2 at 20.

used to determine outcomes where conflict arises.[13] Thus 'law' is confined to a particular framework, one that sets it apart from social life and which promotes an image of autonomy that is used to maintain its power and authority over social relations in general, thereby sustaining a notion of hierarchy while at the same time maintaining an image of neutrality and equality within its own domain. The pervasive power of this legal centralist or formalist model of law is such that it may be said that all legal studies stand it its shadow.[14]

Nonetheless this model of law has been highly contested. It raises particular issues for the study of legal pluralism, many of which form part of debates that have taken place over the ages concerning the very meaning of law itself. Some specific critiques are discussed below.

Law as universal across time and space

Under this model law is decontextualised in that it is presented as universal across time and space. Thus, it not only purports to account for law over time but also to mark its presence across the globe at particular moments in history. Such an approach is essentialist or reductionist in nature for it elevates a particular model of law that developed out of a particular period in history to the status of the governing paradigm that is to provide the framework for locating law at all times and in all places. Subject to critique within its own domain (see discussion of strong legal pluralism below), it becomes more problematic when used for comparative purposes for it exercises the authority to determine what counts as law to the exclusion of those accounts that fail to meet its criteria.

State power over the recognition, legitimacy, and validity of law

This exclusionary power of classification led Evans-Pritchard,[15] who worked among the Nuer in southern Sudan, to observe that judged in these terms the Nuer did not have law. Dissatisfaction with branding those societies that did not conform to the centralist model, as primitive or lawless, prompted many scholars including Gluckman,[16] Bohannan,[17] and Pospisil[18] to shift their focus to the

[13] S. A. Roberts, *supra* n. 12 at 20; J. L. Comaroff and S. A. Roberts, *Rules and Processes: The Cultural Logic of Dispute in an African Context* (Chicago and London University of Chicago Press 1981) at 5.

[14] M. Galanter, *supra* n. 2 at 1; J. Griffiths, *supra* n. 2.

[15] Sir E. E. Pritchard, *The Nuer: A Description of the Modes of Livelihood and Political Institutions of Nilotic People* (Oxford Oxford University Press 1940) at 162.

[16] M. Gluckman, *The Judicial Process among the Barotse of Northern Rhodesia (Zambia)* 2nd ed (Manchester Manchester University Press 1955), *Custom and Conflict in Africa* (Glencoe Ill. and Oxford Free Press and Blackwell 1955).

[17] P. Bohannan, *Justice and Judgment among the Tiv* (London Oxford University Press for the International African institute 1957) 2nd ed with new preface 1968).

[18] L. Pospisil, *Kapauku Papuans and Their Law* (New Haven Yale University Publications in Anthropology n. 54, Yale University Press 1958).

study of disputes. The advantage in making this shift was that it immediately expanded the field of inquiry, for, by focusing on disputes, scholars no longer had to locate their legal studies in particular sources and institutions. What became important was to define law, not in terms of form, but of substance, which represented the means by which order is established and maintained within society. This was reflected through a society's handling of conflict in disputes. Concerns over trying to define law cross-culturally also led a number of scholars at a later stage to make the case for rejecting use of the term law, because of its parochial and ethnocentric connotations, in favour of using disputing and processes of order as the frame for comparative analysis.[19] Many of these studies adopted a methodological approach based on ethnography, involving intensive fieldwork, which focused on local, specific, micro-studies in order to provide, what Clifford Geertz has referred to as the 'thick description' of analysis.[20] As such they provided a counterpoint to analyses of law based on abstract legal theory and gave voice to the multiple ways in which people dealt with positions of dominance and subordination, exclusion from formal legal arenas, or negotiations surrounding their access to, and use of, law. They also marked a move away more generally, in the study of law, from the study of rules and institutional frameworks to more actor-oriented perspectives and the study of dynamic processes.[21]

This study of disputes with its more inclusive approach, which dominated much of legal anthropology through several decades was not, however, without its problems. It also engendered critique on the grounds of

(a) the ahistorical nature and presentation of many disputing studies,[22] the need to expand the concept of dispute settlement to embrace dispute processing and the extended case study method,[23]

(b) the need to study troubleless as well as trouble cases,[24] and thus the need to combine a study of order or everyday life along with the study of disputes.[25] This ultimately led a number of scholars to discover the limitations of the case method study and thus to a reorientation of their work towards the significance of legal rules and institutions outside processes of dispute/conflict management,

(c) neglect in many disputing studies until the early 1970s of the fact that many of the societies under investigation had been influenced by and become part of colonial states and a wider economy,[26] the problems associated with uncritically adopting dispute as a unit of analysis; merely substituting the study of disputes for the study of law 'simply replaces one problem with another',[27]

(d) the problematic role of ethnography in the production of knowledge.

One reason for adopting an ethnographic approach to law was to provide a counterpoint to analyses of law based on abstract legal theory by engaging in the study of people's specific, concrete, lived-experiences of law. But while ethnography may provide another perspective on law which differs from those that are based on abstract legal theory it has also been subject to critique about its claims to knowledge and representation. Clifford and Marcus[28] and Marcus and Fischer[29] among others, have challenged the ways in which anthropologists have constructed anthropological texts to establish 'ethnographic authority'. Wilmsen has criticised the practice of ethnography as removing selected parts of social context from its social formation resulting too often in a form of cultural essentialism.[30] Feminist scholars have challenged what they perceive as the dominance of male authority in the construction of knowledge, while feminist legal scholars have long been critical of the ways in which mainstream legal discourse fails to take adequate, if any, account of women's voices, practices, and experiences in its analysis of law.[31]

[19] R. L. Abel, 'A Comparative Theory of Dispute Institutions in Society' (1973) 8 *Law & Society Review* at 217–347; S. A. Roberts, *supra* n. 12; J. L. Comaroff and S. A. Roberts, *supra* n. 13.

[20] C. Geertz, *The Interpretation of Culture: Selected Essays* (New York Basic Books 1973).

[21] L. Nader and B. Yngvesson, 'On Studying Ethnography of Law and its Consequences' in J.J. Honigmann ed. *Handbook of Social Cultural Anthropology* (Rand Mcnally Chicago 1973); J. L. Comaroff and S. A. Roberts, *supra* n. 12; A. Griffiths, *supra* n. 2.

[22] F. G. Snyder, 'Anthropology, Dispute Processes and Law: A Critical Introduction' (1981) 8(2) *British Journal of Law & Society*, 141–180 at 143; M. Cain and K. Kulcsar, 'Thinking Disputes: An Essay on the Origins of the Dispute Industry (1982) 16(3) *Law & Society Review* 375–402 at 326.

[23] P. H. Gulliver, *Social Control in an African Society* (London Routledge and Kegan Paul 1963); J. Van Velsen, 'The Extended Case method and Situational Analysis' in A. L. Epstein (ed.) *The Craft of Social Anthropology* (Tavistock London and New York 1967), 129–149; M. Gluckman 'Limitations of the Case-method in the Study of Tribal Law' (1973) 7 *Law & Society Review* at 611–641; R. Abel, 'Reply to Max Gluckman' (1973) 8 *Law & Society Review* at 157–159; L. Nader and H. F. Todd (eds) *The Disputing Process—Law in Ten Societies* (New York Columbia Press 1978).

[24] K. N. Llewellyn and E. A. Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman University of Oklahoma Press 1941); J. F. Holleman, 'Trouble Cases and Troubless Cases in the Study of Customary Law and Legal Reform' (1973) 7 *Law & Society Review* at 585–586.

[25] S. A. Roberts, *supra* n. 12; J. L. Comaroff and S. A. Roberts, *supra* n. 13.

[26] F. G. Snyder, *supra* n. 22, and 'Law and Development in the Light of Dependency Theory' (1980) 14 *Law & Society Review* at 723–804; *Capitalism and Legal Change: An African Transformation* (New York and London Academic Press 1981); P. Fitzpatrick, 'Traditionalism and Traditional Law' (1984) 28 *Journal of African Law*, 20–27, 'Law and Societies' (1984) 22 *Osgoode Hall Law Journal*, 115–138, 'Review Article: Is it Simple to be a Marxist in Legal Anthropology ?' (1985) 48 *Modern Law Review*, 472–485.

[27] M. Cain and K. Kulcsar, *supra* n. 22 at 397; A. Griffiths *supra* n. 2 at 32.

[28] J. Clifford and G. Marcus, *Writing Culture* (Berkeley University of California Press 1986).

[29] G. Marcus and M. Fisher (eds) *Anthropology as Cultural Critique* (Chicago University of Chicago Press 1989).

[30] E. N. Wilmsen, *Land Filled with Flies: A Political Economy of the Kalahari* (Chicago and London University of Chicago Press 1989).

[31] N. Lacey, 'From Individual to Group?' in B. Hepple and E. Szyszczak (eds) *Discrimination: The Limits of Law* (London Mansell 1992); C. Smart, *Feminism and the Power of Law* (London Routledge 1989), 'The Woman of Legal Discourse' (1992) 1(1) *Social & Legal Studies* at 29–44, *Law, Crime and Sexuality: Essays in Feminism* (London Sage 1995); C. MacKinnon, 'Feminism, Marxism, Method and the State: An Agenda for Theory' (1983) 8(2) *Signs* at 635–658; *Feminism Unmodified: Discourses on Life and Law* (Cambridge Mass. Harvard University Press 1987); M. A. Fineman, 'Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce' (1983) 4 *Wisconsin Law Review* at 789–886, 'Introduction' in M. A. Fineman and N. S. Thomasdsen (eds) *At the Boundaries*

All the problems associated with the weak, juristic or classic form of legal pluralism come back to the question of power, that is, power to define law, to apply it and to use it. In other words, to accord authority, legitimacy, and validity to the claims made by the members of a society (or the converse). Collier and Starr reject the concept of legal pluralism because, in their eyes, it fails to take adequate account of the power relations that pertain to legal systems and their relationships with one another, treating them as having equal weight when in reality this is rarely the case.[32] While this charge may be laid against the weak, juristic or classic form of legal pluralism, it is not necessarily valid for the strong, deep or new legal pluralism discussed later below.

State law's claims to integrity, coherence, and uniformity

In promoting the view that only state law is law and excluding other forms of normative ordering from falling within the definition of law, the legal centralist/formalist model makes assertions about the integrity, coherence, and uniformity of state law. While legal pluralists have challenged its ideological assertions as to the exclusivity of state law this has mainly been achieved, as Woodman points out, by references to the existence and characteristics of non-state law.[33] He argues that by focusing on the challenges raised by non-state law scholars have tended to implicitly accept the integrity of state law and the claims made for it (other than that of exclusivity). Yet he argues that 'There is strong evidence that state laws are (a) not internally self-consistent, logical systems, and (b) not clearly bounded and distinct from other social normative orders'.[34] Nonetheless he underlines Merry's observation that the ways in which other normative orders shape state law are 'particularly unstudied'.[35]

He argues for recognition of state legal pluralism, pointing to research carried out by scholars under the heading of *Polycentricity of Law*,[36] which is concerned with studying the use of sources of law in different sectors of state administration in several Nordic countries. This kind of research, by acknowledging use of differing sources of law, allows for the possibility of conflict between different state sectors as to the degree of authority that is accorded to the different sources. Not only that, but it allows for the possibility of incompatibility

of Law: Feminism and Legal Theory (Routledge London 1991) at xi–xvi; L. E. White, 'Subordination, Rhetorical Survival Skills, and Sunday Shies: Notes on the Hearing of Mrs G' in M. A. Fineman and N. S. Thomadsen (eds) *At the Boundaries of Law: Feminism and Legal Theory* (London Routledge 1991) at 40–58; M. Minow, 'Consider the Consequences' (1986) 84 *Michigan Law Review* at 900–918.

[32] J. F. Collier and J. Starr (eds) *History and Power in the Study of Law: New Directions in Legal Anthropology* (Ithaca and London Cornell University Press 1989)

[33] G. Woodman, 'Ideological Combat', *supra* n. 2 at 51.

[34] G. Woodman, 'Ideological Combat', *supra* n. 2 at 51.

[35] S. E. Merry, *supra* n. 2 at 884.

[36] H. Petersen and H. Zahle (eds) *Legal Polycentricity: Consequences of Pluralism in Law* (Aldershot Dartmouth 1995).

However, as Woodman[37] notes, it is not clear whether this research 'has revealed incompatible contradictions between the observance of sources of law, or between norms claiming to regulate social behaviour'.

For Woodman, the study of legal pluralism must include state law pluralism within its remit. He makes the case for an ethnography of state law that would examine its plurality and diversity within legal fields, taking account of variation in ways which may promote a better understanding of how law works, for example by showing how a term like customary law may vary in its content and application according to whether it is applied by local people, as part of their 'living' law, as distinguished from what is recognised as customary law by lawyers and courts.[38] For John Griffiths, however, the notion of state law pluralism is an impossibility. Thus, the kind of legal pluralism depicted by Hooker, is for him an expression of legal doctrine forming part of the state's ideological assertions about law. He argues that Hooker's categories of state law are based on a conceptual analysis of law, derived from documentary evidence of the formal rules of state law, rather than on the empirical or social facts that provide the foundation for his theory of legal pluralism. For John Griffiths, given that the law of the state represents a single legal order, legal pluralism can only be said to exist where non-state law and state law coexist, for his definition of legal pluralism is centred on the recognition of non-state law. What others refer to as state law pluralism he views simply as instances of legal diversity or of lack of uniformity of law within a single legal order.

Woodman, however, highlights an important aspect of state law that John Griffiths ignores, that is, its salience and power as a social fact. Woodman makes the point that state law need not be categorised as doctrine alone, but may be viewed as having a reality in the social world that it inhabits. Thus rules contained in an operative state law are social facts as well as doctrine. This aspect of state law is comparable with non-state law and can be used to provide the kind of insight that would be denied under a centralist/formalist model of law and that can, for example, account for the differences between folk law and lawyers' customary law.[39] Such an approach, that treats state law as a social fact, has the advantage of undermining the ideological power of the centralist/formalist model, by blurring the boundaries between state and non-state law on which such a model depends. While John Griffiths also seeks to undermine the power of this model he does so in the context of maintaining a clear separation between state and non-state law which raises questions about whether there is a fundamental difference between state law and non-state law and between non-state law and other elements of social ordering. These issues will be addressed in the section on strong legal pluralism below.

[37] G. Woodman, 'Ideological Combat', *supra* n. 2 at 47.

[38] G. Woodman, 'Customary Law', *supra* n. 2.

[39] G. Woodman, 'Customary Law', *supra* n. 2 at 35.

3. RECONCEIVING LAW: TRANSNATIONAL AND GLOBAL PERSPECTIVES

Taking the state as the central vantage or standpoint from which to analyse law is also problematic in an age where law and legal institutions now cross local, regional and national boundaries and in which the 'local' is embedded in and shaped by regional, national, and international networks of power and information. These intersecting, cross-cutting and dialectical relationships may be seen as the product of globalisation, defined by Twining as 'those processes which tend to create and consolidate a unified world economy, a single ecological system, and a complex network of communications that covers the whole globe, even if it does not penetrate to every part of it'.[40] In this context, the power of transnational forms of law and ordering derived from such diverse sources as the European Union, the European Convention on Human Rights, the World Trade Organisation, the World Bank, the International Monetary Fund, and religious movements, is one that is either ignored or inadequately accounted for under a statist/centralist conception of law.

One arena where complex networks of communication have had an impact on state governance is in the field of human rights. As Merry observes 'indigenous groups often define themselves in terms being developed by the global movement of indigenous peoples' human rights and the provisions of state law'.[41] Such groups, in making claims to retain their land and/or water rights, are forced by law to assert their cultural distinctiveness (regardless of whether that is a dominant feature for the group itself) if such claims are to be successful. In this way 'the legal provisions of the nation in which an indigenous community lives as well as those of the international order affect how a particular indigenous community presents itself and the kinds of identities it assumes'.[42] This perspective is important, for it belies one that would simply treat such groups as 'traditional', in favour of acknowledging 'recent accommodations to the shifting global and national frameworks of power and meaning in which the community lives'.[43]

Women's groups within nation states have also managed to mobilise around international conventions, such as the UN Convention on the Elimination of All Forms of Discrimination Against Women, in order to challenge state laws that have had an adverse impact on them and their children. For example, the case of Unity Dow in Botswana who raised a constitutional challenge to the state's citizenship laws which prevented children born to Tswana women married to foreigners from acquiring citizenship, while at the same time granting citizenship to the children of Tswana men married to foreigners, and those of unmarried Tswana women whose fathers were non-citizens. In bringing this case Unity Dow had strong support from certain feminist groups within the country, such as Emang Basadi (Stand Up Women), as well as from other international human rights networks, such as the Urban Morgan Institute for Human Rights, University of Cincinnati College of Law, that lodged an Amicus Brief with the High Court in Botswana on her behalf.[44]

With regard to economic development and international aid, there has been a shift in policy from providing direct aid to governments on the part of multilateral agencies and donor states and a corresponding redirection of investment and development funds to private sector organisations. An important consequence of this policy has been the proliferation of non-governmental organisations (NGOs) that provide an array of services including education, healthcare, voter literacy, small business development, resource management, and monitoring of human rights. These NGOs represent a diverse array of organizations from multi-million pound organisations that operate on several continents to agencies that represent commercial interests, grass roots alliances, or village based religious or cultural groups. While they vary greatly in terms of size, organisational components, sources of funding, and their relationship with the state, it is clear that whatever their particular composition,

> Local and transnational NGO's may also operate on a global level, forming alliances with private companies or other NGO's to facilitate the exchange of ideas and information, mediation between commercial interests and humanitarian concerns, and lobbying organizations like the UN on issues such as women's empowerment and environmental preservation.[45]

What is clear is that the role of the state must be re-examined in the context of this intersection of development, transnational capital, civil society, non-governmental actors, and states. Thus nation-states can no longer be treated as discrete legal entities that can be studied in isolation either internally or externally.

For some scholars these transnational forms of order mark a 'disengagement of law and state',[46] while for others, like Sassen,[47] the focus is not so much on disengagement as on reconceiving the role of the state in ways that belie its adherence to notions of sovereignty and territoriality. This is necessary, for as Sassen observes, 'today's global economy poses a challenge because it simultaneously

[40] W. Twining, *Globalisation and Legal Theory* (London Edinburgh Dublin Butterworths 2000) at 4.

[41] S. E. Merry, 'Crossing Boundaries: Ethnography in the Twenty-First Century' (2000) 23(2) *PoLAR* 127–133 at 127.

[42] S. E. Merry, *ibid.* at 127.

[43] S. E. Merry, *ibid.* 41 at 127.

[44] For details, see A. Griffiths, 'Gendering culture: towards a plural perspective on Kwena women's rights' in J. K. Cowan, M. Dembour and R. A. Wilson (eds) *Culture and Rights: Anthropological Perspectives* (Cambridge Cambridge University Press 2001) 102–126 at 117–119.

[45] L. Leve and L. Karim, 'Introduction Privatizing the State: Ethnography of Development, Transnational Capital, and NGO's' (2001) 24(1) *PoLAR* 53–58 at 53.

[46] W. Twining, *supra* n. 40 at 53; B. de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (London Routledge 1995).

[47] S. Sassen, 'De-nationalization: Some Conceptual and Empirical Elements – APLA Distinguished Lecture' (1999) 22(3) *PoLAR* at 1–16.

transcends the authority of the national state, yet is at least partly implanted in national territories and institutions'.[48] The challenge exists because of methodological and conceptual frameworks employed by social scientists that tend to view the national and non-national as mutually exclusive zones and because of 'the explicit or implicit assumption about the nation-state as the container of social processes and the implied correspondence of national territory and national exclusive territoriality (the institutional encasement of that territory)'.[49] What is required is another perspective on the relationship between local, regional, national, and global domains and their relationship with law, one which moves beyond an 'ossified notion of culture and the binaries that it underwrites'.[50]

Such a perspective involves an examination of how power operates in different places, how it gets transformed, and an exploration of the complex ways in which 'local forms of knowledge and organization are constantly being reworked in interaction with changing external conditions',[51] so that the knowledge produced is both simultaneously local and global, but not universal.[52] In this way there is a recognition of a reciprocal interaction between the global and the local in ways which do not essentialise either in terms of the 'other' but rather acknowledge the ways in which the global may constrain the local while at the same time also acknowledging the ways in which the local appropriates and transforms the global for its own needs.

The importance of this type of analysis is that it undermines any view of globalisation as a 'monolithic entity'[53] the effects of which are dictated 'by some supranational hegemonic power'[54] with uniform results, as this fails to capture 'global ordering in terms of a complex changing pattern of homogenization and diversity'.[55] Merry observes that just as 'local places cannot be studied in isolation, nor can the global be understood except as constituted by multiple locals clustered together at some local spot'.[56]

This also promotes an understanding of the relationship between local and global domains that is not necessarily predicated upon territorial boundaries and geographic space. For example, Sassen observes that the new international finance professionals and immigrant workers 'operate in contexts which are at the same time local and global'.[57] This is because finance professionals form

[48] S. Sassen, *ibid.* at 1.
[49] S. Sassen, *ibid.* at 1.
[50] L. Abu-Lughod, 'Introduction: Feminist Longing and Postcolonial Conditions' in L. Abu-Lughod (ed.) *Remaking Women: Feminism and Modernity in the Middle East* (Princeton Princeton University Press 1998) 3–31 at 17.
[51] N. Long, *supra* n. 1 at 50.
[52] H. L. Moore, 'Introduction' in H. L. Moore (ed.) *The Future of Anthropological Knowledge* (London and New York Routledge 1996) at 10.
[53] H. L. Moore, *ibid.* at 9.
[54] N. Long, *supra* n. 1 at 42.
[55] N. Long, *supra* n. 1 at 50.
[56] S. E. Merry, *supra* n. 41 at 129.
[57] S. Sassen, *supra* n. 47 at 3.

part of a network that cuts across the boundaries of nation states. Yet, at the same time, these professionals experience very particular working conditions (associated with international finance centers) that form 'part of an international yet very localized work sub-culture'.[58] Thus, what emerges is a global network of 'local' places that share specific features, but where the definition of 'local' has nothing to do with geographic proximity. In the same way, immigrants who enter new communities maintain cross border links with those left behind in their countries of origin. Such links promote an understanding of culture that may be viewed as 'local' because the immigrants and native compatriots share a common set of beliefs and practices, but which is not dependant upon territoriality for its existence.

A recognition that culture and geographic space and territoriality need not coincide is important because it highlights the fact that concepts of cultural identity, law, and difference, that gives rise to notions of the 'other', need not be mapped in terms of territoriality. Greenhouse[59] is critical of approaches to legal pluralism that treat it 'more or less as a synonym for cultural pluralism'. She argues that equating legal pluralism and social/cultural pluralism is highly problematic because such an equation makes law *a priori* and preeminently a sign of cultural identity, as if law's production could be separated from the social processes by which people self-identity or are identified by others as belonging together in a 'cultural group'.[60] She rejects the ways in which 'anthropological discussions on legal pluralism *have* tended to take an axiomatic corollary relationship between the organisation of *legal orders* and an on-the-ground schema of *cultural identity*—as if cultural identity has some axiomatic corollary in territory and legality'.[61] This approach, which is premised on the 'idea that law and cultural identity are each other's corollary' is, as she points out, 'fundamental to the cultural self-legitimations of the nation-state'.[62]

Yet the nation-state cannot be ignored. As Greenhouse acknowledges 'while the conceptual status of the nation-state is in doubt among social theorists' nonetheless as 'recent analyses of globalisation and transnational life make clear, current world conditions by no means remove the nation-state from the horizons of people's stake and aspirations'.[63] No more so than when considering citizenship, yet as Greenhouse notes,[64] this poses a conundrum for researchers for 'ethnography is circular if one posits in advance the nation-state as a cultural or social entity, yet ethnography's relevance depends to some extent on democratic institutions and the ways they do and do not work in and

[58] S. Sassen, *supra* n. 47 at 3.
[59] C. Greenhouse, *ibid.* at 64.
[60] C. Greenhouse, *ibid.* at 65.
[61] C. Greenhouse, *ibid.* at 65.
[62] C. Greenhouse, *ibid.* at 65.
[63] C. Greenhouse, 'Commentary' (1999) 22(2) *PoLAR* at 104–109 at 104.
[64] C. Greenhouse, *ibid.* at 104

across states'.[65] What is required is re-engaging with the state in ways which allow for it to be factored into ethnographic research as *an* element for discussion but which does not focus on it as *the* primary point of reference from which such research commences.[66]

4. STRONG, DEEP OR NEW LEGAL PLURALISM

The strong, deep or new legal pluralism provides a mechanism for doing this. It recognises that legal pluralism exists in all societies, that is, that there are multiple forms of ordering that pertain to members of a society that are not necessarily dependent upon the state for recognition of their authority. This form of pluralism allows for an analysis of law that avoids the kind of critiques leveled against the weak, juristic or classic legal pluralism discussed above. It acknowledges (as the other pluralism does not) what Santos has termed 'porous legality' or 'legal porosity' that is 'the conception of different legal spaces superimposed, interpenetrated, and mixed in our minds, as much as in our actions [that constitutes] interlegality'.[67]

A number of scholars, such as Pospisil,[68] who wrote about different legal levels, and Smith who focused on corporations, have been associated with developing this new legal pluralism.[69] One of the most influential has been Sally Falk Moore, whose concept of the semi-autonomous social field has provided a framework for pursuing this type of pluralism (although Moore herself does not explicitly locate her work within a legal pluralist tradition). Moore addressed the problem of the contextual character of law in her comparison between the Chagga of Tanzania and the garment industry in New York.[70] She developed the term 'semi-autonomous social field' to indicate a social unit that generates and maintains its own norms. Thus, the semi-autonomous social field is one that

> can generate rules and customs and symbols internally, but that . . . 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.[71]

She uses this concept to demonstrate how state regulation reaches the working floor of a factory through the filters of these social fields. Thus, legal pluralism is a social fact that is not characteristic of a specific type of society or of a given social field. These fields are not unaffected by state regulation, but neither are they fully subject to it. In providing an empirical account of these fields Moore makes no claims about the nature of the orders that pertain to them or about the nature and direction of influence between the normative orders. The fact that they are semi-autonomous undermines the hegemonic claim to universal validity and dominance for state law, as state law is acted upon by other normative orders. Thus semi-autonomous social fields highlight the gap between state assertions of legality and empirical reality.

The importance of this perspective is that it counteracts the predisposition to think of all legal ordering as rooted in state law. This is necessary, for the weak, juristic or classic legal pluralism cannot serve as the basis for an analytic and descriptive framework of pluralism because the relationship between the law of the state and other law is predefined.[72] Thus, in order to get away from legal centralism in formulating a descriptive conception of legal pluralism 'it is necessary to identify legal pluralism in the strong sense'.[73] Moore's model provides one means of doing so. Not only that, but it has been developed by scholars to provide an account of the dynamics of change and transformation in a society.

Fitzpatrick,[74] for example, has gone on to develop the concept of 'integral plurality' which focuses on the interaction between normative orders, based on the proposition that state law is integrally constituted in relation to a plurality of social forms. In doing so, he makes the shift from seeing the semi-autonomous social field as constituted by state law, to observing how state law is shaped by its constituent normative orders and vice versa. From this perspective 'Law is the unsettled resultant of relations with a plurality of social forms and in this law's identity is constantly and inherently subject to challenge and change'.[75] Building on this theory, Henry integrates the dimension of individual action.[76] By drawing on Giddens' analysis of structure and action, according to which action shapes structure and structures constrain and enable actions, he

[65] See also C. Greenhouse and D. J. Greenwood, 'Introduction: The Ethnography of Democracy and Difference' in C. Greenhouse (ed.) *Democracy and Ethnography: Constructing Identities in Multicultural Liberal States* (Albany SUNY Press 1998) and C. Greenhouse, 'Legal Pluralism and Cultural Difference' *supra* n. 2 at 61–71.

[66] H. L. Moore, *supra* n. 52 at 12 argues that the focus should be on 'the impact of governmentality on ways of living and on social institutions, including the state'.

[67] B. de Sousa Santos, 'A Map of Misreading—Toward a Postmodern Conception of Law' (1987) 14(3) *Journal of Law & Society* at 279–302.

[68] L. Pospisil, *supra* n. 18, and *Anthropology of Law: A Comparative Theory* (New York Harper & Row 1971).

[69] M. G. Smith, 'Some Development in the Analytic Framework of Pluralism' in L. Kuper and M. G. Smith (eds) *Pluralism in Africa* (Berkeley University of California Press 1969), *Corporations and Society* (London Duckworth 1974).

[70] S. F. Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7 *Law & Society Review* at 719–746.

[71] S. F. Moore, *ibid.* at 720.

[72] K. von Benda-Beckman, 'Legal Pluralism' (2001) Tai Culture VI/1 & 2 at 11–17.

[73] G. Woodman, 'Ideological Combat', *supra* n. 2 at 33.

[74] P. Fitzpatrick, 'Law and Societies' *supra* n. 26.

[75] P. Fitzpatrick, *ibid.* at 138.

[76] S. Henry, *Private Justice: Towards Integrated Theorising in the Sociology of Law* (London Routledge & Kegan Paul 1983); 'Community Justice, Capitalist Society, and Human Agency: The Dialectics of Collective Law in the Corporation' (1985) 19 *Law & Society Review* at 303–327; 'The Construction and Deconstruction of Social Control: Thoughts on the Discursive Production of State Law and Private Justice' in J. Lowman, R. Menzies and T. Palys (eds) *Transcarceration* (Gower Farnborough 1987).

creates a space which allows for human actions to have an impact, even where the persons who carry them out may be powerless.[77]

According to Merry, the new, strong or deep legal pluralism has reoriented, or may in the future reorient, legal analysis away from the ideology of legal centralism and from essential definition of law in a number of ways.[78] It can guide it to an historical understanding, embracing an examination of the cultural or ideological nature of law and legal systems, or towards a dialectical analysis of the relationship among normative orders that provides a framework of understanding the dynamics of the imposition of law and of resistance to it.

Working with gender

One arena where this type of analysis has proved emancipatory is in discussions concerning the gendered nature of law. As noted earlier, feminist scholars have long been critical of the ways in which mainstream legal discourse fails to take account of gender in its analysis of law. A legal pluralist perspective provides a means of giving recognition to those normative orders that impinge on women's lives and so factor them into analyses which can take account of the conditions under which women and men find themselves silenced or unable to negotiate with others in terms of day-to-day social life, or the converse, and how this shapes their perceptions, access to and, use of law. My own Kwena ethnography drawn from detailed life histories and extended case studies highlights the gendered world in which women and men live and how this affects women's differential access to law, empowering women in some contexts while constraining them in others.[79] In her study of how Swahili women pursue marital disputes in local Kadhi's (Islamic) courts, Hirsch offers a nuanced analysis of the ways in which women acquire power or are deprived of it in a setting where customary law, religious law, Western law, and social norms concerning male and female speech intersect and interact.[80] Hellum's work in Zimbabwe, which draws on the concept of the semi-autonomous social field in the framing of her research, reveals the ways in which norms regulating kinship, marriage and gender were upheld or generated in the process of resolving procreative problems.[81]

This type of analysis is especially pertinent for postcolonial societies where there is a tendency to analyse pluralism in terms of the weak, juristic, or classic model. The problem lies in the fact that, as Stewart observes:

[77] A. Giddens, *Central Problems in Social Theory: Action, Structure and Contradiction in Social Analysis* (Berkeley University of California Press 1979).

[78] S. E. Merry, *supra* n. 2 at 889–890.

[79] A. Griffiths, *supra* n. 2.

[80] S. Hirsch, *Pronouncing and Persevering: Gender and the Discourses of Disputing in an African Islamic Court* (Chicago University of Chicago Press 1998).

[81] A. Hellum, *Women's Human Rights and Legal Pluralism in Africa: Mixed Norms and Identities in Infertility Management in Zimbabwe* (Oslo and Harare Tano Aschehoug and Mond Books 1999).

> Postcolonial legal doctrine has a centralist orientation—the task of contemporary legal scholars is seen as interpreting the customary law which evolved in the colonial state courts in the light of contemporary legislation and supreme court practice. It is not concerned with understanding the contemporary social contexts despite the fact that the people's customs and practices are constantly evolving outside of the framework of court decisions and interpretations.[82]

Such an approach ignores the dynamics of social change and transformation. For those engaged in women's law in Africa

> Concepts such as [the strong] legal pluralism and the associated tool of the semi autonomous social field open up new and crucial ways within which the interaction of law and life can be explored, thereby making it possible to obtain a more holistic picture of the factors that affect women's lived realities and the choices they make, or the decisions and directions that are forced upon them.[83]

Working with globalisation

Adopting a perspective on legal pluralism in the strong sense also meshes well with approaches to analysing globalisation and the place of the local within it. Given the uneven and diverse effects of globalisation Long stresses the need to study the processes of 'internalization' and 'relocalization' of global conditions in order to uncover 'the emergence of new identities, alliances and struggles for space and power within specific populations'.[84] In this enterprise actor-oriented perspectives are essential because they refuse to permit an analysis of the local as a sphere that is simply acted upon through the imposition of external institutions, interests, or market forces that derive from national, regional or international agencies brought to bear on its domain. Instead, these perspectives provide for an analysis that not only examines how the global shapes the local but how the local responds. Such an analysis promotes a more finely tuned account of the effects of globalisation and its interventions, one that acknowledges that these phenomena represent socially constructed and continually negotiated processes. This viewpoint not only allows for local agency but provides insights into local actors' strategies for dealing with such phenomena, involving their manipulation, appropriation or, even, subversion of such phenomena, in particular contexts. This in turn promotes an understanding of how these 'external' interventions become endowed with diverse and localised sets of meaning and practices.

In this way, social actors not only interact with globalisaton in terms of their own existing experiences and understandings of culture, but also acquire new

[82] A. Stewart 'The contribution of feminist legal scholarship' in A. Stewart (ed.) *Gender Law & Social Justice* (London Blackstone Press 2000) 3–18 at 11.

[83] A. S. Bentzon, A. Hellum, J. Stewart, W. Ncube and T. Agersnap, *Pursuing Grounded Theory in Law: South-North Experiences in Developing Women's Law* (Norway and Zimbabwe Tano Aschehoug and Mond Books 1998) at 46.

[84] N. Long, *supra* n. 1 at 11.

experiences and understandings which are generated in the course of this encounter, so that, as Long observes, these processes provide 'insights into the processes of social transformation'.[85] Thus a study of the concrete ways in which social actors negotiate their universe serves as an alternative form of analysis to that which is based on abstract and theoretical forms of discourse that seek to account for both continuity and change in social relations. The value of this type of analysis lies in the fact that actors' actions 'can in no way be seen as simply determined by planned intervention or by the exigencies of culture'.[86] It also, as Long has argued, provides 'new insights into the interpretation and analysis of neo-liberal policies, theories and practices that go beyond the common tendency to explore them solely from a macro-economic or macro-political angle'.[87]

5. CRITIQUES OF THIS MODEL

This more open-ended approach to pluralism has come under attack for being too vague and ill-defined, in danger of drawing no distinction between the differing normative orders, and thus, conflating them all under the rubric of law. For Tamanaha,[88] embracing a Malinowskian notion of law as 'all the rules concerned and acted upon as binding obligations'[89] is unworkable because it is so broad as to make the concept of legal pluralism neither definable or useful. For Teubner,[90] defining pluralism in terms of vague connections between social and legal terms that are interpenetrating and mutually constitutive merely creates a situation of 'ambiguity and confusion'.[91] Tamanaha maintains that lumping all normative orders together is unscientific because he argues that there is an empirical distinction between state law and other forms of normative ordering.[92] He views state law norms and non-state norms as being ontologically distinct because state law norms come into being through the institutional apparatus of the state, while non-state norms are social norms that exist by virtue of their being part of the social life of the group, rather than through institutional recognition. While acknowledging that non-state norms may become incorporated into state law (by virtue of their recognition by designated state officials), where this occurs they become transformed in such a way that they can no longer be identified as non-state norms. Thus, weak legal pluralism cannot exist.

[85] N. Long, *ibid.* at 50.
[86] N. Long, *ibid.* at 52.
[87] N. Long, *ibid.* at 52.
[88] B. Z. Tamanaha, 'The Folly of the "Social Scientific Concept" of Legal Pluralism' (1993) 20 *Journal of Law & Society* at 192–217.
[89] B. Malinowski, *Crime and Custom in Savage Society* (London Kegan Paul 1926) at 55.
[90] G. Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' (1992) 13 *Cardozo law Review* 1443–1462 at 1444.
[91] For this reason Teubner turns to systems theory to provide a definition of legal pluralism. For a critique of his approach see Twining, *supra* n. 40 at 87.
[92] B. Z. Tamanaha, supra n 88 and *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* (Oxford Clarendon Press 1997).

The problem that legal pluralism presents for scholars such as Tamanaha is that legal orders or systems require to be clearly identified. The difficulty is that legal pluralism rejects a definition of state law which is limited to state law. Yet once non-state law is acknowledged it becomes impossible to define law precisely and any attempt to do so 'slides to the conclusion that all forms of social control are law',[93] Such a conclusion renders it impossible to define law in a way that can allow the concept of legal pluralism to be sustained. Tamanaha also rejects strong legal pluralism on the basis that it embraces an anti-state ideology, which presupposes that non-state or indigenous law is good, a bias that renders the concept inadequate as an analytical tool for legal analysis.

These arguments have been countered by claims that such an analysis fails to take account of the social scientific concept of law as a social fact, without any presumption about whether it is good or bad. From this perspective both state and non-state law are social facts and both embody aspects of control and particular forms of argumentation so that, for Woodman 'the distinction between state law as doctrine and non-state law as social ordering is no more than a distinction of relative emphasis on the sources of information most readily available, not an ontological divide'.[94] Woodman rejects Tamanaha's attempt to define law 'as a distinct form of social control which is clearly distinguishable from the others',[95] pointing out that attempts to do so have proved unsuccessful in this regard. He argues that if there is no empirically discoverable dividing line that may be applied to the field of social control 'we must simply accept that all social control is part of the subject matter of legal pluralism'.[96] To take for granted that such a dividing line exists, without empirical proof, is both 'irrational and unscientific'. Similarly, Tamanaha's argument that it is essential to distinguish state laws from other social norms because there is no other means of differentiating law 'is also not a valid social scientific argument'[97] Thus, while Tamanaha observes that 'strong legal pluralism is the product of social scientists'[98] his arguments operate at an ideological level and fail to engage with a social scientific perspective on law.[99]

While other scholars, such as Cotterell[100] espouse a more moderate view of legal pluralism, allowing for its possibility, they still give analytical primacy to state law. Even Merry in her approach to pluralism observes 'it is essential to see state law as fundamentally different [from other forms of ordering] in that it

[93] B.Z. Tamanaha, *supra* n. 88 at 193.
[94] G. Woodman, 'Ideological Combat', *supra* n. 2 at 43.
[95] G. Woodman, *ibid.* at 44.
[96] G. W. Woodman, *ibid.* at 45.
[97] G. W. Woodman, *ibid.* at 45.
[98] B. Z. Tamanaha, 1992 *supra* n. 88 at 202.
[99] More recently Tamanaha appears to have shifted his views as to what constitutes a core concept of law and to engage with legal pluralism in a different manner. See B. Z. Tamanaha, 'A non-essential version of legal pluralism' (2000) 27 *Journal of Law & Society* at 296–321 in which he appears to endorse what many scholars of legal pluralism have already espoused although he does not comment on either his earlier views or his reasons for conversion.
[100] R. Cotterell, *Law's Community: Legal Theory in Sociological Perspective* (Oxford Oxford University Press 1995).

exercises the coercive power of the state and monopolizes the symbolic power associated with state authority'.[101] Yet F. von Benda-Beckmann takes issue with Merry on the grounds that she conflates ways in which the concept has been elaborated in empirical research with the issue of whether or not 'the concept as such can be useful as a theoretical possibility of pluralism'.[102] He makes the case for more rigorous attention to be paid to legal pluralism as an analytical concept. In developing this abstract concept he would adopt a plurality of normative orders in society as the point of departure for empirical research. The advantage of this approach is that it would take account of normative systems' ideologies, their claims to exclusive validity and to the monopoly of legitimate power as *empirical* phenomena. This means that such claims would form part of the object of study. They would not, therefore, be taken as the starting point from which research would commence that might lead to the exclusion of certain types of normative ordering from consideration on the basis of their lack of recognition by the dominant system (as is the case with a statist model of law). This is important for as K. von Benda-Beckmann has observed it is not only state law that lays claim to exclusive validity; religious and local laws also make such claims.[103]

Adopting such an approach would not mean that law would become indistinguishable from all other forms of social ordering as 'differences in the sources of rules and the sources of effective inducement and coercion can easily be clarified by indicating the dimensions along which manifestations of law vary'.[104] The strength of this analytical approach is that it 'provides a starting point for looking at similarities and differences in several dimensions of variation in a consistent way and therefore provides a much better perspective on differences in form and function than the state-connected concept'.[105] This is because it does not subscribe to any particular ideology of law and it also allows degrees of differentiation in state law to be documented, differences which are often obscured at present because of an implicit acceptance of the rhetoric concerning the homogeneity of state law.

Another challenge that has been leveled against this approach to legal pluralism is that it privileges 'the folk categories of Western law'[106] by imposing them on the normative orders of all peoples, however removed they may be from the culture that gave rise to them. In so far as other people's normative systems would be made to conform to Western categories this is an ethnocentric enter-

[101] S. E. Merry, *supra* n. 2 at 879.

[102] F. von Benda-Beckmann, 'Riding the Centaur—Reflections on the Identities of Legal Anthropology' (Unpublished paper given at the International Workshop on Anthropology of Law at the Max Planck Institute for Social Anthropology, Halle 22 Sept, 2001) at 8. See also F. von Benda-Beckmann, 'Citizens, strangers and indigenous peoples: Conceptual politics and legal pluralism in F. von Benda-Beckmann, K. von Benda-Beckmann and A. Hoekema (eds), Natural resources, environmental and legal pluralism. *Yearbook Law and Anthropology* 9 1–42 at 7–9.

[103] K. von Benda-Beckmann, *supra* n. 72.

[104] F. von Benda-Beckmann, *supra* n. 102 at 9 and at 20–21.

[105] F. von Benda-Beckmann, *ibid.* at 9.

[106] S. A. Roberts, 'Against Legal Pluralism: Some Reflections on the Contemporary Enlargement of the Legal Domain' (1998) 42 *Journal of Legal Pluralism and Unofficial Law* 95–106.

prise, one that seeks to enlarge the legal domain but on the basis of a parochial conception of law. For this reason it is an inadequate tool for the purposes of defining law cross-culturally and engaging in comparative analysis.

This critique of legal pluralism, however, raises two issues that it fails to address, namely:

a) the notion that *any* conception of law must necessarily be based on Western legal theory, and thus, a denial that a more adequate, less ethnocentric, theory of law can ever be developed for comparative purposes; and
b) that it leaves the ideology of state law intact, for it continues to define law in parochial terms that continue to exclude all those that are 'other' because they fail to conform to its remit.

6. MOVING FORWARD: DEVELOPING A RESEARCH AGENDA

These debates highlight the extent to which approaches to legal pluralism are dependant upon the ways in which law itself is constructed as a concept. Such construction marks ongoing processes of identification, negotiation, and contestation reflecting a project that is always in the making as scholars search for continuity and transformation in their analyses of law over time. Three ways in which an actor-oriented, ethnographic study of law in the strong legal pluralist vein could make a contribution to these debates and to the development of a research agenda that more adequately takes account of the global and local dimensions of law would be to explore the following.

Law as a system of representation and meaning

This approach would analyse law in terms of a system of representation, one that creates meaning within a system of state power. Such an analysis would examine how law creates, produces and enforces meanings and relationships about civilization, rationality, equality, and due process. It would attend to the cultural significance of law through examining discourses concerned, for example, with development, democratisation, and the rule of law. However, it would also focus on the processes by which law comes to be a sign of cultural identity and the implications that this has for claims to citizenship and for the rights of various ethnic or minority groups, which would not be solely dependent upon states assertions as to territory or territoriality. Indeed, in this process it is not only the law of the state that constructs meaning but also religious law, local normative orders and customary law that generate their own version of identity. Such research would provide a more detailed comprehension of the ways in which ethnonationalist movements work, as well as a more comprehensive understanding of the factors underlying religious movements which cut across national boundaries and which, in some cases, form part of the opposition to the government of the day.

Mobilisation of law at a local, national and international level

This analysis would examine the ways in which indigenous or local people seek to mobilise the support of the international community by engaging with a human rights discourse of self-determination and cultural rights. Such research would look at what sources these actors draw on in the construction of their claims and the ways in which they utilise international or global networks to construct their cultural identity. It would also explore the extent to which their claims are constrained by state law, while at the same time rendering state law open to challenge. It would investigate what are the shifting global, national and local frameworks of power that make such claims possible. Such research would directly examine the ways law, power and solidarities cross-cut each other and would take account of the circulation and materialisations of power in the local construction of authority, identities, norms and strategies. Natural resource management and environmental protection presents one pressing area for research, where indigenous groups and their representatives are trying to develop 'indigenous' forms of management of tropical forests, land, and water by calling for recognition of local communal rights. The ways in which they formulate their claims, in terms of participation, self government, 'good governance' and sustainability, derived from the language of administration and international law, would make for a fruitful area of study.

State law as shaped by other normative orders

This approach would explore the ways in which other normative orders shape state law that would provide for detailed analyses of its plurality and diversity within legal fields. This would allow for a more systematic account of the conditions which give rise to variation in state law, including the degrees of its institutionalization and mandatoriness. Such an analysis would provide a more fully informed understanding of the ways in which state law works, one which allows for differing degrees of compatibility and/or incompatibility, thus empirically subjecting state law's claims to homogeneity to investigation. It would also examine the varying ways in which bureaucratic government agencies seek to administer the lives of those individuals and collectivities that are subject to them while at the same time taking account of the ways in which such persons and groups respond. Thus it would explore the multifarious ways in which the state, through its various development programmes and organizational structures attempts to control territory and people, and how this relates to non-state modes of control and regulation at both local and supranational levels. Part of this research would explore the ways in which state legal systems manage the differing ideological charters of its constituent populations and negotiate cultural meanings of difference. Such an approach would ensure that, in analysing difference, legal pluralism and cultural pluralism do not simply become equated with one another in ways that map the cultural self-legitimations of nation-states.

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Globalisation and Law

JOHN FLOOD

IN AN ESSAY on the aftermath of the destruction of the World Trade Centre i New York City, the political scientist, David Held, wrote:

> In our world, it is not only the violent exception that links people together across bo ders; the very nature of everyday problems and processes joins people in multip ways. From the movement of ideas and cultural artifacts to the fundamental issu raised by genetic engineering, from the conditions of financial stability to enviro mental degradation, the fate and fortunes of each of us are thoroughly intertwined.

Four months later on 1 January 2002, the Euro became the common curren of most of Europe. Whether one was in Spain, Greece, Belgium or Germany, or would reach into one's wallet for the same money. Nearly 300 million peop were using a currency that had replaced drachmas, francs, pesetas and marks

Two events that are emotionally and materially quite distinct, yet their ram ifications will be felt around the world for a long time. They encapsulate son of the positive and negative aspects of globalisation. A common currency pr vides for transparency in exchanges: differentials in the price of a Volkswag Golf in Spain and the Netherlands become readily apparent. One no long needs the *Economist's* Big Mac index to calculate relative affordability. Touris do not have to wonder whether they are losing out on exchange rate conversio

Although good things can flow from globalisation, the potential for sufferi is omnipresent and rising. Transnational currencies such as the dollar, pou sterling or Euro give uncosted advantages to their host states, allowing them inflate domestic debt at the expense of developing nations. Countries relying primary resources such as minerals or agriculture are rarely able to set pric that embody *their* ideal value of the products. The futures and commodi exchanges in Chicago and London determine those for them. Only countries national corporations with the power to form a monopoly (eg DeBeers a diamonds) or a cartel (eg OPEC and oil) that make possible a high margin rent in their prices are safe from the vagaries of the world markets. The kinds economic differences found between the US and Argentina or Mali are pote tially serious stimuli to violence and other illegal activities like the drug trad human trafficking and money laundering.

[1] D. Held, 'Violence and Justice in a Global Age' in *After Sep. 11: Perspectives from the Soc Sciences* (http://www.ssrc.org/sept11/essays/held.htm, 2001).