Citizens, Strangers and Indigenous Peoples: Multiple Constructions and Consequences of Rights, Resources and Peoples

Paper presented at the 13th IUAES International Conference
Commission on Folk Law and Legal Pluralism
July 29 - August 5, 1993, Mexico City

Panel on Natural resources, environment and legal pluralism

Franz von Benda-Beckmann
Agricultural University Wageningen

Introduction

Human beings become citizens, strangers or indigenous peoples by cognitive and normative constructions. In all societies human beings and collectivities are typified and endowed with a special status to which is attached a wide array of rights, obligations, and ranges of normatively acknowledged autonomy and self-determination. Such typifications may be used as important constituent elements of all-encompassing normative systems. They are also regularly made up ad hoc in routinized life situations and in problematic situations, as interpretations of existing general types or as innovative constructions. Of course human beings' existence cannot be reduced to such constructions.[1] They become citizens or indigenous peoples by being born to their parents, socialized in their culture and history. They become strangers by moving into foreign communities. The cognitive and normative constructions may only be a caricature of their lives and experiences; they may even obscure or make explicitly irrelevant politically and normatively what people may consider the essence of their own lives and identities. Yet normative typifications of human beings, as individuals or as aggregate-categories, are usually quite significant in social, economic and political life. For these normative constructions form point of orientation for human beings' thought and interactions, and they provide schemes of rationalization and justification for claims and counterclaims about how society should be organized and why. They also open up (normatively defined) access roads to certain arenas of decision making and resource allocation. And they offer the possibilities of "idiom" and "forum shopping". Individuals or groups can attempt, depending on the context of their situation and the objectives of their strategies, to choose or switch between investing themselves, or others, with such statuses or invent new ones. The categories of citizen, stranger and indigenous peoples are not the only ones of relevance for people's lives and the organisation of societies. In this paper I shall focus mainly on them, because most political and socio-economic powers in the fields of the management and exploitation of natural resources are attached to these categories of human

beings, and to the equally normatively typified categories of political organisations, notably the state.

My concerns to write this paper are twofold. The first reason is to explore the differences between different population groups which come into existence as result of such normative typifications. I want to explore the problematic nature of these differences and the legal, political and ideological contexts in which they are embedded. In particular, the new ways of talking about "indigenous peoples" as consequence of international legal documents (UN and ILO) have led to new distinctions between population groups in third world states, without, however, replacing earlier conceptions of "indigenous" or "peoples" or "people's law". But through international law "indigenous people", however vague and elusive this category may be (see Martinez Cobo), are distinguished from other rural people who in many cases may have suffered the same historical injustice in colonial and post-colonial states. Behind this concern are questions such as why Papuans in Indonesia's province Irian Jaya are considered (by many, and certainly by their representatives in international working groups) to be "indigenous peoples", while Papuans in Papua Niu Gini are not, but are "just" rural populations in the sense of PNG citizens living in the countryside or forest areas. Both Papua populations have similar social and political organisations; in any case variation of specific types of social and political organisation do not coincide with the state in whose territory they live.

This leads to further questions of how members of a population are related to the state and about the massive claims to social and political power with which the state institutions and their personnel have endowed themselves. These are captured in the notion of sovereignty and largely expressed in international and state (constitutional and other) law, and they are more or less effectively supported through an institutional organisation. They may also be more or less gladly accepted, indifferently tolerated, grudgingly suffered or violently opposed by the inhabitants. Talking about these questions thus automatically leads into a discussion of sovereignty, law, and rights, and in particular of the law through which human beings and political organisations are constructed as citizens, strangers, indigenous peoples and states, and through which social, political and economic power is legitimized.

This brings me to the second concern of my paper. In most societies one will find more than just one set of such generalized typifications of human beings and political organizations, with different and often contradictory economic and political consequences attached. Inside and outside particular state organized societies there may be a multitude of persons engaged in the creation and maintenance of such categories. Individual, groups and politically organized societies at sub state levels may make, maintain and un-make their own typifications. These can be re-interpreted versions of state law categories, but they may also be based in different normative orders such as those known as folk, customary or religious legal systems. In folk law systems - usually operating at a socio-spatial scale smaller than those of states, sometimes, however, cross-cutting state boundaries - human beings can be defined as politically (ir)relevant persons, as full members or strangers, in ways and with consequences quite different from the way in which the state defines citizens or strangers. Where state law may consciously make irrelevant matters of social or ethnic origin and allocate rights and duties on the basis of abstract equality, village

laws may do just the contrary.[2] Historically particularly important, and maybe also in the future much more important than now world wide, are religion based normative orders rooted in a different legitimation of political obligation, in divine revelation or command, and/or sophisticated doctrines of socurces of law such as in the case of Islamic law. Last, but not least there is the transnational universe of "mankind", the world of natural law and international law, the world in which much of the human rights and also the rights of states and other collectivities such as those who have become known indigenous peoples, are created, shaped, negotiated (see Hinz 1990, Swepston 1990).

It has become customary for many scholars and legal politicians to summarize such co-existence of different normative orders within one socio-political space as "legal pluralism" or "legal plurality". Though originally introduced with modest ambition, as a manner of speaking[3] or as "sensitizing" concept, the concept of legal pluralism has sensitized much more than social, legal and political scientists' methodological and theoretical concerns. It has become a subject of emotionally loaded debates. The concept is full-heartedly embraced or denigrated. While some authors use the notion to counter the hegemony of state law, they themselves are regarded as ideological by others.[4] What we observe is not an analytical clarification, but an increasing politization and ideologization of the concept itself.

In my paper I shall try to bring some more clarity into these relations. For "if we do not understand the genesis of our political ideas we shall be compelled to remain their prisoners rather than enabled to become their masters" (Dunn 1991: 25). I shall defend a radical analytical notion of law/legal pluralism as a useful starting point for the description and analysis of complex normative orders. I shall also maintain that it is the most useful, and intellectually most honest base for engagement in legal politics. While such questions may less easily, and only sporadically come up in relatively well-run states with a rather overall high level of material welfare and thoroughly domesticated inhabitants, these questions come to the fore more easily in those countries in which the state organisational apparatus rather appears as a travesty of those ideals with which the state has been constructed originally. Once asked, however, these questions turn out to be as relevant for western European states as for states in Africa, Latin America and Asia. The political conclusions which one may draw, on the other hand, obviously may differ considerably.

An analytic approach

Before examining the nature of the discussions around legal pluralism, I want to give a brief sketch of my own point of departure which I have elaborated in more details elsewhere (F. von Benda-Beckmann 1979, 1983, 1986, 1993, F. and K. von Benda-Beckmann 1992). An analytic conception of law is a scientific device characterized by abstract properties, that can be usefully employed in the description and analysis of social phenomena and the generation of generalisations and theories. It certainly is not a theory itself, only part of a larger comparative analytical system.[5]

The concept of law refers to a dimension or aspect of the structure of social systems. It refers to social phenomena in the realm of objectified meaning, consisting of cognitive and normative conceptions. These define the status of natural resources

and human beings and relationships, provide standards of evaluation, options, prohibitions and other propositions. These are common joined in rules or principles, in conditional programmes of "if-then" character, in which "situation images" are construed and evaluated for relevant consequences. In this general form, law provides frames of meaning which offer points of orientation for human conduct. These conditional programmes connect purpose-means-outcome schemes upon which human beings can draw in the rationalization and justification of their actions. But law not only consists of rules, concepts, principles and procedures that are external to social practices and institutions; it is also embodied in institutionalized social practices and resources. In even more concrete form, law is manifest in actual evaluations in which concrete events or processes are giving meaning in terms of (existing or newly created) general legal elements.

Law, however detailed in its further definition, for descriptive and analytical purposes cannot be more than an abstract cover term for a large variety of social phenomena of legal character. These concern morphological variation (differences in form, structure, extent of institutionalization, differences in substantive content), functional variation (differences in law jobs) and variation in political weight (differences in social significance). If we are interested in relating law to human interaction, and through the study of such interactions and their intended and unintended consequences wish to analyse the social significance of legal elements, at the analytical level law as objectified meaning must be conceptually divorced from the human activities which generate, use and maintain it through time. However law may be defined in detail, this basic distinction between human activity and objectified meaning as the product or object of such activities must be retained. Otherwise, the interrelationships between law and human activity cannot be logically or usefully analysed. There is no reason to pack all research interests or functional hypotheses into the concept of law. By which agents or authors and through which social practices laws are generated, by whom and for which purpose law is used, maintained and changed, and to what extent human beings are motivated or constrained by their orientation at law, are empirical questions to be answered by research, and theoretical questions to be grounded upon such research. They are not definitional questions to be answered by jurisprudential, sociological or political dogma (F.von Benda-Beckmann 1983).

Analytical equivalence (calling social phenomena law or legal) thus always will be different from empirical variation and (possible) morphological, functional and political equivalences. Most debates over the defintion of law have been concerned with the extent to which morphological and functional variations should be captured by the concept. The discussions about legal pluralism involve the more radical question of how law is to be related to variation in political organisation and legitimating orders. The crucial issue is whether one is prepared to admit the theoretical possibility of more than one legal order, based on different bases of ultimate validity, such as the state organization, religion, tradition or individual and group autonomy, within one political organization. If one does, some form of legal pluralism becomes the nearly automatic consequence, and analytically becomes more or less another way of talking about law (see F. von Benda-Beckmann 1988). It merely emphasizes the need for further conceptual differention, for distinctions according to those agents or organisation generating and maintaining law and the sources of ultimate validity.

The politics and emotions of legal pluralism

The critiques of the notion of legal pluralism share the same basic thought: the identification of analytical with political equality or equivalence. This identification of political (in)equality with analytical equality raises objections from more conservative or liberal/leftist thinkers alike. For the etatist thinker, the suggestion of equality threatens to give political weight to norms which are not recognized as valid law. For the more liberal or folk law sympathizer, the suggestion of equality suggests the obscuring and mystification of the political and economic differences and dependences between the orders in a multiple system. Basically, there are three lines of attack on the idea of legal pluralism. The most radical question is concerned with the concept of law involved. Object of specific scorn can be attached to the idea that there could be more than one law/legal system at the same time in the same space at all. From this perspective, the notion of legal pluralism is indeed a "folly" (Tamanaha 1993[1992]). If within one legal system normative elements rooted in tradition, custom or religion are at all recognized as valid, this has to be recognized through state law. This is a situation which has been characterized as "weak" (Griffiths 1986) or "relative legal pluralism" (Vanderlinden 1989), and it is the logical consequence of etatist conceptions of law. Such conceptions of weak legal pluralism, on their part, have been critcized from two perspectives. One is a critique of its alleged scientific usefulness, most vehemently voiced by Griffiths (1986). The other is a critique of existing situations of weak legal pluralism. Finally, it can also be the notion of **pluralism** which incurs particular displeasure, independent of the question of etatist definitions of law.

Since the processes of constructing people, resources, rights and political organisations and their cognitive and normative products concern the delimination of legitimate exercise of social power over people and other resources, they are inevitably political. Since human and natural resources like land, water, crops and minerals are of existential importance for human life and organization, the conceptualization of types of resources and of rights to control, exploit and distribute them form key elements in any legal system. Contradictory constructions, or interpretations of the same categories, need not necessarily always lead to social and political conflict and can be peacefully negotiated. But given their considerable political and economic consequences, they frequently become involved in social, economic and political struggles, in which they are used as a resource in social conflicts and/or become subject of the struggle themselves (Turk 1978, F. von Benda-Beckmann 1992). These negotiations or struggles take place in diverse arenas, in rural villages, in national government offices and international institutions, and are largely carried out in the terms of law and rights. In those arena's where decisions over the distribution of political and economic resources must be rationalized and justified in general normative terms and where consequently political and economic arguments are valued in "legal currency" (Wickham), the status of a political, economic or moral claim as a "legal" right is assumed to have, and often has a sharper edge than a "mere" moral philosophical, or political claim.

In the contemporary world these constructions are most visibly based upon the normative schemes generated by institutions of the state and refined and elaborated

by the doctrines of legal and political science. It has become customary to summarize these as "law". In these conception, law and state are linked. This finds its consensed expression in concepts or definitions of law which more or less elegantly and coherently construct the law-state nexus, epitomized in the state's monopoly of legitimate use of violence (see F. von Benda-Beckmann 1993). The state's "final legal authority" (Beitz 1991) is based on the normative notions of internal and external sovereignty, which comprise the state's authority to exercise exclusive control over the population that inhabits a territory and the wealth and resources that exists within the territory (Beitz 1991: 243).[6] It thus "effectively sanctions the existing international distribution of wealth and resources as well as that of power. Or perhaps it would be more accurate to say that it sanctions the existing distribution of wealth **because** it sanctions the distribution of power" (Beitz 1991: 243).

Struggles over the nature, but primarily over the substance of law and rights are commonplace even when people assume that there is only one relevant scheme of cognitive and normative meaning, "law". Struggles for political rights have gone one with respect to the relevance of status, gender or wealth criteria. New struggles are going on all around us with respect to the reshaping the differences between citizens and strangers/immigrants, changing "the laws of hospitality" (F. von Benda-Beckmann and Taale 1992). They also go on with respect to "indigeous peoples" collective political and economic rights vis-à-vis the governments of the states in whose territory they live. Even within the world of international law, different definitions, and consequently different legal rights, obtain as the different definition of indigenous peoples in the ILO Convention and the UN Declaration show (see Hinz 1990, Swepston 1990).

Such struggles however are even more complex in situations of multiple normative orders. Here, struggles increasingly turn away from disputes over substance and question the final legal authority on which state legal systems rest. Local people assert the validity of their own law, fundamentalist religious movements deny the legitimacy of bureaucratic state legal orders, and in many continents ethnic nationalism succesfully breaks up existing state organisations. Where people or groups use other normative systems than state and international law as their basis for rationalizing and justifying political and economic claims, some construction of the interrelationships between these systems becomes necessary, in which their respective scope of validity is circumscribed. Such ordering usually involves the construction of a normative hierarchy and problems of "recognition", that is the determination whether and to which degree law/rights based in other normative orders can or must be recognized as valid within another order. In state law and international law arenas state and international law usually are used as the evaluative standard for the ordering of multiple normative orders. There the question to which extent international law must be recognized, and therefore can become valid, within the legal system of the state is to be determined. Or, more familiar to students of third world societies, the question of the recognition of tribal, traditional, customary, religious, people's or indigenous people's law is answered. However, such constructions can be made in different arenas, and by different people and/institutions, and they can take different normative systems as their point of departure. There is no exclusivity for state law and legal science. Religious officials and institutions may define the interrelationship between religious, traditional and bureaucratic state law in a different way. Proponents of

traditional normative systems or self-regulating systems, finally may make yet other constructions (see F. and K. von Benda-Beckmann 1988 for a comparative analysis of these constructions in two Indonesian regions). The discussions over law and rights become part of these struggles about the ordering of normative universes, about the kinds of political obligation, about the ordering of normative systems as dominant or servient (Hooker 1975) or as political equivalent. For political and economic claims based upon "law" have a higher status than claims based upon normative orders which do not have the conceptual status of law, but only of "custom" or "convention". Any suggestion concerning the status of normative orders and their interrelationship therefore becomes a political statement. The notion of legal pluralism, or plurality of legal orders which indicates the (possibility of) co-existence of several normative orders within one political organisation therefore nearly inevitably becomes entangled in these struggles.

It is the objective of an analytical approach to to law/legal pluralism take distance of these struggles, in order to better analyse them. I shall therefore analyse the assumptions, emotions, and politics involved in the three conceptual attacks which are waged against the idea of legal pluralism.

Connotations of pluralism

Some authors react against specifically the notion of **pluralism**. While prepared to acknowledge multiple legal orders, is their connotations of the word pluralism which renders it less useful or even "bad". A recent illustration are Starr and Collier who state in their introduction (1989:9)

> "the recognition that inequality inheres in legal systems, in combination with the idea of continuously evolving cultural traditions, has led the contributors to think beyond the concepts of legal pluralism or dual legal orders. No contributor uses the term legal pluralism or dual legal system when analyzing complex social systems. Both words, pluralism and dual, carry connotations of equality that misrepresent the asymmetrical power relations that inhere in the coexistence of multiple legal orders. Various legal systems may coexist, as occurs in many colonial and postcolonial states, but the legal orders are hardly equal. .... The above terms also imply that coexisting legal systems evolve independently after coming into contact with each other, a notion that misrepresents...that coexisting legal orders evolve together."

Given the early and contemporary state of writing and thinking on the subject, I find this an extravagant statement. The reproaches implied are somewhat silly and not surprisingly not substantiated. But I do not want to argue about words - multiple legal system in one sense is as good as legal pluralism.[7] Yet I think it is useful to understand **why** they dislike the word and from where this emotional reaction comes from. As Van den Berghe pointed out already in 1973, the word pluralism has two different intellectual histories. One is rooted in the analysis of colonial societies (Boeke, Funivall, Smith) where it indicated asymmetrical power (and race) relationships between the constituent white minority and indigenous majority. Used in the beginning primarily for the analysis of colonial economies as dualism, it was gradually replaced by the notion of pluralism and extended to cultural and social pluralism

(and only later to legal pluralism). The other intellectual root, and this is the one which Starr and Collier seem to have in mind, is in (American) political theory where it is associated with a dispersed distribution of power and authority in a democratic political state organisation. In Robert Dahl's words, "the terms pluralism and pluralist refer to organizational plurality of relatively autonomous (independent) organizations within the domain of a state " (1982:5). This type of pluralist theory has been criticized, alleging "that such theory contends, or assumes, that all groups, intererests, interest groups, and so on are equal or substantially equal in organizational capacities and access, or resources, or power, or influence, or the like" (Dahl 1982: 207). However, as Dahl, reviewing such criticisms and crucial assertions in pluralist writings, points out such critiques are largely unsubstantiated (Dahl 1982: 207-209).[8] Starr and Collier's assertions therefore are misplaced in relation to both traditions, to the intellectual line out of which legal pluralism developed as well as in relation to political theory.[9]

However, theirs is not the only misconstruction of the genesis of the more recent thinking about legal pluralism. It has become fashionable to associate the concept of legal pluralism with legal anthropologists and their ideological or professional concerns, such as "proving" that native people "had law", or to go on with their work after state formation and capitalist economy had destroyed their subject of research, "primitive" or "archaic" law (see Tamanaha 1993, see Röhl, see Merry 1988). Tamanaha has recently declared Malinowski to be the ultimate intellectual ancestor of strong legal pluralism (1993: 203). But this is largely a falsification of scientific history.[10] The legal complexity which the concept indicates, and the increasing use of the term was largely the work of **lawyers**. Vanderlinden (1971) and Hooker (1975) popularized it, building mainly on the work of the Dutch scholars of adat law and the English scholars of African law. It took anthropologists much longer to get used to this term, or to make much of it. Both in evolutionist and structural-functionalist legal anthropology, legal pluralism did not play a role. On the contrary, in the great legal anthropological monographs of the 1950's and 60's, the co-existence of state and tribal and village law was largely "edited out" (Moore 1978). While anthropologists like Malinowski and Thurnwald were concerned in demonstrating the functional equivalence of law and spoke of law in "primitive" societies, they did not discuss the problems arising out of the co-existence of these laws with state legal forms. Nor were there any speculations concerning possible legal pluralism within such village and tribal orders, with the exception of Pospisil's conceptualization of legal levels, in a fundamental, though limited sense (1971). While social, cultural and political pluralism in colonial states were increasingly taken up by anthropologists as consequence of the sensitizing impact of the notion of pluralism, "legal pluralism" was not on the anthropological agenda. Van den Berghe in his 1973 review article makes no mention of legal pluralism. Up to the 1970's, legal anthropological writers hardly used the concept, and when they later used it, they did in a self-evident way (see Nader and Yngvesson 1973, F. von Benda-Beckmann 1979).[11] The true intellectual ancestors are those writers who did not take the normative claims to the legal monopoly of the state for granted in theoretical principle. Here the most important writer probably was Max Weber, rarely quoted in this context (but see Kidder 1983). "It does not constitute a problem for sociology, Weber wrote (1964:23) "to recognize [acknowledge the possibility of] the co-existence of different, mutually contradictory,

valid orders", and for Weber (whatever one may think of his definition of a legal order) not only the state-linked and supported normative order was "law" (1964:25).

Against legal pluralist conditions

Moana Jackson's paper at the Wellington congress (1992) provides a good illustration for the perspective where legal pluralism is directly indentified with a political situation. Discussing the ways in which Maori law and rights are being dealt with and "recognized" in the context of the Waitangi tribunal, he radically rejects "legal pluralism".

> "By redefining the base of Maori aspiration and by seeking to co-opt Maori legal and cultural processes, the law maintains its place as a colonising leviathan that can choose which norms of the oppressed will be validated and which will be dismissed. The consequences for the Maori are a painful subjection to delusion and illusion" (1992: 452).

This process of redefinition in his view continues the attempt by alien process to impose its will on the beneficiaries of a different culture. It captures, redefines and uses Maori concepts to freeze Maori cultural and political expression within aparameters acceptable to the state (1992:454). While Pakeha [New Zealand "white"] law no longer rejects the notion of Maori rights, it redefines those rights and thereby sources them within a pluralistisc common law, rather than in Maori authority (Jackson 1992:454). And he concludes,

> "(Thus) Today the ideas of legal pluralism maintain the dishonesty of illusion. By promoting its new found awareness and sensitivity, the Pakeha law deludes many Maori into believing that it will indeed protect their rights and acknowledge the validity of their law, their authority and their place in this land. The acceptance by Maori that this will be so will however inevitably lead them to reclaim their sovereign authority. At that point the changing perceptions of the new nation state will provide the context within which the treaty, the law, and the rights of Maori can have independent life again (Jackson 1992:455).

Legal pluralism here is seen as a "sham", a legal-political placebo.[12] But as convincing as his analysis may be, this has nothing to do with an analytical concept of law/legal pluralism. His argument is directed against the specific conditions of a situation of legal pluralism as it is constructed and maintained by institutions operating within the parameters of New Zealand state law. But these empirical conditions are something different from a concept, nor can the concept be blamed for the conditions in New Zealand, just as other concepts like law, economy, etc. cannot be identified with a specific empirical economic or legal system.

Bashing weak legal pluralism

Legal pluralism, as constructed under the terms of state law with its recognition arrangements of non-state normative orders has a bad reputation also at the conceptual (or theoretical) level. It is presented as just something the state law system does "in order to conceal the inevitable failure of its totalitarian ideal", and as no more than "the acknowledgement by the state system of its incapacity to realize to the full its totalitarian ambition and a way to disguise what according to the first consideration should have been evident" (Vanderlinden 1989: 153).

As much as I agree with such statements, they tend to be biased themselves and easily take a misleading twist. It is certainly important to point out, as Griffiths does, that such legal pluralism - the designation of a possible legal policy within the 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" (Griffiths 1986:8). But it should be added, that such descriptions of legal pluralism do not purport to be an analytical conceptual device for the description and analysis of complex normative systems. Hooker (1975), who has become the exponent of such criticism, says explicitly that "this statement may be said to be a representation of reality, but of a **reality limited in nature and form by the characteristics of dominant systems**" (1975:445). If we take constructions and descriptions of weak legal pluralism as what they are (and, at least in the case of Hooker, as what they are presented), that is as normative constructions of a hierarchy between normative orders, they are social phenomena which cannot be denied by the demonstration that they are normative phenomena. Like any piece of law, they are descriptive of nothing more than their normative self, and cannot pretend to give even a summary of the actual use and consequences of the rules, principles and procedures of different normative orders.

Such critical statements tend to collapse the difference between analytical and empirical legal pluralism with a distinction within the world of the empirical, between the ought and the is. Elsewhere I have argued that such critiques selectively directed against the centralist ideology of state law are a form of anti-ideological overkill which tends to obscure rather than clarify the analysis of the totality of legal ideologies (1988, 1991). For it does not make visible that also folk and religious legal systems may have centralist legal ideologies. They also have their own normative constructions of the interrelationships of legal universes in terms of conflict or harmony, political equivalence and subordination, of dominant and servient laws. More importantly, there is a likelihood of legal pluralism, in the analytic sense, also within folk legal systems and/or religious legal systems. I have therefore sproken of **legal pluralisms** (F. von Benda-Beckmann 1992). Of course, in all these situations, social practices are likely to be different from all claims to sovereignty and different constructions of weak legal pluralism. I my view it is particularly important to make this visible when we are dealing with the question of competing legal ideologies, and, ultimately, ideas about sovereignty. What the weak legal pluralism-critiques do is to highlight the limited social powers and ideologies of state organizations. What they detract from is the question in which other groups and organizations maintain or (re)construct their own competing notions of sovereignty and the right to construct interrelationships between different normative orders - in the direction hinted at by Jackson. And this is the most crucial issue in discussions about law and legal pluralism to which now want to return.

Faith and heresy: The sacrifice of the intellect

As I have stated earlier, analytical equivalence does not mean morphological, functional or political or even moral equivalence. At the analytical level, the crucial question is whether one is prepared to conceive of the abstract possibility of more than one normative order and its foundational basis in some ultimate notions of legitimacy within state-organized societies. If one does, some notion of legal pluralism or multiple legal orders is the rather banal concequence. If one does not, this means that one takes the normative construction of the state and its law as an a priori. As I have argued elsewhere, the struggle over centralist/statist or pluralist definitions of law is only an epiphenomenon of the underlying struggle over the extent to which scientists do take distance from the dominant (and other) legal ideology, or to which they submit to that ideology (F. von Benda-Beckmann 1990, 1993).

Tamanaha's recent paper (1992, now published as 1993) is a good illustration for such submission to the state-law ideology and the consequent downright rejection of legal pluralism conceptualisations, an attitude which he shares with many lawyers, sociologists and philosophers which follow the road laid out by Hobbes and Austin. As justified as some of his critical points of individual writers (mainly Griffiths) may be, he never considers alternatives because, according to his a priori..."the state law model is **our** paradigm for what the concept "law" means (1992:20, 1993: 201). Alternatives are kept out by conceptual fiat. Other forms of normative ordering are not law, for:

> "Normative ordering is not itself law. Normative ordering is, well, normative ordering. Law is something else, something that **we** isolate out and call law" (1992:17, 1993:199).

The rationalization of this tautology is meagre. It is presented in opposition to what Tamanaha assumes to be the working logic of others which "is based upon the faith of the scientific attitude that there is something beneath the culturally generated, state-linked notion of law-that law is a fundamental category which can be identified and described. But there is nothing beneath the culturally generated notion" (1992:22, 1993:201).

This shows us two important things. Tamanaha, like many others, cannot distinguish a concept as a scientific device characterized by properties, from descriptions of cultural, social, political phenomena. An analytical concept is not "beneath" social phenomena; it is an abstract device to describe social phenomena. Secondly, we see the identification of himself with "us". But who are those "we" and "us"? "Us" is not "society"; "us" is just those state politicians, bureaucrats and legal scientists who do not want to take distance from "their" legal ideology. Tamanaha, by taking this approach, is forced to assume cultural homogeneity. Because law is culturally constructed by powerful actors, no other cultural construction is possible.[13] He thus retracts from scientific ambition and settles for what the more powerful technicians of the dominant legal order have provided for him conceptually.[14] Are there good reasons, except submission to the dominant legal ideology, to take over its normative self-definition?

I do not think so. One ends up with a tautologous idea of law, which moreover is normative and therefore inadequate to describe and analyse systematically even what would be called "state law" (F. von Benda-Beckmann 1986), and which besides is rarely used consistently anyway. Religious law, for instance, usually is called "law" also when and where it is nor recognized as valid within the state legal system (see F. and K. von Benda-Beckmann 1993).

Considerations of functional importance or social and political significance also cannot determine the conceptual issue. There are great variation in the extent to which state organisations and other political organizations could make true the claims of their normative orders. Both can be weak and their claims pathetic. Claims to sovereignty, to the exclusiveness of state law and the monopoly of legitimate violence are normative constructions, but such claims can also be made for non-state normative orders.[15] In many phases of the historical development of European states and the early colonial history, state law claims were highly irrealistic and hardly known or felt by the new subjects. This has, no doubt, changed, but such changes, variations in the relative social significance of the different normative orders, do not justify a conceptual difference.

Utilitarian considerations also cannot convince. Even if we concede that social life without law is not possible, this does not mean that such law must be the law of a sovereign state; there will always be other law as well. As Lyons remarks

> "Theorists may assume that [state] law is a valuable institution, useful enough to support a moral presumption favouring obedience, but fragile enough to require one. It is often suggested (not only by Hobbes) that life without law would be nasty, brutish, and short. **The trouble is that life has been just that for most people throughout legal history.**

Also moral considerations cannot determine the issue although many legal and political philosophers, of course, regularly tell us otherwise. But not all. Discussing the assumptions of theorists like Hart, Dworkin, Rawls, Lyons (1993) quotes Dworkin with a typical statement:

> "The constitution sets out a general political scheme that is sufficiently just to be taken as settled for reasons of fairness. Citizens take the benefit of living in a society whose institutions are arranged and governed in accordance with that scheme, and they must take the burdens as well, at least until a new scheme is put into force either by discrete amendment or general revolution (Dworkin 1978: 106).

And Lyons proceeds: "It is plausible only if we assume that unjust laws are aberrations. It is implausible when applied to someone who suffers injustice systematically under the law (Lyons 1993:24). To assume that there is normally a moral presumption favoring obedience to law is, I believe, to view law from the perspective of its beneficiaries" (1993:26). And he concludes that "we have no reason a priori to accept a presumption favoring obedience to law, and neither experience nor theory favors such a presumption" (Lyons 1993:13).[16] The processes of maintaining state legal orders may systematically violate the substantive rules and principles of that very law. In fact, in many contemporary states such processes of law-maintenance are much

more common than processes in which law is maintained in ways prescribed by legal rules.

Is there any reason to keep on calling state law which is corrupted and not observed even by those who are entrusted with its application, law, but deny this to folk laws? It is only the seeming inevitability of the state and state law which can exclude posing such questions. It is certainly not a scientific theoretical inevitability, nor a moral political one for all citizens under all historical conditions. Clinging to etatist definitions of law therefore is a partisan point of view, justified and justifiable only by the belief in inevitability of the state and a one-sided distribution of the benefit of the doubt. But this is not the task of social scientists. The acceptance of such presuppositions, as Weber said, like in the case of theology, lies beyond "science". It is not "knowledge" in the sense as knowledge is commony understood, but rather "a possession" (ein Haben, Weber 1973:309,310). Human being's faculty for such virtuoso achievement of the "sacrifice of the intellect" is characteristic of the positively religious person" (Weber 1973: 337).[17]

Analytic distance, towards state and other law, avoids a scientific justification of partisans view on whatever law. This perspective is more or less consonant with Max Weber's views on the "value-free" science expressed in 1917 and 1919.[18] Of course, also "analytic" points of view are political in one sense. It is not in the hands of a writer to control the meaning she or he gives to words. These are "contextually" interpreted by others in the terms of **their** system of meaning, which may be much more strongly value loaded. The different discourses over concepts used for the description and analysis of legitimate power are inevitably caught up in the political dynamics of the double hermeneutic (Giddens 1984: 284,374). [19] In the eyes of etatist lawyers and legal theorists for whom legal pluralism is anathema or at best a folly, those who maintain an analytic approach to the study of law/legal pluralism in society will belong to "the little wormes", to quote Hobbes, " a desease of a commonwealth, pretenders to political prudence who, by taking the liberty of disputing against absolute power, are meddling with the fundamental lawes to the molestation of the commonwealth (Hobbes 1968: 375, F. von Benda-Beckmann 1993:51). But an analytical approach is different from ideological, religious etc. points of view, different from those views shared and propounded by the dominant legal ideology but also from those of the champions of the rights of indigenous peoples. To give moral or political value to some law, to state law hegemony or to plural legal situations, is a different "profession" than creating and using analytical conceptual schemes. I would not necessarily agree that both could or should not be done "within the lecture room" as Weber held, but they certainly should be distinguished.[20] If others do not want to accept such point of view because it does not fit into the language in which they frame their moral, philosophical and political agendas, bad luck.[21] As Weber says: "The following is a particularly important obligation for professional "thinkers": to keep a cool head in the sense of one's personal ability to swim against the stream if need be, versus the presently dominating ideals, how majestuous they may be" (Weber 1973:309-310).

Meddling with the fundamental lawes

"Meddling with the fundamental lawes to the molestation of the commonwealth" (Hobbes), is, of course, what local population groups in colonial and post colonial countries increasingly do. Especially during the last two decades many of them have gained access to international fora and media, and their spokes(wo)men or organisations have received friendly attention from social scientists, NGOs and even national and international donor agencies. And their claims for greater political and administrative autonomy, for recognition of their rights to natural resources or for the restoration of these resources to them, certainly do "molest" the commonwealths on whose territory they live.

They want to redress historical injustices.[22] In various ways and extent, they have lost their earlier independence and their control over their natural resources, and many are threatened to loose the rest of control. In the course of time, whole populations have been elimiated or decimated in the process, or driven into inhabitable ecological niches. But since these niches like the tropical forest have become more accessible by improved infrastructures and exploitation technologies, they are ever more threatened even there. Their legal history, in the limited sense of the ways in which people and their resources were seen and treated in international, colonial and state laws has been well described by a number of scholars (see for instance Chartier 1982, Fisch 1992, Mertz 1988, Keon-Cohen 1982, Morse 1992). This road took people in the colonies from periods where their sovereignty in international law was acknowledged to an ever increasing reduction of the strength and territorial scope of their rights. Under the sovereignty of colonial and post-colonial states, who had usurped the public-political rights to control natural resources and territory, and under the laws made on that basis (particularly declarations of Crown or state domain over so-called waste lands), people were dispossessed at large scale and driven into native or tribal reservations. Their rights to control and exploit natural resources, different in form and structure from the laws of their colonial "mother" countries, were given, if at all recognized, an inferior status as usufructury rights.[23] Their fate in law (and in practice) has been varied. Some ended up as "domestic dependent nations" under the wardship of the state like American Indians in their reservations, others as "rural populations", "tribes" or simply "citizens". During the more recent past, many became known as "indigenous" peoples.

The extent to which they retained control over their own law under the conditions of colonial and post colonial economic, cultural and legal developments, and the extent to which their own law retained strong social significance, has also varied considerably. In many population groups, as Keon-Cohen writes (1982) a crucial barrier has been passed. Not only do the great bulk of native people appear to have, through long oppression and acculturation, lost their law - they also appear to have lost interest in it, and in some instances have come to consider it inferior or even worthless in the modern world. In many American and Canadian reservations, law and "justice is seen by indigenes in American and Canadian reservations (even the most traditional ones) very much more in "Anglo", rather than in indigenous, terms" (1982:210). For the Maori, Jackson and others have given saddening descriptions of Maori "legal reality", and we know similar descriptions of the conditions of the law of other indigenous peoples such as Inuit groups or Aborigines. Unemployment, alcoholism and the loss of traditional authoritative values and leaders is rampant. It is difficult to generalize or to summarize about the various developments, but it may be said, that in many cases the situation of "indigenous peoples" is much

worse than the one of many rural population groups who in the view of the state and international law are mere citizens, but have - with or without official state law recognition - retained much of their social, economic and legal organisation, however transformed it may have become. Although some indigenous population groups have recently booked some striking successes via legal procedures (Inuit, Australian Aboriginals and also Maori), their social, economic, political and legal situation still largely is miserable.

Could there, or should there be a road "from sovereignty and back" under such conditions? Given the state of peoples' organisation and legal reality and their often considerable poverty and economic marginalisation, can they be expected to manage at all? But this is a biased question. Perhaps it should be phrased differently. If the Maori or other groups were granted sovereignty, if they again could repossess their ancestral lands, if they could control the revenues of agricultural and industrial production form their resources, the situation would obviously be different from now. The argument would otherwise be like pointing to a person of whom you just have stolen everything and say: Look at this poor beggar, he has nothing; he will never be successful.

So why should there not be a road back?[24] One obvious suggestion, as Keon-Cohen says, would be to vest extensive and sovereign powers in native peoples, and retire from the field (Keon-Cohen 1982:238). Of course, such suggestions will always meet with considerable skepticism and/or outright opposition. It may be politically naive and dangerous. The rise of ethnic nationalism, and the violence and "ethnic cleansing" which accompany some "indigenous peoples'" attempts to establish their own sovereignty are a dramatic warning. Thousands or millions people who so far were citizens suddenly are made into strangers, with limited rights. Besides, powerful political and economic interest groups are not likely to want to "retire from the field". Also the policies of international legal organisations tread carefully where the threat of sovereignty (and possible secession) is concerned. While recognizing indigenous peoples' law and rights (Martinez Cobo 1986), these remain in principle subject to overriding sovereign state authority. There is no alternative yet for the international order constituted by sovereign states. History, however, is dynamic. There is widespread recognition that classic conceptions of sovereignty and the nation state change, as well as the actual political and economic (semi)autonomy associated with them.[25] The model of the nation state itself seems to have proven a predominantly negative factor in the political and economic developments in African states, a " curse" as Davidson (1992) has shown. If transnational law and economic enterprises transscend conventional state sovereignty, why not "inside" forces? Who is to state categorically who will do the best job? Keon-Cohen puts the finger on the spot when he draws attention to the ways in which states manage their sovereignty and the economic powers protected by it:

> The competence of Australia federal and state governments to regulate, through legislation, multi-national mining corporations is seriously deficient. Whether Aborigines would do better may be questioned: the anomaly is, however, that while denying Aborigines sovereign powers to govern their own affairs, Australia's sovereign powers over these same affairs are being seriously undermined (Keon-Cohen 1982:238).

Obviously, these questions have to be seen in a historical, dynamic perspective. To exclude such solutions on the basis of conventional ideas about law, the state and sovereignty, would mean sharing the vision of "the end of history" in Fukuyama's sense. But is this plausible? If we look back at history and contemporary processes, we see how fast the world can change. As we know, history can be take rather unexpected turns, and also the history of of law is not characterized by logic but by experience (Holmes). Revolutionaries become rightful governments; bandits become kings and kings bandits; nation states are divided, by war or in rather peaceful negotiations; state bureaucracies and state law dominate religious laws and institutions, but may also be subordinated to them (see Arjomand 1991 with respect to the constitutional developments in Iran). There is no reason to assume that we would have reached "the end of legal history", nor, unfortunately, are there reasons to expect that we are faced with a peaceful and pleasant future.

These are political question and speculations. Current legal systems and legal scientific doctrines will have constraining and enabling influences, similar as they has in the past. But future developments will certainly not be determined by them. It is equally obvious that social science or "legal pluralism" cannot provide an answer to these questions. As an analytical device, legal pluralism can only provide as basis to make visible crucial questions and dilemmas. It provides the basis for seeing state legal ideology and claims as what they are, normative constructions, legal ideologies and claims. It takes the same position towards Maori legal ideology and claims. It takes - analytically - Maori claims to their own law and ultimately to Maori sovereignty - as seriously as those made in the name of the New Zealand State organization. It does not follow from this that a **scientifically justified** claim could be made for the primacy and inevitablity of Maori law, but it neither provides such claim for the inevitablity or primacy of the state law and the state law controlled incorporation and recognition of Maori law and rights. Nor could it justify the distinctions being made in laws between indigenous peoples, strangers and citizens. It can only study the genesis and social significance of such distinctions.

It can also make visible the inevitable contradictions which etatist constructions of (weak) legal pluralism will have. It may be useful to adopt one's political language and terminology to what seems politically feasable, i.e. talk about law and rights to justify one's political claims. A muted "jurisprudence of insurgency" (Tigar and Levy) can, as recent history has shown, be succesful even when bound by the constraints of international and state law. In this way it may be possible to recover some control over natural resources like in the cases of some North American Indian nations, in Maori cases, and in Australian aborigines cases. Such victories may constitute the optimum one can achieve under current political conditions. While these ideas of legal pluralism "maintain the dishonesty of illusion, and redefine Maori rights within parameters of the state", as Jackson said (1992:454), they can make a difference which is positive in comparison with the previous situation. It may be less than Maori would wish for, and could claim in a fully reconstituted history, but it is more than the continuation of dispossession. This is a difficult dilemma. In a sense, the new "discourse" on indigenous people's rights tends to override and redefine the reality of local people's rights and social practices in a way similar to the ways in which state law constructions of (weak) legal pluralism and etatist legal science do. Yet giving it

up for that reason would imply the loss of these international law constructions which can be used as resource in reaching out beyond the normative and political boundaries of the state.

However, as Jackson makes clear, one then remains tied to the logic and contradictions of "weak legal pluralism",[26] subject to the overriding sovereign authority of the state. One also remains subject to the state's logic of constructing "customary" or "indigenous" laws and rights, especially property rights. This assumes that the collectivities called indigenous peoples "have" legal systems, in the sense that such traditional legal rules and institutions which are observed and regarded as binding (see also G. van den Berg 1986). This assumption is an important reason for the justification for indigenous peoples' claims and for setting them apart from (mere) citizens who cannot claim collective rights or people's law. There is a danger here. Because it is likely that research on people's law, and its current social significance, is required in order to use this as a legitimation for people's claims to have their law (and power) recognized. But in mnay instances there is a great likelihood that such research finds out that there is "no more law", only some traditional historical ideals, nostalgic reminiscences or myths of former, pre-colonial legal and political glory; and that few if any really observe this law in their social lives. A conclusion such as Keon-Cohen (1982) has given for North American and Candian native people, that it may be too late for recognition of their, historical, customary law (1982: 211), then is easily reached. With the consequence that the legitimation for indigenous people's rights sought in the local laws of people may never be achieved.

But this is relevant only, if we assume that claims to rights, to people's own law, to self-determination or sovereignty must be based upon a well functioning social and legal organisation. Approaching these problems with an analytical notion of legal pluralism may be useful here. For such approach does not postulate any concrete empirical form or social and political significance of any law, and its treats all laws according to the same analytical standard.[27] In their ideal form, both state and other laws may be noble and worthy. In their practical form, and in their inevitable interdependence, both may be pathetic, weak, perverted, out of line with social practice. The essential criteria for non-state linked law are not that for instance "folk" behave according to their folk law, but that they maintain their claim to folk law, however ideal and, if compared to social practices, how full of nostalgic and pathetic notions it might be. Their social existence and significance may lie in quite other fields of social action than "observance" within the domains of social action to which specific norms pertain. In fact, when we are discussing attempts of indigenous populations to redress what they considered historical injustice by reference to earlier law and "sovereignty", or to maintain the validity claims of "their" law, we are talking about an important domain of such activities (see F. von Benda-Beckmann 1983, Kidder and Hostetler, see also Spiertz 1992). What people claim is not so much the recognition of their law as a solid going concern, but the recognition and remedying of historical injustice, and the legitimate power to regulate their own affairs. The claims to have sovereign control over natural resources are particularly important for sovereignty is linked to territory (see Keon-Cohen 1982: 220). It is difficult to reconstruct claims over land on the basis of (private law) "ownership rights" which remain subject to the overriding sovereignty of state (domain).[28] All these claims **cannot** be based on customary law in the sense of a historical legal tradition or a going concern. For what is claimed is new law, related to, but different from tradition. There often was, and is no common

legal system or political and cultural homogeneity within those collectivities created by international law, as little as there often was in those native populations which gained state sovereignty on the former colonial territories. There are differences, and conflicts between those small scale polities out of which the "people's" are constructed, and the newly institutionalized "people" and their spokesmen and leaders (who have no legitimate position in "tradition") are inevitable. Conflicts between people and the new political leadership will be even more inevitable if the transition to self-government or even independence should be made, and when indigenous people become "citizens". The developments on the terrotory of Papua Niu Gini are a sad example in this respect. In the past, the history of decolonization has provided many examples. In order to relate their claims to their law and rights, "people's" historically older forms of law and rights have to be transformed into "peoples' law". This is, of course, what also happens in the arenas of international law. The difference is that people want to transform their legal traditions themselves, rather than have them transformed by state or international politicians and lawyers.

REFERENCES

Arnold, Th. (1935) The symbols of government. New York.

Baxi, U. (1986) Discipline, Repression and Legal Pluralism, in P. Sack and Minchin (eds) Legal Pluralism. Canberra: ANU.

Beitz, Ch. R. (1991) Sovereignty and morality in international affairs, pp. 236-254 in D. Held (ed.) Political Theory today. Oxford: Polity Press.

Benda-Beckmann, F. von (1970) Rechtspluralismus in Malawi - Geschichtliche Entwicklung und heutige Problematik eines ehemals britischen Kolonialgebietes. München: Weltforum Verlag.
----- 1979 Property in Social Continuity: Continuity and Change in the Maintenance of Property Relationships Through Time in Minangkabau, West Sumatra. The Hague: M. Nijhoff.
----- (1983) Why Law Does not Behave: Critical and Constructive Reflections on the Social Scientific Perception of the Social Significance of Law. In: H. Finkler (comp.), Proceedings of the Symposium on Folk Law and Legal Pluralism, XIth IUAES Congress, 1983, Vancouver. Ottawa.
----- (1984) Law out of context: A Comment on the Creation of Customary Law Discussion. Journal of African Law 28: 28-33.
----- (1986) Anthropology and Comparative Law. In: K. von Benda-Beckmann and F. Strijbosch (eds.) Anthropology of Law in the Netherlands. Dordrecht: Foris, pp. 90-109.
----- (1988) Comment on Merry. Law and Society Review 22, no. 5.
----- (1989) "Scapegoat and Magic Charm: Law in Development Theory and Practice", Journal of Legal Pluralism 28: 129-148.
---- (1990) "Ambonese Adat as Jurisprudence of Insurgency and Oppression", pp. 25-42 in Law and Anthropology, Internationales Jahrbuch für Rechtsanthropologie 5-1990, edited by R. Kuppe. Wien: VWGO-Verlag.
---- (1990) "Changing Legal Pluralisms in Indonesia", pp. 609-629 in H. Finkler (comp.) Proceedings of the VIth International Symposium, Commission on Folk Law and Legal Pluralism. Ottawa, Canada, Agust 14-18.1990. Ottawa.
----- (1991) "Unterwerfung oder Distanz: Rechtssoziologie, Rechtsanthropologie und Rechtspluralismus aus rechtsanthropologischer Sicht", Zeitschrift für Rechtssoziologie 12: 97-119.
----- (1992) "Introduction: Understanding agrarian law in society", pp. 1-22 in F. von Benda-Beckmann and M. van der Velde (eds). Law as a resource in agrarian struggles. Wageningen: Pudoc.
----- (1992) "Symbiosis of Indigenous and Western Law in Africa and Asia: An Essay in Legal Pluralism", pp. 307-325 in W.J. Mommsen en J.A. de Moor (eds.) European expansion and law: The encounter of European and indigenous laws in 19th- and 20th-Century Africa and Asia. Oxford/New York: Berg Publishers.
----- (1993) Le momopole d'état de la violence dans la perspective de l'anthropologie juridique, pp. 35-57 in E. Le Roy et T. von Trotha (eds) La violence et l'etat. Paris: Harmattan.

von Benda-Beckmann, F. and K. von (1987) Auctoritas non veritas facit legem. In: J. Spruit en M. van de Vrugt (red.) Brocardia in honorem G.C.J.J. van den Bergh. Deventer: Kluwer, pp. 9-13.
----- (1988) Adat and Religion in Minangkabau and Ambon. In: H. Claessen and D. Moyer (eds.) Time Past, Time Present, Time Future. Dordrecht: Foris.
----- (1991) "Law in Society: From Blindman's-Buff to Multilocal Law", pp. 119-139 in Living Law in the Low Countries, Special Issue of Recht der Werkelijkheid. Amsterdam: Vuga.

Benda-Beckmann, F. von and T. Taale (1992) "The changing laws of hospitality: guest labourers in the political economy of legal pluralism", pp. 61-87 in F. von Benda-Beckmann and M. van der Velde (eds). Law as a resource in agrarian struggles. Wageningen: Pudoc.

Berghe, P. van der (1973) Pluralism. In J. Honigman (ed.) Handbook of social and cultural anthropology. Chicago.

Chartier, C. 1982 The nature of Indian title, pp. 71-98 in Native People and justice in canada. Special Issue, part II. Canadian Legal Aid Bulletin 5.

Dahl, R.A. (1982) Dilemmas of pluralist democracy: Autonomy vs. control. New Haven and London: Yale University Press.

Davidson, B. (1992) The black man's burden: Africa and the curse of the nation state. New York: Times books.

Dunn, J. (1991) Political obligation, pp. 23-47 in D. Held (ed.) Political theory today. Oxford: Polity Press.

Dworkin, R. 1978 Taking rights seriously. London: Duckworth.

Fisch, J. 1992 Law as a means and as an end: Some remarks on the function of European and non-European law in the process of European expansion, pp. 15-38 in W.J. Mommsen and J.A. de Moor (eds) European Expansion and Law: The Encounter of European and Indigenous Law in 19th and 20th Century Africa and Asia. Oxford and New York: Berg Publishers.

Fitzpatrick, P. (1992) The mythology of modern law. London: Routledge.

Griffiths, J. (1986) What is legal pluralism? Journal of Legal Pluralism 24: 1-50.

Hastrup, K. and p. Elsass (1990) Anthropological advocacy: A contradiction in terms? Current Anthropology 31: 301-308.

Hinz, M.O. (1990) ILO Convention 107: Legal and anthropological remarks. Yearbook Law and Anthropology 5: 201-220.

Hobbes, Th. 1968[1651] Leviathan. Edited by C.B. Macpherson. Harmondsworth: Pelican Books.

Hooker, M.B. (1975) Legal Pluralism. Oxford: Clarendon Press.

Jackson, M. (1992) Changing realities: Unchanging truths, pp. 443-455 in Commission on Folk Law and Legal Pluralism: Proceedings of the papers presented to the Congress at Victorial University of Wellington, Vol. 2. August 1992. Wellington: Law Faculty.

Karst, K.L. and K.S. Rosenn (eds)(1975) Law and development in Latin America. Berkeley: University of California Press.

Kelsey, J. (1992) Rogernomics and the treaty. PhD Thesis. University of Auckland.

Keon-Cohen, B.A. (1982) Native Justice in Australia, Canada, and the U.S.A.: A comparative analysis, pp. 187-258 in Native People and justice in canada. Special Isuue, part II. Canadian Legal Aid Bulletin 5.

Kuppe, R. (1990) Indigene Rechte und die Diskussion um 'Rechte für Gruppen'. Yearbook Law and Anthropology 5: 1-23.
----- (1991) Deutsches Staatskirchenrecht: Modell der Sicherung kulturellen Selbstbestimmungsrechts. Yearbook Law and Anthropology 6: 245-271.

Ladley, A. (1992) In search of self - Concepts in the field, pp. 477-488 in Commission on Folk Law and Legal Pluralism: Proceedings of the papers presented to the Congress at Victorial University of Wellington, Vol. 2. August 1992. Wellington: Law Faculty.

Leroy Little Bear (1982) A concept of native title. pp. 99-105 in Native People and justice in canada. Special Isuue, part II. Canadian Legal Aid Bulletin 5.

Lyons, D. (1993) Normal law, nearly just societies, and other myths of legal theory, pp. 13-26 in R. Brownsword (ed) Law and the public interest. ARSP Beiheft Nr. 55. Stuttgart: Steiner Verlag.

Mertz, E. (1988) The uses of history: Language, ideology, and law in the United States and South Africa, Law and Society Review 22: 661-685.

Merry, S.E. (1988) Legal Pluralism. Law and Society Review 22: 869-896.

Morse, B. 1992 Peoples, identity, territory and self-determination, pp. 457-475 in Commission on Folk Law and Legal Pluralism: Proceedings of the papers presented to the Congress at Victorial University of Wellington, Vol. 2. August 1992. Wellington: Law Faculty.

Nader, L. and B. Yngvesson (1973) On studying the enthnography of law and its consequences. In J. Honigman (ed) Handbook of social and cultutal anthropology. Chicago.

Richstone, J. (1988) The Inuit and customary law: constitutional perspectives. pp. 239-257 in B.W. Morse and G.R. Woodman (eds) Indigenous law and the state. Dordrecht: Foris.

Sack, P. (1986) Legal Pluralism: Introductory Comments, in P. Sack and Minchin (eds) Legal Pluralism. Canberra: ANU.

Swepston, L. (1990) The adoption of the indigenous and tribal peoples convention, 1989 (No. 169). Yearbook Law and Anthropology 5: 221-255.

Tamanaha, B.Z. (1993) The folly of legal pluralism. Journal of Law and Society 20: 192-217 (1992 version in Collection of the Wellington congress).

Tilly, Ch. (1986) War making and state making as organized crime. Pp. 169-191 in P. Evans, D. Rueschemeyer and T. Scocpol (eds.) Bringing the state back in. Cambridge: Cambridge University Press.

Turner, J. (1987) Analytical theorizing, pp. 156-194 in A. Giddens and J. Turner (eds) Social theory today. Oxford: Polity Press.

Vanderlinden, J. (1971) Le pluralisme juridique: essai de synthèse. Pp. 19-56 in J. Gillissen (ed.) Le pluralisme juridique. Brussels: Université libre de Bruxelles.
---- (1989 Return to legal pluralism. Journal of Legal Pluralism 28:149-157.

Weber, M. (1964) Wirtschaft und Gesellschaft. Köln: Kiepenheuer und Witsch.
----- (1973a[1919]) Der Beruf zur Wissenschaft. Pp. 311-339 in Soziologie, Universalgeschichtliche Analysen, Politik. Mit einer Einleitung von E. Baumgarten. Herausgegeben und erläutert von J. Winckelmann. 5. überarbeitete Auflage. Stuttgart: Alfred Kröner Verlag.
----- (1973b[1917]) Der Sinn der "Wertfreiheit" der Sozialwissenschaften, pp. 263-310 in Soziologie, Universalgeschichtliche Analysen, Politik. Mit einer Einleitung von E. Baumgarten. Herausgegeben und erläutert von J. Winckelmann. 5. überarbeitete Auflage. Stuttgart: Alfred Kröner Verlag.

Williams, D. (1992) The Waitangi Tribunal and Legal Pluralism: A reassessment. Pp. 75-87 in Commission on Folk Law and Legal Pluralism: Proceedings of the papers presented to the Congress at Victorial University of Wellington, Vol. 1. August 1992. Wellington: Law Faculty.

NOTES

1. Such constitutive categories are at the basic material through which law becomes a manner of imagining the real (Geertz 1983). It thus can be said that human persons are not "the same", that there are no "real" persons but that people are always social constructions ranging from "the same, equal, free, persons to difference expressed in terms of race, pigment, etc., to non-humans, barbarians, slaves, things, animals, or devils. In all these widely divergent constructions, people are definitely not the same; what is same or different is a normative construction. But it would be strange to maintain that one should not operate with the analytic idea there are no human beings "out there" so constructed (see Turner 1987).

2. See for Ambonese villages F. von Benda-Beckmann and Taale 1992.

3. Like I did in 1970 when calling my book on Malawi legal development "Legal Pluralism in Malawi".

4. The political and ideological implications and distinctions between legal pluralism and legal plurality have been addressed in Sack and Minchin (eds) 1986; see Williams 1992:78). Legal pluralism is seen as being more than the acceptance of a plurality of law; it sees this plurality as a positive force to be utilised - and controlled - rather than eliminated. Legal pluralism thus involves an ideological commitment (Sack 1986:2). This is also expressed in Baxi's idea of the millenarian approach to legal pluralism. The millenarian approach celebrates people's law as a constant reminder of social limits on the sovereign power of the state; and as a promise of the human potential to transcend the state and its repressive/ideological apparatuses (1986:53). Baxi points to the danger that with the concern of the big (scientific) issues like capitalism etc. attention from people's law is detracted.

5. In the sense as it has emerged in the discussions about the approriate conceptual usages for comparative examinations of similarities and differences of normative conceptions (folk systems) and social processes (see Bohannan 1969, Nader 1969, see also Turner 1987.

6. It is useful to distinguish internal and external sovereignty (see Beitz 1991). Both are best understood as juridical concepts. As a normative matter, external sovereignty expresses a distinctive ideal, or at least a distinctive vision, of the ways in which the world political system would best be organized. It bears on the international distribution of authority rather than of power (Beitz 1991: 241). Accordingly we should distinguish between sovereignty and autonomy, where the latter is understood as the absenec of significant external constraints on the actual conduct of a state's internal affairs. The distinction is important: it means that evidence of the erosion of autonomy and the rise of interdependence, now so familiar in international studies, does not necessarily document an erosion of sovereignty in international practice (1991: 241).

7. Unless one uses pluralism to indicate a specific constellation of plurality to indicate a specific constellation of mulitiplicity, namely the

duplicatory, parallel character of multiple rules, as Vanderlinden 1971 and van den Berghe (1973) suggested.

8. We should note, through, that pluralist theory presupposes the existence of a unified state organisation. What is proposed is what we could call a "weak political pluralism".

9. It is interesting to compare Starr and Collier's critique to Kidder's earlier statement, which is similar in his making a parallel between legal and political pluralism, yet has different connotations.

> "The position stated in the previous section, that modern society is composed of many competing forces, none of which gains the kind of dominance implied in the idea that legal modernity means authoritative monopoly, is known as **pluralism**. Those who make the pluralistic case recognize the the existence of inequality in society. But they focus their attention on the efforts of "have-not" groups to change their status, to resist legal intimidation, and to use the law in promoting their own "progress" (1983:194, see also 206).

In fact, Kidder integrates both intellectual histories of pluralism. But his characterization of pluralists is very different from Starr and Collier's.

10. Any historical inquiry should keep distinct the question whether authors conceived of the possibility of more than one normative order deserving the name of law within one and the same socio-political unit; and whether or not they expressed this by speaking of legal pluralism.

11. Despite Tamanaha's disclaimer, the invention of a "school" or movement of legal pluralists, is the creation of a strawman.

12. As Williams also makes clear, it can and should be seen as part of the political economy of informal law as it has been analysed in terms of Abel's Informal justice volumes. But see also Seidman and Seidman 1984. With respect to New Zealand and the Waitangi tribunal Kelsey 1992 and Williams 1992:830.

13. An important scholar rarely quoted in the context of discussions about legal pluralism is Max Weber. Weber would not doubt the possibility of "folk law's" existence as valid order in situations in which the laws were not observed, but, of course, claimed (1964: 23). For the sociologist there is no either/or Geltung, but just a question of the relative significance, as well as the possibility that actors orient their behaviour at both (or more) orders simultaneously, in and through the same action.

14. If Tamanaha argues that "strong legal pluralism is the product of social scientists" (1992:25), what he actually should say that such notions are the product of people who see no reason to just follow ideologically dominant or hegemonic thoughts and conceptual games about law, on the - unwarranted assumption, that "our" law, the state-linked law would somehow provide a concept useful descriptive and analytical device. See also Fitzpatrick 1992:5 on Dworkin. "In the affirmation of [law's] empire, law

becomes the preserve of officials who have 'the last word' (Dworkin 1968:407).

15. "Why regard the claim of sovereignty as anything more than a form of special pleading?" asks Beitz (1991: 246). Also Dunn speaks of the universal political obligation as a **strictly political pretension** which is normatively dignified, but morally highly precarious (1991:24). The "universality of the claim to political obligation [based on sovereignty and state law] in the modern world is essentially a disreputable contingency of ideological history (Dunn 1991:24). See also F. von Benda-Beckmann 1993.

16. There are sufficient scholars who bring these majestuous claims (which states have taken over from absolutist monarchs) down to earth and historical reality (see also Tilly 1986).

17. Over law as myth and belief system, see already Thurman Arnold 1935, and more recently Fitzpatrick 1992.

18. "Denn praktisch-politische Stellungnahme und wissenschaftliche Analyse politischer Gebilde und Parteistellung ist zweierlei" (1973a: 325).

19. We shall always have to do with the intersection of [at least] two frames of meaning, the meaningful social word as constituted by lay actors and the metalanguages invented by social scientists" (Giddens). In this case, the lay actors and their folk system are the lawyers and state officials. Whatever words we use, there will always some slippage between the meanings of the words even if we should, as Bohannan suggested ironically (1969), use a computer language.

20. There is an interesting parallel to the recent debate on "anthropological advocay" carried out in **Current Anthropology** 1990. In their paper, Hastrup and Elsass made more or less the same point:

> "A preliminary conclusion of our discussion is that advocay, as such, is incompatible with anthropology as a distinct kind of scholarship. To be advocates anthropologists have to step outside their profession, because no "cause" can be legitimated in anthropological terms" (1990:301).

Consequently, they speak of "anthropologists' advocacy". Gray castigates Hastrup and Elsass's article as "suffers from the limitations of their post-modernist approach and the poverty of their notion of advocacy (Comment on Anthropological Advocacy, CA31 (no4) 387. He points out that however neutral anthropologists may be, their writings will always be given meaning. "Whereas the ideas and techniques of anthropology may have no political ramifications, as soon as anthropologists "do" anything, written or otherwise, they place themselves in a socio-political context (Gray 1990:387). Gray accuses them that "in their fair-weather" post-modernism, concepts and ideas apparently cease to be contextual and relative once a committed anthropologist enters the scene" (1990:387). It is funny that Gray should qualify Hastrup and Elass's 1917 Weberian point of view as "post-modernist". Yet the point they make is valid and equally relevant for our discussion.

21. As Baumgarten states in his introduction to Max Weber (1973:xxxv) Wissenschaft kann nicht an der Stelle von Glauben, Einseitigkeit, Kampf und Schuld dem Einzelnen seine individuelle Verantwortung durch generalle Entscheide abnehmen. Wissenschaft kann nur das Gewissen der praktisch Handelnden klären, ihr Gefühl für die Tragweite und den Sinn ihres Tuns schärfen.

22. This attempt to redress historical injustice is beautifully phrased in the following quotation (taken from Karst and Rosenn 1975:241).

"Get off this estate."
"What for?"
"Because it's mine."
"Where did you get it?"
"From my father."
"Where did he get it?"
"From his father."
"And where did he get it?"
"He fought for it."
"Well, I'll fight you for it."
Carl Sandburg
The People, Yes 75 (1936)

23. An interesting account of the developments given in Canada, the US and Australia by Keon-Cohen 1982. He describes the fluctuating developments in the three countries, dealing with the different constitutional positition which indigenous populations held in the three countries. In The US Indians had the strongest legal position, where Indians enjoy a quasi-sovereign status as autonomous local governments, an enforceable trust relationships with the federal government, and most important of all, title (either aboriginal or recognized) to large(?) tracts of land. All these rights, however, exist only in so far as they are not expressly abrogated by Congress (Keon-Cohen 1982:190). During the past 3 decades, these "sovereign" rights have been aggressively, and largely successfully, asserted in the American courts (1982: 190). The commission set up in 1977 to review Indian Affairs set out with basic the principles that the Indian tribes are sovereign, political bodies, having the power to determine their own membership, and to enact and enforce laws within the boundaries of their reservations, and a special trust relationship (Keon-Cohen 1982:196). See also Mertz 1988 and Chartier 1982.

24. Leroy Little Bear (1982) with respect to Canadian Indians very clearly puts down the logical questions, undeformed by the ways in which they have been treated in English legal terminologies. Quite similar to the satirical ways in which Herbert questions the logic and authority claims of the Common law in Uncommon law.

25. Ladley argues that the notion of sovereignty should be dismissed. The continued existence of the notion does not mean that the concept has empirical or moral validity; nor that as a particular social form it is eternal (1992:487). States are changing, and so are conceptualisations of sovereignty. Ladley argues that to put folk-sovereignty against state sovereignty is not the way out. One should rather think in terms of nego-

tiating for interdependency between political claims, attempt to manage degrees of autonomy, rather than start from a concept of individual, ethnic or even state sovereignty (1992:488).

26. See also Richstone 1988. Kuppe (1991) has pointed to the "vicious compromise" where

> "in many cases state legal norms in which rights of indigenous peoples are to be incorporated, are constructed in a way which on the one hand acknowledges the recognition of rights of indigenous peoples, but emphazises on the other hand that these rights are tied to state laws. Such a formulation can turn out to become a vicious compromise. It is verbally acclaimed that indigenous peoples have rights which somehow have come into existence in the pre-state/incorporation sphere. And in some states, one also subsumes herunder that the state also recognizes rights which indigenous have had under earlier statal norms or contracts with the state. On the other hand, a guarantee for the state is explicated clarifying that the indigenous peoples are not free of/autonomous of state law" (Kuppe 1991: 267). The question whether the state by legislation can extract a subject matter from the recognized self-autonomy of an indigenous people - would lead to a nonsensical tautology" (1991: 267).

But also Kuppe's attempts, however ingeniously elaborating parallels from state-church relations, gets caught up, and cannot help getting caught up, in the submission to the ultimate authority of state constitutions, and a plea for a particular form of weak legal pluralism in which wide areas of cultural, economic and political autonomy of indigenous peoples are recognized (1991:268).

27. These ideas are also expressed in many legal anthropological conceptualisations of law which posit social observance as an important criterion for folk law's existence. In fact, their are the consequence of "realist" definitions of norms and the typologies based on them see F. von Benda-Beckmann 1986). Tamanaha (1992) has succinctly pointed to this with respect to Woodman's conception in the Commission's newsletter XX: 34).

> "If state law ceases to be socially observed it may continue to be a valid norm of state law, but this is not the case with the norms of folk law".

Tamanaha rightly notes that the criteria employed when talking about state and folk law are different. "The essential criteria of existence for state law is in its pedigree in the state, not in its relation to normative ordering [social significance, social observance, vBB] (Tamanaha 1992: 34). Tamanaha's critique is certainly justified. The consequence which he draws from that, namely that therefore the idea of legal pluralism is a folly and should be abandoned, however, is not. The more logical consequence, it seems to me, is indeed to treat state and folk law in the same analytical manner.

28. Richstone (1988: 248) makes a similar point with respect to the contradictions concerning the administration of justice in Canada. "The answer would be..lies in the creation of mechanisms of judicial control

placed in the hands of the aboriginal peoples who best are able to determine and shape their own law."