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**Legal Pluralism, Plurality of Laws, and Legal Practices:
Theories, Critiques, and Praxiological Re-specification**

Baudouin Dupret*

Legal pluralism has become a major theme in socio-legal studies. However, under this very broad denomination, one can identify many different trends which share little but the very basic idea that law is much more than state law. Despite their eclectic character, these many conceptions of legal pluralism also share some common fundamental premises concerning the nature of law, its function, and its relationship with its cultural milieu. This contribution aims at critically addressing these premises and at suggesting some re-specification of the question of law, its plural sources, and the many practices that enfold in relationship with it. In its spirit, this re-specification can be characterised as realistic and praxiological.

Indeed, I shall argue that it is at best useless and at worst wrong to start from a label like “legal pluralism” so as to describe something which is presumed to be an instance of such label. My contention here is that law is what people consider as law, nothing more nothing less, and that occurrences of legal plurality are limited to these situations where people explicitly orient themselves to the fragmented spectrum of law. Instead of looking at the hypothetical pluralistic model of law which something like, *e.g.*, Egyptian law, would be an instance of, the task of social scientists is, rather, to describe the situations, the mechanisms and the processes through which people orient to something legal which they identify as pluralistic. This position is grounded on a principle of indifference, by which one seeks to avoid normative and evaluative engagements: the focus is put on the description of practices, not on their evaluation. Moreover, this position is based on the refusal of any ironic standpoint, *i.e.* the denial that social scientists occupy any kind of overhanging position vis-à-vis the social, by which they would be entitled to “reveal” to “self-deceived people” the truth which is concealed from them because of their “lack of critical distance”, “ignorance” and/or “bad faith”.

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In a first section, I shall briefly describe the main trends in the field of legal pluralism, from its historical scientific background to its more recent theories. In a second section, I formulate some of the major criticisms which can be addressed to the postulates sustaining these many versions of legal pluralism. These critical stances vis-à-vis the legal pluralistic study of law articulate around three main questions, *i.e.* the definitional problem, the functionalist premises, and the culturalist conception which undermine existing theories. I shall argue, in the third section, that realism is a possible remedy to these flaws. However, these are best addressed through what I call a praxiological re-specification of the whole issue of legal pluralism, which I shall illustrate through the study of Egyptian cases. In conclusion, I shall formulate some remarks on praxiology as a way to fill the “missing-what” of classical socio-legal studies.

I. People’s law and state-law: Old dispute and current trends

A. The many layers of social control

Reactions to dogmatic conceptions of law are as old as social sciences. According to Durkheim, law is a social phenomenon, which reflects all the essential varieties of social solidarity. Building on Durkheim’s legacy, Marcel Mauss formulated the idea that, within a society, there can be many legal systems interacting with each other. However, it is Bronislaw Malinowski who first gave a definition of law that strongly associates it with the notion of social control. According to Malinowski, law should be defined “by function and not by form”.¹ There are many societies who lack any centralised institution enforcing *the* law, but there is no society which is deprived from these rules which “are felt and regarded as the obligations of one person and the rightful claims of another”.² His reasoning operates in the following way: (1) the function of law is to maintain social order; (2) social order can be found in regularised patterns of actual behaviour; (3) the complex of social obligations constitutes the binding mechanism maintaining social order; (4) legal norms are norms abstracted from actual patterns of behaviour and law is identical with social control.³ Accordingly, law is as plural as social life itself, of which it represents the rules which are

¹ **B. MALINOWSKI**, ‘Introduction’ in **H.I. HOGGIN**, *Law and Order in Polynesia*, New York, Harcourt, Brace and Company, 1934, p. xiii.

² **B. MALINOWSKI**, *Crime and Custom In Savage Society*, London, Routledge, 1926, p. 55.

³ **B. TAMAHA**, *Realistic Socio-Legal Theory: Pragmatism and A Social Theory Of Law*, Oxford, Clarendon Press, 1997, p. 104.

“too practical to be backed up by religious sanctions, too burdensome to be left to mere goodwill, too personally vital to individuals to be enforced by any abstract agency”.⁴

The contribution of Eugene Ehrlich is central to the concept of legal pluralism. This Austrian sociologist developed the theory of “living law” in reaction to the ideology of an exclusively state-centred law. Considering that law is mainly independent from the state, Ehrlich proposes what he calls a “scientific conception of law”, which is concerned by the rules of conduct. Accordingly, he states that “it is not an essential element of the concept of law that it be created by the state, nor that it constitute the basis for the decisions of the courts or other tribunals, nor that it be the basis of a legal compulsion consequent upon such a decision”.⁵ Like Malinowski, Ehrlich considers that law is fundamentally a question of social order, which is to be found everywhere, “ordering and upholding every human association”.⁶ It is from these associations, from these instances which produce norms of social control, that law emerges. In other words, law is synonymous with normativity.⁷

Georges Gurvitch’s theory deserves a particular mention, since it develops an unquestionably pluralistic approach to law.⁸ According to Gurvitch, there is historically no fundamental unitary principle in law. State centralism is the achievement of specific historical and political conditions. He identifies three main types of law, which are differently hierarchised in every society: state-law (claiming to monopolise legal activities), inter-individual or inter-group law (bringing together exchanging individuals or groups), and social

⁴ *Ibid.*, p. 68.

⁵ **E. EHRLICH**, *Fundamental Principles of the Sociology of Law*, transl. **W. MOLL**, Cambridge, Harvard University Press, p. 24.

⁶ *Ibid.*, p. 25.

⁷ Although American legal realism was also concerned with the idea of plurality in the development of legal systems, **K.N. LLEWELLYN and E.A. HOEBEL**, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*, Norman, University of Oklahoma Press, 1941. It is much more to the Dutch Adat Law School that legal pluralism was indebted, at least in its anthropological dimension. On the Adat Law School, see **K. VON BENDA-BECKMANN and F. STRIJBOCH**, *Anthropology of Law in the Netherlands*, Dordrecht, Foris Publications, 1986. Also, **C. GEERTZ**, *Local Knowledge: Further Essays in Interpretive Anthropology*, New York, Basic Books, 1983, at Ch. 8. As soon as 1901, Van Vollenhoven (**C. VAN VOLLENHOVEN**, *Het Adatrecht van Nederlandsche Indië*, Leyden, 1918, 1931, 1933) stated that associative sub-groups which compose societies produce their own law. He was followed by a whole set of Dutch researchers who achieved the collection and description of many legal practices -adat is a word of Arabic origin which designates in South-East Asia local practices as opposed to state-law and Islamic law- in the field of inheritance, marriage, land law, etc. After the independences, they were followed by indigenous scholars who furthered the study of local customs, though often idealizing their properties. Among these scholars, **M. KOESNOE**, *Introduction into Indonesian Adat Law*, Nimeigen, 1971.

⁸ **G. GURVITCH**, *L'idée du droit social*, Paris, 1932; *L'expérience juridique et la philosophie du droit*, Paris, 1935.

law (bringing together individuals so as to constitute a collective entity). The latter is clearly non-statist, since it corresponds to the multiplicity of legal systems which social law generates. Gurvitch makes also an important distinction between the plurality of the sources of law and legal pluralism.⁹ Gurvitch's theory did not receive very much attention. This may be attributed to different reasons, among which his vague, fanciful, complex and abstract language, on the one hand, and the fact that "his concept of 'social law' challenged and disturbed the traditional juristic notion of law which was founded on a state-centralistic ideology".¹⁰

B. Law and the many social fields

The seventies and the eighties witnessed the blossoming of a more fully integrated attempt to deal with law from a social perspective denying the state its monopoly on, and even its mastering of, the production of law. In his radicalism, John Griffiths' article "What Is Legal Pluralism"¹¹ might prove instrumental for describing the basic tenets of this new trend. Moreover, it remains a seminal contribution in the field.¹² Griffiths first identifies his main enemy: legal centralism, the law of which "is an exclusive, systematic and unified hierarchical ordering of normative propositions, which can be looked at either from the top downwards as depending on a sovereign command (Bodin, 1576; Hobbes, 1651; Austin, 1832) or from the bottom upwards as deriving their validity from ever more general layers of norms until one reaches some ultimate norm(s)" (Kelsen, 1949; Hart, 1961).¹³ Claiming that legal centralism is an ideology, he charges many social scientists with having confused a normative stance and a descriptive one. According to him, law does not exist where the heralds of legal centralism

⁹ **N. ROULAND**, *Anthropologie juridique*, Paris, PUF, 1988.

¹⁰ **R. BANAKAR**, 'Integrating Reciprocal Perspectives. On Georges Gurvitch's Sociology of Law', *Oñati Prize Essay in Sociology of Law*, Oñati/Internet, 2000. One can consider that L. Pospisil's conception of "legal levels" does not stand far away from Gurvitch's concept of social law. According to Pospisil, societies are never fully integrated. On the contrary, society is a mosaic of subgroups that belong to certain types with different memberships, composition, and degree of inclusiveness, every such subgroup largely owing its existence "to a legal system that is its own and that regulates the behavior of its members", **L. POSPISIL**, *Anthropology of Law: A Comparative Theory*, New York, Harper & Row, 1971.

¹¹ **J. GRIFFITHS**, 'What Is Legal Pluralism', *Journal of Legal Pluralism*, No 24, pp. 1-55.

¹² Although other contributions are certainly as important as Griffiths'. See, for instance, **M. GALANTER**, "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law", *Journal of Legal Pluralism and Unofficial Law*, No 19. As a whole, Griffiths' approach to legal pluralism is mainly represented in the Commission on Folk-Law and Legal Pluralism and in the *Journal of Legal Pluralism and Unofficial Law*, in which the influential presence of Dutch scholarship must be stressed. Among other prominent representatives of this "school", we might mention Gordon Woodman, Franz von Benda-Beckmann, Keebet von Benda-Beckmann, and Fons Strijbosch.

¹³ **J. GRIFFITHS**, *o.c.*, p. 3.

have claimed it to be: legal centralism would be “a myth, an ideal, a claim, an illusion”,¹⁴ whereas legal pluralism would be the fact. Griffiths then proceeds to the distinction between what he calls weak and strong definitions of legal pluralism. The former refers to legal systems in which the sovereign commands or validates or recognises different bodies of law for different groups in the population; if it is a weak conception of legal pluralism, it is however mainly a (weak) conception of legal centralism, for it gives the central state the ultimate power to acknowledge or refuse the existence of such different bodies of law. The strong definition of legal pluralism, on the other hand, is the one which is, according to Griffiths, directly concerned with “an empirical state of affairs in society”,¹⁵ not with mere ideology. It is to the yardstick of such distinction between weak and strong definitions that Griffiths evaluates existing descriptive conceptions of legal pluralism. Griffiths concludes by giving his definition of law and legal pluralism. As to law, it is the self-regulation of every social field - law becomes therefore synonymous with social control; with regard to legal pluralism, it becomes the legal organisation of society, which is “congruent with its social organisation”.¹⁶

Sally Falk Moore has been unanimously applauded among legal pluralists for having provided the appropriate *locus* of law in socio-legal research. She claims that “the social structure” is composed of many “semi-autonomous social fields”, the definition and boundaries of which are not given by their organisation, but “by a processual characteristic, the fact that it can generate rules and coerce or induce compliance to them”.¹⁷ Three characteristics of Moore’s concept can explain the appeal it exercised: first, she presents these fields as the fundamental unit of social control, which is directly connected to behavioural norms of conduct; second, every individual may simultaneously belong to many social fields, which accounts for social complexity;¹⁸ third, a social field is autonomous, *i.e.* it can resist the penetration of external norms, but never totally, its capacity of resistance being function of

¹⁴ *Ibid.*, p. 4.

¹⁵ *Ibid.*, p. 8.

¹⁶ *Ibid.*, p. 38.

¹⁷ **S.F. MOORE**, *Law as Process : An Anthropological Approach*, London, Henley and Boston, Routledge & Kegan Paul, 1978, p. 57.

¹⁸ The semi-autonomous social field “can generate rules and customs and symbols internally, but [...] is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded. 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”, **S.F. MOORE**, ‘Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study’, *Law & Society Review*, Vol. 7, p. 720.

the degree of independence of its members vis-à-vis itself and of its force of resistance to norms originating in other fields. It should be noted, however, that Moore does not use the word “law” when describing the rules and norms which are generated by semi-autonomous social fields.¹⁹

Jacques Vanderlinden contributed a reappraisal of his former conception of legal pluralism, which had been targeted by Griffiths.²⁰ Vanderlinden’s position is interesting in that it identifies some of the reasons that pushed lawyers to adhere to a certain conception of legal pluralism. First, he reacts against a continental, civilistic way to consider law. Against some legal theorists, who has a very restrictive understanding of the concept of rule, Vanderlinden advocates the taking into consideration of normative practices. Second, he considers law as one regulating system among others (etiquette, morality, fashion, *etc.*), which is however distinctive because of its hegemonic ambition. It means that, contrary to Griffiths, Vanderlinden does not deny the specificity of state law and does not assimilate it to mere social control. Third, he states that society as such is plural, meaning that pluralistic normative orderings cannot be evaluated to the yardstick of a monistic societal conception. Finally, Vanderlinden advocates an approach to the phenomenon of legal pluralism from the perspective of the normative practices of individuals embedded within social networks and individually shopping in these many normative *fora*. Paradoxically, Vanderlinden, who at the beginning of his demonstration recognises a certain specificity of law, ends with the statement that individuals, because of their belonging to many social networks, are subjected to many legal systems.²¹

¹⁹ The concept of polycentricity of law was also developed by scholars in the Nordic European countries. It refers to a category of instances of legal pluralism, which are described as the use of sources of law in different sectors of the state administration. The principal hypothesis is that different authorities frequently use different sources of law or use the same sources with different orders of priority between them. It aims at supplementing Sally Falk Moore’s picture of the semi-autonomous social fields inside the apparatus of the State itself, cf. **G. WOODMAN**, “Ideological Combat and Social Observation: Recent Debate About Legal Pluralism”, *Journal of Legal Pluralism and Unofficial Law*, No 42.

²⁰ **J. VANDERLINDEN**, ‘Return to Legal Pluralism: Twenty Years Later’, *Journal of Legal Pluralism and Unofficial Law*, 1989, pp. 149-157.

²¹ **J. VANDERLINDEN**, ‘Vers une nouvelle conception du pluralisme juridique’, *Revue de la Recherche Juridique – Droit Prospectif*, Vol. XVIII, No 53, pp. 575-583.

Many scholars, like Vanderlinden,²² made the assumption that, because of the existing gap between legal practices and formal textual legal provisions, there is a plurality of laws. Instead of seeing in these practices the sad effect of the inefficiency of law, it should be read, following these authors, as the positive manifestation of their conformity to other legal orderings.²³ According to some of these scholars, these alternative legal orderings are totally independent from state law, whereas, according to others, the state remains the gravity point of these practices. However, all converge in challenging the legitimacy of state law. Today, the classical theme of conflict resolution seems to constitute the focal point of this program. This interest in the anthropology of conflict may be traced back to American legal realism and Llewellyn's "trouble case method", ²⁴ and more recently to Laura Nader and Harry Todd's *Disputing Process*²⁵ and Simon Roberts' *Order and Dispute*.²⁶

C. Plural legal pluralism: Culturalism, post-modernism, autopoiesis

According to Brian Tamanaha, "since there are many competing versions of what is meant by 'law', the assertion that law exists in plurality leaves us with a plurality of legal pluralisms".²⁷ Besides Griffith's and Moore's influential conceptions of legal pluralism, there exist other approaches worth mentioning.

Massaji Chiba's theory of non-official laws stays a little apart from the different orientations described above. The main endeavour of this Japanese scholar is "less to develop or clarify a definition of legal pluralism than to develop or clarify the features of certain

²² **A.J. ARNAUD**, *Le droit trahi par la sociologie*, Paris, Librairie Générale de Droit et de Jurisprudence, 1998; **J.G. BELLEY**, *Le contrat, entre droit, économie et société*, Québec, Les éditions Yvon Blais, 1998; **J.F. PERRIN**, *Sociologie empirique du droit*, Bâle, Helbing & Lichtenhahn, 1997.

²³ **E. SERVERIN**, *Sociologie du droit*, Paris, La Découverte, 2000. The following paragraph is directly borrowed from this book.

²⁴ **K.N. LLEWELLYN** and **E.A. HOEBEL**, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*, Norman, University of Oklahoma Press, 1941.

²⁵ **L. NADER** and **H. TODD**, *The Disputing Process: Law in Ten Societies*, New York, Columbia University Press, 1978.

²⁶ **S. ROBERTS**, *Order and Dispute: An Introduction to Legal Anthropology*, Harmondsworth, Penguin Books, 1979. Also, **J. COMAROFF** and **S. ROBERTS**, *Rules and Processes: The Cultural Logic of Dispute in an African Context*, Chicago, University of Chicago Press, 1981. Recently, Marie-Claire Foblets edited a special issue of the *Journal of Legal Pluralism* on the theme of "popular justice": **M.C. FOBLETS**, "Popular Justice: Conflict Resolution within Communities", *Journal of Legal Pluralism and Unofficial Law*, No 36, 1996.

²⁷ **B.Z. TAMANAHA**, "A Non-Essentialist Version of Legal Pluralism", *Journal of Law and Society*, 2000, Vol. 27, No 2, pp. 296-321, at p. 297.

instances of legal pluralism”.²⁸ Instead of simply opposing state law and people’s law, Chiba identifies many legal levels: official law, *i.e.* “the legal system authorised by the legitimate authority of a country”;²⁹ unofficial law, *i.e.* “the legal system which is not officially authorised by the official authorities, but authorised in practice by the general consensus of a certain circle of people”³⁰ - and having a distinctive influence upon the effectiveness of the official law; legal postulates, *i.e.* “the system of values and ideals specifically relevant to both official and unofficial law in founding and orienting the latter”.³¹ These three levels are not organised according to a rigid and permanent hierarchy, but differ from one society to another. For instance, Eastern societies would be characterised by their reliance on unofficial law, whereas Western ones would be mainly state-centred. Besides these legal levels, Chiba identifies three dichotomies of law: official law vs. unofficial law, legal rules vs. legal postulates, and indigenous law vs. transplanted law.³² It is in the combination of these many levels and dichotomies that the law of each individual country could be analyzed. This analytical scheme serves “to advance social sciences of non-Western law with respect to the alleged cultural lag or legal pluralism”.³³

With the emergence of the “concept” of post-modernity, scholars oriented their research in legal pluralism toward a new definition. Boaventura de Sousa Santos is the main representative of this trend that seeks to forge a post-modern conception of law based on the notions of legal pluralism and interlegality, that is, “encompassing both the social constructions of normative orders and the human experiencing of them”.³⁴ Santos states: “legal pluralism is the key concept in a post-modern view of law. Not the legal pluralism of traditional legal anthropology in which the different legal orders are conceived as separate entities coexisting in the same political space, but rather the conception of different legal spaces superimposed, interpenetrated, and mixed in our minds as much as in our legal

²⁸ G. WOODMAN, “Ideological Combat and Social Observation”, *o.c.*

²⁹ M. CHIBA, “Three Dichotomies of Law in Pluralism: An Analytical Scheme of Legal Culture”, *Tokai Law Review*, 1987, pp. 1-11, at p. 173.

³⁰ *Ibid.*

³¹ *Ibid.*

³² M. CHIBA, “Three Dichotomies of Law in Pluralism”, *o.c.*, pp. 177-179.

³³ M. CHIBA, “Introduction”, in M. CHIBA, *Sociology of Law in Non-Western Countries*, Oñati, Oñati International Institute for the Sociology of Law, 1993, p. 13.

³⁴ A. GUEVARA-GIL, J. THOME, “Notes on Legal Pluralism”, *Beyond Law*, 1992, No 5, pp. 75-102, at p. 87.

actions”.³⁵ Between these multiple networks of legal orders, there is continuous porosity. People’s life “is constituted by an intersection of different legal orders, that is, by interlegality”.³⁶ So as to make sense of these legally plural contexts, people need a “new common legal sense”, which would aim “at trivializing our daily encounters with the laws so that their meaning becomes clear to the untrained law user”.³⁷ Drawing a metaphorical comparison with geographical cartography, Santos describes how this “polycentric legal world” represents and transforms reality through a set of conventions. It claims to provide the methodological clues and theoretical propositions explaining how different legalities are constructed, enforced and experienced, within and beyond the intra-state level of conflicting legalities.³⁸ Santos acknowledges that, under his definition, there is a great variety of legal orders. However, he focuses on what he calls “six structural clusters of social relations in capitalist societies integrating the world system”:³⁹ domestic law (norms and dispute settlements resulting from social relations in the household), production law (resulting from labour relations), exchange law (resulting from merchant relations), community law (resulting from group identities), state law, and systemic law (“the legal form of the workplace”), these very broadly defined legal clusters potentially and partly overlapping each other.

Although it seems very marginal in the general framework of the systemic theory of law, it must be noted that Gunther Teubner proposed his own theory of legal pluralism. There are three main assumptions in Teubner’s theory of law as an autopoietic system (a system self-sustainable and closed on itself): law, as an autonomous epistemological subject, constructs its own social reality; law, as a communicational process, produces human actors as semantic artefacts; because of the simultaneity of its dependence and independence vis-à-vis other social discourses, modern law permanently balances between positions of cognitive autonomy and heteronomy.⁴⁰ On such basis, Teubner criticises the “classical approach” to legal pluralism for its inability to properly define law. This is due to the absence of proper distinction between law and other kinds of normativities and to the attribution to law of a

³⁵ **B.S. SANTOS**, “Law: A Map of Misreading. Toward a Postmodern Conception of Law”, *Journal of Law and Society*, 1989, pp. 279-302, at pp. 297-298.

³⁶ *Ibid.*, p. 298.

³⁷ *Ibid.*, p. 302.

³⁸ **A. GUEVARA and J. THOME**, *o.c.*, p. 91.

³⁹ **B.S. SANTOS**, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*, New York, Routledge, 1995, p. 429.

⁴⁰ **G. TEUBNER**, “Pour une épistémologie constructiviste du droit”, *Annales ESC*, 199, pp. 1149-1169, at p. 1150.

single function, while various functions are identifiable. Then, he defines legal pluralism “as a multiplicity of diverse communicative processes that observe social action under the binary code of legal / illegal”.⁴¹ This binary code of legal/illegal is constituted as the discriminating factor, which allows excluding “purely economic calculations” as well as “sheer pressures of power and merely conventional or moral norms, transactional patterns or organisational routines”.⁴² This binary code is not peculiar to state law, but “it creates instead the imagery of a heterarchy of diverse legal discourses”.⁴³ Finally, it serves many functions, including inter alia, “social control, conflict regulation, reaffirmation of expectations, social regulation, coordination of behaviour or the disciplining of bodies and souls”.⁴⁴

II. Critiques

According to Merry, Moore’s concept of semi-autonomous social field remains “the most enduring, generalisable, and widely-used conception of plural legal order”.⁴⁵ Such statement reveals how little criticism has been addressed to the concept and the propositions associated to it.⁴⁶ It also reflects the increasing support the radical theory of legal pluralism received. Nowadays, legal anthropology, the sociology of law and legal theory must pay it tribute. Nevertheless, critiques which may be addressed are many. In the following section, I shall organise these critiques around what can appear as the three main fundamental flaws undermining existing legal pluralistic theories: its definitional problem, its functionalist nature, and its holistic essentialist culturalism.

A. Definitional deadlock

Griffiths explicitly identifies the ideology of legal centralism as what legal pluralism set out to challenge. While the state portrays itself as sole lawmaker, legal pluralism highlights the multitude of partially autonomous and self-regulating social fields also producing legal rules. However, there is a strong case for moving away from the present

⁴¹ G. TEUBNER, “The Two Faces of Janus: Rethinking Legal Pluralism”, *Cardozo Law Review*, 1992, pp. 1443-62, at p. 14.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ G. TEUBNER, “The Two Faces of Janus: Rethinking Legal Pluralism”, *o.c.*, p. 15.

⁴⁵ S.E. MERRY, *o.c.*, p. 878.

⁴⁶ G. WOODMAN, ‘Ideological Combat and Social Observation: Recent Debate About Legal Pluralism’, *Journal of Legal Pluralism*, 1998.

dichotomisation of the analysis of the phenomenon of law between state law and legal pluralism.

Brian Tamanaha reveals some of the many weaknesses in the reasoning of the proponents of legal pluralism, among which the “conclusion that all forms of social control are law”.⁴⁷ As Merry puts it, “calling all forms of ordering that are not state law by the name law confounds the analysis”.⁴⁸ The problem can be attributed to the confusion between descriptive and non-descriptive concepts. Law belongs to the latter, at least in the sense that it was never constituted as a tool in the hand of sociologists for describing social reality. When they establish law as a synonymous with social norms, legal pluralists create an ambiguity, since they use a word which has some commonsense meaning so as to perform an analytical task which runs contrary to this meaning. In other words, what is the analytical utility of using the word “law” so as to describe what common sense would never associate with law (good manners, *etc.*), especially if this alleged concept either does not carry anything which makes it distinct from other less connoted words (like norm) or surreptitiously carries the distinctive characters of what it is supposed to be contrary to?

Tamanaha goes further and states that, “lived norms are qualitatively different from norms recognised and applied by legal institutions because the latter involves ‘positivising’ the norms, that is, the norms become ‘legal’ norms when they are recognised as such by legal actors”.⁴⁹ Contrary to what I claimed in another article,⁵⁰ this critique is most sound, though the dividing line is not so much between lived norms and positivised norms but between law as recognised and referred to by people -whoever they are- and other moralities and normativities as recognised and referred to by people - whoever they are.⁵¹ In other words, law is not an analytical concept, but only what people claim that law is, this type of position allowing denying the relevance of a question that a hundred years of legal sociology and anthropology have been unable to settle - the question of the boundaries of juridicity. The existence of law is evidenced only by its self-affirmation or, rather, by its identification as such by people. This does not preclude the study of normativity in general, on the contrary,

⁴⁷ **B.Z. TAMANAHA**, “The Folly of the ‘Social Scientific’ Concept of Legal Pluralism”, *Journal of Law and Society*, 1993, pp. 192-217, at p. 193.

⁴⁸ **S.E. MERRY**, “Legal Pluralism”, *o.c.*, p. 878.

⁴⁹ **B.Z. TAMANAHA**, “The Folly of the ‘Social Scientific’ Concept of Legal Pluralism”, *o.c.*, p. 208.

⁵⁰ **B. DUPRET**, “Legal Pluralism, Normative Plurality, and the Arab World”, in **B. DUPRET, M. BERGER, L. AL-ZWAINI**, *Legal Pluralism in the Arab World*, The Hague, Kluwer Law International, 1999.

⁵¹ See *infra*, section 4.

but it seriously challenges the possibility to conduct it under the auspices of a non-descriptive (“legal”) ideology (“pluralism”).⁵² It is non-descriptive, in the sense that it has used the legal vocabulary to describe general normativity and general normativity completely to dilute law (as it is referred to by people in general). It is ideological, in the sense that legal pluralism, whereas it militates for the recognition of all diffused normativities, ignores the fact that there is no possibility of recognizing any normativity as law without an authority having the right to say what is right and the capacity to interpret it as law, meaning that militancy against state law would necessarily mean militancy in favour of any such other authority.

B. Functionalism

This definitional problem of legal pluralism is related to the fundamental assumption that lies behind its construction. Law is considered as the concept that expresses the social function of ordering which is performed by social institutions. Tamanaha, Malinowski, Parsons and Luhmann are the main representatives of the functionalist theory in the study of law.⁵³ Basically, these authors share the idea that: (1) law has a role and a nature; (2) these role and nature are determined *a priori* by their social function; (3) this function is to maintain order in society. Even in its most sophisticated versions, legal pluralists assume this legal function: “The normative orders of legal pluralism always produce normative expectations [...] and they may serve many functions”.⁵⁴

As shown by Searle, among others, functionalism is necessarily associated with intentionality: the heart does not have the function to pump blood, except if there was an intentional agent that created it so as to pump blood; on the other hand, artificial hearts have indeed the function to pump blood. “Whenever the function of X is to Y, X and Y are parts of a *system* where the system is in part defined by *purposes, goals, and values generally*. This is why there are functions of policemen and professors but no function of human as such - unless we think of human as part of some larger system where their function is, *e.g.*, to serve God”.⁵⁵ Accordingly, whereas law, when conceived as an institution created so as to regulate

⁵² This is why I proposed to substitute the notion of “normative plurality.”, **B. DUPRET**, “Legal Pluralism, Normative Plurality, and the Arab World”, *o.c.*

⁵³ **B. TAMANAHAN**, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law*, Oxford, Clarendon Press, 1997, p. 106.

⁵⁴ **G. TEUBNER**, “The Two Faces of Janus”, *o.c.*, p. 15.

⁵⁵ **J.R. SEARLE**, *The Construction of Social Reality*, London, Penguin Books, 1995, p. 19.

human relations, might be given a social function, law, when it is understood as emanating from the social, might hardly be given such a function. Otherwise, it would mean as a consequence that societies would be credited from scratch (from before their existing as societies) with a collective consciousness, which in turn would result in their creating the institutions necessary to their functioning, *i.e.* they would have created themselves. In other words, functional analysis can only operate if law is considered as the product of an intentional agency.

Yet, some legal pluralists consider law as the product of an intentional agency. This is the case with Teubner, for whom the multiple orders of legal pluralism exclude “merely social conventions and moral norms”, recharacterized by their common organizing “on the binary code legal/illegal,” and “may serve many functions: social control, conflict regulation, reaffirmation of expectations, social regulation, coordination of behaviour or the disciplining of bodies and souls”.⁵⁶ However, this “legalistic” version of legal pluralism is only a partial solution to the problem of functionalism. Indeed, when considering that law is multi-functional or even dysfunctional, it still assumes that legal institutions have been created so as systematically to perform one function or another. This leaves no room for their being non-functional. Moreover, these systems are, according to Teubner, autopoietic, *i.e.* they are radically autonomous subsystems which communicationally produce and reproduce their components within the system (the system is operationally closed).⁵⁷ The remaining question is: Has law been intentionally created so as independently to perform social functions? This is historically and empirically dubious. Obviously, parts of law were crafted so as to perform functions (though they never succeeded in being totally efficient in performing them). Clearly as well, other parts of law were not conceived in such a way. If there are many legal constructors, there was never any Creator of the Concept of Law, although such an intention remains necessary for the sake of functional analysis.

C. Essentialist culturalism

Legal pluralism has also often proved very essentialist and culturalist. Generally with the best intentions, some legal pluralists promoted concepts like “folk law,” “indigenous law,”

⁵⁶ G. TEUBNER, “The Two Faces of Janus”, *o.c.*, p. 15.

⁵⁷ For an excellent and concise summary, see K. BÄLZ, “Shari’a and Qanun in Egyptian Law: A Systems Theory Approach to Legal Pluralism”, *Yearbook of Islamic and Middle Eastern Law*, 1995, pp. 37-53, at pp. 40-42.

“native law,” “imported law,” “transplanted law,” “state law,” “official law,” “unofficial law,” “primitive law,” *etc.*. Besides the huge definitional problems associated with the term “law,” it mainly assumes that there is something like a “true” law, which is the reflection of an “authentic” society whose main cultural characters are translated into rules of conduct. Actually, this kind of “nativist” interpretation is not worth any close examination. It offers a very naïve picture of law which is far from being supported by substantial empirical evidence. The so-called “indigenous” or “native” law has often never existed but in the heads of these scholars, though it is constituted as the yardstick to which the scope of legal “acculturation” is evaluated.

Much more interesting is Clifford Geertz’s interpretive theory. This is not the proper place to discuss it. Suffice to say that he conceives of law as a cultural code of meanings for interpreting the world: “‘Law’ here, there, or anywhere, is part of a distinctive manner of imagining the real”.⁵⁸ In this hermeneutic project, “words are keys to understanding the social institutions and cultural formulations that surround them and give them meaning”.⁵⁹ Geertz gives the example of the Arabic word “*haqq*”, which is supposed to come from a specific moral world and to connect to a distinctive legal sensibility.⁶⁰ This word would carry along with it all the specific meanings which are co-substantial with something which is called “Islamic law.” In plural situations, *i.e.* situations where many cultural systems are described as interacting (for instance Egypt, where modern law is commonly presented as co-existing with Islamic law and customary law), law would produce a “polyglot discourse”.⁶¹ In that sense, pluralism would only be the juxtaposition of many cultural and legal histories.

However, culturalism fundamentally conceives of law in holistic terms, that is, as one of the many reverberations of a larger explaining principle: culture.⁶² Yet, this cultural unity is not deduced from empirical observations, but assumed from the beginning. This is how Rosen proceeds when, starting from the small Moroccan town of Sefrou, he ends his journey

⁵⁸ C. GEERTZ, *Local Knowledge: Further Essays in Interpretive Anthropology*, New York, Basic Books, 1983, p. 184.

⁵⁹ S.E. MERRY, “Legal Pluralism”, *o.c.*, p. 886.

⁶⁰ C. GEERTZ, *Local Knowledge*, *o.c.*, p. 185.

⁶¹ *Ibid.*, p. 226.

⁶² Lawrence Rosen describes it as “a set of orientations which gains its very life by reverberating through numerous analytically separable domains so as to appear immanent in all of them” and as “commonsense assumptions about features that cross-cut virtually all domains of law and life - assumptions about human nature, particular kinds of relationships, the ‘meaning’ of given acts”; L. ROSEN, “Legal Pluralism and Cultural Unity in Morocco”, in B. DUPRET, M. BERGER and L. AL-ZWAINI, *o.c.*, p. 90.

with the anthropology of justice in Islam.⁶³ Moreover, he considers that Middle Eastern culture, which Moroccan culture is supposed to epitomise, can itself be caught by one “key metaphor”, one ‘central analogy’: “it is an image of the bazaar market-place writ large in social relations, of negotiated agreements extending from the realm of the public forum into those domains -of family, history, and cosmology- where they might not most immediately be expected to reside”.⁶⁴ This kind of approach carries a strong flavour of genetic essentialism, according to which societies -and the laws that characterise them- carry along with them throughout history the same basic tenets, which historical incidents would only superficially scratch. Also, it seems that cultural interpretivists are much more interested in the “why” question than in the “how”, although attention given to the latter would have enabled them to consider that law is not necessarily and integrally part of culture and that culture is not a set of permanent pre-existing assumptions but something which is permanently produced, reproduced, negotiated, and oriented to by members of various social settings.

III. Re-specifications

This third section reviews some of the possible remedies and shifts in focus which might help the reconsideration of the plural nature of law. A few years ago, I supported the idea of forsaking the use of the words “law” and “legal” for analytical purposes. To the question of the sociological boundaries of juridicity, I answered that the question is devoid of sociological relevance.⁶⁵ From a distance, I would say that social scientists have no means sociologically to define law outside what people say law is, with the consequence that any study of law should basically look at what people do and say when practicing what they call law.

A. Realism

From an epistemological standpoint, the problem of definition is fundamental. The real danger of speaking of “law” when dealing with all forms of norms is, first, to equate them with something which people consider as totally different. Second, it is to take a product of

⁶³ L. ROSEN, *The Anthropology of Justice: Law as Culture in Islamic Society*, Cambridge, Cambridge University Press, 1989.

⁶⁴ *Ibid.*, p. 11.

⁶⁵ B. DUPRET, “Legal Pluralism, Normative Plurality, and the Arab World”, in B. DUPRET, M. BERGER and L. AL-ZWAINI, *o.c.*, p. 30.

political theory (state law) for a sociological tool (legal pluralism). Third, it is to assume a functional definition of some general social mechanisms (social control), whereas non-intentional phenomena cannot be given any social function. Instead of elevating law to the rank of an analytical instrument, I would suggest to go back to the observation of social practices and to consider, in the broad field of the many normativities, that law is what people refer to as law.

This is what advocates Tamanaha, according to whom “the project to devise a scientific concept of law was based upon the misguided belief that law comprises a fundamental category. [...] Law *is* whatever we attach the label *law* to. It is a term conventionally applied to a variety of multifaceted, multifunctional phenomena”.⁶⁶ In other words, “what law is, is determined by the people in the social arena through their own common usages, not in advance by the social scientist or theorist”.⁶⁷ Accordingly, a situation of legal pluralism would exist “whenever more than one kind of ‘law’ is recognised through the social practices of a group in a given social arena”.⁶⁸ Tamanaha argues that, whereas legal pluralism states that the word law applies to the many manifestations of a single basic phenomenon, conversely his approach would assume that the same label law applies to many different phenomena.

Tamanaha claims that his approach conveys many advantages. Besides the fact that, first, it overcomes the inability to distinguish legal norms from social norms, second, it provides practicable criteria for distinguishing between a legal rule-system and normative pluralisms. Third, it urges that all these forms of law-recognised-as-such in one specific social arena “be studied in their specific manifestation, and in their relations with other kinds of law in that social arena, and as they compare to general categories of kinds of law or manifestations of law in other social arenas”.⁶⁹ Fourth, this approach does not lose, through its elaboration, what made the force of the legal pluralistic appeal, *i.e.* that there are forms of law which are not or only loosely connected to the state. By so doing, this approach would be successful, according to Tamanaha, precisely where legal pluralism has failed, that is, in providing a descriptive non-ideological theory of the plural nature of law. “Indeed, one merit

⁶⁶ B.Z. TAMANAHA, *Realistic Socio-Legal Theory*, *o.c.*, p. 128.

⁶⁷ B.Z. TAMANAHA, “A Non-Essentialist Version of Legal Pluralism”, *o.c.*, p. 314.

⁶⁸ *Ibid.*, p. 315.

⁶⁹ *Ibid.*, p. 318.

of this approach -what makes it non-essentialist- is that it is entirely free of presuppositions about law (beyond the negative one that it has no essence). Everything is left open to empirical investigation, and category construction and analysis following such investigation. Another significant merit [is that] it directs an equally sharp-eyed, unsentimental view at all manifestations and kinds of law”.⁷⁰ In sum, conducting research in legal pluralism is to look at situations where there is a plurality of kinds of law, law being understood as what people conventionally refer to as law.

B. Praxiology

In this last section, it will be argued that, even though Tamanaha’s approach greatly betters the sociological study of law, it still suffers from some flaws which can be mitigated by the deepening of his insights and by the adoption of a praxiological approach to legal phenomena.

The main problem with Tamanaha’s conception of law comes from his attempt to root it in the combination of behaviourism and interpretivism, a combination which is deemed to overcome some of the classical caveats of legal sociology and anthropology and to come out in his realistic socio-legal theory. However, as mentioned above, one of the difficulties of interpretivism is related to its culturalist essentialist standpoint. It is not to say that such perspective has no scientific value, but it points to the fact that it reproduces some of the deficiencies it is supposed to eliminate. Among other things, it maintains one of these dualities which muddy contemporary sociological theorizing, that is, the duality opposing activities and meanings. Instead of considering that this opposition constitutes the main problem to be solved in order to succeed in theorizing, I suggest that it is the propensity to theorizing itself which should be questioned. In other words, the inquiry “into the *comprehensibility of society*, into the ways in which social life can be understood and described when seen from within by members” should be substituted to the theoretical elaboration of “a specific mode of comprehending society, a theoretical framework *within* which a substantive conception of society is to be construed”.⁷¹ It is definitely not Geertz’s interpretivist culturalism -not to say Rosen’s- that will promote such an inquiry, for he

⁷⁰ *Ibid.*, pp. 318-319.

⁷¹ W. SHARROCK and R. WATSON, “Autonomy among social theories: The incarnation of social structures”, in G. FIELDING, *Actions and Structures*, London, Sage Publications, 1988, p. 59.

assumes the constraint of a pre-existing cultural order to which people conform, the task of the social scientist being to discover the keyword that epitomises it, not to look at practices from which to infer people's orientation to the many constraints of the local settings in which they (inter)act. On the contrary, a praxiological approach requires using "the criteria that participants have for determining the salient features of interactional episodes",⁷² and this does not provide an interpretation of people's conducts. "Rather, analysis is based on, and made valid by, the participants' own orientations, characterisations, and exhibited understandings".⁷³ In other words, while the opposition between meaning and behaviour "requires its solution by means [...] which are external to the orderliness observable in the sites of everyday activity," *e.g.* social structures, local cultures, schemes of behaviour, *etc.*, the praxiological re-specification I advocate considers "'the problem of social order' as completely *internal to those sites*".⁷⁴ It also means that it is not so much "why" questions - which form the basis of interpretivism- which should draw the attention of legal sociology, but "what" and "how" questions - "what is involved in doing this or that?"; "how does X manage to do Y"?

Another major problem arises from the slippery character of definitional endeavours. Although Tamanaha succeeds in escaping legal pluralism's definitional caveat, mainly by his characterizing law as what people refer to as law, it does not make him immune from falling into the pit of other definitional enigma. For instance, when advocating the restriction of the use of the word "legal" to state law⁷⁵ or when ascribing to certain legal systems a particular characterisation (*e.g.*, theocracy in Iran),⁷⁶ he substitutes his external overhanging scholarly vision to people's production of and orientation to an identifiable, understandable, and practicable law, which does not necessarily attend to these statist or theocratic characters. There are other places where one can find this ambivalence when it is stated, on the one hand, that law is what people refer to as law and when it is assumed, on the other hand, that people use the label law so as to refer to what are often quite different phenomena. In other words,

⁷² D.W. MAYNARD, *Inside Plea Bargaining: The Language of Negotiation*, New York, Plenum, 1984, p. 19.

⁷³ *Ibid.*

⁷⁴ W. SHARROCK and G. BUTTON, "The social actor: social action in real time", in G. BUTTON, *Ethnomethodology and the Human Sciences*, Cambridge, Cambridge University Press, 1991, p. 141.

⁷⁵ B.Z. TAMANAHA, "The Folly of the 'Social Scientific' Concept of Legal Pluralism", *o.c.*, p. 212. In a personal communication Tamanaha told me however that this was said in the context of his argument against the attempt to devise a "social scientific" concept of law. He adds: "Once I more fully developed my positive approach to legal pluralism (what I call a conventionalist approach), I would no longer make the assertion that 'legal' should be limited to state law".

⁷⁶ B.Z. TAMANAHA, "A Non-Essentialist Version of Legal Pluralism", *o.c.*, p. 318.

whereas Tamanaha rightly criticises legal pluralism for its over-inclusiveness, *i.e.* its including phenomena most people would not consider to be law, and its under-inclusiveness, *i.e.* its excluding phenomena many would consider to be law,⁷⁷ he queers the pitch by underestimating people's practical and context-sensitive understanding of the word "law" or its equivalents. Thus, people do not loosely use one same word so as to refer to different phenomena; they specifically use one word to refer to some specific phenomenon to the production and intelligibility of which they orient in the local and temporal context in which they interact. The same word might be used to refer to another phenomenon in another context or in another sequence, but this is a question which must be empirically answered through the close examination of each interactional occurrence taking place in every specific setting. This runs against the interpretivist notion of the legal polyglot discourse. In that sense the notion of legal pluralism does not exist as a sociological question unless people, participants, or members orient to it as such. In other words, the question of legal pluralism does not arise from scholars looking at the social world from outside, but it becomes a topic in its own right when it comes out from people's practices that they orient to a situation of co-existing, conflating and/or conflicting multiple laws.

Finally, with regard to the questions that the realistic approach to legal phenomena might raise, my contention is that they are better solved by adopting a praxiological perspective. The first question concerns the identity of the people whose practices qualify a phenomenon as law. While the realistic theory answers that it is any social group, the praxiological would rather say that there is no such question unless or until people call into question the authority of someone or something having identified a phenomenon as law. The question only emerges from practical, local, punctual circumstances. Before, it is a question of a philosophical and political nature, not a practical and sociological one. To the question of how many people are necessary to view a phenomenon as law for this phenomenon to qualify as such, it is answered that "a minimum threshold to qualify is if sufficient people with sufficient conviction consider something to be 'law', and act pursuant to this belief, in ways that have an influence in the social arena".⁷⁸ This answer suffers from its giving to whatever external authority the task subsequently to determine how people, conviction and influence rate so as to be considered as sufficient, whereas it would be said in a praxiological perspective that no answer can be given *a priori*, since it is from people's practices that the

⁷⁷ *Ibid.*, p. 315.

⁷⁸ *Ibid.*, p. 319.

qualification of something as law will be recognised as such (and thus will remain unnoticed) or will not be recognised as such (and thus will be noticed and become accountable). It is also said that a third question would address the risk of a proliferation of kinds of law in the social arena. Tamanaha's answer is that such a profusion of kinds of law will seldom occur in practice. To the same question, the praxiological answer would be that it is not up to social scientists to decide by the means of concepts whether there are too many or too few kinds of law, but it is an empirical phenomenon which must be attended to through a close scrutiny of people's practices. Moreover, since activities in legal settings are characterised, as human activities in general, by the general orientation to the production of intelligibility, coordination and order, it would be rather surprising to observe such an anarchical proliferation of laws without observable attempts to reduce it. The last question addresses the authority which is granted by conventionalism to social actors to give rise to new kinds of law. The realistic answer stresses that law as a social institution is necessarily produced by social actors and that recognizing these actors' authority only threatens social and legal theorists' authority. This holds true in a praxiological perspective. Moreover, it should be said that it is not up to legal sociologists and anthropologists to determine whether or not granting social actors the authority to give rise to new laws. What social sciences only can do is to observe and describe how actual people in actual settings orient to the production of a phenomenon which they call law.

C. What is legal pluralism in a praxiological perspective?

To illustrate the heuristic gains of the praxiological re-specification, I shall briefly present three cases concerning the issue of customary marriage in the Egyptian context. It should contribute to the strengthening of my contention according to which the theories of legal pluralism have little heuristic capacity in the explanation of the law, whose pluralistic character must not be determined by some external criterion, but only when it belongs explicitly to the relevancies of situated practices.

In Egypt, a series of laws organise personal status, *i.e.*, the regulations concerning marriage, divorce, affiliation, and inheritance. The law always encouraged the contracting of formal marriages registered by a notary whose authority is officially acknowledged. However, marriages satisfying minimal conditions, *i.e.*, being established in a contractual form and testified to by two witnesses, are deemed legitimate. Nevertheless, contrary to official

marriages registered by the notary, this type of marriage is not demurrable and cannot be invoked by the wife in front of law courts. Until the Law No 1 of the year 2000, no claim concerning marriage could be heard by the courts unless it was supported by an official marriage document. The Law No 1 of the year 2000 introduces a very important change with that respect: any written document can be used to prove the existence of the customary marriage whose dissolution is requested of the judge. This type of marriage that does not fulfil the official registration requirement but is still legitimate is commonly called *zawâg 'urfi*, which means literally “customary marriage”. According to the theory of legal pluralism, the mere use of this word testifies to the existence of a multitude of legal orders among which people navigate and engage into forum-shopping. However, it must be stressed that this “customary marriage” is explicitly recognised by the law (even though restrictively) and oriented to as legal by the people. In no way does it constitute an alternative or parallel legal order. Whereas it is used in order to preclude some of the consequences of officially registered marriages, it is also explicitly practiced so as to grant a legal status to sexual intercourse and to some of the practices associated to it and otherwise blameable (*e.g.*, cohabitating, procreating legitimate children, *etc.*). In this case, the theories of legal pluralism, far from providing us with the means to properly describe the situation, contribute, through the foregrounding of a pluralistic situation to which people do not orient themselves, to the prevailing confusion.

In April 2000, the press heard about a case investigated by the Public Prosecutor, which involved two men who had contracted a customary marriage. The investigation transcripts show that it was the case of a computer store owner who had induced a young man working in his store to have homosexual intercourse under the threat of divulging marriage-like documents which were signed by the latter. The young man eventually complained at the police station and the police and then the Prosecution investigated the facts, which were subsequently characterised as indecent assault under duress. The press, the parties, the Public Prosecutor, indeed, everybody referred to a “contract of declaration and mutual engagement”. It was implicitly or explicitly argued that the two men had contracted a kind of “customary marriage”. According to the theories of legal pluralism, this would testify to the existence of a plurality of social fields (*e.g.*, homosexuals, the police, the state, the press, *etc.*), each one being endowed with and generating its own normative values and rules, *i.e.*, producing its own law and having a law mirroring its social norms. However, this is particularly confusing, since it is obvious from the case that there is no legal plurality but only legal practices, *i.e.*,

practices oriented toward an object of reference identified by the people as law, be it for interpreting it, implementing it, bypassing it, emptying it of its substance, contesting it, or whatever else. So-called “customary law” is centred on the law-organised practices of marriage contracting. It is oriented toward the creation of mutual rights and obligations by the signing of a written document. It follows the lines of “customary marriage”, despite the malicious intent of one of the two parties. It does not reflect the existence of parallel systems of law; it only reveals the law-centred organisation of a whole range of (private) practices. It is not only the state legal system that “digests” the social so as to give to the facts that are brought to its attention a characterisation that makes them legally relevant and open to the ascription of legal consequences, but it is also the so-called many social fields that take state law as their focal point.⁷⁹

Also in 2000 the press reported that two young men were found dead in the countryside nearby the town of Aswân, in Upper Egypt. Their bodies were showing that the two boys had been executed. In accordance with the law and the procedures organizing the profession, the police opened a file and transferred it to the Public Prosecution, which had to conduct the investigation. However, for lack of evidence upon which to build the case, it was soon considered a matter closed. Parallel to the official story of the case the press reported that the boys had actually sexual relationships and had entered a kind of customary marriage. As their families found the situation unacceptable, they asked for the convening of a customary assembly that was required to adjudicate on this case. It is said that the assembly convened and issued a ruling condemning the two boys to the death penalty. This little story explicitly reflects on the existence of parallel systems of justice that function autonomously, independent of one another, despite the possibility that their respective path comes across each other at a certain point. There is, on the one hand, the state justice system, represented by the police and the Public Prosecution, whose functioning necessitates the opening of a file and a procedure as soon as some criminal act is discovered. Technically speaking, this system cannot enter into any negotiation with alternative justice systems without jeopardizing its claim to exclusive legitimate authority. Practically, it is often confronted with certain types of crimes which are known by its professionals as falling outside the scope of its jurisdiction.

⁷⁹ This case by no way reflects any common phenomenon in Egypt. Gay customary marriage is a concept rather unimaginable in this society, even within the homosexual community itself. However, it must be stressed that this case is not used for its capacity to represent some general pattern in the evolution of Egyptian society, but for the practical purpose of demonstrating people’s orientation to state law even in the most peculiar circumstances.

Policemen as well as prosecutors are very much aware of the existence of so-called Arab councils following “local traditions,” issuing rulings and covering what appears to state law as criminal liability beyond a collectively enforced solidarity (which results mainly in the unavailability of witnesses testifying to, and evidences substantiating, the crime and its individual author). On the other hand, there is a “customary” legal system which people identify as such, to which they orient and which issues rulings of its own⁸⁰ on a large number of matters. This justice system, which runs parallel to the official system, can borrow many of its features from the latter (form of the procedures, explicit references to substantial provisions of positive law, written rulings, *etc.*). However, it clearly stands on its own two feet and neither depends nor is centred on the existence of state law. In other words, it constitutes an instance of a plural legal order. In this case, *urf* (custom) does constitute law, insofar as social actors give it such a quality. It can therefore be called customary law and become the object of customary legal practices.

In sum, the three cases briefly exposed seemingly constitute instances of legal pluralism (weak or strong in Griffiths’ terminology). However, if we closely examine the fine-grained detail of these cases and especially the ways in which people orient to these supposedly many laws and norms, we get a much better picture of what law is and what it is not for these people. We also get a much better understanding of its plural sources and the non-pluralistic ways of its implementation, of the many places where laws interfere with each other and the very few places where they remain totally autonomous. Last but not least, norms, laws and legal practices cease to be confounded. Any set of norms is not necessarily law and law is no more diluted in the all-encompassing and opaque category of “social control”. Many practices can be characterised as legal practices, not as parallel social, normative or legal fields. Legal practices are these practices that develop around an object of reference identified by the people as law (and it can be state law, customary law or any other law recognised as such). In other words, a legal practice is that, which is done in such a way because of the existence of a referent law and which would not be so done in its absence.

⁸⁰ On Arab councils and customary law in Upper Egypt, see **H.K. NIELSEN**, “Négociation et écriture : à propos du droit coutumier en Egypte”, *Egypte-Monde arabe*, No 34, pp. 155-165 and **S. BEN NEFISSA**, “The *Haqq al-Arab*: Conflict Resolution and Distinctive Features of Legal Pluralism in Contemporary Egypt”, in **B. DUPRET**, **M. BERGER** and **L. AL-ZWAINI**, *o.c.* See also **H.K. NIELSEN** in this volume.

IV. Conclusion

In their analysis of the plural nature of law, the proponents of legal pluralism largely miss the phenomenon they seek to study. Most practicalities, contingencies, background expectations, situational constraints and orientations of people engaged in legal activities are erased for the benefit of the production of a retrospective account of cases that are supposed to have the demonstrative capacity to prove the validity of the legal pluralistic model. It does not mean that, through the reading of these authors, we do not learn a lot, but only that we did not learn what we wanted to know, that there was a kind of “missing-what” in this approach to law. This missing-what was the phenomenon of practicing a law identified as plural. In other words, by looking for legal pluralism in the dynamics of history or in the structure of societies, research had lost the phenomenon of the law itself. The analysis is acutely grounded in concepts (codification, social control, modernisation, globalisation, *etc.*), categories (Islamic law, indigenous law, imported law, customary law, *etc.*) and theories (systemic, structural, realist, behavioural, *etc.*), but, by so doing, it probably misses an essential part of its object, perhaps even the core of its topic, *i.e.*, actually practicing the law and orienting to its possible plural nature. In sum, legal pluralism was used as a resource for explaining larger issues, like change, power, domination, equality; however, the law itself was forgotten as a topic in its own right.

Praxiology seeks to substitute to the building of grand model theories the close investigation of actual data reflecting the ways (methods) in which people (the members of any social group) make sense of, orient to, and practice their daily world. Following Stephen Hester and Peter Eglin, we can identify four principles that characterise a praxiological approach.⁸¹ First, the attention to the “the production and recognition apparatus”⁸² of action, *i.e.* the means used to produce an action in a way that allows it to be understood by others. Second, the injunction to “treat social facts as interactional accomplishments”.⁸³ Social facts, in this sense, are not givens but ongoing social productions of people engaged in courses of mutually constituted actions within mutually constituted self-organizing settings. Third, rather than predefining social phenomena or employing people’s meanings as resources for

⁸¹ S. HESTER and P. EGLIN, *A Sociology Of Crime*, London, Routledge, 1992, pp. 14-17.

⁸² H. GARFINKEL and H. SACKS, “On Formal Structures Of Practical Actions”, in J.C. McKINNEY and E.A. TIRYAKIAN, *Theoretical Sociology*, New York, Appleton Century Crofts, 1970.

⁸³ M. POLLNER, “Mundane Reasoning”, *Philosophy of the Social Sciences*, 1974, pp. 35-54.

explanation, praxiology seeks to describe what participants in particular settings are oriented to and how these features enter into their perceptions, actions and accounts. People's "meanings" become topics of inquiry in their own right rather than resources for mapping out sociological relevance. Four, people, *i.e.* social actors, are rule-using, not rule-determined creatures. It means that, in the course of their actions, they eventually orient to bodies of rules. However, their actions cannot be depicted as rule-governed. As a whole, praxiological studies involve a radically non-mentalist approach, where, by non-mentalist, it is meant that processes related to mind, thought, emotions and the like cannot be reduced to mere neuronal firings nor relegated to any inaccessible inner self, but must be radically "sociologised".⁸⁴ If methodology is about rigour, the rigour of praxiological analysis has to be found in its capacity to reproduce the features of the phenomena it observes and not in its assuming about these phenomena anything specific in advance of investigating them.⁸⁵

Praxiological research is sensitive to the question of categories. Instead of falling into the trap of analytic de-contextualisation, with all that it means in terms of mentalistic notions like "false consciousness," "latent functions," "subconscious processes," "incorporation," and the like, praxiological analysis argues that "the specificity of sense of a given social action is discernible by members and analysts alike only *in situ*".⁸⁶ The goal of this praxiological re-specification of the study of law we advocate is not to identify how far legal practices deviate from an ideal model or a formal rule but to describe the modalities of production and reproduction, the intelligibility and the understanding, the structuring and the public character, of law and the many legal activities. Instead of assuming the existence of cultural, racial, sexual, psychological or social variables, praxiological research focuses on how activities organise themselves and on how people orient themselves to these activity structures, which they read in a largely unproblematic way. If we are to take law seriously, it is, nevertheless, neither the law of abstract rules nor the law of principles independent of the context in which they are utilised nor the law as identified with social control nor the law of dichotomies (*e.g.*, imported v. indigenous, state v. people) imposed by scholars notwithstanding people's actual practices; rather, it is the law of people involved in the daily practice of law, *i.e.* the law made

⁸⁴ **J.C.F. COULTER**, *Mind In Action*, Atlantic Highlands, NJ, Humanities Press International, 1989; **R. WATSON**, "Ethnomethodology, Consciousness and Self", *Journal of Consciousness Studies*, 1998, pp. 202-223.

⁸⁵ **D. BENSON and J. HUGHES**, "Method: Evidence and inference-evidence and inference for ethnomethodology", in **G. BUTTON**, *Ethnomethodology and the Human Sciences*, Cambridge, Cambridge University Press, 1991, pp. 128-129.

⁸⁶ **R. WATSON**, "Ethnomethodology, Consciousness and Self", *o.c.*, p. 215.

of the practice of legal rules, of their interpretive principles, and of their eventual identification as plural.