

State, Society and the Relations Between Them: Implications for the Study of Legal Pluralism

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This Article examines the implicit assumptions about the state and state-society relations that pervade the literature on legal pluralism. I argue that much of this literature rests on an underlying conception of the state as a monolithic entity which is clearly and objectively differentiated from society. Most notably, John Griffiths' influential distinction between "weak" legal pluralism, which exists within the boundaries of the state, and "strong" legal pluralism, which involves both state and non-state legal orders, reflects such assumptions. I contend that an alternative conceptualization of the state, which acknowledges the internal diversity and contradictions within the state and the blurred boundaries between state and society, can serve as a more productive basis for the study of legal pluralism. Such an approach draws attention to the socially constructed character of the boundaries between state and non-state legal orders, to the social significance of intra-state legal pluralism, to the points of view of individual litigants who maneuver between different courts of law, and to the institutional level of analysis, namely, the complex interrelations between different courts under conditions of legal pluralism.

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INTRODUCTION

Legal pluralism constitutes a major theme in the sociology and anthropology of law, as well as in legal theory of the last few decades. Defined as "the condition in which a population observes more than one body of law,"¹ legal pluralism emerged as a distinct analytical concept in the 1970s.² By the end of the decade, it had become one of the hottest topics in socio-legal research. Anthropologists of law, but also sociologists and historians of law and legal scholars with a social-scientific orientation, were studying instances of legal pluralism everywhere: in the past and in the present, in tribal societies, in nation states and in international law, in post-colonial states and in the industrialized West.³

Indeed, so prominent and self-evident has the legal pluralist perspective become in socio-legal studies of recent years that one reviewer has gone so far as to claim that "legal anthropology can no longer be a distinctive subdiscipline standing apart from the study of legal pluralism,"⁴ and John Griffiths, a major proponent of the theory of legal pluralism, did not hesitate to declare that "[t]he new paradigm, as far as the social scientific study of law is concerned, is legal pluralism."⁵

Hegemonic or not, the legal pluralistic perspective has by no means remained unchallenged and uncontested. Critics such as Brian Z. Tamanaha sought to "pierce the legal pluralism balloon" by revealing its "unstable theoretical foundation," so that "the momentum of the doctrine will break."⁶ Tamanaha's critique, as well as others',⁷ generated a heated debate that focused

1 Gordon R. Woodman, *The Idea of Legal Pluralism*, in LEGAL PLURALISM IN THE ARAB WORLD 3, 4 (Baudouin Dupret, Maurits Berger & Laila al-Zwaini eds., 1999). For similar definitions, see, for example, Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869, 870 (1988); John Griffiths, *What Is Legal Pluralism?*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 2 (1986). A discussion of definitional and conceptual issues related to legal pluralism will follow below.

2 Griffiths, *supra* note 1, at 1.

3 See Merry, *supra* note 1.

4 Chris Fuller, *Legal Anthropology, Legal Pluralism and Legal Thought*, 10 ANTHROPOLOGY TODAY 9, 12 (1994).

5 John Griffiths, *Legal Pluralism and the Theory of Legislation — With a Special Reference to the Regulation of Euthanasia*, in LEGAL POLYCENTRICITY: CONSEQUENCES OF PLURALISM IN LAW 201, 201 (Hanne Peterson & Henrik Zahle eds., 1995).

6 Brian Z. Tamanaha, *The Folly of the "Social Scientific" Concept of Legal Pluralism*, 20 J.L. & SOC'Y 192, 202 (1993).

7 See, e.g., Simon Roberts, *Against Legal Pluralism: Some Reflections on the*

mainly on conceptual and definitional matters. Specifically, questions such as "what is law?" and "what is a body of law?" were intensely debated, for if scholars are to study "populations that observe more than one body of law," they must first have a clear notion of what they are looking for — namely, what a "body of law" is. Proponents and opponents of legal pluralism were also drawn into hairsplitting debates concerning the nature of the relations between law and government/state: Can law exist independently of the state or of central government? Is it analytically and theoretically admissible to speak of non-state law or of non-state legal orders? If so, what is the dividing line between state law and non-state law? And so on.

Of course, none of these questions is new; they have plagued the field of socio-legal studies for many decades. The current debate concerning legal pluralism can in fact be viewed as a reemergence of the old debate concerning the definition of law, which dominated legal anthropology in the first half of the twentieth century and which faded away without resolution.⁸ Legal anthropologist Laura Nader noted, for example, that "direct attempts to define law have not borne much fruit."⁹ There is no wonder, therefore, that the current debate, like its predecessor, is gaining the reputation of being non-constructive and barren.

In this Article I address some of the theoretical and analytical entanglements that have produced this sense of non-constructiveness in the study of legal pluralism, even of having reached a dead-end. I argue that much of the confusion is the result of a significant conceptual lacuna, namely, the failure to conceptualize *the state* in a proper manner. I contend that while students of legal pluralism have put much effort into providing a definite, decisive answer to the question "what is law?", they have paid very little attention to the equally important question "what is the state?" At the same time, the debate on legal pluralism is rife with implicit assumptions concerning the state and its relations with society, which are neither discussed explicitly nor questioned.

This Article therefore has two objectives. First, I attempt to expose and to problematize some implicit assumptions concerning the state and its character which seem to underlie much of the debate on legal pluralism. Specifically, I examine the implicit assumptions concerning the state in two texts that are often considered foundational statements on the subject of legal

Contemporary Enlargement of the Legal Domain, 42 J. LEGAL PLURALISM & UNOFFICIAL L. 95 (1998).

8 For an overview of this debate, see Laura Nader, *The Anthropological Study of Law*, 67 AM. ANTHROPOLOGIST 3, 4-6 (1965).

9 *Id.* at 5.

pluralism: John Griffiths' well-known article, *What Is Legal Pluralism?*,¹⁰ and Brian Z. Tamanaha's often-cited critique of legal pluralism, *The Folly of the "Social Scientific" Concept of Legal Pluralism*.¹¹ Both of these articles have exerted a significant and lasting influence on the study of legal pluralism. My second objective is to discuss an alternative conceptualization of the state, and to highlight the implications of this conceptualization for the study of legal pluralism. I suggest that a more explicit and informed consideration of the state may help to clear up at least some of the confusion that currently prevails in discussions of legal pluralism.

The Article opens with a presentation of Griffiths' and Tamanaha's essays and of the main arguments that they set forth. Part III briefly discusses the debates concerning the definition of the state in the fields of sociology and political science. I show that the concept of the state, just like the concept of law, has been the focus of endless disputations and Sisyphean attempts at formal definition. In light of this discussion, Part IV returns to Griffiths and Tamanaha and uncovers their implicit positions with regard to the state. I contend that although their views concerning the analytical capacities of legal pluralism are antithetical, their implicit understandings of the state are in fact quite similar. It appears that both of them share two assumptions: (a) that the state is a distinct, well-defined entity that can be clearly distinguished from society; and (b) that this entity is monolithic, internally consistent and centralistic. This monolithic image of the state, I argue, is especially problematic coming from Griffiths, since it stands in sharp opposition to his pluralistic view of society.

In Part V I therefore present an alternative conceptualization of the state, which rests on two alternative assumptions: (a) that the boundaries between state and society are blurred, constantly reshaped by actors, and by no means well-defined; and (b) that the state should be viewed as a polycentric construct, an aggregate of institutions and institutional fields, and not as a monolithic entity. I then discuss the implications of this conceptualization for our understanding of legal pluralism. Specifically, I suggest a reconceptualization of Griffiths' influential distinction between "strong" and "weak" legal pluralism. I suggest that a view of the state as more open and pluralistic can lead the theory of legal pluralism in new directions, and perhaps even help to break the stalemate that appears to obstruct it nowadays.

10 Griffiths, *supra* note 1.

11 Tamanaha, *supra* note 6.

I. GRIFFITHS' FORMULATION OF THE "LEGAL-PLURALIST CREDO"

As mentioned above, the notion of legal pluralism entered into socio-legal academic discourse in the early 1970s, and immediately gained considerable status and popularity. The first decade of research on legal pluralism was characterized by rapid accumulation of empirical studies, but relatively scant conceptual and theoretical discussion. Consequently, the growing literature on legal pluralism was characterized by terminological inconsistency, vagueness and analytical obscurity.¹² It was only during the 1980s that theorists managed to conceptualize legal pluralism in a more or less systematic and coherent fashion, although, as we shall see below, the debates were by no means settled and terminology still varies considerably.

Undoubtedly, a new phase in "the intellectual odyssey of the concept of legal pluralism," to quote Merry's apt phrase,¹³ was achieved with the publication of John Griffiths' seminal paper, *What Is Legal Pluralism?* (1986). Griffiths, a legal scholar, offered a systematic examination of key conceptual and analytical issues related to legal pluralism, which was unparalleled in the work of previous writers.

Griffiths opens his paper by explicitly stating his objective: "to establish a descriptive conception of legal pluralism,"¹⁴ which will enable students to compare types and degrees of this socio-legal phenomenon in different societies. Drawing on Moore's notion of "semi-autonomous social fields,"¹⁵ he defines legal pluralism as "that state of affairs, for any social field, in which behavior pursuant to more than one legal order occurs."¹⁶ Following Jacques Vanderlinden,¹⁷ Griffiths thus emphasizes the social group — the "social field" in his terms — within which instances of legal pluralism exist. Moreover, he insists that for legal pluralism to exist, it is not enough that different legal

12 Griffiths, *supra* note 1, at 1.

13 Merry, *supra* note 1, at 869.

14 Griffiths, *supra* note 1, at 1.

15 Moore defines a semi-autonomous social field as a social group that has "rule-making capacities, and the means to induce and 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." Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Object of Study*, 7 LAW & SOC'Y REV. 719, 724-25 (1973).

16 Griffiths, *supra* note 1, at 2.

17 Jacques Vanderlinden, *Le pluralisme juridique: essai de synthèse*, in LE PLURALISME JURIDIQUE 19 (John Gilissen ed., 1971).

orders co-exist within a single social field, but the *actual behavior* of actors should be guided by these orders.

Griffiths then launches a pungent attack on the idea of legal centralism:

A central objective of a descriptive conception of legal pluralism is . . . destructive: to break the stranglehold of the idea that what law *is*, is a single, unified, and exclusive hierarchical normative ordering depending from the power of the state, and of the illusion that the legal world actually looks the way such conceptions require it to look.¹⁸

Griffiths' commitment to the task of deconstructing — or rather, destroying — the idea of legal centralism is indeed uncompromising. For him, the primary objective of legal pluralism as a paradigm is to substantiate the existence of non-state legal orders that coexist with state law and that are not subordinated to it (at least not entirely). This focus leads him to dismiss any instance of legal pluralism that occurs *within* the framework of state law — because "it is not an empirical fact, but merely a feature of the arrangement of state law."¹⁹ Thus, Griffiths makes an important distinction between "legal pluralism in the strong sense" and "legal pluralism in the weak sense." The first, which he considers to be the only "real" and socially significant legal pluralism, is found when state law operates parallel to other, non-state legal orders.²⁰ Also dubbed by him "social-scientists' legal pluralism," legal pluralism in the strong sense is "the name of a social state of affairs and it is a characteristic which can be predicated of a social group. It is not the name of a doctrine or a theory or an ideology."²¹

As an example of legal pluralism in the "strong" sense, Griffiths mentions the internal rule-making capacities of the garment industry in New York City, studied by Sally Falk Moore.²² He argues, following Moore, that this industry

occupies a highly volatile market and consists of the interaction of a variety of persons and organizations (jobbers, contractors, union, trade association). This interaction is to some extent regulated by the general law, to some extent by contractual and similar arrangements between the parties, and partly by unwritten customs and expectations.²³

18 Griffiths, *supra* note 1, at 4-5.

19 *Id.* at 13.

20 *Id.* at 38.

21 *Id.* at 12.

22 Moore, *supra* note 15.

23 Griffiths, *supra* note 1, at 30-31.

By contrast, the second, "weak" type of legal pluralism, which Griffiths calls "lawyers'" or "juristic legal pluralism," occurs within the boundaries of state law. This type of legal pluralism, according to Griffiths, is not a "social fact," but a product of a legal doctrine. It is irrelevant for the purpose of producing a descriptive conception of legal pluralism, which requires an "empirical intent," i.e., an empirical focus. In Griffiths' view, to adopt a "juridical intent" is to implicitly accept the state's claims to exclusive regulation of social life as conclusive statements of reality.²⁴ Thus, for example, according to him the Ottoman *Millet* system — in which special communal courts were designated for each of the recognized religious communities in the Ottoman Empire — should be regarded as a clear case of "weak" legal pluralism.²⁵

In line with these assertions, Griffiths criticizes previous writers who did not distinguish between "weak" and "strong" legal pluralism. He analyzes Barry Hooker's writings,²⁶ and concludes that many of his examples are actually cases of "lawyers'" or "weak" legal pluralism. He notes that Hooker draws on various types of documentary evidence of formal state laws, and charges him with concentrating on "conceptual analysis, in doctrinal legal terms,"²⁷ rather than studying empirical social facts and "empirical" legal pluralism.

II. TAMANAHA'S CRITIQUE OF GRIFFITHS

Tamanaha's critical essay *The Folly of the "Social Scientific" Concept of Legal Pluralism* is naturally directed against all studies using the theoretical framework of legal pluralism and against the very concept of legal pluralism. Yet his most poignant criticism is targeted directly at Griffiths' influential formulation of the "legal-pluralist credo." Tamanaha develops his critique of Griffiths along several tracks: first, he contends that the attack on legal centralism is like kicking a dead horse, since "few lawyers today would describe the law in such terms."²⁸ Therefore, if the alleged opponent is not as hegemonic as presumed, perhaps we should not make such a fuss

²⁴ *Id.* at 9-10.

²⁵ On the Ottoman *Millet* system, see Benjamin Braude, *Foundation Myths of the Millet System*, in CHRISTIANS AND JEWS IN THE OTTOMAN EMPIRE: THE FUNCTIONING OF A PLURAL SOCIETY 70 (Bernard Lewis & Benjamin Braude eds., 1982).

²⁶ BARRY M. HOOKER, *LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS* (1975).

²⁷ Griffiths, *supra* note 1, at 10.

²⁸ Tamanaha, *supra* note 6, at 196.

about legal pluralism. Second, he derides Griffiths' scientific pretensions to reconceptualize "law" in a more accurate and "objective" (legal-pluralistic) manner. The "folly of the social-scientific concept of legal pluralism," to quote Tamanaha's title, is to see legal pluralism "in this time of increasing sensitivity to the insights of interpretivism" as an "unmediated look at social reality — that . . . even gets underneath concepts to reach things ('the facts') as they really are."²⁹ Third, and most importantly, Tamanaha criticizes the "Malinowskian approach to law" taken by Griffiths and other legal pluralists who followed him. This approach to law, Tamanaha argues, results in a profoundly ambiguous notion of law that cannot be substantiated.³⁰

This third criticism is of course directly related to the old debate concerning the definition of law, which was mentioned in the Introduction to this Article. Tamanaha argues that the very existence of non-state legal orders is questionable. He claims that law is empirically and analytically distinct from other normative orders, since the essence of law is its identification with, and enforcement by, state institutions, while non-state normative orders (even if they are institutionally enforced) are no more than the "concrete patterns of social ordering."³¹ Thus, in Tamanaha's view, there is an ontological divide between state law and other normative orders, and the term "law" must be reserved for state law only.³²

According to Tamanaha, any recognition of non-state normative orders as "law" immediately produces the "Malinowski problem": it becomes impossible to define law precisely, and any attempt to do so leads to a slippery slide and to the conclusion that all forms of social control are law:

Not only does the term "law" thereby lose any distinctive meaning — law in effect becomes synonymous with normative order — other forms of normative orders like moral or political norms, or customs, habits, rules of etiquette, and even table manners are swallowed up to become law.³³

Taking Tamanaha's arguments together, we may conclude that if we extend the concept of law beyond state law, we immediately face an almost insurmountable problem of differentiating the legal from the non-legal. Thus, we cannot speak of non-state legal orders, and therefore the concept

29 *Id.* at 198 (quoting Griffiths, *supra* note 1, at 4).

30 *Id.* at 193, 205.

31 *Id.* at 206. This expression is borrowed from Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering and Indigenous Law*, 19 J. LEGAL PLURALISM 1, 17 (1981).

32 *Id.* at 201.

33 *Id.* at 193.

of legal pluralism cannot be sustained. This line of critique, which was brought up by other writers as well,³⁴ poses a difficult challenge to the theoretical framework of legal pluralism.³⁵

Although Griffiths' and Tamanaha's views appear to be diametrically opposed, there is one thing that they have in common: they both completely neglect the conceptualization of the state. While much of their intellectual and analytical energies are directed towards defining "law" and the "legal," they seem to assume that the "state" is a well-defined, self-evident concept which does not merit much discussion. Thus in their discussions of "state law," the second part of this phrase receives all the analytical attention, while the first part remains completely unexamined. And yet, the concept of "state" is in fact just as elusive and resistant to formal definition as the concept of "law." Sociologists and political scientists have long been engaged in frustrating, desperate and often unconstructive attempts to answer the question "what is a state?", attempts that are analogous to the desperate (and equally unconstructive) attempts of socio-legal scholars to answer the question "what is law?"³⁶

34 Warnings against too broad a conceptualization of law, which results in a conflation of legal order with social and cultural orders, may be found, for example, in Boaventura de Sousa Santos, *Law: A Map of Misreading. Toward a Post-Modern Conception of Law*, 14 J.L. & SOC'Y 279, 279 (1987); Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 CARDOZO L. REV. 1443, 1444 (1992); Carol J. Greenhouse, *Legal Pluralism and Cultural Difference*, 42 J. LEGAL PLURALISM & UNOFFICIAL L. 61, 64-65 (1998); Sally F. Moore, *Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949-1999*, 7 J. ROYAL ANTHROPOLOGICAL INST. 95, 106 (2001).

35 Tamanaha published one more influential article on legal pluralism: Brian Z. Tamanaha, *A Non-Essentialist Version of Legal Pluralism*, 27 J.L. & SOC'Y 296 (2000). Interestingly, it appears that over the years, Tamanaha underwent a change of heart with regard to legal pluralism. In this later essay he appears to be joining the ranks of the "legal pluralists," while promoting a "non-essentialist" approach to legal pluralism. There are certain similarities between Tamanaha's later approach, which is influenced by the works of Boaventura de Sousa Santos and Gunther Teubner, and the constructionist approach that I am proposing here, but there are also some significant differences. A comprehensive discussion of Tamanaha's second article on legal pluralism, however, is beyond the scope of this Article. For the writings of de Sousa Santos and Teubner on legal pluralism, see the sources cited *supra* note 34. For a discussion of Tamanaha's "non-essentialist" approach to legal pluralism, see Franz Von-Benda-Beckmann, *Who's Afraid of Legal Pluralism?*, 47 J. LEGAL PLURALISM & UNOFFICIAL L. 37, 45 (2002).

36 See, e.g., Philip Abrams, *Notes on the Difficulty of Studying the State*, 1 J. HIST. SOC. 58 (1988); George Steinmetz, *Culture and the State*, in STATE/CULTURE: STATE FORMATION AFTER THE CULTURAL TURN 1, 4-5 (George Steinmetz ed., 1999).

In the next Part I will briefly review, in very broad contours, the debate concerning the definition of the state in the disciplines of sociology and political science. Following this presentation, I will return to Griffiths and Tamanaha and examine the image of the state that emerges, perhaps unwittingly, from their writings.

III. CONCEPTUALIZING THE STATE

According to political sociologist Bob Jessop, "states are not the sort of abstract, formal objects which readily lend themselves to clear-cut, unambiguous definition."³⁷ Rather, the state is a "messy concept,"³⁸ characterized by a paradoxical set of attributes: it is real and self-evident, but also illusory and "ambiguously defined;"³⁹ it is a historically contingent entity, but also, in the public imagination, a timeless, universal entity.⁴⁰ It is an aggregate of specified institutions, but also a bundle of functions. This paradoxical nature of the state is particularly resistant to objectivist definitions.⁴¹

In a highly influential essay, Timothy Mitchell reviews the intellectual history of the concept of the state in post-World War II political science.⁴² He shows that the profound difficulty of conceptualizing the state yielded two opposite responses among political scientists. The first was to abandon the state altogether as an analytical concept, replacing it with the concept of the "political system."⁴³ The second, which emerged in reaction to the first, was

37 BOB JESSOP, *STATE THEORY: PUTTING CAPITALIST STATES IN THEIR PLACE* 340 (1990).

38 Michael Mann, *The Autonomous Power of the State: Its Origins, Mechanisms and Results*, 25 *EUR. J. SOC.* 185, 185 (1984).

39 See Akhil Gupta, *Blurred Boundaries: The Discourse of Corruption, the Culture of Politics, and the Imagined State*, 22 *AM. ETHNOLOGIST* 375 (1995); MICHEL-ROLPH TROUILLOT, *GLOBAL TRANSFORMATIONS: ANTHROPOLOGY AND THE MODERN WORLD* 79 (2003).

40 John Bendix, Bartell Ollman, Bartholomew H. Sparrow & Timothy P. Mitchell, *Going Beyond the State?*, 86 *AM. POL. SCI. REV.* 1007, 1009 (1992).

41 MARK J. SMITH, *RETHINKING STATE THEORY* 7 (2000).

42 Timothy P. Mitchell, *The Limits of the State: Beyond Statist Approaches and their Critics*, 85 *AM. POL. SCI. REV.* 77 (1991).

43 This point illustrates the striking analogy between the debate concerning the definition of law and the debate concerning the definition of the state. Whereas the difficulty of defining the state has led some political scientists to abandon the concept of state in favor of the broader concept of "political system," the difficulty of defining "law" has led some socio-legal scholars to call for the abandonment

to "bring the state back in"⁴⁴ and to conceptualize it not only as distinct from society but also as partially or entirely autonomous in relation to it.

Mitchell criticizes both these approaches. He argues that the first approach, which he names "the system approach," advocates a shift from the formal study of the state to the meticulous examination of presumably well-defined political systems. This move, he claims, has in effect resulted in the elimination of any boundary between the political domain and other domains (social, cultural, religious, etc.).

By contrast, the second approach — "the statist approach" in Mitchell's terms — adopts a narrow, subjectivist point of view, which reduces the state to a system of decision making. Political theorists advocating this approach, such as Skocpol⁴⁵ and Nordlinger,⁴⁶ conceptualize the state, according to Mitchell, as essentially a subjective actor that exhibits the coherence, agency and subjectivity that we normally attribute to individual actors:

Like personhood, statehood is conceived [in the statist approach] in fundamentally idealist terms. The state stands apart from society as a set of original intentions or preferences, just as persons are thought of as units of autonomous consciousness and desire distinct from their material or social world. However uncertain its edges, the state, like the person, is an essential unity.⁴⁷

Except that states are not persons, and Mitchell demonstrates, convincingly in my view, that such "statist" conceptualizations fail to explain the complexity, the internal contradictions and the internal dynamics of state policy. He thus concludes that both approaches fail to properly conceptualize the state and its dialectical relations with society.

Mitchell points to some new directions and ideas that may potentially avoid the pitfalls of both approaches. But before we move on to discuss some of his ideas, let us return to Griffiths and Tamanaha. What approach

of the concept of law in favor of the broader concept of "normative order." For such calls, see, for example, Roberts, *supra* note 7; Bouduin Dupret, *Legal Pluralism, Normative Pluralism and the Arab World*, in *LEGAL PLURALISM IN THE ARAB WORLD* 29, 31 (Baudouin Dupret, Maurits Berger & Laila al-Zwaini eds., 1999).

44 This was the title of a seminal article by Theda Skocpol, which appeared in a volume of collected essays under the same title. See Theda Skocpol, *Bringing the State Back In: Strategies of Analysis in Current Research*, in *BRINGING THE STATE BACK IN* 3 (Peter Evans, Dietrich Rueschemeyer & Theda Skocpol eds., 1985).

45 *Id.*

46 Eric Nordlinger, *Taking the State Seriously*, in *UNDERSTANDING POLITICAL DEVELOPMENT* 353 (Myron Weiner & Samuel P. Huntington eds., 1987).

47 Mitchell, *supra* note 42, at 88.

do they implicitly take with regard to the state? In the next Part, I will argue that both scholars implicitly embrace a view of the state that is close to what Mitchell dubs "the statist approach."

IV. GRIFFITHS' AND TAMANAHA'S IMPLICIT ASSUMPTIONS ABOUT THE STATE AND STATE-SOCIETY RELATIONS

As we have seen, Tamanaha's critique of Griffiths is indeed sweeping. Yet, surprisingly, one important component of Griffiths' conceptualization of legal pluralism does not raise problems for Tamanaha. I refer to Griffiths' most influential distinction — that between "strong" and "weak" legal pluralism. As noted above, Griffiths made this distinction as part of his attempt to develop a "descriptive concept" of legal pluralism, and it has generally been accepted as the most fundamental distinction between types of legal pluralism.⁴⁸

My contention is that this distinction between two types of legal pluralism — one of them "strong" and socially significant, and the other "weak" and nominal — stems from an implicit, naïve "statist" perception of the state and of its relations with society. It appears that Griffiths' weak/strong distinction rests on two underlying assumptions with regard to the state.

First, Griffiths assumes that the state (and its legal embodiment, state law) is a well-defined entity, which is to a significant extent distinct from society and autonomous relative to it. Moreover, state law is perceived by him not as a "living law," but as a doctrine, detached from social life. Accordingly, state law is mostly the domain of lawyers, not of social scientists.⁴⁹ By contrast, non-state legal orders are "concrete patterns of social ordering," and thus constitute a proper object of study for social scientists.

Second, while Griffiths presents a pluralistic perception of social life as guided by different normative orderings, he uncritically adopts a monolithic perception of the state. Consequently, he interprets any manifestation of legal

48 See, e.g., Merry, *supra* note 1, at 870; Gordon R. Woodman, *Ideological Combat and Social Observation: Recent Debates About Legal Pluralism*, 42 J. LEGAL PLURALISM & UNOFFICIAL L. 21, 32-40 (1998); Ann Griffiths, *Legal Pluralism*, in INTRODUCTION TO LAW AND SOCIAL THEORY 289, 290 (Raza Banakar & Max Travers eds., 2002); Emmanuel Melissaris, *The More the Merrier: A New Take on Legal Pluralism*, 13 SOC. LEGAL STUD. 57, 77 n.1 (2004).

49 Indeed, Griffiths does call on social scientists to examine state law, but only for the purpose of revealing its lack of social impact. See John Griffiths, *Is Law Important?*, 54 N.Y.U. L. REV. 339 (1979).

pluralism that occurs within the boundaries of state law as lacking social significance. In his view, for example, once state law formally recognizes an indigenous or religious law, the latter immediately becomes an integral part of the former, and loses any distinct social impact it ever had. Legal pluralism, as much as we can speak of it in such cases, is no longer real and consequential, but merely doctrinal or "nominal" (since it does not affect behavior any more). By contrast, normative orderings that evade the bleak fate of appropriation by state law maintain their distinct effect on social life. Thus, the "private legal systems" of institutions such as universities and corporations,⁵⁰ or the normative orders of semi-autonomous social fields like the garment industry in New York,⁵¹ produce "strong" legal pluralism when they interact with state law.

As we can see, Griffiths' conception of state-society relations and of state law is extremely formalistic, perhaps even "legalistic."⁵² In fact, what we have here is a peculiar inversion: while Griffiths squarely attacks legal centralism, he himself ends up stating, at least implicitly, that state law is "uniform for all persons" and "administered by a single set of state institutions." Notably, as Tamanaha argues, legal scholars themselves have ceased in recent decades to view state law in such terms. Ronald Dworkin's well-known work on the common law reveals that, contrary to this image, state law is not an internally consistent logical system, nor is it clearly bounded and distinct from other normative orders.⁵³

It should be noted, however, that Tamanaha's critique reflects the very same underlying assumptions with regard to the state. In this sense, Griffiths and Tamanaha develop their arguments within the same paradigm. Tamanaha, too, conceives of state law as a separate, autonomous and self-contained legal universe, which is ontologically different from other forms of social order. He too views state law as a monolithic and relatively coherent entity. Nevertheless, whereas these assumptions lead Griffiths to overemphasize the autonomy of non-state legal orders, they lead Tamanaha to overemphasize the role of the state in constituting and defining legal orders.⁵⁴

50 Galanter, *supra* note 31, at 17-18.

51 Moore, *supra* note 15.

52 Indeed, Mitchell claims that the "statist" approach usually adopts a "legalistic" perspective. See Mitchell, *supra* note 42, at 92.

53 RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978); RONALD DWORKIN, *LAW'S EMPIRE* (1986).

54 See also Ruth Halperin-Kadari, *Rethinking Legal Pluralism in Israel: The Interaction Between the High Court of Justice and the Rabbinical Courts*, 20 TEL-AVIV U. L. REV. 683, 724 n.130 (1997) (Hebrew).

To take this argument a step further, it may be claimed that both Griffiths and Tamanaha succumb to prevalent ideologies that portray the state as separate, distinct and somehow "above" society. In Mitchell's words, both scholars portray

[a] world that appears to consist not of a complex of social practices but of a binary order: on the one hand individuals and their activities, on the other an inert structure that somehow stands apart from individuals, precedes them, and contains and gives a framework to their lives⁵⁵

We may conclude, therefore, that despite Griffiths' proclaimed opposition to legal centralism, his implicit assumptions with regard to the state are in fact "statist" and centralist in nature. His view appears to reflect a conception of the state as analogous to an actor, separate from society and exhibiting a significant degree of internal coherence. It is from this conception of the state that his highly influential distinction between "strong" and "weak" legal pluralism emanated, and it is through this distinction that legal centralist assumptions have re-entered the literature on legal pluralism.

The affirmation of this distinction by many other students of legal pluralism had two unfortunate consequences: first, it made the discourse on legal pluralism analytically and theoretically inconsistent; and second, it encouraged a polarization of the socio-legal field between legal scholars and social scientists. As a result of this polarization, the study of legal pluralism within the boundaries of state law was virtually monopolized by legal scholars, while the study of non-state legal orders was left to social scientists. This sharp division of labor made cross-fertilization between the disciplines difficult to achieve. Even more importantly, because of this division of labor the study of a particularly pervasive type of legal pluralism, namely, state legal pluralism,⁵⁶ has been largely neglected.

⁵⁵ Mitchell, *supra* note 42, at 95-96.

⁵⁶ See Woodman's discussion of the legal pluralism that occurs within the boundaries of state law, which he terms "state legal pluralism." Woodman, *supra* note 48, at 51-52. See also Von-Benda-Beckmann, *supra* note 35, at 64-65. One school of thought that was engaged in the study of state legal pluralism was the Nordic school of legal polycentricity, discussed below.

**V. AN ALTERNATIVE CONCEPTUALIZATION OF THE STATE
AND OF STATE-SOCIETY RELATIONS AND ITS IMPLICATIONS
FOR THE STUDY OF LEGAL PLURALISM**

As Mitchell persuasively argues, any attempt to develop an alternative conceptualization of the state must begin by recognizing that the elusiveness of the state-society boundary needs to be taken seriously, not as a problem of conceptual precision but as a clue to the nature of the phenomenon itself.⁵⁷ Thus, an alternative conceptualization of the state and of state-society relations must rest on the assumption that

[t]he line between state and society is not the perimeter of an intrinsic entity, which can be thought of as a freestanding object or actor. It is a line drawn internally, within the network of institutional mechanisms through which a certain social or political order is maintained [T]his does not mean that the line is illusory. On the contrary [P]roducing and maintaining the distinction between state and society is itself a mechanism that generates resources of power.⁵⁸

In other words, Mitchell argues against closed, universal, ahistorical and formal definitions of the state and of the boundaries between state and society. Instead, he contends that the boundaries between state and society are emergent, context-dependent and socially constructed. Actors themselves may manipulate these boundaries for various strategic reasons. Rather than viewing state and society as two distinct and freestanding actors, we should speak of a continuum that runs between state and non-state entities and institutions, with the exact demarcation line empirically determined and open to negotiation.

The scope of this Article does not allow me to elaborate on Mitchell's conception of the state and to discuss, for example, his use of Foucauldian theory to analyze the mechanisms through which the state-society boundary is socially constructed in specific historical circumstances. True, Mitchell is far from resolving the profound problems associated with conceptualizing the state. Moreover, formal and positive definitions cannot be abandoned altogether, and Mitchell's article fails to deliver the goods in this regard. Nevertheless, Mitchell and other contemporary scholars⁵⁹ do indicate

⁵⁷ Mitchell, *supra* note 42, at 79.

⁵⁸ *Id.* at 90.

⁵⁹ *E.g.*, Bob Jessop, *Institutional (Re)turns and the Strategic Relational Approach*,

valuable new directions for theorizing the state and state-society relations, which can potentially inspire socio-legal theory as well.

In the following pages, I will discuss three interrelated implications of the above discussion for the study of legal pluralism. First, I will discuss the distinctions between state law and non-state law, and between law and other normative orders. Second, I will address the issue of the heterogeneity of state law, i.e., state legal pluralism. Finally, I will suggest a new definition of "strong" and "weak" types of legal pluralism, based on the assertion that legal pluralism that occurs within the boundaries of state law may be just as "strong" and consequential as legal pluralism that transcends those boundaries.

Political scientists such as Mitchell⁶⁰ and Jessop⁶¹ attempt to avoid closed, definite, formal and universal answers to the question "what is the state." Instead, they opt for more limited, operational and historically contingent answers which do not delineate the boundaries of this concept with a considerable degree of precision, but which are sufficient for meaningful and constructive empirical research. Similar principles should guide the attempts to tackle the question "what is law." Scholars should substitute limited, operational, historically contingent definitions of law for universal and ahistorical definitions. Indeed, legal anthropologist Laura Nader called for just such an approach as early as the 1960s, in the context of the old debate over the definition of law.⁶²

Accordingly, it should be recognized that the boundaries between law and non-legal normative orders, as well as between state law and non-state law, are blurred and open to social construction and negotiation. We can speak of a continuum that runs from the clearest cases of law to the clearest cases of non-legal normative orders.⁶³ Within the realm of law, we can speak of a continuum that stretches from bodies of law and legal institutions that are directly and formally supported by the state to bodies of law and legal institutions that are hardly recognized or even opposed by it. The exact dividing lines within these continuums — between law and non-legal social norms, and between state and non-state law — should be defined operationally, relative to the specific socio-historical context and socio-legal

33 ENV'T & PLANNING 1213 (2001); Bob Jessop, *Liberalism, Neoliberalism, and Urban Governance: A State-Theoretical Perspective*, 34 ANTIPODE 452 (2002).

60 Mitchell, *supra* note 42.

61 Bob Jessop, *Bringing the State Back In (Yet Again): Reviews, Revisions, Rejections and Redirections*, 11 INT'L REV. SOC. 149 (2001).

62 Nader, *supra* note 8, at 5.

63 For a similar argument, see Woodman, *supra* note 48, at 44-45.

orders under examination. Moreover, scholars should take into account the manner in which actors themselves draw these dividing lines and manipulate them, in accordance with their cultural understandings and personal interests and agendas.

This last point can be demonstrated briefly by an empirical example. In a recent article, Nurit Tsafir examines the interrelations between Israeli civil courts and Arab customary law in contemporary Israel.⁶⁴ She argues that the customary institution of *sulha* (an agreement for peaceful settlement of a dispute) often influences the criminal proceedings as well as the decisions of Israeli civil courts. For example, in many cases, the attainment of a *sulha* outside of the court may raise the chances that the accused will be offered an alternative to incarceration. On the other hand, *sulha* agreements may also, on rare occasions, work against a defendant, since judges sometimes consider the fact that a *sulha* has taken place as an indication that the defendant committed the crimes of which he or she is accused. Although Tsafir does not refer to this possibility directly, there is reason to assume that in such cases, the accused, their legal representatives and state attorneys can argue either for the recognition of *sulha* agreements by state law and civil courts or against it. In other words, the parties themselves, acting according to their interests, may push towards state recognition of customary law or towards non-recognition of this law. Establishing a relationship between state law and a non-state body of law is therefore a matter of dispute and negotiation, which can serve as a resource in concrete legal struggles that take place in court. In this particular case, the interrelations between state law and customary law can also be viewed as a reflection of identity politics and power struggles at the national level.

The blurred boundaries between state law and non-state legal orders can also be illustrated by examining Griffiths' own examples of "strong" legal pluralism. As mentioned above, Griffiths claims that the "private laws" of corporations or universities are external to state law and distinct from it, and that their interaction with state law therefore constitutes a case of "strong legal pluralism." However, it is clear that if such institutions enforce a private normative order that directly violates state law, state institutions are likely to intervene (provided the matter is brought to their attention) through regulators, courts or enforcement agencies and to invalidate such a code as illegal.⁶⁵

In this respect, states intervene in semi-autonomous social fields both more

64 Nurit Tsafir, *Arab Customary Law in Israel: Sulha Agreements and Israeli Courts*, 13 ISLAMIC L. & SOC'Y 76 (2006).

65 For example, if a university promulgates an internal code that bars handicapped

and less than Griffiths assumes. State interventions in semi-autonomous social fields are more pervasive than he is willing to recognize, but also less vigorous and overbearing than he assumes. Instead of Griffiths' all-or-nothing conception of state intervention, a more realistic view is required, one that admits that the state has a considerable capacity to intervene in semi-autonomous fields, and yet that its intervention is often partial, limited and indirect. For example, under the influence of globalization coupled with neo-liberal reforms, contemporary states do tend to allow new forms of non-state governance.⁶⁶ Nevertheless, the withdrawal of the state from broad areas of social life is never complete, and states may intervene at crucial moments in (almost) any social field.⁶⁷ In other words, the autonomy of social fields may be growing, but they are still only *semi*-autonomous.

Acknowledging the impact of states on semi-autonomous social fields does not entail, however, a return to a legal centralist perspective. To the contrary, this acknowledgment is based on the assumption that states are not centralistic, uniform entities, but rather decentralized aggregates of institutions, which do not always operate in a coherent manner. Moreover, states' intervention in semi-autonomous social fields may range from the most constraining to the virtually imperceptible.⁶⁸

This leads us to a second lesson that students of legal pluralism can learn from the debate among political scientists on the definition of the state — the need to highlight not only the heterogeneity, pluralism and contradictions that are external to state law, but also those that are internal to it. Since the state itself should be conceptualized as a polycentric and internally differentiated arena of social action, its legal embodiment, state law, should also be viewed in a similar way. State law can consist of diverse legal institutions and various bodies of legal doctrine which are related to each other in multiple ways, and which may occasionally oppose each other and pull in many different directions.

The assertion that diverse legal institutions and bodies of law co-exist

persons, Jews or women from enrolling, it is more than likely that this code will be nullified by the (liberal) state, either in the courts or through legislation.

66 On new forms of governance, see R.A.W. Rhodes, *The New Governance: Governing Without Government*, 44 POL. STUD. 652 (1998); Jon Pierre, *Introduction to DEBATING GOVERNANCE: AUTHORITY, STEERING AND DEMOCRACY 1* (Jon Pierre ed., 2000).

67 See Louis W. Pauly & Edgar Grande, *Reconstituting Political Authority: Sovereignty, Effectiveness and Legitimacy in a Transnational Order*, in COMPLEX SOVEREIGNTY: RECONSTITUTING POLITICAL AUTHORITY IN THE TWENTY FIRST CENTURY 3, 5-6 (Edgar Grande & Louis Pauly eds., 2005); TROUILLOT, *supra* note 39, at 83.

68 TROUILLOT, *supra* note 39, at 89-90.

within state law is by no means new to legal scholars and students of legal pluralism.⁶⁹ In the last decade, this point has been taken up and elaborated by scholars who study "legal polycentricity." This school, which originated in the Nordic countries, highlights the internal diversity of state law, and derives from "an understanding of 'law' as being engendered in many centers — not only within a hierarchical structure — and consequently as having many forms."⁷⁰ Obviously, the concept of legal polycentricity bears a significant resemblance to the older concept of legal pluralism. Nevertheless, students of legal polycentricity note that whereas legal pluralism was developed by scholars looking at law from the outside (that is, by social scientists), "legal polycentricity attempts to reform the understanding of law from inside."⁷¹ In other words, students of legal polycentricity accept the superficial division of labor between social scientists and legal scholars, according to which the former focus on legal pluralism *between* state and non-state legal systems, whereas the latter specialize in legal polycentricity (or legal pluralism) *within* the state legal system.⁷² It appears that Griffiths' ill-conceptualized distinction between a "strong" legal pluralism of social scientists which transcends the boundaries of state law and a "weak" legal pluralism of legal scholars which is encapsulated within these boundaries is once again reproduced here. I argue, however, that the time is ripe for discarding this superficial division of labor and adopting a unified, general framework of legal pluralism, which applies the same analytical and disciplinary tools within state law and outside it.

Should we then abandon the distinction between "weak" legal pluralism and "strong" legal pluralism altogether? Perhaps we should — at least for the sake of clarity. However, I believe that the degree of legal pluralism or its "strength" is an important parameter, and that students of legal pluralism must therefore establish a yardstick for measuring the strength of legal pluralism in their empirical case studies.⁷³

As argued above, the differentiation between legal pluralism that occurs within the boundaries of the state and legal pluralism that transcends state

69 The thriving fields of conflict of laws and private international law attest to this.

70 Hanne Patersen & Henrik Zahle, *Introduction* to LEGAL POLYCENTRICITY: CONSEQUENCES OF PLURALISM IN LAW, *supra* note 5, at 3, 8.

71 *Id.*

72 For a critical discussion of the notion of legal polycentricity, see Gordon Woodman, Book Review, 39 J. LEGAL PLURALISM & UNOFFICIAL L. 155 (1997) (reviewing LEGAL POLYCENTRICITY: CONSEQUENCES OF PLURALISM IN LAW, *supra* note 5).

73 For a different approach to assessing the strength of legal pluralism, see Yüksel Sezgin, *Theorizing Formal Pluralism: Quantification of Legal Pluralism for Spatio-Temporal Analysis*, 50 J. LEGAL PLURALISM & UNOFFICIAL L. 101 (2004).

boundaries cannot constitute such a yardstick. Instead, I suggest, following Jacques Vanderlinden,⁷⁴ that we measure the "strength" of legal pluralism by focusing on the point of view of the litigants. In other words, the criterion for the "strength" of legal pluralism should be the ability of litigants to engage in meaningful forum shopping.

Vanderlinden proposes to use the term legal pluralism to denote cases in which a person, in his or her daily life, experiences various different "regulatory orders." He thus calls for a shift in focus: "instead of looking at the legal pyramid from the top, from the centres of decisions, from the standpoint of power, one is brought to contemplate it at the level of ordinary men in their daily activities."⁷⁵ Accordingly, he defines legal pluralism as "a situation in which, from the point of view of an individual, legal mechanisms belonging to different legal orders are likely to apply."⁷⁶

I therefore propose the following conceptualization of strong vs. weak legal pluralism: from the point of view of an active individual agent, "strong" legal pluralism exists if he or she may choose to appeal in a particular matter to more than one tribunal or "legal mechanism." Presumably, a social agent's choice to appeal to one legal mechanism rather than the other may have significant implications not only for the legal trajectory taken, but also for the outcome of the legal confrontation.⁷⁷

By contrast, when a legal system designates specific tribunals (or "legal mechanisms," to use Vanderlinden's term) to specific categories of the population (e.g., Muslims, Jews, Chagas, Navahos, soldiers, tradesman, minors, etc.), and each individual has access to only one tribunal, then we have a case of "weak" legal pluralism. Notably, according to this formulation, legal pluralism in the weak sense may only take place *within* a legal system, whereas legal pluralism in the strong sense may occur either *within* a legal system or *between* legal systems.⁷⁸

74 Jacques Vanderlinden, *Return to Legal Pluralism: Twenty Years Later*, 28 J. LEGAL PLURALISM & UNOFFICIAL L. 149 (1989) [hereinafter Vanderlinden, *Return*]; Jacques Vanderlinden, *Vers une nouvelle conception du pluralisme juridique*, 53 REVUE DE LA RECHERCHE JURIDIQUE — DROIT PROSPECTIF 573 (1993) [hereinafter Vanderlinden, *Vers une nouvelle conception*].

75 Vanderlinden, *Return*, *supra* note 74, at 153.

76 "la situation, pour individu, dans laquelle des mécanismes juridiques relevant d'ordonnements différents sont susceptibles de s'appliquer à cette situation." Vanderlinden, *Vers une nouvelle conception*, *supra* note 74, at 583.

77 Of course, this criterion emphasizes processes of dispute resolution. It does not refer to other aspects and functions of legal systems.

78 The term "legal system," as I use it here, does not designate a fully coherent and systematized legal order, but rather suggests that there are connections and

Under conditions of "strong" legal pluralism thus defined, litigants tend to engage in forum shopping: they are free to choose a court in which they believe they have a greater chance of attaining a favorable result.⁷⁹ Legal scholars often view this phenomenon critically, on the grounds that forum shopping violates the principle of the unity of law.⁸⁰ Legal anthropologists, on the other hand, are less concerned with the normative implications of such strategic behaviors. Instead, they focus on their social implications, and try to answer questions such as: who benefits from forum shopping? Does forum shopping serve the interests of the dominant party in the dispute (typically, men), or does it serve the disadvantaged party (typically, women)?⁸¹

According to this new definition of strong versus weak legal pluralism, legal pluralism in the strong sense can occur either within the state legal system or between this system and other systems. Most importantly, many situations of legal pluralism that are intrinsic to the state legal system are considered just as strong and socially consequential as those that are extrinsic to it.

A brief example may serve to illustrate my formulation of strong and weak legal pluralism. Under the Israeli personal status regime, each recognized religious community in Israel maintains its own religious courts, which have jurisdiction in matters of personal status relating to their respective community members.⁸² For historical reasons, Shari'a courts in Israel used

interdependencies between the system's components. For a similar conceptualization of "legal system," see Von-Benda-Beckmann, *supra* note 35, at 63.

79 BLACK'S LAW DICTIONARY 681 (8th ed. 2004).

80 See, e.g., David E. Steinberg, *The Motion to Transfer and the Interest of Justice*, 66 NOTRE DAME L. REV. 443 (1990); Kimberley J. Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267 (1996); Andreas F. Lowenfeld, *Forum Shopping, Antisuit Injunctions, Negative Declarations, and Related Tools of International Litigation*, 91 AM. J. INT'L L. 314 (1997). Nevertheless, in recent years legal scholars appear to have become more tolerant of this phenomenon. See Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507 (1995); ANDREW S. BELL, FORUM SHOPPING AND VENUE IN TRANSNATIONAL LITIGATION (2003).

81 See, e.g., ATHALIA MOLOKOMME, CHILDREN OF THE FENCE: THE ALIMONY OF EXTRA-MARITAL CHILDREN UNDER LAW AND PRACTICE IN BOTSWANA (1991).

82 This personal status regime is a vestige of the Ottoman *Millet* system. Daniel Friedmann, *The Effect of Foreign Law on the Law of Israel: Remnants of the Ottoman Period*, 10 ISR. L. REV. 192, 206 (1976); Mark Galanter & Jayanth Krishnan, *Personal Law Systems and Religious Conflicts: A Comparison of India and Israel*, in RELIGION AND PERSONAL LAW IN SECULAR INDIA: A CALL TO JUDGMENT 270 (Gerald J. Larson ed., 2001). On the Ottoman *Millet* system, see Braude, *supra* note 25.

to have broader jurisdiction than other religious courts.⁸³ In fact, unlike Rabbinical, Ecclesiastical and Druze courts, which had exclusive jurisdiction only in matters pertaining to marriage and divorce, Shari'a courts had exclusive jurisdiction in almost *all* matters pertaining to the personal status of Muslims.⁸⁴ Consequently, Israeli Muslims involved in family disputes were forced to litigate in Shari'a courts (except in matters of succession), whereas Jewish, Christian or Druze litigants had the option of filing suit either in civil courts or in their respective religious courts (except in matters of marriage and divorce, in which the religious courts have exclusive jurisdiction).

In the early 1990s this situation came under increasing criticism from women's organizations and civil rights organizations, which argued that, compared to Jewish, Druze and Christian women, Muslim women were discriminated against. Viewing the procedural and substantive laws applied in Shari'a courts as inherently discriminatory, these feminist activists demanded that Muslim women be granted the same access to the more liberal civil family courts that members of other religious communities have.⁸⁵ In the mid 1990s a coalition of several women's groups and civil rights organizations initiated a bill to amend the Family Courts Law.⁸⁶ The primary objective of the proposed amendment was to give Muslim women the option to have recourse, in all matters of personal status except for marriage and divorce, to the civil family courts. After more than six years of bitter struggle⁸⁷ the feminist reformers won the day, and the bill passed into law on November 5, 2001.⁸⁸

As a result of this legislation, the jurisdiction of Shari'a courts was narrowed from exclusive to concurrent in all matters of personal status

83 See Aharon Layish, *Muslim Religious Jurisdiction in Israel*, 1 ASIAN & AFR. STUD. 49 (1965).

84 See NORMAN BENTWICH, *LEGISLATION OF PALESTINE, 1918-1925*, at 14 (1926).

85 See Suhad Bishara & Aida Toma-Suliman, *Personal Status and Family Laws*, in NGO REPORT: THE STATUS OF PALESTINIAN WOMEN CITIZENS OF ISRAEL 66 (1997), available at <http://www.arabhra.org/publications/reports/PDF/cedaw.pdf>.

86 The joint endeavor was titled "Working Group for Equality in Personal Status Matters." On this group, see Ido Shahar, *Practicing Islamic Law in a Legal Pluralist Environment: The Changing Face of a Muslim Court in Present Day Jerusalem* 128-30 (2006) (unpublished Ph.D. dissertation, Ben Gurion University, on file with author).

87 On this struggle, see Ido Shahar, *Legal Reform, Interpretive Communities and the Quest for Legitimacy: A Contextual Analysis of a Legal Circular*, in *LAW, CUSTOM AND STATUTE IN THE MUSLIM WORLD: STUDIES IN HONOR OF AHARON LAYISH* 198 (Ron Shaham ed., 2007).

88 Family Court Law (Amendment No. 5), 5755-1995, S.H. 1810.

except for marriage, divorce and *waqf*. And from the point of view of Muslim litigants involved in matrimonial disputes, this legislation had the effect of significantly increasing the degree of legal pluralism. In most matters of personal status Muslim men and women could now appeal either to a Shari'a court or to a civil family court. Thus, for example, a Muslim woman who is separated from her husband may choose to file a maintenance suit either in a Muslim court or in a civil family court, and her choice may have significant implications, not only procedurally but also in terms of the substantive legal outcome.⁸⁹

This example illustrates the fact that, as my re-conceptualization of strong versus weak legal pluralism suggests, the equation "less state intervention equals more pluralism" does not necessarily hold true. Under certain circumstances, the opposite may obtain: the state may extend the jurisdiction of its laws, and individual litigants may gain greater freedom as a result, and this under conditions of stronger legal pluralism.

The proposed re-conceptualization of strong versus weak legal pluralism thus helps to achieve two purposes. First, it draws attention to the actors' points of view and their legal strategies, and to the institutional level at which different tribunals co-exist, interact and occasionally even compete with each other over litigants. Second, it opens the door to a re-evaluation of legal pluralism within the state legal system as a significant and consequential phenomenon which should occupy social scientists no less than it occupies lawyers and legal theorists.

CONCLUSION

This Article calls for the adoption of a more constructionist approach to the study of legal pluralism. Several students and critics of legal pluralism have already noted that despite its emphasis on the diversity and the heterogeneity of the socio-legal sphere, this literature tends to a positivist, essentialist and objectivist view of law.⁹⁰ They have therefore called for the advancement of postmodern,⁹¹ discursive,⁹² non-essentialist⁹³ or non-positivist⁹⁴ approaches to legal pluralism. Nonetheless, none of these

⁸⁹ See Shahar, *supra* note 86, at 136-46.

⁹⁰ See Tamanaha, *supra* note 35; Melissaris, *supra* note 48.

⁹¹ De Sousa Santos, *supra* note 34.

⁹² Teubner, *supra* note 34.

⁹³ Tamanaha, *supra* note 35.

⁹⁴ Melissaris, *supra* note 48.

authors has pointed out that these positivist and essentialist tendencies are based on implicit assumptions regarding the state, under which the state is viewed as an internally consistent entity, objectively distinct from society. In this Article, I have shown that foundational statements on legal pluralism, and particularly Griffiths' seminal essay on the subject,⁹⁵ implicitly treat both the state and its legal embodiment, state law, as monolithic entities that can be objectively and universally distinguished from society. I have also drawn attention to the fact that current trends in political science push toward an alternative, constructionist conceptualization of the state, of society and of the relations between them. I have therefore contended that a similar constructionist approach should be embraced in the study of legal pluralism.

I have argued that the flawed conceptualization of the state and of state-society relations has caused considerable confusion and has exerted a considerable negative impact on the study of legal pluralism. First, it has enabled legal centralist assumptions to enter the literature on legal pluralism through the back door. Second, it has embroiled students of legal pluralism in endless debates searching for formal and universal definitions of law, bodies of law, non-state law, non-legal normative orders, and the like. A third problematic ramification has to do with Griffiths' well-known distinction between strong and weak legal pluralism.

As argued above, it is Griffiths' implicit view of the state and of state law as dissociated from society and as internally consistent and homogenous systems that underpins his distinction between strong and weak legal pluralism. In his view, legal pluralism that exists within the parameters of state law is weak, empirically insignificant, and of no interest for social scientists. By contrast, legal pluralism as it exists between state law and other systems of law is strong, empirical, consequential and sociologically interesting. I contended that this view is false, and that legal pluralism that is internal to state law can be just as dramatic and consequential as legal pluralism that transcends the state's boundaries.

Unfortunately, despite the dubious validity of Griffiths' distinction between strong and weak legal pluralism, it has had considerable and lasting impact on this field of research. In particular, it has encouraged a polarization between legal scholars and social scientists. While the former focus on the study of normative and doctrinal aspects of legal pluralism within state law (what Griffiths dubbed "lawyers'" or weak legal pluralism), the latter focus on the study of legal pluralism between state law and other

95 Griffiths, *supra* note 1.

legal systems (Griffiths' "social scientists'" or strong legal pluralism). In this Article, I argue against this superficial and misleading divide.

I therefore contend that the theoretical perspective of legal pluralism should deal with the plurality of law in all its contexts and manifestations: it has to deal with pluralism both within legal systems and between legal systems. Thus, Sally Falk Moore's apt assertion that "not all the phenomena related to law and not all that are law-like have their source in government"⁹⁶ should be supplemented by an additional proposition, that *every legal system is pluralistic, in the sense that no legal system is entirely coherent, internally consistent and monolithic*. The implication of these two assertions taken together is that any student of legal pluralism, whether a legal theorist or a social scientist, should acknowledge pluralism both within legal systems and between them. It is only through this acknowledgement that a true and comprehensive alternative to legal centralism can be set forth.

As for social scientists, this Article calls on them to direct more attention to state legal pluralism, namely, to the pluralism, heterogeneity and internal dynamics that characterize complex state legal systems. While legal theorists have made significant headway in examining the polycentricity and heterogeneity of state law, social scientists have largely neglected this topic, and have focused instead on the relations between the state legal system and other legal orders. Nevertheless, the same social scientific methods and perspectives can be brought to bear on state legal pluralism. For example, the tendency of anthropologists to emphasize the point of view of individual actors can shed more light on forum shopping phenomena that occur within the boundaries of the state legal system. Anthropological methods such as ethnographic interviews and participant observations can advance our understanding of how litigants and their legal representatives strategize and maneuver between different state courts and bodies of law.⁹⁷ In addition, a sociological approach to state legal pluralism can draw attention to the institutional level of analysis: it can provide a better understanding of the complex relations, characterized by competition, cooperation, assimilation and differentiation, that develop between different courts operating under the aegis of the state.⁹⁸ Hopefully, these new emphases will reinvigorate current research and the theorization of legal pluralism.

96 SALLY FALK MOORE, *SOCIAL FACTS AND FABRICATIONS: CUSTOMARY LAW ON KILIMANJARO, 1880-1980*, at 15 (1986).

97 See Shahrar, *supra* note 86.

98 See, e.g., Ido Shahrar, *Legal Pluralism and the Study of Shari'a Courts*, 15 *ISLAMIC L. & SOC'Y* 112 (2008).

