Legal Pluralism as a Theoretical Programme

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Abstract

This paper reconstructs the development of the status of the *theory* of legal pluralism: while originally the term has been used as descriptive label referring to a situation observed in the world, nowadays a more sophisticated understanding of the role of the concept is needed. The epistemology of social sciences can help us make sense of the multifarious literature on legal pluralism, and of the different conceptions of the term that have been proposed. More specifically, legal pluralism is here devised as a theoretical programme and its influence on the production of social-scientific knowledge is analysed. The investigation concentrates on the role of the concept in the selection of relevant data and on the intelligibility structure imposed on them.

Key words

Legal pluralism; empirical legal studies' epistemology; law; sociology; anthropology

Resumen

Este artículo reconstruye el desarrollo de la situación de la *teoría* de pluralismo jurídico: aunque en un principio el término se utilizó como una etiqueta descriptiva referida a una situación que se observaba en el mundo, hoy en día se necesita una comprensión más sofisticada del rol del concepto. La epistemología de las ciencias sociales puede ayudar a dar sentido a la literatura heterogénea sobre pluralismo jurídico, así como a las diferentes concepciones del término que se han propuesto. Más específicamente, aquí se concibe el pluralismo jurídico como un programa teórico y se analiza su influencia en la producción de conocimiento científico social. La investigación se concentra en el papel del concepto en la selección de datos relevantes y en la estructura de inteligibilidad impuesta sobre ellos.

Palabras clave

Pluralismo jurídico; epistemología de los estudios jurídicos empíricos; derecho; sociología; antropología

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Table of contents

1. Introduction

There is an ancient Indian tale about a group of blind men who have never seen an elephant and want to discover what they look like; so they touch one. Each man grasps a different part of the animal and consequently imagines it differently: The one who touches the leg is persuaded that elephants are like trees, and the one who feels the ear convinces himself that elephants are like fans. They all end up with very different opinions about the appearance of elephants. The American poet John Godfrey Saxe popularised this tale in the Western world with a poem that concludes:

> [E]ach was partly in the right,/ And all were in the wrong!/ Moral:/ So oft in theologic wars,/ The disputants, I ween,/ Rail on in utter ignorance/ Of what each other mean,/ *And prate about an Elephant/ Not one of them has seen!* (Saxe 1873, p. 78)

Some versions of the tale specify that the blind men are not aware of their blindness, and this is a relevant detail, because if they were informed about it they would also take into account the fact that their own perception of the animal is limited, as is that of their fellows. The whole point of the tale is to prompt speculations on the conditions and relativity of human perception. In a similar way, this paper wants to reflect on the influence of analytical tools on the results of empirical legal research. In other words, the elephant of this paper is legal pluralism, and the tactile sense of the blind men, the only means at their disposal to get to know what an elephant looks like, is the *concept* of legal pluralism.

This paper aims to redraw the theoretical trajectory of the concept of legal pluralism from being considered a descriptive label to having a more complex epistemological status. The starting point is a research question concerning the kind of knowledge that is produced by legal scholars who approach the world with the legal pluralist mindset and the influence of the concept on the empirical knowledge produced. An initial short excursion into the history of the term puts forth the *theoretical takeover* (Berthelot 2012a, p. 229) that was induced by the introduction of a descriptive term in the vocabulary of the legal scholar. That is to say, the shift towards an empirical approach to law entailed the recognition of an existing pluralism and unsettled established theories of law. Yet, it will be argued that an unsophisticated understanding of analytical tools as merely descriptive is problematic. Any agreement on the exact content of the concept's definition has proven impossible: As a matter of fact, the meanings of words are variable, and are even more so if they refer to an evolving societal phenomena such as law. Consequently, it is necessary to recognise a different epistemological status of analytical tools, and the purpose of this essay is to reflect on the relation between the *concept* legal pluralism, the social reality it refers to and the legal pluralistic knowledge produced. Here, Bourdieu's notion of *epistemic reflexivity* can be invoked:

> The analysis of mental structures is an instrument of liberation: thanks to the instruments of sociology, we can realize one of the eternal ambitions of philosophy-discovering cognitive structures […] and at the same time uncovering some of the best-concealed limits of thought. I could give hundreds of examples of social dichotomies relayed by the education system which, becoming categories of perception, hinder or imprison thought. The sociology of knowledge, in the case of the professionals of knowledge, is the instrument of knowledge *par excellence*, the instrument of knowledge of the instruments of knowledge. I can't see how we can do without it. (Bourdieu 1990, p. 16)

This way of proceeding entails the systematic applicability of the instruments of sociology to the subject who practices sociology and the exploration of the "unthought categories of thought which limit the thinkable and predetermine what is actually thought" (Bourdieu 1990, p. 178). Thinking about limits does not enable one to think without limits (Bourdieu 1990, p. 184) but allows a more realistic

account of the epistemological status of the knowledge produced, thus buttressing the fundaments of the discipline to which epistemic reflexivity is applied (Wacquant 1992, p. 46). Following the teachings of Bourdieu, in order to support the epistemological security of empirical approaches to law[1], a theory of the intellectual practice itself has to be included as an integral component and necessary condition of a critical theory of legal pluralism. Reflexivity is here thus referred to the activity of research itself. The ambition is to unearth the "epistemological unconscious of [the] discipline" (Wacquant 1992, p. 41), which is not going to happen by magically abolishing the distance between knower and known, but by taking into account this objectivising distance and analysing it (Bourdieu 1990). The reflexive turn "lead[s] to constructing scientific objects differently. It helps produce objects in which the relation of the analyst to the object is not unwittingly projected" (Wacquant 1992, p. 42). What makes this reflexive exercise particularly interesting is the fact that the objectivising distance and the relation of the legal pluralist to legal pluralism has changed over time. The present paper purports to show the variations of this relationship, or in other words, the evolution of the epistemological status of the concept "legal pluralism".

Clearly, facts and concepts are different. They influence one another, and any knowledge-producing activity based on an empirical approach entails a progressive co-shaping of concepts and facts in an ongoing process of understanding and revising the explanatory tools. Through a reciprocal interaction the facts mould the concepts and vice-versa. Such "prudent" (Santos 1995, p. 22) knowledge requires a rethinking of the relation between the subject (with its concepts) and the object (with its facts) in a way that entails the possibility of a connection between the two. Confusion between observed realities and conceptual instruments used to observe them is sometimes being prompted by the fact that we perceive realities *through the filter* of concepts, representations, theories, values and paradigms (Ost and Van de Kerchove 2002, p. 21). Consequently, careful consideration of the chosen theoretical framework and verification of its effect on the empirical research conducted are not only legitimate but also necessary.

Both anthropology and sociology, which deal with the exceptionally variable and receptive "objects of study" that humans inevitably are, had to face epistemological issues of this sort, such as the risks of "nostrification" of the Other into the categories of the observer's mindset as an outcome of the "*Aufmerksamkeitsfixierung*" (Matthes 1992, p. 84). From the time it emerged as a distinct subdiscipline, legal anthropology has been enlivened by analogous debates: Max Gluckman and Paul Bohannan pursued ethnographic studies of law and social control that led to opposite theoretical positions. The former maintained that the legal categories developed by Western legal scholarship could be used in order to represent indigenous legal practices and concepts (Gluckman 1955), while the latter considered the indigenous legal categories to be irreducible to Western vocabulary, and argued for the use of untranslated terms (Bohannan 1957). The Gluckman-Bohannan controversy on the appropriateness of the use of concepts stemming from the culture of the observer in order to account for a different observed culture was, in a way, a discordance of cognitive interests (Moore 1969, p. 339): not only a disagreement on the emic or etic way of rendering the results of ethnographic fieldwork, but also on the posture of the ethnographer herself. Of the two, Bohannan showed more concern for the impossibility of ever arriving at a "fact" that is uncoloured by the ethnographic instrument that is represented by the perceiver of the fact, and therefore affirmed the importance of learning "more about our sensory means of perception, and mechanical and other extrinsic extensions of them, and our own cultural prison" (Bohannan 1969, p. 407).

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[1] Taken in a broad sense. I am not referring here to any specific American school of thought such as the Empirical Legal Studies of New Legal Realism. For an overview, see Macaulay and Mertz (2013).

Animated by similar concerns, this essay tries to apply epistemic reflexivity to legal pluralism by conceptualising and making explicit the way in which an apparently descriptive concept is actually also normative, to wit directing the research. This will be done by relying on the notion of *theoretical programme* (Berthelot 2012b, p. 457). The second section seeks to capture the cognitive operations that have been set out by the concept legal pluralism since its inception, focusing on the fundamental strategic moves of the empirical turn and of the problematisation of classical legal theory. In the third section a way of conceiving legal pluralism that is abreast with contemporary reflection on the epistemology of social sciences will be advanced.

2. "Legal pluralism" as a label to account for a fact

The link between the empirical study of law and the realisation of its plurality predates the coinage of the term, thus proving its descriptive origin. It is worth mentioning how more than a century ago Eugen Ehrlich (1913), observing the "living law" in the Bukowina region, acknowledged the coexistence of nine completely different legal bodies of rules applied on a personal basis. Another founding father of the sociology of law, Georges Gurvitch, noted that the accuracy of the immediate empirical data of the juridical experience, and their particularly intense variability, necessarily leads to a pluralist conception of law (Gurvitch 1935, p. 66, 1960, p. 185). Moreover, Gurvitch argued that the study of law as a social fact should avoid adopting any particular philosophy of law (Gurvitch 1960, p. 188). Nevertheless, the introduction of a pluralist understanding of law has since its inception been the expression of a certain legal politics in the sense that it implied the recognition of the existence of power structures that are maintained by the monist tendency of the dominant social group (Rouland 1988, p. 304). This double dimension is acknowledged by Jean Carbonnier, who used the term *pluralisme juridique* as an explicative hypothesis for the widest possible number of juridical phenomena (Carbonnier 1969, p. 5) mentioning at the same time the connection between the choice of a theory of law (monist *vs.* pluralist) and the preference for a given political structure (Carbonnier 1969, pp. 13-16).

Then the term appeared as the title of a collection of papers published by John Gilissen, where the monist theory of law is vehemently shown to be inadequate, in particular in its variant developed by Carré de Malberg, who considered the State to be the starting point of all legal order, the only creating power of proper law (Gilissen 1972, p. 7). In the same book, the well-known definition of legal pluralism proposed by Jacques Vanderlinden (1972, p. 19) refers to the existence, within one defined society, of various juridical mechanisms that apply to identical situations. This statement is interesting for the purposes of this paper because it defines the concept as *existence*. Along these lines, according to other contributors, the aim of legal pluralism is the definition of a complex *reality* in its present state (Van den Bergh 1972, p. 93) or the *rendering* of the historical evolution of law (Ingber 1972, p. 82). Here, it is essential to acknowledge that the term is considered to be a descriptive one. This employment continues in Barry Hooker's book from 1975 called "Legal Pluralism". He also gives an account and analysis of a particular phenomenon and likewise uses the term as a descriptive category by referring to "the *situation* in which two or more laws interact" (Hooker 1975, p. 6, emphasis added). The same can be said about the seminal article by John Griffith, where he imperatively states: "[l]egal pluralism is *the fact*. Legal centralism is a myth, an ideal, a claim, an illusion" (Griffith 1986, p. 4, emphasis added). So legal pluralism is perceived to be the best label to describe a fact that is out there. There are certain facts in the world which deserve the label of "legal pluralism", while some other facts only deserve the label of "weak legal pluralism". Clearly, in so doing, the author was also defining what he wanted this label to mean, dismissing different meanings proposed by other anthropologists. The debate concerning the appropriate meaning continued, and the focus shifted from the societal group to the

individual (Vanderlinden 1989). The definitional dispute notwithstanding, the lowest common denominator is that "legal pluralism" remains part of a conceptual apparatus that is suggested directly by observed realities and is treated as a label proposed to *describe* a situation *existing* in the world, empirically verifiable, for which there was no label before (Merry 1988, Von Benda-Beckmann 1988).

The adoption of an empirical point of view led legal anthropologists to take into account normative phenomena which are not defined as law by the state legal system. In other words, the boundaries between law and notlaw posed by the rule of recognition of the state system itself are not considered to be the only valid way to define the relevant data. Legal pluralists, by going to look for law in previously unexpected places and recognising more sources of law than the ones usually accepted in classical legal theory, questioned the very meaning to be given to the word "law" (Le Roy 2003, p. 10). Apart from being one major cause of disarray and disparagement, this has also given rise to fruitful discussions and reflections. What is at stake is clear: the very possibility of "detect[ing]" and "see[ing]" (Davies 2010, p. 810) *legal* pluralism in a society depends upon the concept of law utilised. Far from being a sterile debate on nomenclature, this raises important issues for the legal scholar. To be sure, it is at this very point that legal pluralism, carrying its baggage of knowledge about the interconnected patterns of normativities at work in the complex world we happen to live in, enters and upsets the field of jurisprudence.

The dispute unfolds on at least two levels: the first is the level of legal theory, where a pluralist conception of law clearly contributes to the denouncement and progressive erosion of the ideological rhetoric of state legal monism (Woodman 1998, p. 48). Alternative conceptions of law challenge more conventional understandings of the term; legal theory is summoned inasmuch as it is ultimately built on the common sense and intuition about law drawn from the scholar's own domestic experience. Furthermore, at times legal theory might even fail to fit the facts of the legal system of the theoretician, if empirically tested. Thus, abstract and coherent logical constructs are criticised not only because theoretically they are ethnocentric, but also because they do not even correspond with domestic social reality (Galligan 2010). At the level of jurisprudence, legal pluralism, which is the product of an empirical approach to normative phenomena, challenges the validity of the pure theories of law. Where they are proven to be ill-founded, their universal soundness is reduced to a point of view that is necessarily relative and bearer of local interests. Still, it is indisputable that in the Western world there is (or there has been, due to reinforcement of local affinities and transnational regulations) a state monopoly on law. This fact is surely based on the process of centralisation of power that occurred in most European nation states during the nineteenth century, but is also a consequence of the elaboration of general theories that defined law in such a way that by the twentieth century it was understood to be necessarily centred on a State (Davies 2010, p. 808). Through a process of co-shaping, state monopoly on law and monist legal theories have been upholding and reinforcing each other. The jurisprudential debate triggered by legal pluralist conceptions of law is in this way charged with meaning and values: the expression "politics of definition" (Santos 1995, p. 115) makes it clear and leads us to the second level of the quarrel set off by legal pluralism, the one of politics *tout court.*

As Michel Leiris (1992, p. 37) argued, in most of the cases the anthropologist becomes the "natural advocate" of the people she studies: in the same way the legal pluralist is likely to claim that marginalised normativities deserve to be acknowledged by the central legal system, and to contend for more biodiversity in law. Clearly, it is important to be aware of what becomes visible through the lenses of a concept. Becoming visible means also acquiring a certain credibility, and in the best case scenario this might lead to recognition by neighbouring (dominating) normative systems. Research on legal pluralism gives voice to submerged social processes and fields, and this produces an effect of empowerment. Doing empirical

research utilising a legal pluralist framework certainly produces (at least indirectly, or in the long run) different political consequences than repeating and developing further abstract theories of law. Nevertheless, the elaboration of a theoretical framework is analytically not coincident with its desirability. Thus, the *concept* of legal pluralism cannot be blamed or prized for empirical constellations that are abhorred or found attractive for political or moral reasons (Von Benda-Beckmann 2002, pp. 45-46).

Both at the jurisprudential and the political level, compelling debates arise when the descriptive conception of legal pluralism meets classical academic legal science, but they will not be followed further here. Rather, the accent is set on another aspect of the theoretical matter of contention, namely the impossibility of a universally valid definition. The main shortcoming of the extended conception of law advocated by anthropological and sociological approaches is the one pointed at by the so-called pan-legalist objection: the problem of the distinctiveness of law from other social normative orderings has been haunting the theorists of legal pluralism until today (see for example the advanced distinction proposed by Croce 2012). The various attempts to locate an appropriate threshold of legal relevance notwithstanding, a conclusive line could not be drawn (Tamanaha 2008, p. 391). Theories and definitions are necessarily situated and cannot be considered universal (Tamanaha 2009, pp. 18-22, 2012, pp. 22-23). More recently the attempt to identify the essence of law through the use of a general concept that is universally valid has been acknowledged as an "illusion", and any such search defined as vain, "for the simple reason that this fundamental existence of the genuine properties of law does not exist" (Treiber 2012, p. 37). The very definition of law adopted, the very general theory one espouses, is dependent upon the cognitive interests of the research (Treiber 2012, p. 1).

Evidently, the impossibility of a universal definition of "law" for "legal pluralism" conceived of as a descriptive label is a quite predictable shortcoming for any term that claims to account for reality: empirical phenomena do not fit into analytical categories in a neat one-to-one manner, and the multiplicity of the real cannot be forced into one forever imperfect definition. In other words, the problem is not the law (with its variability in different human societies in time and space), but the epistemological status of our concepts. If we consider them to be descriptive labels we will necessarily end up having to admit their incompleteness and imprecision, and it could not be otherwise. A more complex understanding of the role of concepts in the production of knowledge is needed, and this applies to legal pluralism too.

3. Legal Pluralism as a theoretical programme

Many contemporary theorists explicitly distance themselves from the naïve objectivism of the social-scientific, empiricist-positivistic take on legal pluralism that is spread among the first proponents of the concept. Fortunately, the speculation on the influence of analytical tools on the production of knowledge in the social sciences has come to a more sophisticated understanding of the social scientific enterprise. These theoretical investigations may help us make sense of the various literature on legal pluralism and of the different conceptions of the term that have been proposed. Various approaches are indeed possible in order to account for the present state of the literature on the topic. For example, one could concentrate specifically on the scientific community itself, on its internal ordering and its influence on the knowledge produced (Husa 2014). Admittedly, Bourdieu's notion of epistemic reflexivity requires a recognition of the gravitational forces of the academic field on the intellectual work. Even so, it also provides the means to overcome the relativism this might lead to, namely highlighting the significance of the relation between knower and known. Not all aspects of the content of a notion can be explained through reference to the academic social field of its production. Epistemic reflexivity makes the objectifying relation between knower and known

itself the object of analysis; and the resultant objectification of objectification is the epistemological basis for social scientific knowledge (Maton 2003, p. 57). The impact and validity of a theory are not entirely expounded only by referring to the usages made of it by the scholarly community, but can also be evaluated on the basis of its internal consistency and its ability to structure empirical data. In this paper, the objectifying relation of the legal pluralist to the legal phenomena is scrutinised with the help of the notion of *theoretical programme* as developed by Jean-Michel Berthelot (2012b, pp. 469-70).

In his exploration of the epistemology of social sciences, Berthelot distinguishes, in between the broad disciplinary borders and low-rise methodological procedures, the middle level of the plurality of possible approaches, theories and schools of thought. As had already been noted by Robert K. Merton, this plurality is to be found within any discipline, and at the same time the "middle-range theories" share common issues, commitments and debates that create bridges among disciplines; and within sociology, they can be consonant with a variety of comprehensive sociological theories which are themselves discrepant in certain respects (Merton 1968, pp. 41-69). Those different approaches concern in fact the intellectual framework of the researcher. In order to solve a problem, to represent or explain a social normative phenomenon, the researcher brings into play schemes of analysis and more generally schemes of thought which inscribe the problem into a space of plausible solutions and designate certain acceptable operations (Merton 1968, pp. 39-40). Berthelot (2012b, p. 459) ventures to reconstruct those schemes and their workings, by relying mainly on the notion of a programme as developed by Imre Lakatos[2] and adapting it to the social sciences.

A programme can consist of an implicit guide of thought or of an explicit struggle manifesto and can be transposed into different particular theories. For each theory there is a tension between the dominant programme brought into play and the complexity of the real world that it aspires to reconstitute and at the same time describe (Berthelot 2012b, p. 485). Being a sort of a bet on the fruitfulness of an orientation of research, it is evaluated on the basis of its capacity to put aside "anomalies" which would falsify it and of its power of rational clarification of new occurrences (Berthelot 2012b, pp. 469-70). In other words, a programme is appraised according to its capacity to reduce the tension and the incongruencies between the "map" and the "territory". Also the clarity of the coding language is a determinant feature. The same phenomenon, within one same discipline, can be cut out from the context, studied, thematised and represented in different ways according to the indications given by the different programmes (Berthelot 2012b, p. 461), which therefore can be in competition with each other. As a matter of fact, there are conflicts between schools of thought: to conceive the epistemological space of social sciences through programmes does not mean to forget their situatedness within a certain scientific community. Instead, it involves focusing on some aspects inherent to the programmes' structure and their internal coherence rather than on the human background in which they are developed. Such an approach thus concentrates on the fundamental propositions which define a certain

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[2] Lakatos's programmes are formed by a sequence of theories and experimental techniques grounded on a central core of assumptions, around which a belt of auxiliary hypotheses is developed. His view of science tries to reconcile Popper's falsification and Kuhn's paradigm revolution: conflicts with observation cause adjustments in the auxiliary hypothesis before they lead to a shift to a new research programme, and the whole process is rational and progressing and avoids the theoretical astray of incommensurability. The programme as conceived by Lakatos manages at the same time to convey its role as a vector of scientific activity, but it does not imply absoluteness and thus justifies the coexistence of different scientific explications of the same phenomenon and accounts for the social and historical context of the activity. Programmes have been poetically described as emerging as "excrescences of imagination fighting for existence by trying to outgrow each other", and defined as "flowers of phantasy" that display heuristic power (Motterlini 1999, pp. 9-10). Berthelot adjusts this notion for the purposes of social science epistemology and focuses on the role played by programmes in the creation of knowledge (programmes as heuristic devices) rather than on their ability to account for and explicate the history of science.

point of view in research in a given domain at a given time. The core of a programme is composed of axioms that define the *ontological* orientations concerning the entities and their relevant properties to be retained in the analysis; and of axioms that determine the *epistemological* orientations, outlining the legitimate forms of explication (Berthelot 2012b, pp. 474-475). In this sense, the programme steers the research through a set of axioms that are considered to be applicable to certain domains of reality.

The basic idea that the concepts steer the analysis is not completely absent from the legal anthropological literature. Leopold Pospisil already assigned to the very concept of law the role of a heuristic device:

> "Law as a theoretical and analytical device is a concept which embraces a category of phenomena (ethnographic facts) *selected according to the criteria the concept specifies*. Although it is composed of a set of individual phenomena, the category itself is not a phenomenon - it does not exist in the outer *world*. The term "law" consequently is applied to a construct of the human mind for the sake of convenience. The justification of a concept does not reside in its existence outside the human mind, but in its value as an *analytical, heuristic device*" (Pospisil 1971, p. 39)[3].

His position might have been partially due to the quixotic aim of developing a cross-cultural understanding of legal knowledge, and the authority he recognises in the social researcher might be considered excessive and outdated since it maintains the observer/observed dichotomy instead of depicting the research endeavour as an interactive one (Goodale 1998, p. 138). Nevertheless, he has the merit of introducing the researcher as one of the elements that, together with the inequality of power, determine the relativity of the concept of law. The reflection concerning the use of culturally relative concepts and their influence on the constitution of legal anthropological knowledge (Arnaud 1998, p. 6) has led to the recognition that the role of the concept is not one of a final description or explanation of what has been previously observed, but instead it is one that has shifted to the very beginning of the analysis. The concept becomes the "starting point for looking at the complexities of cognitive and normative orders" (Von Benda-Beckmann 2002, p. 40), and as such is particularly relevant for the subsequent research, since sociological theoretical frameworks are not value-free or non-normative (Westerman 2011, p. 109, 2013, pp. 50-63).

The following sub-paragraphs focus on the structuring force of the ontological and epistemological axioms entailed in the programme of legal pluralism, making explicit the theoretical programme's guiding power in the data selection process and in determining the legitimate forms of explanation.

3.1. Data selection

Applying the notion of a social scientific programme to legal pluralism requires a rethinking of the conception of relevant data. Berthelot differentiates between the *background* of reality, the *events* as perceived and organised by the people living them, their *traces,* and the stabilised *facts* as forged by the researcher. The infinite succession of events composing the background of reality is always already structured in the mind of the people living them. The difference between "ordinary" and "social-scientific" structuring of events is uniquely a difference between "*de jure*" and not "*de facto*" (Berthelot 2012b, pp. 489-493)*.* The legal pluralist proposes one possible reconstruction among others, which will be evaluated according to the accurateness of its rendering and its pertinence, even if the participants would not have reconstructed the facts that way[4]. The materials are

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[3] Emphasis added.

[4] A completely adverse position is held by scholars belonging to the ethnomethodology school, for whom the role of the researcher is uniquely the description of the mechanisms and the processes through which people organise and orient themselves, without proposing any "scientific" structuring of data

gathered by the researcher partly through the traces they leave, which are but fragmentary expressions of the events, and partly they are produced by the researcher herself by means of questionnaires, interviews, observations and similar means. The social scientist then engages in a pertinent structuring of the traces, transforming them into facts, steady objects of analysis and explication. Those facts are the results of a constructing operation that applies structuring axioms that consist of schemata of selecting elements from a continuum of reality and regrouping them in pertinent entities and sequences (Berthelot 2012b, pp. 494-95).

Each programme, or more specifically their ontological axioms, determine the application of this sophisticated mechanism of data selection and structuring. This point is openly accepted by some theorists of legal pluralism in the form of statements such as: "pursuing legal pluralism raises questions of scale and projection concerning the range and scope of the investigation, that are in turn dependent upon the standpoint from which legal pluralism is being addressed. For what you look for defines what you see" (Griffith 2011, p. 176). Yet others are more cautious. In his theoretical assessment of legal pluralism for instance, Melissaris mentions the issue concerning the selection of facts and discourses that are to be taken into consideration, rendering it as a sort of *fumus boni juris* evaluation of the "lawness" of a certain discursive practice. Nevertheless, he rapidly moves on to the decision concerning the merits, since it is only at that stage that a fully accomplished evaluation of the legal pluralist phenomenon can take place (Melissaris 2004, p. 75). What is argued here is that it is necessary to reflect about the very primordial moment of the acquisition of knowledge: the interstice between the mind of the researcher and her *prima facie* impression of the discourses she listens to and identifies as legally relevant.

Accepting this renovated theory of data is vital for any contemporary legal anthropologist. Clearly, the whole history of legal pluralism can be considered to be a debate about the selection of the pertinent data. Since the very beginning, legal pluralists have struggled to obtain the acceptance of a more extended definition of law, raising to the level of the "legally relevant" information bases that are not taken into consideration by traditional legal theory. Here the purpose is a more complicated one: the renovated data theory developed by the contemporary epistemology of social sciences involves the recognition that traces of events are reconstructed into facts by the researcher. In this manner state-enforced rules are constructed as "legality" and set within the wider matrix of normative phenomena existing beyond the State. Such a way of re-imagining normative and legal "hybridity" (Donlan 2012, p. 4) evidently puts into question the validity of a different data-organisation, for instance the hierarchical theory of sources of law or the classical taxonomical disposition into discrete and closed families or systems. Each programme entails certain rules of data selection and organisation, and legal pluralism as a programme also has the same guidance power.

3.2. Legitimate forms of explanation

The second half of the core of legal pluralism when conceived of as a research programme is constituted by its epistemological axioms. In order to account for the explanatory structures considered to be acceptable, Berthelot introduces the notion of *scheme of intelligibility.* A scheme of intelligibility is a set of operations and prescriptions that determine what kind of correlations between events are deemed to be pertinent. A non-exhaustive list of six possible schemes is proposed: (1) the *causal* scheme (if *x*, then y or *y=f(x)*) understands social facts as being cause and

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alternative to the "ordinary" one. Such an approach has been applied to legal pluralism by Badouin Dupret, with the conclusion that there is no legal pluralism unless the participants consider themselves to be in such a situation (Dupret 2007, pp. 18-19). Those efforts to downplay the role of the researcher notwithstanding, it cannot be denied that there would be no social sciences without social scientists, and the purpose of this paper is exactly to explore the often overlooked role of the analytical tools in the mind of the researcher.

consequence of one another, and presents them as connected in an aetiological chain; (2) according to the *functional* scheme (S→X→S), phenomenon X is analysed in relation to its role or purpose in a given system, and consequently the teleological connections will be stressed; (3) in the *structural* scheme, elements gain their meaning from their respective position within a coherent structure (X results from a system founded on disjunctive rules, A or not A); (4) the *hermeneutical* scheme comprehends each fact as a symptom or expression of an underlying signification to be discovered through interpretation; (5) in the *actional* scheme the focus is set on the intentional actions of the agents, and events are mainly conceived of as the result of those intentions; and finally, (6) the *dialectical* scheme is presented, where a certain fact is explained as being the outcome of the development of internal contradictions within a system (Berthelot 2012b, p. 484). Those are but examples of different possible ways of selecting certain nexuses between elements. The schemes designate the connections that are considered to be more relevant or at least specifically worthy of attention in order to gain knowledge that deserves academic recognition. They present an array of possible relevant interactions to be singled out and studied by the researcher, operating at an intermediary level between reasoning techniques (such as induction or analogy) and paradigm orientations. These matrices of possible associations between facts are at work in different programmes and, silently but effectively, operate in contemporary theories of legal pluralism as well. Each different conception of legal pluralism applies a different scheme of intelligibility so as to meaningfully reconstruct the plurality of laws. In order to discover the scheme of intelligibility at work it is necessary to read between the lines about what kind of connections between facts are deemed to be telling. For instance, the conceptions of legal pluralism proposed by Roderick Macdonald, Emmanuel Melissaris and Margaret Davies can be usefully considered from this point of view as differentiating from each other exactly on the basis of the scheme of intelligibility they incorporate. Similarly, those schemes of intelligibility have also been used as a key to understand the methodological disputes between comparative lawyers (Samuel 2014, p. 14, pp. 81-95).

Macdonald sets forth a conception of *critical* legal pluralism that focuses on the individuals who are not passive subjects exposed to the control of law, but who are agents continuously negotiating their agency with one another (Macdonald and Kleinhans 1997, pp. 38-40): "[l]egal subjects are not just law-obeying or law-abiding. They are law-creating, generating their own legal subjectivity and establishing legal order as a knowledge process for symbolizing inter-subjective conduct as governed by rules. In such an aretaic conception, every human being in interaction with others is both law-maker and law-applier" (Macdonald 2011, p. 310). Compliance occurs through personal commitments arrived at without coercion or inducement, and people define acceptable behaviour in ways that engage their fluid, competing and multiple identities and notions of the self (Macdonald 2011, pp. 323-24). His position resembles the conception of law as an individual claim proposed by the liberal Bruno Leoni, who considers to be legal those demands that, following the rule of thumb *id quod plerumque accidit*, enjoy a good probability of being satisfied in a given society at a given time. Legal and illegal demands are located at the opposite ends of a spectrum of all possible demands that people may make, and each single individual, with his intentional actions (of claiming and of satisfying a claim), determines the position of the demand along this spectrum (Leoni 1991, pp. 195-205). In this sense, a multiplicity of laws is the outcome of the agents' intentional doings: this way of concatenating facts follows the epistemological orientation of the *actional* scheme of intelligibility as presented above. Therefore, it can be said that, with his theory of legal pluralism, Macdonad is proposing to recognise as most telling the interaction between facts that focuses on agents' intentions and actions.

The epistemological axioms that underlie Melissaris' theory are less clearly identifiable. He proposes to shift the focus away from the strictly defined and hermetically closed legal systems and the empirico-positivist approach typical of the last century and advances a theory that is a refinement of the contributions of Gunther Teuber, Robert Cover and Boaventura de Sousa Santos (Melissaris 2004, pp. 73-75). He proposes a conception of legal pluralism that focuses on discourses reducible to the basic schema legal/illegal. He adopts Teubner's definition of "communicative processes that observe social action under the binary code legal/illegal" (Teubner 1998, p. 128). Those discourses, in order to be considered relevant, need to fulfil the further condition to be institutionalised, which is to create generalised expectations and to be the object of the commitment of their participants. The notion of commitment is borrowed from Cover, who has a very strong understanding of the term, which includes an intellectual sense of belonging as well as bodily participation (Cover 1986, p. 1605). Melissaris thus mixes the work of two authors to elaborate his definition of the legal, and to further detail his conception he prescribes also the posture that the research should take. He requires that voice is given to the participants themselves, to their understanding of "what is it that they do when entering the legal discourse and why": this is what Santos calls for, when he argues for letting the South (symbolising the socio-economically dominated subjectivity) emerge and express itself without the distorting interference of a distant observer (Santos 1995, pp. 506-518). Melissaris' sophisticated theory of legal pluralism finds a balance between the philosophies of three different scholars, and for this reason it mixes elements from different schemes of intelligibility. It applies partly the *structural* scheme of intelligibility to legal discourses, since different elements acquire their meaning in relation to the position they occupy in the complex interrelation of closed systems. Interdiscursive relations are conceptualised by Teubner who mobilises a vocabulary and a theoretical apparatus such as "structural coupling" and "linkage institutions" that define specific roles for each element in the total economy of the systems relations (Teubner 1998, pp. 126-129). Melissaris then calls for a move from structures to discourses, which are institutionalised but not in the sense that they become whole coherent systems, rather the institutionalisation is due to the participants' commitment (Melissaris 2004, p. 74). It is at this point that the *hermeneutical* scheme of intelligibility enters into play, with the reference to the participation and with the emergence of the subjugated subjectivities in their own terms. It is they, who, connecting a certain meaning to a certain discourse, make it legal, and it is their understanding of the practice that should be given voice to. Therefore, the researcher should figure out, by interpretation, the signification underlying the (facts of) participation. By so doing, she clarifies the scope of the research and produces legal pluralistic knowledge in line with Melissaris' conception. To sum up, the relevant connections are those that convey a certain meaning to certain facts (hermeneutical scheme), thus setting them within the non-contradictory matrix of legal/illegal discourses (structural scheme).

Finally, Davies aims at developing a new understanding of law, one which is appropriate to contemporary conditions of diversity. Her idea of pluralism is twofold. On the one hand, there is the outward looking pluralism which sees a multiplicity of normative spheres coexisting in the same one space, with state law being one among many normative instances. Davies is aware of the fact that this approach risks remaining trapped in a theoretically singular view of plural laws, focusing on developing a systematic and totalistic understanding of legal plurality. To be sure, she contends (Davies 2005, p. 96), this is what happened to much of the empirical research on legal pluralism. Instead she pleads for a deeper understanding of the conceptual pluralities concerning law. She calls for a re-evaluation of the relation of law to the social, political and moral spheres of life, and for the recognition that all law is a form of cultural practice (Davies 2005, p. 107). As a consequence, legal pluralism comes to signify the multiplicity of the legal

phenomena, which is expressed in a variety of different forms that are incommensurable and cannot be reduced to unity. On the other hand, the second understanding of pluralism she advances points to the inherent pluralism of state law itself, which, far from being a coherent and complete block, is actually full of lacunas, contradictions, unresolved histories and counter-narratives (Davies 2005, p. 96). She suggests re-conceptualising the Western concept of positive law as complex and heterogeneous and presents Cover's insights on *nomos* as effectively expounding the contradictory and fictional foundations of any singular structure of law. This second pluralist attitude also rests on the conviction that law is essentially a cultural expression of a radically plural society (Davies 2005, p. 110). These two attitudes of pluralism, which convene under the expression "ethos of pluralism" both entail a "descriptive" part in which she determines what should be focused on, and what she calls a "normative" part, which includes the political and social reasons that make pluralism preferable to monism (Davies 2005, pp. 100-105). Nevertheless, her approach to pluralism can also be understood as a programme with its heuristic guidance power. Because of her aspiration of making sense of the dominant legal order through its implications in systems of social power and of explicating the alternative concepts of the legal as elaborations on cultural, sexual and other forms of difference, the *hermeneutical* intelligibility scheme can be seen at work in her theory. In other words, the concept of law she expounds is envisaged as an expression of underlying cultural meanings, which are to be assessed through interpretation, and the characterisation of this kind of nexus between meanings and practices is considered to be the *proprium* of the legal pluralistic research.

The divergences in the scholarly production of legal pluralists are in this way grasped as being an expression of variance in the epistemological core of the programmes. The authors briefly considered here all propose a programme of legal pluralism that differs from the other proposals not in the ontological part of the core but in its epistemological axioms. They all apply a different intelligibility scheme to their data, and thus they isolate as relevant different kinds of interactions between their constructed facts. The very same world phenomena would be conceptualised and made sense of in partially different ways by each of these theories. Very much like the blind men touching the elephant, legal scholars conducting their research empirically are being guided by the theoretical programme they adopt, which leads them to construct as legally relevant certain facts and to perceive as academically worthy of attention certain kinds of interrelations between facts.

4. General considerations

The concluding remarks will consider what is the interest in setting the concept of legal pluralism within the theoretical programme theory. Before that, it is appropriate to acknowledge explicitly the nature of the stance of this essay. Clearly, it entails the implicit assumption that the recognition of (not only) normative pluralism in society is necessary. It is under the eyes of everyone that different *Weltanschauungen* happen to coexist very closely and intersect with each other, and this established social reality does not even need to be upheld. Needless to say, the "central" legal system is in need of finding ways to deal with this factual situation, and legal pluralism is certainly a very useful analytical tool. Furthermore, developing theoretical frameworks that enable getting to grip with the complexity of, and to make sense of, the network of interrelated normativities existing in the contemporary world is clearly a way of challenging whether generations of law students should still be inculcated with the general theories of state law that do not take into account other kinds of norms. On the whole, reflecting on the theoretical foundations of the anthropology of law is a way of supporting the overall project of the discipline. This is the underlying agenda of this paper, which has hopefully been visible throughout, the abstractedness of the approach taken notwithstanding. Yet, the main focus of this essay is not to prompt any particular policy of legal pluralism,

but instead it is to apply epistemic reflexivity to the concept by illustrating the way in which the epistemic practice of research, and in particular the theoretical programme chosen, affects the results.

A first corollary of this operation is the reduction of distance between the so-called internal and the external approaches to law. As has been discussed above, the legal anthropological and sociological enterprise involves a change in the nature of the legal research. It introduces, alongside the classical legal doctrine that uses a nomologico-deductive way of reasoning, an inductive way of looking at law, one where the researcher proceeds in order to establish the facts by empirical investigation. This opposition can be presented as the methodological dichotomy between paradigms of inquiry and of authority (Samuel 2007a, 2007b). Often, legal scholars are trapped into a world of consenting insiders and therefore are unable to produce any relevant social scientific knowledge (Samuel 2009). Their intellectual work consists of analysing and systematising rules in the pyramid of precepts so as to determine their exact prescriptive content within the authority paradigm. Conversely, the empirical legal researcher concentrates on the actual behaviour of the people in the world; instead of developing alleged universal theories of law she reveals features of lived normative phenomena (be they of state origin or not). By and large, legal theory and empirical research on law have tended to ignore one another, each going in its own direction and following different research agendas. Still, since they both aim at comprehending the same phenomenon, cooperation could be advisable (Galligan 2010, p. 991). To this end, legal pluralism happens to be rather well placed: it is a fruitful area for constructive engagement between empirical research on law and legal philosophy, whose concepts are directly put into question (Cotterrell 2002, p. 638, Davies 2010, p. 825).

A second corollary of the complexification of the epistemological status accorded to the concept of legal pluralism consists in a further challenging of the dichotomy between the internal *vs.* external approach. The very validity and utility of such a sharp opposition are questioned. A search for the archetypal instance of the dichotomy leads us back to the beginning of the twentieth century, to the conflict between the internal, conceptual and pure theory of law developed by Hans Kelsen and the external approach to law, seen as part of a social complex, adopted by Eugen Ehrlich (Davies 2010, pp. 809-810). The prominence of the two first proponents notwithstanding, this disciplinary division is conventional, unnecessary and furthermore contestable since it is based on the assumption that law has clear conceptual boundaries which scholars can be inside or outside of (Davies 2010, p. 825). In order to question this dichotomy, Bourdieu (1991, p. 95) argues that the internal approach can be conceived of as a product of the legal scholars' social field and of their legitimation strategies. Far from being the general and abstract output of a universal reason, law is actually a space of belief within which the agents are players socialised to think that they are playing a game that deserves to be played (Bourdieu 1991, p. 99). The "internal" point of view is attacked by showing its historicity, its situatedness and contingency. The legal social field yields a normative order that reflects its own values, which are therefore not neutral nor universal. In this paper the direction of the attack to the dichotomy is specular, and the internal/external opposition is challenged by reflections on the inherent normativity of frameworks adopted by the "external" approach to law. The outcome is influenced by decisions concerning the scale and the projection of the inquiry, the purposes of the research, the actors involved in the investigation, the selected sources and the methodological approaches used. Those terms of reference determine what the scholar sees (Griffith 2013, p. 272). How this happens is the question that has been dealt with in this paper, which contributes to the further articulation of the dichotomy beyond the simplistic understanding of internal = normative *vs.* external = descriptive approach.

The overall aim of this paper has been to investigate the nature of empirical knowledge produced through legal pluralistic lenses, its presuppositions and

foundations, its extent and validity. By showing the heuristic guidance exercised by the concept of legal pluralism, it has been highlighted how it enables research and at the same time limits the space of manoeuvre. Such an assessment should not be understood as undermining the validity of the concept. As Bourdieu puts it: "Reflexivity is a tool to produce more science, not less. It is not designed to discourage scientific ambition but to help make it more realistic" (Bourdieu and Wacquant 1992, p. 194). That is to say, the programme approach offers a realistic assessment of the capacity of the term to convey information about the studied domain, one that takes into account the normativity inherent to the use of concepts. Moreover, this approach provides a way to analyse the coherence and the internal structure of the various conceptions of legal pluralism proposed in scholarly literature. It has been claimed that the different usages of the concept by various contemporary theories of legal pluralism can be explained as being a consequence of their derivation from programmes incorporating different intelligibility schemes.

The basic point of this paper is that the definition of legal pluralism adopted steers the research: awareness of this allows for a choice of framework corresponding to one's cognitive interest. In this way, the shape of the "obstacle" constituted by the empirical method is made clear, and the relation between observed realities and the conceptual instruments used to observe them is acknowledged, in that the influence of the latter on the former is undisguised.

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