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Jurisprudence

An International Journal of Legal and Political Thought

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/rjpn20

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To cite this article: Fernanda Pirie (2023) Beyond pluralism: a descriptive approach to non-state law, Jurisprudence, 14:1, 1-21, DOI: 10.1080/20403313.2022.2108608

To link to this article: https://doi.org/10.1080/20403313.2022.2108608

Published online: 27 Sep 2022.

JURISPRUDENCE
2023, VOL. 14, NO. 1, 1–21
https://doi.org/10.1080/20403313.2022.2108608

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RESEARCH ARTICLE

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Beyond pluralism: a descriptive approach to non-state law

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ABSTRACT

The concept of legal pluralism has been used widely in legal scholarship to draw attention to the existence of multiple legal orders. Scholars have relied upon it to avoid the ideology of legal centralism, to counter colonialism, and to highlight the neglect of Indigenous laws. These are ameliorative approaches, which aim to expand the concept of law for particular purposes. But it is not clear that they help to explain what law is and does. In this article, I contrast these normative and critical projects with analytic and descriptive approaches to the concept of law. Descriptive conceptual analysis, using empirical examples to enhance the insights of legal theorists, can better shed light on what is distinctive about law as a social form. The article illustrates this approach with a number of historical and anthropological examples. This leads us, I suggest, to form rather than function, that is, to the quality of legalism. The creation and use of general rules and abstract categories, that is, usefully distinguishes law, as a category that encompasses both state and non-state forms, from the wider class of norms encompassed by the expansive theories of the legal pluralists.

The concept of legal pluralism as a means of studying law beyond the state captured the imagination of legal scholars in the 1980s and enthusiasm has hardly waned since. As well as sociologists and anthropologists, international lawyers have promoted the concept, invoking 'global legal pluralism' as a means to study a wide range of international and transnational laws.[1] Legal theorists have risen to the challenge: some have argued for an expansive concept of law that can encompass multiple forms of social ordering,[2] while others have sought to develop a 'pluralist jurisprudence', which moves beyond the ideologies of the state.[3]

These approaches draw our attention to the existence of multiple legal norms and non-state laws. But it is not clear that they help us to understand better what law is and does. They leave open such questions as what constitutes a legal regime. Does legal pluralism encompass different legal systems or other types of

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[1]Paul Schiff Berman, *The Oxford Handbook of Global Legal Pluralism* (Oxford University Press, 2020) 13.
[2]William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge, University Press, 2009).
[3]Nicole Roughan and Andrew Halpin (eds), *In Pursuit of Pluralist Jurisprudence* (Cambridge, University Press, 2017).

norms?[4] The problem of how to define its boundaries and distinguish law from other social phenomena has frequently been raised but not, as many scholars also recognise, resolved.[5] Does this matter? Berman talks disparagingly of the 'intractable and largely fruitless debates about what should count as "law"' and many scholars seem content to avoid the question of definition and simply to adopt an 'expansive' notion of law.[6] But others remain concerned about whether and how the term can be used for description and analysis.[7]

One of the reasons these tensions remain, I suggest, is that scholars have been pursuing different agendas. The aims of pluralists – to use a single term to encompass a variety of positions – have generally been critical and normative, to avoid the ideology of 'legal centralism', to counter colonialism and its legacies, and to highlight ways in which states disregard the rights and interests of Indigenous people. In pursuit of these aims, they advocate expanding the concept of law to encompass a broader range of legal orders. The more traditional goal of legal theory is, by contrast, simply to clarify what law is and does.

That goal, I suggest here, can be pursued in a way that takes into account non-state laws without embracing the expansive normative agenda of the pluralists. Many of the most important and influential theories about what law is have, it is true, centred on state systems of law and account poorly for non-state laws. But a descriptive conceptual approach can use empirical examples, both anthropological and historical, to develop a broader account. By analysing such examples on their own terms, we can ask what they reveal about law as a social form and the ways in which it is distinctive. This leads us, I suggest, to form rather than function, that is, to the quality of legalism as a distinctive feature of law. The creation and use of general rules and abstract categories, I argue here, can distinguish law, as a category that encompasses both state and non-state forms, from the wider class of norms encompassed by the expansive theories of the legal pluralists.

Legal pluralism: the debates

The project of legal pluralism has a well-analysed history.[8] The antecedents lie in Ehrlich's concept of 'living law'.[9] By this, Ehrlich meant the norms that actually guide human behaviour, 'ordering and upholding every human association', whether or not

[4]Michaels concedes that non-state law is not a real category, and that it is not clear we can treat all examples alike: Ralph Michaels 'What is non-state law? A primer' in M.A. Helfand (ed.) *Negotiating State and Non-state Law: the Challenge of Global and Local Legal Pluralism* (Cambridge, University Press, 2015).

[5]Michael A. Helfand 'Introduction' in his *Negotiating State and Non-state Law* (n. 4), 2; Ralph Michaels, 'What is non-state law?' (n. 4), 48; Brian Z. Tamanaha, *A Realistic Theory of Law* (Cambridge, University Press, 2017); *id. Legal Pluralism Explained: history, theory, consequences* (New York, Oxford University Press, 2021); Roughan and Halpin, 'Introduction' in *In Pursuit of Pluralist Jurisprudence* (n. 3).

[6]Berman (n. 1), 2; Sally Engle Merry, 'An anthropological perspective on legal pluralism' in Berman (n. 1) 169.

[7]Tamanaha, *A Realistic Theory* (n. 5); Fernanda Pirie, *The Anthropology of Law* (Oxford, University Press, 2013); Sean Donlan and Lukas Urscheler, *Concepts of Law: Comparative, Jurisprudential, and Social Science Perspectives* (Routledge, 2014); Roughan and Halpin (n.3); Michael Giudice, 'Global legal pluralism: what's law got to do with it?' (2014) 34 *Oxford Journal of Legal Studies* 589–608.

[8]Franz von Benda-Beckmann, 'Who's afraid of legal pluralism?' (2002) 34 *Journal of Legal Pluralism and Unofficial Law* 37–82; Simon Roberts, 'After government: on representing law without the state', (2005) 68 *Modern Law Review* 1–24; Baudouin Dupret, 'Legal pluralism, plurality of laws, and legal practices: theories, critiques, and praxiological re-specification' (2007) 1 *European Journal of Legal Studies* 296; Brian Z. Tamanaha, 'Understanding legal pluralism: past to present, local to global' (2008) 30 *Sydney Law Review* 374–411; *id. Legal Pluralism Explained* (n. 5).

[9]Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (New York, Arno Press, 1975 [1913]).

they form part of a system of state law. A similar approach was taken by the pioneering anthropologist Malinowski in his analysis of the society of the Trobriand Islands.[10] Here, the influence of centralised government was minimal. Malinowski made a bold move to dissociate law from the institutions of a state, arguing that law was the basis for social order, the unwritten norms that members of a society expected one another to observe and took steps to enforce. The Trobriand islanders had their own laws, he argued, concerning such things as communal fishing activities and the distribution of economic resources, even if these were not written.

Much anthropological work followed on social norms, acephalous societies, their means of maintaining order, and processes of conflict resolution. But it was Moore's concept of the 'semi-autonomous social field' that laid the foundations for theories about 'legal pluralism'.[11] Among garment traders in New York and Indigenous farmers in Tanzania, Moore identified norms that effectively governed patterns of behaviour, both in defiance of state law and in relationship with it. She did not describe these as non-state 'laws', yet John Griffiths put her examples at the heart of his call for empirical scholars to study legal pluralism.[12] Other legal scholars had already noted multiple forms of law in colonial and post-colonial situations, but now, he argued, the idea should also apply to situations where non-state norms were not officially recognised as 'law'. The object of studying 'legal pluralism', then, was to draw the attention of legal scholars to the importance of alternative normative orders, thereby undermining claims that the state's legal system could, and should, provide the main basis for social order.

Griffiths's article generated considerable enthusiasm, but also trenchant criticism.[13] Roberts ultimately developed a careful and comprehensive argument against the expansive use of the concept of law.[14] He offered cogent reasons for precision in the use of concepts and the need to distinguish analytically between legal and negotiated orders. As he put it, to characterise the understandings and practices of stateless societies as legal orders and embrace all normative universes as equivalent does not tell us much of what we might want to know about any of them.[15] There is a risk we will fail to identify the distinguishing features of 'law', properly so called, as well as attributing negotiated orders with the characteristics of law-centred models.[16] Our concept of law has a specialised and differentiated character, Roberts argued, and the result of over-expansion is loss of analytic purchase.[17]

Moore, herself, was also not happy about the way in which her work had been used to argue for a more expansive concept of 'law'. As she later pointed out, she had simply

[10]Bronislaw Malinowski, *Crime and Custom in Savage Society* (London, Kegan Paul, 1926).
[11]Sally Falk Moore, 'Law and social change: the semi-autonomous social field as an appropriate subject of study' (1973) 7 *Law and Society Review* 719–46.
[12]John Griffiths, 'What is legal pluralism?' (1986) 19 *Journal of Legal Pluralism* 1–47.
[13]Brian Z. Tamanaha, 'The folly of the 'social scientific' concept of legal pluralism' (1993) 20 *Journal of Law and Society* 192–217; Simon Roberts, 'Against legal pluralism: some reflections on the contemporary enlargement of the legal domain' (1998) 42 *Journal of Legal Pluralism* 95–106.
[14]Simon Roberts, 'After government' (n. 8).
[15]*ibid.* 23.
[16]*ibid.* and see Chris Fuller, 'Legal anthropology, legal pluralism and legal thought' (1994) 10(3) *Anthropology Today* 9–12, 10.
[17]As I have argued elsewhere and explain further below, while fully agreeing with Roberts's critiques, I do not agree with his conclusion that law is always associated with centralized government: Fernanda Pirie, 'Law before government: ideology and aspiration', 30 *Oxford Journal of Legal Studies* 207–28.

recognised that state law did not control everything.[18] She did not call the norms of the garment traders 'law'. Legal pluralism, she continued, has become too general a category to be analytically useful. Scholars need to distinguish among the very different types of norms and fields in which they occur, from transnational norms and agreements made within global commodity chains, to small scale, face-to-face community-based normative systems. These are not all the same and it does not help to call them all 'law'.[19] Recognising these issues, some empirical legal scholars eventually moved away from the concept of legal pluralism, not least Griffiths, himself, who has now advocated the more general concept of 'normative pluralism'.[20] Others, such as Tamanaha, have suggested that scholars should recognise a wide range of norms, which may be more or less law-like.[21]

The idea of legal pluralism has, nevertheless, remained popular, and many empirical scholars have continued to use the concept of 'law' very broadly, not least to study the laws of Indigenous people.[22] It has been taken up by scholars studying transnational laws: 'global legal pluralism' characterises an important wave of scholarship on the norms, ordering mechanisms, and institutions that seek to regulate transnational activities.[23] Others advocate taking a 'decolonial' approach, in order to counter the 'myth of modernity', that law 'is univocal state law'.[24] Legal theorists, meanwhile, advocate a 'pluralist jurisprudence'.[25] What are the implications for the concept of law?

Ideological approaches and pluralist jurisprudence

Ehrlich and Malinowski were trying to understand and analyse the norms that provide the basis for social order in different parts of the world. Both, that is, took a functionalist view of what law is. Griffiths took a more explicitly ideological approach. He wanted, as he explained it, to move away from 'legal centralism'.[26] This ideology reflects the moral and political claims of the modern nation state, he maintained, and is 'unsuitable and obfuscatory' for the social scientific study of non-state law. The objective was to 'break the stranglehold of the idea that law is a single, unified, exclusive, hierarchical ordering, dependent on the power of the state'.[27] He even criticised Moore's careful ethnographic distinction between the laws of the state and the social norms or 'reglementation' of the garment traders, as she had described them. This, Griffiths argued, was a 'lapse into legal

[18]Sally Falk Moore, 'Legal pluralism as omnium gatherum' (2014) 10 *FIU Law Review* 5–18.
[19]*ibid.* 17–18.
[20]John Griffiths, 'The idea of sociology of law and its relation to law and to sociology' in M. Freeman (ed.) *Law and Sociology* (Oxford, University Press, 2006).
[21]Tamanaha, 'Understanding legal pluralism' (n. 8) 396.
[22]Gregory Ablavsky, Sarah Deer, and Justin Richland, in their chapter on 'Indigenous law' in *The Oxford Handbook of Law and the Humanities* (2019), recognize the problems with the concept, but also its popularity.
[23]Francis Snyder, 'Governing economic globalization: global legal pluralism and European law', (1999) 5 *European Law Journal* 334; Sally Engle Merry, 'From law and colonialism to law and globalization' (2003) 28 *Law and Social Inquiry* 569–90; Berman (n. 1).
[24]Lena Salaymeh, 'Decolonial translation: destabilizing coloniality in secular translations of Islamic law' (2021) 9 *Journal of Islamic Ethics* 1–28, 16, 19.
[25]Roughan and Halpin (n. 3).
[26]Griffiths (n. 12) 1.
[27]*ibid.* 4. In a similar vein, Teubner, a strong proponent of legal pluralism, talked of 'the suppressed discourses of non-state law': Guenther Teubner, 'The two faces of Janus: rethinking legal pluralism', (1992) 13 *Cardozo Law Review* 1443–62, 1443.

centralism'.[28] Recognising legal pluralism required using the concept of 'law' to describe a wider range of social norms.

For many proponents of legal pluralism, the main objective was to draw legal scholars' attention to non-state forms of law. Von Benda-Beckmann described legal pluralism as a 'sensitising concept', intended to highlight the frequent existence of parallel or duplicatory legal regulations within one political organisation.[29] He made it clear that an analytic concept of law needed to be constructed, 'explicitly formulated', in order to 'escape the prison [of state law]'.[30] Like Griffiths, he was deliberately developing a concept that would be suitable for the purposes of studying law beyond the state and this had to be wide enough to encompass a wide variety of normative orders, including rules, principles, categories, concepts, standards, notions, and schemes of meaning.[31] Legal theorist William Twining has pursued a similar approach, explicitly criticising the focus of much legal theory on the domestic law of a municipal legal system.[32] What is needed, he argued, is a 'broadened view of the discipline' of legal theory and a correspondingly inclusive conception of law.[33] This would allow scholars to consider 'all levels of relations and of ordering' including non-state, religious, transnational, chthonic, customary, and soft law.[34]

Similar goals lie behind the more recent enthusiasm for 'global legal pluralism'. Berman argues that the concept provides an analytic framework for understanding and conceptualising laws in the twenty-first century; it pays attention to the interactions among them, as well as the ways in which norms move across borders. Legal pluralists, he claims, are 'unwilling to be confined by a single formalist definition, or a hierarchy of legitimacy among legal orders'.[35] This is the ideology implicitly attributed to the state and its legal system. Legal scholars, in Berman's view, should consider a broad array of 'regulatory norms' and 'institutionalized collective action'. A central objective of such scholars has, thus, been to widen the range of subjects studied by legal scholars and this is to be done by expanding the concept of law. Behind all these positions is a normative stance, a critique of the hierarchical ideology of state law, which traditional legal theory is seen to endorse.

An even more explicitly ideological project is that of 'decoloniality'.[36] The aim, as explained by Salaymeh, is to counter the 'myth of modernity'. This is based on 'a coloniality trinity', which alleges that secularism is the rational and superior alternative to religion, that the state is a secular nation with complete territorial sovereignty, and that law is universal state law.[37] Coloniality, that is, links secularism, the state, and law. Criticising Roberts and his careful distinction between the laws developed by centralised government and the norms of negotiated orders, Salaymeh argues that 'scholars should not police the boundaries of the category of "law"'. Differentiating laws and norms, she

[28]Griffiths (n. 12) 37–38.
[29]von Benda-Beckmann (n. 8) 37.
[30]*ibid.* 40.
[31]*ibid.* 48.
[32]Twining (n. 1) 262.
[33]*ibid.* 374.
[34]*ibid.* 262. He did, however, recognize the consequences: 'the concept of law has so many varied associations that it is unwise to expect it to have much analytic purchase': *ibid.* 373.
[35]Berman (n. 1) 12–13
[36]Salaymeh (n. 24).
[37]*ibid.* 264–66.

says, is a socio-political, rather than an analytic, process.[38] This is to argue against any attempt to define or analyse the concept of law. Salaymeh, herself, resists demands for precise definition: 'decoloniality does not ascribe notions of essence or purity to any of its analytic categories'; law needs a broad and flexible elaboration. It is 'a discourse and praxis in which historical precedents, exegesis and legal opinions interact'; it is 'the product of interpretation of and interplays among legal texts, jurists, judges, bureaucrats, and other legal actors'.[39]

A similarly critical stance towards the state and its laws is taken by those who advocate recognition of Indigenous laws. To Anker, for example, legal pluralism offers a way to critique state dominance and assert the survival of Indigenous law. It is a means of resisting the state's monopoly over the label 'real law' or simply 'law'.[40] Legal scholars should, she says, engage with Indigenous law, so as to 'put into question previously unexamined theoretical assumptions about the characteristics of law' .. and 'ask jurisprudential questions about which normative order should prevail'.[41] As Anker explains, this means critiquing the ethnocentrism of a 'statist understanding of law', which associates law uniquely with the state and regards it as 'the singular characteristic of a civilized society'.[42] The solution, she argues, lies in theories of legal pluralism and postcolonial critiques of law, imbued with Indigenous perspectives, which 'seek to challenge the monologue of state law' and 'tell other stories of law and sovereignty'.[43] Like the project of 'decoloniality', this is an explicit attempt to construct a new theory of law, one that suits the goal of respecting Indigenous people's claims that their laws *are* law.

These positions have understandable aims. Much legal theory, it is true, has concentrated primarily on state law. Hart was explicit about it, introducing *The Concept of Law* as 'an analysis of the distinctive structure of a municipal legal system'.[44] In a paper entitled 'Why the state?' Raz has developed a 'pluralist' account of law which, nevertheless, uses state law as the paradigm example.[45] Other legal theorists, such as Khalidi and Murphy, explicitly confine their attention to systems, such as state law, that distinguish law from religion.[46] It is also, of course, true that colonial powers marginalised, disregarded, and deliberately suppressed Indigenous forms of law, social ordering, and government and that their legacies have not been adequately addressed. And it is in the nature of the nation state to claim supremacy for its own legal system. Anker is right to highlight the limited extent to which Canadian courts have given effect to Indigenous rights and claims to sovereignty.

But what does this mean for legal theory? The strategy adopted by the pluralist scholars is to expand the concept of law so that it can extend to forms of non-state law. These are not projects that seek to explain what law is, but to advocate how it should be, to define a new and broader subject for analysis. Legal theorists, while acknowledging the need to look beyond the state, have acknowledged the problem of over-expansion. Culver and

[38] *ibid.* 268.
[39] *ibid.* 270.
[40] Kirsten Anker, 'Postcolonial jurisprudence and the pluralist turn: from making space to being in place', in Roughan and Halpin (n. 3) 264.
[41] *ibid.* 265.
[42] *ibid.* 268.
[43] *ibid.* 292.
[44] H.L.A. Hart, *The Concept of Law*, 3rd ed. (Oxford, University Press, 2012) 17.
[45] Joseph Raz, 'Why the State?' in Roughan and Halpin (n. 3).
[46] Muhammad Ali Khalidi and Liam Murphy, 'Disagreement about the kind *law*' (2021) 12 *Jurisprudence* 1–16, 10.

Giudice, for example, insist that the concept of law has, at least, a settled core.[47] They argue that scholars can and should consider 'novel phenomena' created by both states and non-state organisations, such as the First Nations Tax Commission in Canada, international commercial agreements, the laws of the EU, and international war crimes tribunals.[48] These, they argue, are forms of 'inter-institutional legality'. But it is not clear in what ways they distinguish them, as legal, from non-legal norms and orders. What about international norms and conventions that are not reduced to written agreements or ad hoc arrangements made between states? Are these all laws? The authors recognise that legal normative orders must be distinguished from moral, aesthetic, religious, and traditional orders, but it is not clear on what basis this should be done.

Donlan and Urscheler argue that law is a 'polyvalent' concept, albeit one with an identifiable 'focal meaning'.[49] Proposing a heuristic account of how a legal regime might emerge from non-institutionalised normative practices, they suggest that the distinguishing features lie in the development of a class of legal experts with specialist training, who use a distinct language, assisted by writing and archives. They also propose a comparative methodological approach, which involves actually 'doing comparison'. Rather than starting with a definition, they suggest, theorists simply need to work with presumptions – implicitly to identify the sorts of examples to start with – and continually reconsider the concept of law. They should, then, assess what such examples reveal about common features of law and those that turn out to be contingent. This is, in outline, the approach I propose below. However Donlan and Urscheler suggest taking a functional approach as a starting point, presumably looking for the sorts of norms and processes by which people maintain social order and resolve disputes, rather as the early anthropologists did. In what follows, I suggest that it is better to start elsewhere. Indeed, it is the implicit functionalism of much legal pluralism that constitutes one of its main limitations. Anthropologist and historians can offer a better range of examples.

A descriptive concept of law

If the goal is to develop an account of law that takes into account a range of non-state laws without losing analytic clarity, how and where should we begin? The pluralists are right that legal philosophers have often started with familiar models of state law in building their theories. Hart and Raz based their accounts explicitly on state law, while others, such as Finnis, have taken state law to be the 'central case'.[50] In doing so, they implicitly relied upon their intuitions about what law is, using the most familiar examples as the central case or paradigm example.[51] But, as analytic philosophers remind us, conceptual analysis may need to go beyond matters of intuition. Advocating descriptive conceptual analysis, the philosopher Haslanger distinguishes an 'internalist' from a 'descriptive' approach to the analysis of concepts.[52] The first uses a priori methods

[47]Keith Culver and Michael Giudice, *Legality's Borders: an essay in general jurisprudence* (Oxford University Press, 2010).
[48]*ibid.* ch. 5.
[49]Donlan and Urscheler, *Concepts of Law* (n. 7).
[50]John Finnis, *Natural Law and Natural Rights* (Oxford, Clarendon, 1980) 11.
[51]Raz made his approach clear: we can identify 'necessary' features by examining 'common conceptions of law' and 'intuitively clear instances of municipal legal systems: Joseph Raz, *The Concept of a Legal System* (Oxford, Clarendon Press, 1970) 3; *The Authority of Law: Essays on Law and Morality* (Oxford, University Press, 1979) 104, 116.
[52]Sally Haslanger, 'What good are our intuitions?' (2006) *Proceedings of the Aristotelian Society*, supplement 106, 89–118.

and relies primarily upon intuitions. If we ask people, in the abstract, what law is, for example, many will start by describing features of state law. This is an 'internalist' approach. A 'descriptive' approach, by contrast, asks about the 'objective' types to which a word translates, relying upon empirical methods and using paradigm cases.[53] We might, for example, prompt our interlocutor to think about different sorts of law, including Islamic or international laws. This might cause them to modify their account of law, for example by questioning whether there must be a direct link with the state. As Haslanger argues, it is a mistake to rely primarily upon our intuitions, which may be too limited and, hence, misleading. A descriptive approach, which considers a range of examples, may reveal that the concept captures something different from what we had assumed when relying solely upon our intuitions. It may reveal that, by using the word, we are tracking something different from what we originally had in mind when considering its meaning. The type of legal theory that the pluralists critique largely takes an internalist approach, starting with intuitions about what law is, rather than exploring a broad range of empirical examples.

A descriptive approach, Haslanger explains, must also be distinguished from an 'ameliorative' approach.[54] This involves the deliberate extension or alteration of a term to form a concept that some may feel is better suited to the contemporary world. It means asking, not 'what objective types does our epistemic vocabulary track', but 'what is the point of having the concept in question and what concept, if any, would do the work best?' Such theorists stipulate the meaning of a new term, she says, with content determined by the role it plays in a particular theory. This occurs, for example, in discussions of 'race' and 'gender', the main focus of Haslanger's own work. Such theorists claim to enhance our conceptual resources to serve their critically examined purposes. This approach may raise useful normative questions about how we should understand such things as race and gender, Haslanger concedes, but it is different from exploring the ways in which we currently understand these concepts.

The same can be said of approaches that seek to improve the concept of law. The pluralists are pursuing various sorts of ameliorative projects, which seek to expand the concept of law for specific purposes, rather than analysing the ways in which we currently understand what law is. They seek to improve the concept of law, to construct legal theories that can serve their critically examined purposes. But this is different from taking a descriptive approach to the concept and exploring the ways in which we currently understand and use it.

Haslanger's 'descriptive approach' to conceptual analysis can, I suggest, shed light on the class of forms we ordinarily designate as legal without either assuming they cluster around the state and its ideologies or seeking to enhance the concepts. To explain the difference between 'intuitive' and 'descriptive' approaches, Haslanger distinguishes 'manifest' from 'operative' concepts.[55] Manifest concepts are those that we think we are applying when we use a word, relying on our intuitions. The operative concept is that which reflects the way in which the concept is, in fact, understood in conversation and which should be at the heart of the analysis. Looking to legal examples, Hart's

[53] *ibid.* 95–97.
[54] *ibid.* 95.
[55] *ibid.* 97–101.

discussion of Austin's theory of law could be regarded as a case in point.[56] Austin proposed that law consists essentially in the commands of a ruler. His theory was undermined by Hart's careful use of examples, which showed that not everything we call 'law' represents a ruler's commands. Many laws, as he pointed out, are facilitative rather than directive: they do not seek to regulate behaviour, rather to make possible such things as reliance upon contracts, or the making of wills or mortgages. Austin, it could be said, was relying on his intuitions about what law was. For him, the manifest concept was that of the regulatory laws enforced by the state. Hart, by contrast, was taking a descriptive approach, using a broader range of examples, which demonstrated that the operative concept was different, and wider, than Austin had assumed. But Hart, himself, could have relied upon an even wider range of examples. He deliberately started with the case of municipal law, not considering such things as Islamic or canon law or other historic examples, which would have produced a different sort of theory. As it was, he concluded that international and pre-state laws were not really law.[57] This does not, on the other hand, justify constructing a new and improved concept of law. A descriptive approach seeks to carry out the initial task by considering a broader range of the examples, of things commonly designated as 'law'.[58]

So how do we identify such examples? Law is what the philosopher John Searle refers to as an 'institutional', rather than a 'physical', fact.[59] To analyse institutional facts – such things as religion, money, citizenship, or democracy – we need to explore what the terms mean and their social roles. To understand their meaning, in turn, we have to observe matters of behaviour, attitudes, assumptions, beliefs, and values. Such facts, or concepts as we might describe them, are rarely amenable to a single, tight definition and there is always the possibility of marginal cases.[60] But the fact that we think and talk in terms of these concepts indicates that they are institutional facts, that they are part of how we make sense of the world. They are concepts whose meaning and ambit we can and should examine in order better to understand the world around us.

As legal theorist Frederick Schauer explains, we have to examine our usage of the concept of law.[61] By considering a range of empirical examples, we may discover that some things commonly thought of as legal may best be understood otherwise, and vice versa. The resulting theory must be able to account for our intuitions about law. But this is not the same as saying that we should base our analysis solely, or even primarily, on our intuitions about it, or on what people take to be the clear standard case.[62] We need to use our intuitions to judge what counts as law, to identify which empirical

[56]Hart (n. 44) ch. 2.
[57]*ibid.* 91–94, ch. 10. Some theorists have proposed that his theory can be expanded to include such cases: Mariano Croce, (2015), 'A practice theory of legal pluralism: Hart's (inadvertent) defence of the indistinctiveness of law', 27 *Canadian Journal of Law & Jurisprudence*, 27–47; David Lefkowitz (2017), 'What makes a social order primitive? In defense of Hart's take on international law,' 23 *Legal Theory*, 258–82; Cormac Mac Amhlaigh (2020) 'Does legal theory have a pluralism problem' in Berman (n. 1).
[58]Haslanger (n. 52), 107–08. This also appears to be the approach advocated by Donlan and Urscheler (n. 7).
[59]John Searle, *The Construction of Social Reality* (London, Penguin Books, 1995).
[60]This is a feature of what Wittgenstein calls 'family resemblance' concepts, and which the anthropologist Needham describes as 'polythetic' categories: Rodney Needham, 'Polythetic classification: convergence and consequences' (1975) 10 *Man* 349–69.
[61]Frederick Schauer, 'Necessity, importance, and the nature of law', in J. Ferrer Beltrán, J. Moreso, and D. Papayannis (eds), *Neutrality and Theory of Law* (Dordrecht, Springer, 2013) 17–31. This is, implicitly, the approach taken by Roberts, when he talks of 'the cultural assemblage we have come to call law': 'After government' (n. 8) 1.
[62]Ian Farrell, 'H.L.A. Hart and the Methodology of Jurisprudence' (2005) 84 *Texas Law Review* 983–1011, 1003.

examples are possible cases, and which are not.[63] But, Dickson argues, even if we work with intuitions, they still need to be analysed: legal theorists can and should describe and evaluate understandings, which might be vague, confused, mistaken, or incomplete.[64] Along the way, we need to note usage that is metaphorical, or simply inaccurate. In conversation we regularly gloss over loose use of language if, in the context, we understand perfectly well what our interlocutor means. But it is different for scholars trying to describe and analyse the social world, where descriptive accuracy and careful distinctions are crucial. As Patterson insists, we must ask what words 'really mean'. What are the concepts implicated in our linguistic practices?[65]

Legal theorist Farrell explains the project well: the targets of conceptual analysis are ordinary concepts, which delineate the situations to which we take the word to refer.[66] The object is to clarify usage, pointing out patterns, and making sense of the way in which we use words, even if this is not wholly systematic. Conceptual analysis unveils their common properties and underlying relationships. The goal is to identify a coherent or structured set to which the word applies, so that sense can be made of it.

This is more than just exploring language use. As the philosopher JL Austin put it, we can use a sharpened awareness of words, to sharpen our perception of the phenomena.[67] Examples that lie on the borderline may be particularly productive for these purposes because they help to clarify understanding and use: we can ask what makes them seem like examples of law, or not, or law-like without being obviously so. We should take seriously, for example, the fact that Moore distinguished the norms of the New York garment traders (as 'reglementation') from state law. This suggests a boundary to the concept of law, based on detailed analysis of empirical examples. This is where legal anthropologists can add valuable resources, by offering empirical examples, of which they have a ready supply, as 'possible cases'.

Law and legalism

Where, then, should we begin? Which examples should we chose? Historians have described and analysed many laws and legal systems created in political contexts that can hardly be described as states. These include the early Mesopotamian laws, the legal codes of traditional China, and law in the Roman Republic.[68] Historic Indian and Islamic laws were the work of religious specialists, who maintained an authority separate from that of the kings and caliphs who wielded political and military power

[63] *ibid.* 996–98.

[64] Julie Dickson, 'On naturalizing jurisprudence: some comments on Brian Leiter's view of what jurisprudence should become' (2011) 30 *Law and Philosophy*, 477–97, 493–95.

[65] Dennis Patterson, 'Alexy on necessity in law and morals' (2012) 25 *Ratio Juris* 47–58, 49. As Joseph Raz, points out, we can make mistakes about concepts. To clarify our concepts, he says, we must use qualitative, rather than quantitative, empirical material, that is, case studies, rather than surveys with pre-defined categories and questions: *Between Authority and Interpretation* (Oxford, University Press, 2009) 24.

[66] Farrell (n. 62).

[67] J.L. Austin, 'A plea for excuses', (1956) 57 *Proceedings of the Aristotelian Society* 1–30, 7–8.

[68] On the Mesopotamian codes: Martha Roth (ed.) *Law collections from Mesopotamia and Asia Minor* (Atlanta, Georgia: Scholars Press, 1995) and Jean Bottéro, '*Mesopotamia: Writing, Reasoning, and the Gods*', Z. Bahrani and M. Van De Mieroop (trans.) (Chicago, University Press, 1992). On imperial China: Wallace Johnson, *The T'ang code*, 2 vols (Princeton, University Press, 1979–1997). On Republican Rome: J.A. Crook, *Law and Life of Rome* (Ithaca, Cornell University Press, 1967).

in their regions.[69] Scribes of medieval Ireland and Iceland, the villagers of remote communities in Dagestan and medieval Spain, and tribesmen in Tibet and Yemen were not citizens of any state yet they made detailed and sophisticated sets of laws.[70] Such examples give us a starting point, but what are the common features? What makes them law? What unites such cases and distinguishes them from non-legal forms? Is there not a danger of falling back upon the paradigm case of state law to identify the 'legal' features amongst such a disparate range of examples?

A combination of intuition and judgement must be used in these cases and we cannot expect clear-cut answers. The history of law in the Roman Republic can be used as an example. Much scholarship on Roman law concerns the doctrine set out in the jurists' *responsa* collected together in the *Corpus Iuris Civilis* promulgated for the emperor Justinian in the sixth century of the common era. But the history of legal developments over the preceding millennium raises a host of interesting questions about the nature and role that law played in Roman society. The earliest written laws (*lex*, *leges*) were approved by citizens' assemblies, mainly to grant rights to ordinary people and ensure fair process. The first laws were the Twelve Tables, promulgated in 459BCE.[71] These consisted of a rather mundane set of rules, concerning legal procedures, specifying compensation for injuries, theft, and other minor crimes, and making rules for wills and inheritance, debt and debt bondage, contractual obligations, and damage to property. The laws contained rules about how legal processes ought to be conducted and they formalised certain legal relations, but little more than that. In terms of regulating social life, the Twelve Tables probably made very little difference to the lives of most citizens, to processes of government, or to the traditions and practices of mediation that must, in reality, have governed everyday life.

So what justifies us in referring to the *lex* as law? The Twelve Tables were important, inscribed on bronze tablets and displayed in the Forum for all to see. One significant provision was the rule that 'important cases', those involving the death penalty, required the approval of 'the fullest possible assembly', that is, the council of ordinary citizens. This was confirmation that all Roman citizens should participate in the administration of justice. They made important statements, that is, about citizens' rights. Romans came to see the Twelve Tables as the foundation of their legal system. And in form, they were obviously laws – casuistic statements about legal processes, debt claims, and compensation. But they were also important for what they symbolised – the status of the citizens' assemblies and the fact that ordinary people, particularly debtors and those subject to injuries, had rights. In practice, too, many of the *leges* made by later citizens' assemblies imposed restrictions on the exercise of official power and provided weapons in their constant campaigns against corruption.

It was centuries before anything like a legal system took shape in Rome.[72] Gradually, the judges hearing the most important cases came to demand a precise form of words to

[69]Donald R. Davis, *The Spirit of Hindu Law* (Cambridge, University Press, 2010); Joseph Schacht, *An Introduction to Islamic Law* (Oxford, Clarendon Press, 1964).

[70]For these and other examples, see Fernanda Pirie, *The Rule of Laws: a 4,000-year quest to order the world* (London: Profile Books, 2021).

[71]On the Twelve Tables, see Elizabeth A. Meyer, *Legitimacy and Law in the Roman World* (Cambridge, University Press, 2004) 26.

[72]The scholarship on Roman law is extensive. I have relied, in particular, upon David Ibbetson, 'Sources of law from the Republic to the Dominate', in D. Johnston (ed.) *The Cambridge Companion to Roman Law* (New York, Cambridge

establish a claim and eventually the *praetor*s, government officials in charge of the courts, specified what claims could be made and in what ways. They set out the *formulae* that people had to use to initiate a legal action. This brought legalism and formalism to the processes. Meanwhile, the citizens' assemblies continued to make laws, *leges*, often concerning official corruption. Later again, a more abstract sense of law, *ius*, was developed by jurists. These legal scholars gave *responsa*, opinions, to litigants and judges who came to them for advice. Gradually, the jurists teased out general legal principles and rules which could be used for argument and they debated amongst themselves what the underlying law, the *ius*, was and should be. It was their opinions that eventually formed the basis of Justinian's great codification. In the meantime, they developed the *ius* as a complex set of legal rules and principles, abstracted from the *formulae* of the praetors and the *leges* of the assemblies.

During most of its period of development in Republican Rome, then, Roman law was found in three distinct sets of resources, the *leges* of the assemblies, the *formulae* of the praetors, and the *ius* of the jurists. The Twelve Tables and other *leges* were explicit, publicly produced rules that anyone could cite. The *formulae* were precise forms of words, which effectively defined legal rights and their consequences. The *ius* was explained in carefully specified rules and principles. Using the term 'law' is one way to identify what is distinct about these social forms, although none of the Latin terms is the exact equivalent. In each case, it was their form, their legalism, that distinguished them from the host of other norms that must, in practice, have regulated the lives of Roman people, including the decrees and orders of officials and, later, emperors. This brief summary can hardly do justice to Republican Roman law, but it indicates how empirical examples can be used to raise and address useful questions about the nature of law and the distinction between law and non law.

Historians of medieval Europe provide further examples. Cheyette describes the shift in practices of conflict resolution that occurred in twelfth-century Septimania, now in southern France.[73] In the eleventh century social relations were structured by networks of patronage and hierarchies of social status. Disputes, particularly among the landowning classes, were resolved by respected mediators, whose primary goal was to address insults and satisfy ideas of honour. Cheyette describes how these systems broke down in the twelfth century, with the growing political centralisation and the introduction of new courts and laws, based on the rediscovered Roman law. Now an owner of land in Septimania might be based in Paris, so disputes over boundaries or land use could arise between people who hardly knew one another, making the old systems less effective. Cheyette also describes the attraction of the new courts and the impersonal nature of the laws they applied. People felt they could rely on the laws to stand up to those who had infringed on their interests.

But Cheyette starts his analysis by asking the cogent question: why should anyone prefer the objective neutrality of the new laws to a system of partiality in their favour?

University Press, 2015); Alan Watson, *Law Making in the Later Roman Republic* (Oxford, Clarendon Press, 1974); Callie Williamson, *The Laws of the Roman People: Public Law in the Expansion and Decline of the Roman Republic* (Ann Arbor, The University of Michigan Press, 2005). For the work of the praetors and the jurists, I have consulted T. Cory Brennan, *The Praetorship in the Roman Republic* (Oxford, University Press, 2000) and Bruce Frier, *The Rise of the Roman Jurists: Studies in Cicero's pro Caecina* (Princeton, University Press, 1985).

[73]Fredric L. Cheyette, 'Suum cuique tribuere', (1970) 6 *French Historical Studies* 287–99.

Neutral, objective order is very much a learned value, he points out.[74] The answers he offers are complex, a combination of social, political, and economic factors. But the point is that there was a significant difference between the two sorts of process and their implications. On the one hand, the historic system of arbitration took into account the social complexity of most disputes and it recognised and reinforced long-standing relations of social hierarchy, honour, and patronage. What developed in the twelfth century was a system that used objective and impersonal laws, which themselves employed abstract categories: movables and immovables, inheritance and gift, tenant and lord, nobleman and bourgeois, married woman and widow. While the old system had relied upon norms expressed in terms of the subjective feelings of the persons involved, their pride, honour, or shame, the new laws put people, things, and events into distinct classes, to which rules could be applied to adjudicate in a dispute.[75]

This case sheds light on the difference between the social norms and general principles used in practices of mediation, on the one hand, and legal norms and legal means of decision-making, on the other. The legalism that characterised the new laws, many of them based on Roman precedents, is a style of describing the world and prescribing how it ought to be using general rules and abstract categories. It is not a feature of all the social norms that must have shaped the daily lives of the Septimanians, but identifies a set of resources that were distinct among them, and which could be used to adjudicate disputes in the new courts. It is similar to the difference between the explicit *leges* and *formulae* of the Roman praetors and the informal practices of negotiation and mediation that must have co-existed alongside them. It highlights the difference between adjudication through the application of explicit laws and mediation or conciliation according to implicit norms and moral principles.

Ethnographic examples of marginal cases highlight a similar distinction in very different contexts. The anthropologist Lloyd Fallers carried out fieldwork in the 1960s among the Basoga of what is now Uganda.[76] The Basoga had established courts, influenced by colonial models, but in which all proceedings were oral, and which they managed independently of the colonial authorities. Fallers noted what he called 'legalism', a style of decision-making and argument often used by Soga judges and litigants, and he contrasted this with the 'moral holism' some litigants might also appeal to. The former he described, drawing an analogy with the English common law, uses abstract categories and general rules to reach definite decisions. One case he witnessed concerned a charge of 'harbouring'. It was a case in which a wife in an unhappy marriage had returned to her natal home and the husband had brought a charge of harbouring against her father. The case largely turned on the issue of the bride-price and whether or not the father had offered to return it. 'Harbouring' was, Fallers explains, a legalistic concept with a precise meaning for the Basoga, which they used in such cases to decide on what the outcome of a family dispute should be. It allowed the judge to make a clear decision about whether the father's conduct had been right or wrong and what the consequences should be. Fallers hesitated to call this an example of 'law' – it is a case that hovers usefully on the margins – but he identified an important distinction between

[74] *ibid.* 290.
[75] *ibid.* 289–90.
[76] Lloyd Fallers, *Law without Precedent: Legal Ideas in Action in the Courts of Colonial Busoga* (Chicago, University Press, 1969).

the style of argument he called 'legalistic' and the 'moral holism' that Soga litigants might resort to in other circumstances. People who felt that legalistic concepts gave them no particular help in a dispute might resort to a different sort of argument, describing the people, situations, events, and issues in question in all their complexity, rather than reducing them to precise categories and propositions, as happened with the charge of harbouring. Moral holism is a form of argument, Fallers pointed out, that makes a definite decision far more difficult to reach. Legalism, by contrast, uses categorising concepts, which can be applied in a variety of cases to reach a clear decision.[77]

The importance of categorising concepts and the consequences of their use in other legal systems has been remarked upon by legal theorists. Honoré pointed out that 'real laws', including English criminal statutes, tend to classify and specify the consequences of acts – the damages payable on a breach of contract or the punishment that should be meted out for a crime, for example – rather than telling people directly what they can or cannot do.[78] They give guidance to judges, that is, on how to decide a legal case, making adjudication possible. The Soga example draws our attention to the cross-cultural importance of this style of adjudication and the use to which abstract categories and general rules may be put, in both state and non-state systems. It helps to identify a distinct social form, legalism, that can be found widely in very different political settings and cultural contexts, within or beyond the state.

Legalism is, however, not a universal way of organising social life or addressing disputes. Elsewhere, I have described a Ladakhi village, based on lengthy ethnographic fieldwork. In this village, the inhabitants had a clear sense of custom, of 'what we do', but used no written records, let alone formulating a village constitution. They took internal conflict extremely seriously, almost inevitably calling a village meeting to address public arguments and fighting. But they worked entirely through negotiation and conciliation, not by imposing explicit rules or even trying to define categories of wrong.[79] During such meetings, the villagers, rather, appealed to ideals about social order and the perils of conflict, the fact that quarrelling was problematic and 'bad' for the village, as they sought to persuade the parties to overcome their antagonism. They did not attempt to adjudicate by applying explicit rules. The focus of these mediation process was almost invariably on the antagonism, on the shouting or fighting that had erupted and which, the villagers clearly felt, was a threat to the order and stability of the whole community. In practice, unresolved antagonism might simmer for years: one man's son had abandoned another's daughter and then run away to the town. Arguments might periodically erupt between the two fathers, but the object of the village meeting was always to persuade the two men to apologise for their argument, to pay a fine to the village in recognition of the disruption they had caused, to shake hands, and to promise not to fight again. It was symbolically to restore order, not to adjudicate the underlying dispute through the application of legalistic rules, as the Soga judges did.

It is not that questions of fault were never considered in Ladakh. In one case, a young boy had perished while herding sheep up in the mountains with a group of other village youths. The villagers investigated and were unable to work out what, exactly, had

[77] *ibid.* 20–21.
[78] A.M. Honoré, 'Real laws', in P. M. S. Hacker and J. Raz (eds), *Law, Morality, and Society* (Oxford, University Press, 1977).
[79] Fernanda Pirie, 'Legalism: a turn to history in the anthropology of law' (2019) 15 *Clio@Themis* 1–15.

happened, but clearly felt that the other boys were, at least to some extent, responsible. Their families were made to pay very heavy fines, both to the village and to the victim's family and to exercise more control over their sons, after which the case was regarded as resolved. But there was no question of any crime being defined or any procedural rules being imposed, or anyone appealing to rules of evidence to determine the question of guilt. Unlike the Soga judges, the Ladakhi villagers did not use legalistic concepts or rules to address even the most serious cases.

The Ladakhi example is particularly interesting because the villagers had prized literacy and learning for centuries. So it seemed like a deliberate choice on their part not to create local rules or a village constitution or even to keep records of decided cases. Elsewhere in the greater Tibetan region, equally remote villagers have kept extensive records of legal cases, agreements, and decisions.[80] The Ladakhi villagers seem deliberately to have turned their backs on law and legalism. Drawing a distinction, then, between legal and non-legal forms and practices allows for insights into distinctive features of these societies and differences amongst them, which would be obscured if we simply classified all norms and normative practices as 'law'.

The distinctive nature of law, among other social norms, becomes even clearer by contrasting another Tibetan society, in which disputes were also resolved through mediation but where the tribespeople and their mediators did refer to a set of written laws.[81] Again, the study was based on ethnographic fieldwork. Although they formed part of the greater Tibetan cultural area, these Tibetan tribesmen had, over the centuries, developed very different social dynamics from those of the Ladakhi villagers. Patterns of feuding and mediation shaped them: livestock raids were common, fights regularly erupted, the young men felt obliged to get angry and take revenge. But, as is common in such societies, the tribespeople had also developed systems of mediation by which to address and, often, prevent, the escalation of conflict. In the most serious cases, when mediation was arranged after an injury or a killing, the mediators heard elaborate argument about status, the nature of the antagonism and injury in question, the insult it represented, and the inadequacy (inevitably) of the proposed compensation. The parties and their representatives engaged in flamboyant oratory, using elaborate and obscure metaphors and aphorisms, with which the most respected advocates took pride in wrong-footing their opponents. The processes were essentially forms of negotiation; the object was to bring the parties to agreement, and the most respected mediators had to rely on their status – often as reincarnate lamas – to persuade angry tribespeople to set aside the imperative for revenge and accept compensation. They made no reference to legal rules and could not simply adjudicate on what was right and wrong or what proper compensation ought to be.

Yet the Tibetan tribespeople did have sets of rules. Although they did not apply them directly, tribal leaders kept written texts, which they had carefully recreated after the destruction of the Cultural Revolution. These texts contained rather schematic sets of rules, which clearly reflected local mediation practices, including the procedures normally used to call a truce before mediation could begin, as well as the basis on which

[80]Charles Ramble, *The Navel of the Demoness: Tibetan Buddhism and Civil Religion in Highland Nepal* (New York, Oxford University Press, 2008). This is also true of small communities elsewhere, particularly in the Islamic world: see further examples in Pirie, *The Rule of Laws* (n. 70), ch. 8.

[81]Pirie, 'Legalism' (n. 79).

compensation should be awarded in different cases. They were legalistic in form, setting out levels of compensation and making use of abstract categories, including a hierarchy of social status, which could, at least in principle, have been applied to a range of cases. But they were complicated and, in practice, never actually applied during mediation processes. As one mediator declared, 'we don't need to, we know what they contain'. So what were they for? Comparison with other anthropological cases suggests they should be understood more as symbols of tribal integrity.[82] The mediators insisted that their tribes had their own laws, even if these were similar to the laws of the other tribes in their region. The preambles to the laws also made reference to historic Tibetan kings and the Buddhist principles they had introduced into Tibet. The texts were, as I concluded, symbolic and aspirational, more than practical legal instruments.[83]

Yet what were they, if not sets of laws? The rules were legal in form, even if never applied directly in practice. Such a case, on the margins of what we might normally described as 'law', directly raises the question of definition. What makes the example of the Tibetan texts seem more law-like than the general principles appealed to during the Ladakhi mediation processes and, indeed, those undertaken, in practice, by the tribesmen? Is it really right to describe either of them as an example of law and, if so, on what basis? Addressing these questions again highlights the importance of the legal form, the legalism of the written text. The second example raises a further issue. How can a set of rules be laws if they are never applied, if they seem to be symbolic more than practical?[84] Must law always take the form of 'effective' norms? Can it be law if it does not directly determine behaviour, even that of the mediators? The written rules, in this case, were more law-like than the customs of the Ladakhi villagers, even though the latter more effectively regulated social practice. Much more could, and has been, said about these cases, but the point here is to illustrate how empirical examples can be used to test and clarify our concept of law. They can help to highlight boundaries and features that make certain cases seem more legal than others.

They also highlight some of the limitations of the concept of law developed in legal pluralism scholarship, broad though it is. Many of these theories link the concept of law to a normative system or order.[85] Berman, for example, talks of 'regulatory norms' and 'institutionalized collective action', while Helfand refers to 'systems of rules' with authority.[86] Other scholars emphasise 'efficacy' and 'binding obligations'.[87] Implicit in these approaches is the idea that law is found in systems of norms that guide behaviour, in the ways described long ago by Ehrlich and Malinowski. But this concept of law, although loosely delineated, is still under-inclusive. It does not account for all the social forms and processes that we intuitively describe as 'legal', such as the texts of Tibetan tribesmen, along with other examples of legal texts that seem to have had no direct application. Examples abound, from the legal codes of early Mesopotamia, to the texts of early medieval Germanic kings, to many modern constitutions, which are

[82]Pirie, 'Legalism' (n. 79) 7–10.
[83]Pirie, 'Legalism' (n. 79); see also Pirie, 'Law before government' (n. 17).
[84]I have discussed these issues in Pirie, *The Anthropology of Law* (n. 7).
[85]Michaels refers to 'legal rules' that are regarded as authoritative and thus have social efficacy, even if they are not backed by the power of the state: 'What is non state law?' (n. 4) 44.
[86]Berman, (n. 1) 2–3; Helfand, 'Introduction' (n. 5) 5–6.
[87]Michaels, 'What is non-state law?' (n. 4) 49; Berman (n. 1) 10–11.

never likely to be enforced in any detail.[88] These examples suggest that we need to look beyond systems of norms to understand what is distinctive about law, legal processes, and legal arguments.

Possible cases and the problem of translation

These examples can all be regarded as what Schauer and Farrell call 'possible cases'. They are the basis for what I have called a descriptive approach to the concept of law or the sort of comparison proposed by Donlan and Urscheler. By considering their details we can test out intuitions about what law is and its central features, as well as the boundaries between what is law or legalistic, and what is not.

Legal theorist John Gardner acknowledges the importance of testing intuitions in this way.[89] To set about understanding the nature of law, he says, one needs constantly to juxtapose it with nearby things that are not law and to isolate the various axes or dimensions in which it differs from its many neighbours. Differentiation is only possible, he emphasises, against a background of commonality. Rather than hoping to achieve a precise definition in the abstract, this means considering real examples of phenomena that might or might not be examples of law and using them to reflect on the application of the concept, hence its boundaries. Even if those boundaries cannot be clearly defined, as may become obvious when we come across an example that seems to be neither clearly law, nor not law, the exercise still gives us a sense of where the boundary is.

The starting point for such work, as Schauer recognises, is common linguistic usage. It means asking whether an example can would ordinarily be designated as legal. But a challenge is presented when those who form the institution or undertake the practice in question use different concepts and language to describe their social relations. Schauer argues that to understand the nature of law we need to start from ordinary language use, 'it is *our* understanding that is at issue, just as it is *our* concept of law that we are considering'.[90] But should we not start with the things that those we are studying designate as 'law'?

Tamanaha has developed what he calls a 'conventionalist' approach to the identification of law, which means relying upon usage and social practice, so that law is 'whatever people label as "law"'.[91] 'Folk legal pluralism', as he puts it elsewhere, defines law by asking what people in a given social arena collectively recognise and treat through their social practices as law (or *recht*, *droit*, *lex*, *ius*, *diritto*, *prawo* etc.)'.[92] This is an attractive approach, in that it draws our attention to the ideas and understandings of those we study. It suggests that we take them seriously on their own terms. It also implicitly recognises that if those we study call something 'law', they are endowing it with some sort of importance or authority. Islamic legal scholar Baudouin Dupret similarly insists that the study of socio-legal phenomena needs to be focussed on ordinary people's identification and comprehension of legal situations and should contribute to the elucidation of what they ordinarily understand by the term.[93]

[88]Bottéro (n. 68); Patrick Wormald, *Legal Culture in the Early Medieval West: Law as Text, Image and Experience* (London, Hambledon Press, 1999).
[89]Gardner, *Law as a Leap of Faith* (Oxford, University Press, 2012) 296.
[90]Schauer (n. 61) 25, 30.
[91]Tamanaha, *A General Jurisprudence of Law and Society* (Oxford, University Press, 2001) 49.
[92]Tamanaha, *Legal Pluralism Explained* (n. 5) 12; see also his *A Realistic Theory of Law* (n. 5).
[93]Baudouin Dupret, 'The concept of law: a Wittgenstinian approach and some ethnomethodological specifications', in S.P. Donlan et al. (eds), *Concepts of Law* (Ashgate, 2014) 59–74, 62.

But although this approach may work well among English speakers, as a means to identify laws it quickly breaks down if the people in question do not use the English language. What, then, do they 'label as "law"'? The problems multiply if there are just a few English-speakers among the population in question or if they are not consistent in their use of the term. How many of them need to call it 'law' before it counts as such, and must we recognise the usage of those who have obviously political reasons for applying the label? This includes the many Indigenous groups who, for the best of reasons, seek recognition of their 'laws' in the state's court.[94] Are they best described and understood as such? We still need to know what counts as treating something as law.[95] As Gardner put it, 'what Tamanaha wants us to search for … are various indigenous ideas of law'. But 'how can we possibly identify them as concepts of law before we know what counts as law?'[96]

Responding to such criticisms, Tamanaha says that 'one should look at what people in a given community consider 'law' in their own language, which a theorist can find using common translations'.[97] 'Shariah' is law, he says, because Muslims recognize that as law.[98] It is true that *shari'ah* is often translated as 'law', but really it encompasses more than law.[99] Many scholars prefer to translate it as 'God's path for the world', more often regarding the *fiqh* texts as Islamic law.[100] This is the body of legal texts developed over centuries by Islamic legal scholars in an explicit attempt to translate the ultimately unknowable *shari'ah* into accessible, but inevitably imperfect, legal rules. And there is a continuing debate among English-speaking scholars about how the phrase 'Islamic law' should be used.[101] The issues and debates go far beyond anything that could be resolved by looking for common translations.

But this does not mean we have to limit what we understand or describe as 'law' to cases in which the people in question use the term 'law', or even a concept that might be directly translated as 'law'. English-speaking scholars regularly use the term 'law' to describe the systems and practices that may not be conceptualized in equivalent terms by the people in question, as the examples described above demonstrate. None of the Latin concepts of *lex*, *formula*, or *ius*, for example, is the exact equivalent of the English 'law' and, indeed, Roman scholars often refer them as 'sources of law'. But they provide the basis for what is generally described as 'Roman law'.[102] English, like most languages, is sophisticated enough to offer phrases, sentences, paragraphs, even whole books, in which scholars attempt to do justice to ideas and concepts that have no equivalent in a single English (or other) word. In doing so, they may describe

[94]Examples include those described by Elizabeth Cassell in 'Anthropologists in the Canadian courts', in M. Freeman and D. Napier (eds), *Law and Anthropology* (Oxford, University Press, 2009) and Maria Sapignoli in 'Indigeneity and the expert: negotiating identity in the case of the central Kalahari Game Reserve', in M. Freeman and D. Napier, *op. cit*.
[95]Pirie, *The Anthropology of Law* (n. 7) 44.
[96]Gardner, (n. 90) 298. To be fair Tamanaha acknowledges and addresses these criticisms in his *Legal Pluralism Explained* (n. 5), 206. I hope I have done justice to his responses.
[97]Tamanaha *A Realistic Theory of Law* (n. 5) 75.
[98]Tamanaha *Legal Pluralism Explained* (n. 5) 12.
[99]Wael Hallaq, *An Introduction to Islamic Law* (Cambridge, University Press, 2009) 163.
[100]Bernard Weiss, *The Spirit of Islamic Law* (Athens, University of Georgia Press, 1998) 22; Knut S. Vikør, *Between God and the Sultan: A History of Islamic Law* (London, Hurst & Co, 2005) 1–2.
[101]Hallaq (n. 99), ch. 10. And see Joseph Schacht, 'Problems of modern Islamic legislation' (1960) 12 *Studia Islamica* 99–129; and *id. An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964) ch. 15; Dupret, 'The concept of law' (n. 93) 74, 72; *id. What is the Sharia?* (London: Hurst & Company, 2018) ch. 7.
[102]Crook (n. 68) 18–30.

indigenous ideas, social forms, and practices as examples of law or as being law-like in particular ways, or as something else, in their effort properly to convey their meaning to those who do not read and think in the relevant language. But equally, they cannot simply rely on what the people in question described as 'law' in order to identify what counts as an example. This brings us back to descriptive conceptual analysis, which is necessary to clarify the circumstances in which we can use the term 'law' or, indeed, where it is better avoided. The object is to explain accurately, in ways that our audience will readily understand, the nature of the phenomena in question.

Conclusion: a descriptive concept of law

Taking a descriptive approach to the concept of law, using empirical examples, does not always produce neat definitions. The concept of law is what the anthropologist Needham calls a 'polythetic category'.[103] It is not amenable to precise delineation. But this does not mean that we cannot ask useful questions about what law is and does as a distinct class of social forms or that we can avoid asking how we should properly use the term for description and analysis.

The methodological starting point, I have suggested, is to consider empirical cases and ask whether they are examples of law. To account for non-state law and situations of plurality we must start with non-state examples and rely, at least in part, on our intuitions: is the case one to which we take the concept of law to apply? Does it square with our clear intuitions about the concept? Does it highlight the limits of the concept of law? Such examples can then clarify boundaries – for example between explicit laws and implicit customs, or legal systems and negotiated orders, or adjudication and mediation – without offering a comprehensive definition. This, in turn, can lead to reflections on the distinct class of social forms we ordinarily refer to as 'law' or 'legal'. The examples I have outlined in this paper all point to the importance of the legal form, to legalism, in clarifying the boundaries between law and non law. This suggests that law is distinct not because of what it does – providing the basis for social order and mechanisms for regulation – or because people look to it to guide human behaviour and resolve their disputes. It is distinct because it does these things in a particular way. As John Gardner argued, law provides 'a special *way* of resolving disputes', it is a 'modal form'.[104]

As legal theorist Mariano Croce, puts it, legal rules are distinct among others in that they offer explicit norms, which claim autonomy from extra-legal factors and assert their own validity.[105] Legal experts come to be regarded as the 'authorised interpreters' of legal knowledge, while lay people employ legal categories to rephrase and renegotiate their everyday reality. Law has a productive circularity, he concludes, which affects social reality in a performative manner. This resonates with the remarks of anthropologist Chris Fuller, that law consists of 'powerfully self-validating systems of thought'.[106]

[103]Needham (n. 60).
[104]Gardner, (n. 89). I do not, however, entirely agree with his account of the role of officials in identifying law.
[105]Mariano Croce, 'Is law a special domain: on the boundary between the social and the legal', in Donlan and Urscheler (n. 7) 162–65.
[106]Chris Fuller, 'Legal anthropology, legal pluralism and legal thought' (n. 16).

The examples I have given in this paper, brief though they are, indicate that legal rules make processes procedurally more formal, more legalistic, allowing for definite decisions. The praetors' formulae transformed court practices, demanding the use of explicit rules and forms of words, in a similar way to the court practices in Septimania and Uganda described by Cheyette and Fallers. This indicates that empirical and theoretical legal scholars can and should distinguish what is distinctly legal among the many social norms and related practices they consider, not because it is more important, but because it is different. This, in turn, raises questions about the roles that law and legalism play in human societies. Rather than simply identifying law with all the social norms that govern behaviour, this approach identifies legalistic forms that are not wholly practical, leading to new questions about who created such texts and for what purposes.[107]

So what of the ameliorative goals of the legal pluralists? Clarifying use of the concept of law in this way does not mean limiting our subjects of study, let alone restricting them to state law. There is nothing to stop legal scholars investigating non-legal forms of normative order. Anthropologists and other empirical scholars should continue to take an interest in social forms that have law-like forms or functions without necessarily being examples of law. Their task is to examine the social world in all its complexity, to understand societies on their own terms. They may start with forms that seem broadly legal, but conclude that these are not, in fact, examples of law, rather implicit rules and principles or traditional social practices, like those of the New York garment traders or the Ladakhi villagers. This approach and the insights it produces are diminished if we call all of this 'law'.

None of this is to deny that there may be contexts in which it seems morally and politically right to use an expanded concept of law and to recognize the arguments of those who do so. Legal scholars may support the claims of Indigenous people to 'their' law, recognizing that they are making valid claims to autonomy and sovereignty in terms of law. But to seek to improve the concept of law, for political or other purposes, is to pursue a different project from that of descriptive analysis. Over time, new usage may lead to a change in the way that a concept is ordinarily understood: concepts, as Haslanger points out, do change their meanings.[108] But the two projects are different in their aims and methods.

An ameliorative approach is not even always necessary to counter the state's claims to the pre-eminence of its legal hierarchy. Careful analysis of empirical examples, as I have demonstrated, reveals that different forms of law have existed through history and in different parts of the world, not all connected with a state or even centralized government. It also makes clear that not all societies have resorted to law as the foundation of their social order.[109] This opens the possibility of other arguments that could be advanced by Indigenous people – that their social traditions and sovereignty should be recognized as having developed without explicit laws; and that they deserve just as much respect, on this basis, as they would if they had developed more legalistic practices.

[107]Croce (n. 105) also remarks that social rules do not just mandate conduct, they also conserve shared knowledge.
[108]Haslanger (n. 52) 105.
[109]As Donlan and Urscheler argue (n. 7), 'law' is a folk concept, which should not be seen as culturally or morally superior to other normativities. Efforts to validate non-Western forms by labelling them 'law' are often misplaced, making the Western concept a standard for others, a form of 'concept colonialism'.

Conceptual accuracy may, in some circumstances, be the best contribution that legal scholars can make to the toolkit of those who would make the world a better place.

Acknowledgements

This article has been a long time in the making. For the early genesis of some of the ideas I am indebted to discussions with Paul Dresch and Judith Scheele in the *Oxford Legalism Project*. Peter Cane gave helpful advice and encouragement on a much earlier draft. The current version has benefitted considerably from the comments of two anonymous reviewers for *Jurisprudence*. I thank them all.

Disclosure statement

No potential conflict of interest was reported by the author(s).