COMMENT ON MERRY

FRANZ VON BENDA-BECKMANN

Merry's comprehensive review shows us how studies of plural normative orderings during the past twenty-five years have greatly enriched our understanding of the complexity of normative structures, their interdependence and the ways in which these structures are involved in human agency. At the same time her review illustrates how little conceptual progress has been made. We do not have a more acute understanding nor a refined conceptual usage of the terms law, normative order, or pluralism. In a way this is reassuring. It tells us that stimulating new research and methodological approaches can be developed without giving much thought to these conceptual problems. The best historical writings in legal pluralism in colonial societies, such as the Dutch studies on Indonesian societies, did not excessively ponder whether the local normative systems should or should not be called law. The neo-classicists of legal pluralism such as Macaulay (1963) and Moore (1973) explicitly did not present their data as *legal* pluralism, and when Galanter (1981) tells us about indigenous law in western societies he does not make much fuss about it.

Yet I do think that more conceptual clarity is desirable. Legalistic ideology has not yet been fully banned from the research methodology of sociolegal studies. Ideological bias is not barred from methodology by simply calling non-state normative systems law. Most studies in legal or normative pluralism, whatever their definition of law may be, still tend to recognize only a limited number of contexts in which the reproduction of elements from the legal system is really a *legal* process. Typically, it is judges (or other representatives of the state, by preference of the judicial apparatus), or more generally legal authorities, whose activity make the process legal. Reproduction of state law by ordinary citizens is not considered legal. This thinking is deeply ingrained in the methodology of sociolegal scholars (K. von Benda-Beckmann 1984: 103–107); it also colors the analyses of the "creation of customary law," to which Merry refers (F. von Benda-Beckmann, 1984).

Descriptions of normative systems should include their ideologies, their claims to exclusive validity and to the monopoly of legitimate power, etc., as empirical phenomena. It is here that we encounter the ideology of legal centralism as the folk system of state officials and legal scientists. We may find similar legal ideologies in religious law or folk legal systems. But we may also find situa-

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tions that involve the mutual (partial) recognition of normative systems on the basis of each system's criteria of validity (as in some cases of the coexistence of secular and religious legal/political institutions). On the *descriptive* level, legal pluralism could be viewed as expressing the normative/ideological interrelations between different normative systems. And we may go further and reserve the concept of pluralism to the duplicatory, or replicatory nature of institutions, rules, and processes, as has been suggested by Van den Berghe (1973) and Vanderlinden (1971).

The question which confronts researchers is whether they should incorporate any such normative claim, and its cognitive postulates concerning "legal reality" ("there is but one legal order", "there is legal pluralism under my terms of validity") into their concept of law. This is an *analytical* question, the search for a set of analytical concepts for the purpose of analysis of variations in a common field characterized by properties (see Nader 1969: 4; in the conclusion of the Gluckman-Bohannan controversy, see also F. von Benda-Beckmann, 1986). If in such a conceptual approach specific normative claims to exclusive and general validity are excluded for the reason that the study of variations in such claims is one of the objects of study, normative mechanisms or systems that are not recognized as such by the dominant system become legal.

A plurality of normative orders in society thus becomes the point of departure for empirical research, irrespective of what individual systems may assert about the valid law or legal pluralism. The concern to disprove the ideological claim of legal centralism by the empirical fact of legal pluralism readily becomes a sort of anti-ideological overkill in which ideology and normative regulations are not taken seriously as categories of social phenomena. Such overreactions to ideology underlie most realistic definitions of law that merge different kinds of social phenomena such as myth, ideal, and thought, on the one hand, and the process, sanctioning behavior and self-regulation, on the other. Such merger does not allow a consistent analysis of their dialectic or interdependence. It leads to statements such as "that any dualistic distinction, such as that between folk law and state law, is misleading because plural normative orders are part of the same system in any particular social context and are usually intertwined in the same micro-processes" (Snyder, as quoted in Griffiths 1986: 17–18, in Merry p. 307). Of course this is not wrong, but talking of intertwining, interaction or mutual constitution presupposes distinguishing what is being intertwined.

It is here that the "reconceptualisation of the law/society relation" that Merry signals in the beginning of her paper [p. 301], starts with the questions of what coexistence, intertwining, and interdependence mean, and in which contexts they should be studied. After Moore's stimulating study (1973) the major theoretical and methodological advances in this field, the reconceptualization

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of the relations between human agency and cognitive and normative structures, the emphasis on the different time and space bound interaction settings in which rule-related actions take place, and on the lines of interdependences between such contexts, have been based on social theory unconcerned with legal pluralism (notably on Giddens 1979; see, e.g., F. von Benda-Beckmann 1983; Henry 1985; Nelken 1985). The strength of Moore's article also did not lie in the fact that she proved legal pluralism, but in that she showed how in everyday relation and interaction networks people generate their own rule system, and in doing so are influenced by (a plurality of) rules and institutional elements that have been, and continue to be, generated and maintained in other interaction settings such as law schools, bureaucracies, and courts. Its limitation is not that she refused to call the rules of the semiautonomous field legal, but that she left open how semiautonomy is established. Is it by normatively defined constraints or by interactive constraints (in the name of law) from persons inside or outside the interaction network? Another limitation of her study was that she did not address the question of what the interdependences between the interactions in the semiautonomous field studied are on economic, social, and normative structures in other semiautonomous fields.

Failure to think in terms of interdependence as interconnections between time- and space-bound human agency may, as in the creation of customary law discussions, lead to unwarranted overgeneralisations of what has been observed in one context. The same danger is present when authors discuss the interaction or the mutual constitution of folk law and state law. Obviously, what happens—simultaneously and consecutively—in different semiautonomous fields with respect to the same general rule system (state, religious, or folk) differs. It may be restated in its pure form in one context, it may be selectively intertwined with elements from other normative systems, or it may be negated in the process of self-regulation; and what happens in one context may, or may not, influence what is going on in others. In this sense, any single normative system is plural, as Merry says (p. 311). But whatever the actors in different fields do will not have the same significance for the maintenance of the overall, complex, normative system. And in whatever they do, they will be constrained, among other things, by the complex normative system in which they act. Pluralism, if we wish, can thus be viewed analytically as the coexistence of two or more sets of normative conceptions within the same process, or in aggregates of processes, of structuration; but also as the coexistence of simultaneous, but different reproduction of the same normative element in more than one context.

Merry's comprehensive account discusses an impressive amount of the relevant material. Yet it is not altogether convinc-

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ing. Some interesting new work (Chiba, 1986; Podgorecki *et al.*, 1985) should have been mentioned. Van den Berghe's (1973) and Vanderlinden's (1971) treatments of pluralism/legal pluralism should have been discussed. Merry further gives the reader the wrong impression that *Anthropology in the Netherlands* (K. von Benda-Beckmann and Strijbosch, 1986) would describe legal pluralism in the Netherlands and therefore is a work in what Merry calls the "new" legal pluralism. What is more serious, however, is that her distinction between the classic and new legal pluralism strikes me as artificial and misleading. Why take Moore, Snyder, and Fitzpatrick as proponents of the new (western) legal pluralism? Rather, why not speak of early and late discovery of plural normative orders? The insinuation that classic and new studies should make odd companions is undermined by Merry herself.

Another reason for a certain lack of coherence lies in Merry's ambivalence and inconsistency concerning the conceptual and analytical issues involved. She seems to be attracted by the recognition of "legal pluralism at home" and the "rejection of the idea of legal centralism," which it involves (as defined by Griffiths, 1986). Yet she is troubled that the approach runs the risk to define legal system so broadly that all social life can be included. But in the end she accepts essential elements that constitute the ideology of state/legal centralism by stating that state law is fundamentally different from other forms of regulation in that it exercises the coercive power of the state and monopolizes the symbolic power associated with state authority. Thus she invalidates herself the first three "conclusions and directions for future research" at the end of her paper (p. 321). She does not really move away from the ideology of legal centralism because the predisposition to think of all legal ordering as rooted in state law is based on this fundamental difference. Taking refuge in "historical definitions" is no way out. It simply distances legal ideologies in time, but not the researcher from legal ideology.

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