

Beyond the Law of the Nation-State:

An Inquiry into the Theory of Legal Pluralism
and Societal Law

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Introduction

”Basing societies around plural self-governing communities of choice would enable individuals to exercise the option of doing things differently, but also offer the constraint of exit over exercise community regulation, since such obligations would be voluntary. Greater community self-control would tend to reduce inter-community friction, because individuals would not feel threatened that they would be the subject of legislation in matters of morals and lifestyles by artificial political majorities”¹

Background

These “artificial political majorities”, as Paul Hirst has phrased it, leads to a kind of oppression, in which ”democratic process” becomes its legitimacy ground. Because of merely passing through the carousel of “democratic process”, suddenly it would justify the oppressive nature of governance in, which law is being employed as at tool to oppress the minority who lost in the “Democratic Carousel”.

In the words of Carl Schmitt, “Whoever control 51 percent would be permitted to use legal means to close the door to legality, though which they themselves entered, and to treat partisan opponents like common criminals, who are then perhaps reduced to kicking their boots.”² Because “The majority is now suddenly no longer a party; it is the state itself. In the state, as Otto Mayer once said, “that which is without limits breaks through” the norms, in which the legislative state and statutory application bind themselves, however narrow and limited these sets of norms may be.”³

This control of political power enables the majority to employ law as an instrument to exert their power. “The claim to legality renders every rebellion and countermeasure an injustice and a legal violation or “illegality.” If legality and illegality can be arbitrarily at the disposal of the majority, then the majority can, above all, declare their domestic competitors illegal, that is, hors-la-loi, thereby excluding them from the democratic homogeneity of the people.“ So the question, which arises with our regular “nation-state law” is, to which extent will our system accommodate the diverse values which resides within political entity?

¹ Paul Hirst, *Statism, Pluralism and Control*, Brit. J. Criminol. (2000) 40, 279-295

² Carl Schmitt, *Legality and Legitimacy* p.37

³ Idem

In the past century we have witnessed many legislative processes, in which majority in the parliament exploited the democratic process to get control on the legislative force. They pushed through many legislative acts through the parliament, many times, even criminalizing the minority or the actions of minority.

Female circumcision is a clear example to illustrate this phenomenon. Without attaching any moral value about the content of this practice, at a certain moment a public opinion is created, out of a sudden, based on one or two cases that is being scrutinized in mass media. And female circumcision is banned. Not only is it banned, it is also being criminalized.

In the same token, but slightly different, is the desire to ban male circumcision. It was quite surprising to witness a commercial of the Physician's association who draw the attention on the danger of male circumcision to health, which was the result of many discussion that were going on, in the mass media to ban male circumcision. Strangely enough, male circumcision belongs to the profession of Plastic surgery, and the whole branch as such is not being criminalized, but just one practice that belongs to, a minority within this society. Triggering the public opinion, is one of the tools to attain the majority in the parliament and to attain the legislative power, to oppress the minority, in their actions, dealings, life and customs.

Carl Schmitt's above quoted phrase, is a direct challenge against this phenomenon of the so-called, legal instrumentalism, the abuse of legal tools by majority, to press their will through the whole of (political) society, amongst others. There are also other ways in which legal instrumentalism can be employed, namely "social engineering projects", like in Turkey and Afghanistan in 1923, where certain or a whole legal systems has been implemented, with the aim of modernizing the, predominantly, traditional Muslim population.

Carl Schmitt attack is clearly aimed at Hans Kelsen's dictum of "Herrschaft der Mehrheit" (majority rule), which advocates that in order to maintain a great amount of freedom, "Herrschaft der Mehrheit" is the best option among the worst. The fact that the majority will rule and oppress the minority, is perceived as a minor collateral damage. Because according to Kelsen, the minority would have a chance in this system to gain the majority in the parliament and undue all the 'harm' that is being done to them.

However, as Tamanha depicted, "Common to these ideas is that they encourage participants to pursue only their individual or groups agendas. They involve a process of competitive combat, they invest faith in the capacity of the process to select or produce the correct outcome, they draw upon metaphors to discredit interference with the "natural" working of the process as improper meddling that generates distortions, and they assert that winning is verification of right or entitlement. The winners or survivors or products of these processes, by having gone or common good.

The losers don't see it that way. They complain that the process unfairly rewards those with greater resources, that the system has a built-in tilt against them, that the decisionmakers are biased or corrupt,

that competition or combat is not a proper way to decide what is right, and that the winner are the most rapacious or unscrupulous rather than the most deserving. But these complaints have little traction.”⁴ The attention that I want to draw on is not so much, which political system would attain more freedom or more equality (Carl Schmitt argues; Equality and Freedom do not match), but to attack the process in which law is being endorsed as an instrument to attain a certain goal to a certain group or people. This requires a totally new approach to law and governance, whereby attention would be paid on “particularity” instead of “universality”.⁵

Research Object

In order not to lose track in my thesis in exploring an alternative from of law and governance, I will try to follow strictly the research following research question: “How can legal pluralism liberate citizens from oppressive value systems imposed by the state?”

Object of Study

Legal Pluralism is a theory that is developed by social scientists based on their empirical experience on the ground about the existence of diverse legal system or legal normative frameworks. Gradually on this theory developed further into a kind stand off against the existent dominant concept of nation-state law, as the sole generator of legal norms. Nevertheless, their attempt is ill-fated because of its analytical lacuna.

This is why I will embark first of all with analysing this concept of legal pluralism, and develop it in such a way that it can be employed for political ends as well. The aim is to achieve a concept of Legal Pluralism, which is comprehensive enough so it can include both legal norms as well as the institutional-organizational framework which accommodates it. Moreover, while identifying diverse legal systems, I will argue that one has to take the social unit into account, since law is embedded in the whole overarching institutional-organizational framework of the social unit. .

But before I embark on this exploration I will first try to give a brief historical survey, in order to comprehend the nature of Legal. I will further continue emphasising on the conceptual dispute between John Griffiths, who has constructed the concept of Legal Pluralism, and Brian Tamanaha, who attacks this concept on analytical grounds. Departing from this dispute, I will develop my conception of Legal Pluralism that is comprehensive and broad enough to be applied in my thesis to solve my research question. Since Legal Pluralism as a concept is linked to the modern concept of law, I want to emphasise on the organizational -institutional framework, in which different legal

⁴ Brian Tamanaha, *How the Instrumental View of Law Corrodes the Rule of Law*, 56 DePaul L. Rev. 469 2006-2007

⁵ “There is therefore but one categorical imperative, namely this: Act only on that maxim whereby thou canst at the same time will that it should become a universal law.” P.38—p.46 Kant

system/norm can originate from. This is essential to my research since I want to explore how legal pluralism, as an autonomous body, can accommodate value systems. For this purposes I will employ Eugen Ehrlich's account of Living Law, where he addresses the importance of autonomous organizational structures like community or association has legal and/or norm generating structures.

In the next chapter I will dwell more on this organizational structure of community and associations and I will apply the rather new scholarship of "community and law" approach to explain how community can generate and enforce legal norms. For this purposes I will emphasis on three elements within this field, namely, *trust*, *values* and *Alternative Dispute Resolution*.

For the sake of clarity I will apply Tönnies dichotomy of *Gemeinschaft* and *Gesellschaft*, in order to explain the difference between the modern concept of law and that of "community and law" approach. This is not give an exhaustive theory of how "community and law", but just to give a clue on what it entails. Only in this way we would get a glimpse in the difference and the function of community as a legal-norm generating organization. By using Tönnies typology I want to locate the locus of law within community. By juxtaposing these three elements, namely, Trust, Values and Alternative Dispute Resolution, to Logic, Rules and Judication, I will try to sort out the different perspectives of the locus of law, between community and nation-state.

Consequently, I will try to illuminate this theory, by illustrating how the diamond industry has maintained its own legal system for so many years (centuries), parallel to the state legal system. I will argue that *reputation-trust* in the diamond industry, their peculiar *Value system* and the function of Diamond Dealers Club as the arbiter, which employs *ADR*, has been essential in this process.

In my fourth chapter I will dedicate on the main criticism from the liberal point of view on "community and Law" approach. Namely that individuality is being discarded in this approach, since communities will only emphasise on group achievements and not on individual's accomplishment and ambitions. I will refute this claim by posing two arguments. The first one comes from within the liberal philosophy, namely I will argue that the Harm-principle of John Stuart mill would be enough safeguard to protect citizens. Although, this concept can give an absolute protection to individuals, since no theory can, it will give the maximum amount of safeguard to protect individuals.

On the other hand, I will argue from an associationalists point of view, and claim that associationalist do emphasise on the importance of the "individual within the community and association. But since they consider an individual as a 'social animal'", who can only achieve his goal through collaboration with others, existence within a community is perceived as an prerequisite to pursue their individual goals.

In the next following two chapters, I will use Afghanistan as an example and try to apply whatever I have analysed up till now. First I will try to argue that the so-called legal and political lacuna, which exists in Afghanistan is to great extent the result of the failure of adopting constitutions, which would pave the way for a modern concept of state. All seven constitution, which were adopted, have failed.

In the last chapter, I will further argue that since idealistic perceptions underlies the adoption of seven failed constitutions, we should pay emphasise on the fragmented society of Afghanistan. I will argue that by adopting Althusius' theory of social-federalism, we would be able to draw Afghanistan's reality of tribal and communal fragmented society into a political framework. My main argument is that Althusius' concept of "popular sovereignty", which attaches sovereignty (political power) in the social units, allows social units, like tribes, clans and communities to have political significance. By integrating these social units within the political system, instead of centralizing political power in one government, stability can be attained in Afghanistan.

Chapter 1 The Concept of Legal Pluralism

1.1 Introduction

1.1.1 Law and Legal Pluralism

What Law “is” or what law “ought to be”, has kept the legal minds of many scholars, philosophers and theorists, busy for centuries from any range of scientific field.⁶ Whether they derive from philosophy, religion, sociology or anthropology, everyone has contributed and troubled one’s head about what law should actually entail and how it can or will effect our society.⁷ This development of the concept of law went parallel with other scholarly achievements that marked our intellectual history, like the Renaissance and Scholastic era, Humanism and Enlightenment, Modernity and Post-Modernity, they have all put their stamps on the question about what Law “is” or what law “ought to be”.

However, the call for a more pragmatic approach to law, stripped from all fancy, formalistic scientific, formula and concepts, has been looming up in the past century and is absorbed by the society in their public debates. This culmination is the result of both scholarly achievements of the past decades, in exposing the pragmatic of law, as well as the vast demographical change that has swayed around the world.

Between all this, Legal Pluralism as a concept has appeared as a counterforce against the dominant notion of law, which is characterized by formalism and rationality. Legal Pluralism as a concept is being instigated as a “weapon” to break through the fence, which modern concept of law convulsively tries to defend. In contrary to the monistic approach of the current modern concept of law, Legal Pluralism asserts that not one but a variety of legal systems can be applied and exist in a certain political territory.

1.1.2 Problem statement

Given that my research question is about “How legal pluralism can liberate citizens from oppressive value systems imposed by the state”, I want to dedicate this chapter on analysing, exploring and constructing a concept of Legal Pluralism that is in pace with current needs. Moreover, I want to get to a more comprehensive concept of Legal Pluralism, whereby the emphasise will be laid on the organizational/institutional framework, which will generate and enforce legal-normative rules. More in particular, I want to develop a concept of legal pluralism which conceives law in a broader perspectives, taking the social unit, like community or associations, as its guiding line.

⁶ See, Roger Cotterrell, *The Politics of Jurisprudence*, 2nd edition, Lexus Nexus 1996, for a comprehensive analysis of Common Law Legal Philosophy (Jurisprudence); H.L.A. Hart, *The concept of Law*;

⁷ Hans Blumenberg, *die Legimität der Neuzeit*; Gerald F. Gaus and Chandran Kukathas (edited by), *Hanbook of Political Theory*, Sage Publications 2004

This is why the first question I want to tackle is, as Chiba has asserted, "...the scientific validity of the inquiry into legal pluralism, for it is a basic requisite of scientific inquiry to formulate the operational definition of its objective in order both to delineate its extension distinctly and to analyse its intension clearly."⁸

1.1.3 Outline

This explains why I want to elaborate briefly, on the conceptional background of Legal Pluralism, in order to demarcate the scope and purpose scientific inquiry into Legal Pluralism. I want to stress on the "dual conceptional problem", which not only denotes the fact that Legal Pluralism is a concept in its infancy, but at the same time, as being an anomaly against another concept namely, the concept of "Law".

Subsequently, I will indulge on the conceptual and analytical twist between John Griffiths and Brian Tamanaha. The main argument in this debate, concentrates on the so-called "the Malinowski problem", which brings us back to the main legal philosophical question as explained above. What is Law? "Malinowski Problem" deals with the dilemma that if we would conceive every human social action as law, than were do we set the boundary between that what constitutes law and that what is just normal social behaviour?

My main argument against the so called "Malinowski Problem", is the scientification of law. What we tend to call law, nowadays is just, bluntly put, a mere logically framed tool for central governance. I will outline my arguments further by bringing up the so called "Logical, Formal, Reasonable" theory of Max Weber, amongst others, and claim that this "logicalization" of law has put a kind of aureole of exclusivity around the modern concept of law. This explains why, whenever a scholar points at the social nature of law, his argument or theory is easily being discarded as "not law", by legal scientists or theorists. One of the most prominent Legal Theorist, in this respect is Hans Kelsen, who has tried to settle for once and for all the exclusivity of "Logical", "normative", characteristics of law, by asserting that "ought" (prescriptive) and "is" (descriptive) are and should be separated.

Instead, I want to claim that "is" and "ought" are not separable, but in the contrary, intertwined and interdependent. Social rules nurture Legal rules (Law), because they belong to the social environment with its inner dynamics. Moreover, I will eventually claim that it is the comprehensive nature of association/community, in which we can trace law as part of this social unit.

For this reasons, I will propose to utilise Eugen Ehrlich's notion of "Living Law" instead of Sally Falk Moore's) "Semi-Autonomous Social Field", which I will explain in the next paragraph. My assertion

⁸ Masaji Chiba, 'Other Phases of Legal Pluralism', in 'the Contemporary World', *Ratio Juris*. Vol. 11 No. 3 September 1998 (228-45), p.2

is that Eugen Ehrlich's account of law is more suitable to underlie the comprehensive concept of Legal Pluralism, since it does not only concentrate on norms but embraces also all tenets of law which partakes in the law generating activity. More in particular, Ehrlich addresses clearly the importance of associations and communities in law-creating and law-abiding activities, in his theory.

1.1.4 Background

The Archbishop of Canterbury unleashed a fierce public debate about whether or not Sharia, should be accepted alongside with the English law. While advocating for Legal Pluralism, paying attention on Sharia Law in particular, caused for a wide upheaval/disturbance in society which was reflected in public debates. The striking point was not so much the fact that the archbishop was advocating for Legal Pluralism, since the English were already acquainted with the excessive use of Arbitration Act by alternative legal systems, notably by Jewish Law. Instead the turmoil was focused on the clash between certain values, namely that of enlightened values and Islamic values, which are both being represented by Common Law System and the Sharia Law.

In his speech, the Archbishop touched upon a core issue in the development of law, which cannot be avoided, and that is the indisputable link between values and the legal consciousness of that particular community. As he stressed "...there is a risk of assuming that 'mainstream' jurisprudence should routinely and unquestioningly bypass the variety of ways in which actions are as a matter of fact understood by agents in the light of the diverse sorts of communal belonging they are involved in. If that is the assumption, 'the appropriate temporal unit for analysis tends to be the basic action. Instead of concentrating on the history of the individual or the origins of the social practice which provides the context within which the act is performed, conduct tends to be studied as an isolated and one-off act' (139-40)."⁹

Moreover, the focal point of identifying legal-normative systems has been transformed from normative systems, to tracing a more private-communal regulatory system, which is more comprehensive and contain other elements that can influence the legal-norm making effect.

In order to depict this change of identifying the locus of norm generating factor, Prakah Shah has dedicated a whole book on how Legal Pluralism is being employed in United Kingdom outside the official channels. He asserts that, "In the British scene, therefore, (...)we have an uneasy coexistence of at least two models of legal regulation. One of the positivist modernist, top-down model of state regulation, with a territorial emphasis, either throughout the country or in its subdivisions. On the

⁹ Archbishop of Canterbury, <http://www.archbishopofcanterbury.org/1575>. It is noteworthy to mention the longstanding tradition, which Archbishops of Cantburry had with associationism and self-regulatory governance of autonomous communities. See Figgis, *Curches in the Modern State*, 1973; and Laski Harold Laski, *Studies in the Problem of Sovereignty*, 1917.

other hand, we have a series of cultural communities which overlap territorially and residentially, with their varying values effectively forming zones of self-regulation”¹⁰

He further asserts that this condition/circumstances will eventually lead to “...a conflict of values and principles between the state and the self regulatory orders of ethnic minorities, leading to different sorts of ‘deviant’ behaviours, both within the state and among the minority communities.”¹¹

In a way, we have to depart from a normative centred approach to law, and Legal Pluralism, and embrace a more comprehensive approach, which can explain us the flow of these trends that takes place around the world and in Europe. We need a different approach to law that has its basis in social complexities and which can explain us how law is being framed within this complexities.

1.2 Legal Pluralism and the “The Malinowski Problem”

1.2.1 The Concept of Legal Pluralism

In the past few decades many definitions and concepts of Legal Pluralism has passed the revue and non of them had really encapsulated the totality of what Legal Pluralism actually entails. Moreover, they all have enlightened just one aspect of legal pluralism and were more a descriptive definition than a concept. What I will try to analyse and develop in this chapter is a concept of Legal Pluralism, which can easily be applied to a broader framework. There is namely a need for a more theoretical well-defined concept of Legal Pluralism in which certain empirical data can be collected, processed and theorized. Otherwise, all the empirical data will only remain loosely, distorted collected data without any scientific or scholarly value. Data’s which are collected from empirical work, should be in turn be able to be employed for a legal -or political-theoretical research.

Like many other concepts, Legal Pluralism is first of all a tool to capture a specific part of a reality, in order to get charge over it. A concept therefore works like a vernacular, which will bring a certain part of view closer, by zooming up, but leaves the surrounding (the contextual environment) out of sight. This will ultimately, lead to many controversies off course, disputes and arguments, but after all this is the function of a vernacular, or in this case, the function a concept.

Hence, a concept, like a vernacular, cannot be considered as bearing any universal essentials in itself, since it is just a tool to portray a certain aspect of reality. If one turns the vernacular to another direction, the projected or presupposed reality would suddenly disappear or contain a different reflection of reality. Hence, what I want to claim here is that a concept in itself is just a tool, like a vernacular and nothing more, and one should not aim to try to find a kind of “universal truth” in the concept (tool) itself. As von Benda-Beckman rightly observed, Legal Pluralism as a concept “... must be measured against their ambitions and evaluated for their usefulness for the enterprise actors are

¹⁰ P. Shah, *Legal Pluralism in Conflict, Coping With Cultural Diversity in Law*, 2005, p.64

¹¹ *Ibid.*, p.6

engaged in.”¹² Considerably, one can try to improve the tool, in order to suite the conditions of the studied object (like for example, one can employ a telescope, which is much more sophisticated in studying the stars, than a vernacular is), but one cannot aim for “universality” in concepts.

Applied to Legal Pluralism, this concept is first initiated to study the anthropological nature of norm-creating and norm-abiding habits of savage people in colonized countries. Along the way, the concept of legal pluralism got crystallized and developed into a “true” concept, which can be easily applicable to a wide range of legal research. However, it is this far fetched ambition of the concept of Legal Pluralism that has attracted wide criticism.

There are two hitches we have to bear in mind while dealing with the concept of Legal Pluralism. The first one is the fact that Legal Pluralism is rather a concept in its infancy and needs to be developed. Which means that it will have some inconsistencies and incoherency in the outlook of the concepts naturally, but they all can be surmounted.

The second one however, is a rather more complicated one. Namely, the fact that Legal Pluralism is an anomaly, a concept that is developed against an existent concept of law. This explains why Legal Pluralist struggle about this aspect of Law. Without getting it plain what actually is meant with the concept of law, it is hard to proceed in developing on the concept of Legal Pluralism. Consequently, it triggers a “paradigm change”, which puts simultaneously more pressure on the soundness of the alternative paradigm as such. “A Paradigm is”, as Kuhn has elucidated that “what the members of a scientific community share, and conversely, a scientific community consists of men who share a paradigm”.¹³ A concept is based on a paradigm, which can be regarded as a kind of garden where “concepts” ‘rise’. This criticism or “anomaly” as Kuhn has mentioned, should in turn, not be conceived as something destructive, but rather as something constructive in achieving a more solid, comprehensive concept of legal pluralism, which can be applied in a wide range of facets concerning legal or normative systems. If the paradigm changes, so does the concept.

Yet another problem, outskirts which we encounter is that Legal Pluralism is not a concept that stands on its own, but it challenges an already existent concept about law, namely that of “nation state Law” (modern concept of law.)” This conceptional progress of Legal Pluralism and it simultaneously challenge of an existent concept of law, attaches, as Teubner argues a “double faced character. On the one hand it starts to unravel new ground if it comes down to legal science, at the same time it wants to attack the existing concept of Law. This would eventually lead to as Teubner calls it a “double faced character”. He argues that, “It is the ambivalent, double-faced character of legal pluralism that is so attractive to post-modern jurists. Like the old Roman god Janus, guardian of gates and doors, beginnings and ends, with two faces, one on the front and the other at the back of his head, legal pluralism is at the same time both: social norms and legal rules, law and society, formal and informal,

¹²Franz von Benda-Beckmann, ‘Who’s Afraid of Legal Pluralism?’, *Legal Pluralism & Unofficial Law*, Vol.37 (2002), p.39

¹³ Thomas S Kuhn, *The structure of scientiifc revolutions*, p. 176

rule oriented and spontaneous. And the relations between the legal and the social in legal pluralism are highly ambiguous, almost paradoxical: separate but intertwined, autonomous but interdependent, closed but open.¹⁴ It is this ambiguity within Legal Pluralism that has on the hand/side attracted much attention from (legal) scholars, but at the same time scepticism

However, I argue that this so called double faced character is just part and parcel of the underdevelopment of the concept of legal pluralism and the fact that is exemplification of and “anomaly” of another concept namely that modern state law.

1.2.2 Legal pluralism: A Brief History

Legal pluralism is known for its diffuse and a complex amount of definitions, which makes the concept ambiguous and vague and therefore, inappropriate to be employed for (legal-)normative purposes. The reason for this hazy conceptual development, is that the scientific inquiry into unofficial legal systems, went simultaneously with the changes on the floor. The scientific studies reflected the political and institutional changes that crossed the mainly colonized countries. This also explains why social scientists like anthropologist and sociologist, were the first ones who showed interest in unravelling unofficial legal systems. But unfortunately, this has amounted conceptually to a vast array of definitions and concepts of legal pluralism, mainly linked to an empirical research, which are highly inconsistent.

Nevertheless in order to portray a certain consistent historical development in the definitions of Legal Pluralism, which is being utilized in the past century, I will discern five phases of developments that has shaped the concept of Legal Pluralism. This five phases more or less embraces the phases which Merry¹⁵ and Berman¹⁶ had used in their Article about Legal Pluralism.

The first anthropological inquiry into unofficial legal systems, erupted with Bronislaw Malinowski's¹⁷ inquiry/study in the customs of certain tribes in Malaysia (Micronesia). In this study he reflected to a systematisation, which existed in the customs that has been practised, and he was the first one to

¹⁴ Günther Teubner, Two Faces of Janus, *Cardozo Law Review*, Vol.13, 1991 – 1992, p.1443

¹⁵ Sally Engle Merry, 'Global Human Rights and Local Social Movements in a Legally Plural World' (1997) 12 *Canadian Journal of Law and Society* 247

¹⁶ Paul Schiff Berman, *Global Legal Pluralism University of Connecticut School of Law*, University of Connecticut School of Law, Year 2007 Paper 71; Günther Teubner, *Legal Pluralism in the World Society*, in *Global Law Without a State 3* (Günther Teubner ed.,1997); Sally Engle Merry, *International Law and Socio-legal Scholarship: Toward a Spatial Global Legal Pluralism*, Studies in Law, Policy & Society (forthcoming 2007); Marc Galanter, *Poetic Justice: Punitive Damages and Legal Pluralism*, The American University Summer, 1993 42 *Am. U.L. Rev.* 1393; 58 Marc Galanter, 'Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law' (1981) 19 *Journal of Legal Pluralism* 1 at 17–18.; Brian Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, Sydney Law Review, Vol 30:375; Gordon R. Woodman, *Constitution in a World of Powerful Semi-Autonomous Social Fields*; Gordon R. Woodman, *Ideological combat and Social Observation, Recent Debate about Legal Pluralism*, Part II. Urban Normative fields: Concepts, Theories and Critiques

¹⁷ Bronislaw Malinowski, *Crime and Custom in Savage Society* (1926)

expose a self-regulatory governance structure, in this particular village. Despite this interesting discovery, it was nothing more than an anthropological observance, which was difficult to put it in any abstract theory, reaching an analytical or scientific conclusion.

This pioneering work of Malinowski was promptly taken up/followed by other scholars who did research in tribal law, mainly in colonized areas. This soon led to the revelations of certain so-hybrid legal-systems within colonized countries/areas. This second phase was characterized by exposing how colonial legal systems intermingled with tribal customary law or religious law. Anthropologists like Pospisil¹⁸, Hoebel¹⁹, Hooker²⁰, Jude Star²¹ (in a non-colonized country, namely Turkey) did their research in how customary-religious law/legal interacted with colonized legal system (in case of Jude Law it was more the relationship between Turkish national Law and the rural customary law Turkey). These studies led to theoretical conclusions in which legal systems were seen as 'Legal Levels' (in Pospisil case). 'Legal Levels' denoted the gradation in which one legal systems stands as opposed to the other. The importance of Pospisil's anthropological-theoretical depiction is that he emphasised on the hierarchical structure that existed both in the tribes themselves as well as their relationship with the state-law.

Hooker on the other hand tried to exemplify how colonial Dutch law, tried to integrate Indonesian Tribal law, called 'Adat', and Islamic law in their legal system. The important conclusion which one could derive from this elucidation is the way how 'weak Legal Pluralism'²², tried to obliterate tribal or religious legal systems on the long run. At least, Hooker's exposition clarified the aspiration of a state law in acknowledging and integrating other legal systems in their system, which is controlling and guiding these particular legal systems.²³

The more principle development came in around 1970's and 1980's, in regard to the conception of legal pluralism.²⁴ Until this period, particular legal systems were seen as an exception in contrast to colonial legal system. By reverting the attention to national state law, this has become the focal point of attack. Culminating in Griffiths' call for the "destruction of nation-state law".

¹⁸ Leopold Pospisil, *The Anthropology of Law: A Comparative Theory* (1971)

¹⁹ Adamson Hoebel, *The Law of Primitive Man* (1954)

²⁰ M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (1979).

²¹ Jude Star and Jonathan Pool, *The Impact of a Legal Revolution in Rural Turkey*, 8*Law en Society Rev.* 533 1973-1974

²² 'Weak Legal ' pluralism is a term introduced by John Griffiths, which exemplifies national legal systems which has integrated 'unofficial' law in their system, as opposed to strong legal pluralism. Strong legal pluralism connotes the existence of parallel legal system juxtaposed to state law.

²³ In chapter 5 I will show how previous constitutions of Afghanistan has tried to apply "weak Legal Pluralism" in their legal systems and still failed. In Israel for example, the Sharia Law is allowed to exist as long as it does not bridge the constitution of Israel. See, Yüksel Sezgin, *A new Theory of Legal Pluralism: the case of Israeli Religious Courts*,

²⁴ Gordon R. Woodman, *Constitutions in a world of Powerful semi-Autonomous Social-Fields*, 1989 *Third World Legal Studies* 1 1989, Gordon R. Woodman, *Ideological Combat and Social Observation Recent Debate about Legal Pluralism*, in ParII: Urban Normative Fields: Concepts, Theories

This change of the state of mind by anthropologist made it possible to create theories on how unofficial legal systems' worked. Most notably, we can mention the theory of Sally Falk Moore's, "Semi-autonomous social field."²⁵

According to Moore, "Semi-Autonomous Social Field is a social unit that can " generate rules and customs and symbols internally, but that it is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded. The semi-autonomous social field has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance. The analytic problem of fields of autonomy exists in tribal society, but it is an even more central analytical issue in the social anthropology of complex societies. All the nation-states of the world, new and old, are complex societies in that sense."²⁶

With the increasing influence of international organizations on direct enforceable legal rules and as a result of globalisation and the collapse of the Soviet Union, the existence of unofficial legal systems penetrated also in legal theory and legal science. Suddenly, legal theorist became aware of the effects of different legal system, whether tribal or not, in their own legal system. This has erupted in the so-called post-modernist²⁷ approach to law or sociological inquiry in the existence of different legal systems.²⁸ International Lawyers, European Lawyers, but also Legal Philosophers started got interested in Legal Pluralism.

European Law²⁹ has broaden its scope with directives and regulations, which penetrated into the national legal systems. Within the 90's national state border were pressured by globalisation and its impact on national law that occurred. The influence of GATT and later WTO regulations, International treaties, UNIDROIT Principles (which allowed contracting parties to apply these rules for their contracts) and so on.

In legal philosophy the effect of global changes on nation- state legal systems, reflected in for example the book Francois Ost and van Kerckhove, '*La Pyramide ou LeRessau*'³⁰, They depicted a change in law from hierarchical structure of legal systems to a web of legal systems that effect the citizens of a nation state. The nation state lost its monopoly in generating their own legal systems. To give an

²⁵ Sally Falk Moore, *Law as Process: an Anthropological Approach* (1978)

²⁶ Idem 220

²⁷ Boaventura de Sousa Santos, *Law: A Map of Misreading. Toward a Postmodern Conception of Law*, , Journal of Law and Society, Vol. 14, No. 3 (Autumn, 1987), pp. 279-302;

Boaventura de Sousa Santos, *Towards a Multicultural conception of Human rights*
Published in Hernandez-Truyol, Berta (Ed), Moral Imperialism. A Critical Anthology. New York University Press, 2002

²⁸ Niklas Luhman and Günther Teubner, *The existence of autopoiesis*.

²⁹ Francis Snyder, Global Economic Networks and Global Legal Pluralism, EUI Working Paper Law No. 99/6

³⁰ François Ost and Michel van de Kerchove ; *De laPyramide au Réseau,Pour uneTtheorie Dialectique du Droit*;
François Ost and Michel van de Kerchove, *De la Pyramide au Réseau? Vers un nouveau mode de production du Droit?* R.I.E.J., 2000.44

example, the Dutch Civil code which was revised in 1992, needed another revision by 2003 due to huge amount of directives and regulation that made the quite newly revised Civil code abundant. Currently, we have reached a subsequent stage, which is part of this global development. The Archbishop of Canterbury's call was in this sense important because, what he was referring to was not so much the acceptance of diverse legal rules, but legal rules as part of self-governing social units like communities and associations

Moreover, the question which we are dealing right now is how communities or certain groups, business corporation, can manage their own issues or business, without doing recourse on national state legal system. For this purposes we need to construct a concept of legal pluralism that is comprehensive enough to include institutional-organizational framework, which generates and enforces legal systems. This is the goals of this chapter.

This brings me to the conceptual dispute between Griffiths and Tamanaha, from which I can continue in my exploration into a more comprehensive approach to Legal Pluralism

1.2.3 John Griffiths and Brian Tamanaha: 'The Malinowski Problem' and the Analytical dispute on Legal Pluralism

Currently, the core issue in the dispute between John Griffiths and Tamanaha evolves around Griffiths concept of Legal Pluralism, which he defines as follows: "In the legal centralist conception, law is an exclusive, systematic and unified hierarchical ordering of normative proposition, which can be looked at either from the top downwards as depending from a sovereign command or from the bottom upwards as deriving their validity from ever more general layers of norms until one reaches some ultimate norm(s) (Kelsen, 1949; Hart, 1961)"³¹ The reason why Griffiths established his conception of legal pluralism against legal centralism, is mainly to counterbalance the monopoly of legal thought by legal centralism in the western world.

According to Tamanaha, the main criticism against Griffiths' account of legal pluralism and his notion of law, is the fact that it is based on a romanticized and retrieved theory of law, which defines law as framework of rules in formal and hierarchical settings. He argues further that this theory of law is based on Austinian conception of law, whereby the command of the sovereign is perceived as law, which also explains the hierarchical and formal nature of law.

Griffiths further continues with his radical concept of Legal Pluralism by saying that "A Central objective of a descriptive conception of legal pluralism is therefore destructive: break the stranglehold of the idea that what law is, is a single, unified and exclusive hierarchal normative ordering depending from the power of the state, and of the illusion that the legal world actually looks the way such a conception requires it to look."

³¹ John Griffiths, *What is Legal Pluralism*, 24 *Journal of Legal Pluralism & Unofficial Law* 1 1986

Tamanaha further challenges the ambiguity in Griffiths' concept of Legal Pluralism by addressing the unfeasibility of claiming both "concrete patterns of social ordering" and at the same time referring to institutional identification and enforcement of norms. If they bring up 'concrete patterns of social ordering' they will be entangled with the so called "Malinoskwi problem".

The "Malinowski Problem" constitutes the core issue within this dispute. It stresses on the blurred boundaries between law and social norms when one labels every social norm as law.³² He argues that within Griffiths' notion of law, which he employs in his concept of legal pluralism, even a hand shake would amount to law. This is why Tamanaha wonders whether it is not more appropriate to employ 'normative pluralism' in this case, instead of 'legal pluralism'.³³ The reason is that Tamanaha, implicitly departs from the existence of a concept which can be framed as "law" in contrary to other normative systems. However, as we will see in the next part, even Tamanaha is not certain how to define this concept of 'law'.

Although this proposal of Tamanaha looks quite plausible in the first instance, it does not solve the core issue of the problem namely, what do you call law? Is that all legal rules which are enacted by the state and structured into a system? And what about rules that emanated from international organizations? We have reached to the central point of legal philosophy, namely what do we call law?

1.2.4 Non-Essentialist Version of Law- definition of Law

As a solution for the above mentioned legal-analytical problem, Tamanaha presupposed a kind of – non-essentialist definition of law, which is stripped from any goal of purpose-orientated approach to law. As he states "The approach I suggest draws from the existing social views of law, so such conflicts will not routinely arise. Under my account, the normative relations within the family will be considered 'law' only if the people within the social arena conventionally characterize them in terms of 'law'. This approach is based upon the recent interpretative turn in social theory and the social sciences, which insists that greater attention and respect be paid to the meaningful orientations and categories of ordinary social actors."³⁴

This account of law draws further on Günther Teubner's dichotomy of defining law as something which is depended on whether we call it "law" or "non-law", without going to deep into theoretical analytical inquiry. Its aim is to establish an account of law which prevents to be "...over-inclusive and under-inclusive, respectively, including phenomena most people would not consider to be law, and excluding phenomena many would consider to be law"³⁵

³² Brian Tamanaha, 'The Folly of the 'Social Scientific' Concept of Legal Pluralism' (1993) 20 *Journal of Law and Society*, p200

³³ Idem

³⁴ Tamanaha, Brian, A non essentialist version of law, *Journal of society and Law* , Vol.27, Num.2, June 2000, p.20

³⁵ Idem

Because of the abovementioned problem of analytical inaccuracy of the underlying notion of law in Legal Pluralism as a concept, Tamanaha argued for a non-essentialist version of law because a concept of law will always portray/capture one aspect and not a “comprehensive” version of law. Moreover, his quest for a non-essentialist version of law is actually a call for a comprehensive concept of law, that embraces all aspects that contributes to the undertaking, acceptance and norm-generating function of law.

However, as Tamanaha conceded this non-essentialist version of law entails actually a non-conception of law which is not possible. This is why he tried to construe a kind of non-essentialist concept of law which can be applied as the foundation for Legal pluralism as a concept.

The question is whether this so called “non-essentialist” concept of law will solve all the shattered underpinnings of Legal Pluralism. Does this concept really bring us further in applying this concept to the (newly discovered) legal developments (that threatens our nation state Legal system)? This question can only be answered the moment we dig into the roots of our current modern conception of law, and understand what makes this concept so practical and why it has created a strong group of adherents, while at the same time being repulsive to others.

1.3 Law in Manacle of Logic

The main assertion made by John Griffiths is that his concept of legal pluralism is aimed to destroy the dominance of “nation-state –law”, as the controlling force in rule making and rule enforcement. And it is precisely this misplaced, emotional and blunt statement that underlies at the analytical ambiguity argued by Tamanaha. This is why I want to assert that instead of taking the opposition against the nation-state as the main rule making factor in law, it would be more fair to oppose the logical, scientific and rational character of our dominant notion of law, whether or not emanating from the state.

The problem of logical structure has already appeared while doing comparative research in legal systems and legal cultures. It has already doomed at comparative research that legal rules are not easily replaceable by one or the other legal rules or systems, as if it is just a case of mathematical calculation. The comparative legal studies, and especially in the field of private law, are carried out with the aim and intention to look at possible harmonisations of legal systems, or to create a new common civil code. This is especially the endeavour of comparative lawyers of the last decade³⁶

As a response and critique to this somewhat mathematical, calculative restrained approach to law, that became prevalent in comparative law, Pierre Legrand argued that “legal systems cannot be

³⁶ Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law*; Jam Smits, *Een Europees Privaatrecht ald Gemengd Stelsel*, *Nederlands Juristenblad* 73 (1998)p.61-66; In this article Smit argues that we should adopt a “free market of rules” so that legal participant could choose and apply the legal rules available to suit their own needs. In this way one could develop a more harmonized and unified private law system in Europe.

converged” just by comparing merely legal rules.³⁷ In the realm of the construction of a European Civil code (*Ius Commune*) Legrand contended that legal systems themselves are nourished within a cultural background. In another words, legal systems according to Legrand, are not just merely logical, mathematical formula’s that can be easily counted up or deducted, instead, they are intertwined with cultural background of that particular country.

But were does comparative legal studies went wrong according to Legrand, in its analytical analyses and study of different legal systems? One of the reason, he elucidates is:

“Most reasonably, comparative legal studies is about law. But, who undertakes comparative work equipped with a theory of law? Who has a sense of where the law begins and where it ends? Who has reflected upon what counts as law and what counts as non-law? Where is the boundary to be drawn between the normal and the deviant, the normal and the pathological? For most ‘comparatists’, some of my colleagues, as they have intimated to me, are plainly irritated by the mere suggestion of the need for theory. In short, the law is to be found in legislative text and judicial decisions. And, it is that which ‘comparatists’ empathetically study. However, their conviction is not the outcome of deep reflection on the ontology of law. Rather, it is mere extension of what these ‘comparatists’ were taught about the meaning of law, often by teachers who themselves were not comparatists or theoreticians, but were simple technicians of the national law. Let me advocate that things are not so evident and that the meaning of law for comparative legal studies is rather more complex than is usually assumed.”³⁸

Pierre Legrand has touched upon a soar wound in legal science, especially that within comparative law. In comparative law, legal rules are just being juxtaposed against each other, and in their goal to unify legal rules, they either harmonize legal systems or rules or they swap them, just like Ole Lando has done together with several colleagues in drawing an alternative European Private Law, which constitutes merely mozaïque of European legal rules.

As he again stressed, “French law is much more than a compendium of rules and propositions. Accordingly, to say that the study of French law consists in the study of legislative texts and judicial decisions is plainly inadequate. French law is, first and foremost, a cultural phenomenon, not unlike singing or weaving.”

Legal rules cannot be perceived in its “universals”, which is characterized by the logical underpinning of law. Just because legal rules are logically systematized or reasoned in logical way, does not mean that one can just swap a legal rule or implement a whole legal system. As he further argued, “I hold that civilians have long been proponents of the idea of ‘universalisation’ in law. My contention is that the values of rationalisation, systematisation and generalisation- the building blocks of mental processes whose aim is to banish particularised perceptions by ordering them into an exhaustive and categorical regulative framework- have seemingly always distinguished the civilian approach to the

³⁷ Pierre Legrand, *Are Civilians Educable?* Legal Studies, 216 (1998); Pierre Legrand, *How to Compare Now?*, Vol.16 Legal Studies 232 (1996)

³⁸ Pierre Legrand, *Are Civilians Educable?* Legal Studies, 216 (1998), p.217

fashioning of the legal. Although ‘roman jurisprudence on the whole shows a disinclination to the process [of abstraction]’, this priority already mattered for jurists like Q Mucius Scaevola, Gaius, especially, and Tribonian. In fact, ‘from the end of the third century a tendency towards simplification of the law set in [Rome], which is no less characteristic of the period up to Justinian than the tendencies towards classicism and stabilisation’.³⁹

During the renaissance, when the interest in old roman language, culture, art and architectures revived, Justinian codex’s were studied as learning materials for Logic. This is how law faculty came to be and became the foundational source in the coming centuries to shape our legal mind. The interest in Roman Law were mainly due to its suitability for (central)governing purposes.⁴⁰

Logical systematisation of legal rules and logical reasoning has been an indispensable element in scientification of legal norms, making law an objective and formalistic science. The rationale behind scientification most of all is its unitary, objective applicability of same rules to same events. This enhances predictability, certainty, and serves particularly the governability of human behaviour. Everything outside the realm of logical, formalistic, objective reasoning has been contemplated as being vague.

Our modern notion of law dates back to roman law when roman law was not already codified. Even in this period there was a struggle in whether or not law has to be systemized in a logical way, in order to have a priori predictability, or whether it should be applied on factual case, like common law.⁴¹

Eventually roman law, in the version of Lex Justinianus became one of the modern, logical systemized codex’s of our time and an example to all jurists when it comes to down legal reasoning and systematisation.

The importance of logic in this strand is again been reiterated by the study of Lex Justinianus as an example for logicians at the university of Bologna in the eleventh century, which at the same time marked the first study of modern legal science. Both Logic and Lex Justinianus has directed legal thinking in the middle ages and shown the practicability of legal science for governing purposes.

Moreover, as a modern framework for future legal scientific world, logic was the basis on which future legal thinking was based on. It became its further shape in 15th century when law was being employed for the so called “civil science” purposes in order not only to govern human beings, but also to frame them into a certain shape, or civilization. This also explains and shows where the instrumentalist character of our modern concept of law comes from.⁴²

Thus, the modern concept of law was discovered and perceived as an appropriate instrument to govern human beings behaviour. Law became a tool along with politics, literature, philosophy and logic,

³⁹ Idem

⁴⁰ Van Caenegem, *Legal history: A European Perspective*, 1991

⁴¹ Richard E. Speidel, *Logic and Experience in Roman and Common Law*, 59 Boston. University Law Review 433 1979

⁴² Brian Z. Tamanaha, *How an Instrumental view of Law corrodes the rules of law*, 56 DePaul L. Rev. 469 2006-2007

which is called “civil science” philosophy. Its prominent advocate, Claude de Seyssell argued that “civil science” constituted “as “true philosophy...and is to be preferred to all other fields because of its purpose”⁴³.

The purpose of “civil science” is to create, mould and direct people into civilization, which actually means, systemizing them according to logical predetermined systems.

As Donald R. Kelley mentioned, “The Bartolists were masters of political thought as well as of legal science and set about literally to 'civilize' the world by bringing the activism of the *civis*, the urbanity of the *civitas*, and the regularity of *the jus civile* to the social groupings and political forces that agitated the cities and countryside of Renaissance Europe.”⁴⁴

To keep it brief, the scientification of law, has already set its foot in the middle ages and created a kind of artificial legal reality, which has become a common ground in normative sciences. The point I want to claim here is that logic has paved the way for the creation of legal profession and as Max Weber stated, the “aristocracy of legal literati”, the legal elite.

Weber argued that “Practical needs, like those of the bourgeoisie, for a “calculable law”, which were decisive in the tendency towards a formal law as such, did not play any considerable role in this process. As experience shows, this need may be gratified quite as well, and often better, by a formal, empirical case law. ...This logical systematisation of the law has been the consequence of the intrinsic intellectual needs of the legal theorists and their disciples, the doctors, i.e., of a typical aristocracy of legal literati.”⁴⁵

The importance of Weber’s account of law is that it clearly phrases how legal/normative science has elevated itself from a social phenomenon, which just constitutes one of the elements of social life, into a science on its own, with a high instrumental character. Law has become a tool to govern instead of directing element within social life. It creates its own vicious circle of legal prophecies who only can think within this frame of logic, leading to a self-affirming reality, which does not keep pace with the real world.

As Otto von Gierke has correctly stressed “The fiction is used in the most comprehensive manner: indeed, in the fiction law celebrates its greatest triumphs. And where all this fails, it is made possible with the keenest abstraction simply to deny what really exists, to set up what is nowhere at hand as the only “theoretical” reality.”⁴⁶

⁴³ J.H. Burns, *The Cambridge History of Political Thought 1450-1700*, Cambridge Histories Online, Cambridge University Press, 2008, p.66

⁴⁴ *Idem* p.72

⁴⁵ Max Weber, *Economy and Society*, 2 Vol. Berkely: University of California Press (1978), p.855; See also, Sally Ewing, *Formal Justice and the Spirit of Capitalism: Max Weber's Sociology of Law* 21 *Law and Society Review* 494 1987-1988; David M.Trubek, *Max Weber on Law and the rise of Capitalism* 1972 *Wisconsin Law Review* 720 1972; Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, 55 *Hastings Law Journal* 1031 2003-2004

⁴⁶ John D. Lewis, *The Genossenschaftstheory of Otto von Gierke*, 1935, p.161

Moreover "...the jurist turns with justifiable annoyance away from vagueness, darkness, confusion; he finds profundity and mysticism uncomfortable; what does not lend itself to definition does not exist for him"⁴⁷ Furthermore "It is very easy to shake off those material factors, which find no place in the theoretical formula with the assertion that they are "juristically irrelevant."⁴⁸

So, the issue which I have tried to exemplify above with Griffith's dispute with Tamanaha, as regard to the underlying definition of law of the concept of legal pluralism, is the consequence of departing from a scientific notion of law. The whole "Malinowski Problem" is due to the fact that we depart, unknowingly from a logical, mathematical and scientific notion of law. The moment a norm does not fit this logic, it is considered as non-law.

1.4 Legal Pluralism and Institutional -Organizational Framework

What is failing in Griffiths' concept of Legal Pluralism is the depiction of institutional or organizational framework that accommodates the norm-creating and norm-enforcing dynamism in a particular "social field". The importance to identify correctly the institutional/organizational framework, became clear in a recent research carried out by the University of Nijmegen to the existence of Sharia Courts in the Netherlands.

The lacuna of Legal Pluralism is primarily that it focuses merely on the norms itself, and tries to ascertain to which extent one can frame a certain norm as law and whether a social definition of law can be established. This conception however goes astray of the institutional/ organizational aspect that is attached to the study of other legal systems. To begin with, it is important to note that in the construction of a comprehensive concept of legal pluralism (or a comprehensive understanding of Law), the components, which is discussed, do not reflect anything alike what we have in our mind.

In this paragraph I will concentrate on two writers that do emphasise on the importance of the organizational/institutional aspect of Legal Pluralism, namely Ido Sahar and Ricardo Vudoyra. The aim is only to reflect and give an insight in how organizational outlook of legal pluralism can add to the perspective of legal pluralism as a concept.

The main criticism of Ido Sahar in this above mentioned debate between John Griffiths and Brian Tamanaha, is on their emphasis on norms, taking norms as the focal point of research. He argues that, the whole debate evolves around the concept of state-law, the same concept which Griffiths tend to challenge.

This is why Ido Sahar tries to get to another definition of legal pluralism by re-conceptualizing the notion of state, as the decisive concept within the concept of legal pluralism. He asserts that in addition to the dispute around Griffiths' account of legal pluralism and law, that both scholars tend to

⁴⁷ Idem, p.160

⁴⁸ Idem

take law, and in this case state-law, as the focal point of departure in their formulation of legal pluralism and the definition of 'law'. He criticizes both authors of taking the conception of state, as being "well-defined and self-evident, which does not merit much discussion". And he is in particular critical of Griffiths' theory because of "...his implicit assumptions with regard to the state are in fact "statist" and centralist in nature."⁴⁹

Ido Shahar's main point is based on Timothy Mitchell's perception of state and its relation to the society. According to Shahar, referring to Mitchell, the relationship between state and society is not clearly separated but are in a kind of "dialectical relationship" as he calls it. Subsequently, the state is interfering in the "semi-autonomous social fields", and vice versa. So, according to Shahar, (referring to Mitchell), the distinction between state law and legal or non-legal normative systems are blurred, because of their mutual influence.⁵⁰

A way to look at this issue is from an institutional perspective. The reasoning which I will try to adopt here is try to distinguish normative systems in that what constitutes to be an institution and that which is not institutionalized. In finding the definition of "an institution", Ricardo Vudoyra, referring to Helmke and Levinsky, maintains that "...informal institutions [should be understood as] socially shared rules, usually unwritten, that are created, communicated, and enforced outside officially sanctioned channels. By contrast, formal institutions are rules and procedures that are created, communicated, and enforced through channels that are widely accepted as official."⁵¹ Furthermore, "Formal institutions refer thus to official channels, while informal institutions refer to unofficial channels."

However, after having analysed different facets that should deal with the concept of Legal Pluralism, it still lacks the comprehensiveness which I am striving for. How does all these elements, like institutions, social definition of law, amongst others interrelate? How does this comprehensive mechanism work? To answer this question I will refer to Ehrlich's conception of Living Law for two reasons. First of law his approach to law from an individual's perspective, and secondly his communal approach to law.

⁴⁹ Ido Shahar, *State, Society and the Relations Between them: implications for the Study of Legal Pluralism*, Legal Pluralism, Privatisation of Law and Multiculturalism, Vol.9, Number 2, July 2008, p.430

⁵⁰ Idem

⁵¹ Ricardo Vudoyra, *The New Institutionalism of Legal Pluralism, Social Norms, Legal rules, and Political Bargaining*, Oct.24th 2008, p.2

1.5 Eugen Ehrlich's "Living Law"

In the previous paragraphs I have tried to analyse certain elements, which had a direct or indirect influence on the concept of legal pluralism. Exposing those elements helped me to identify the lacuna and the problems, which lie at the roots of legal pluralism. This brought me to the conclusion that a correct definition of law in combination with an institutional/organization framework, which enable the generation of legal norms, was missing. Either, Legal Pluralism was investigated from purely social scientific purposes, in which the notion of law got blurred with social norms, or from a legal perspective, where one was facing an analytical dilemma.

Moreover, the reason for this analytical dilemma was the result of separating the source of legal norms with legal norms itself. Eventually, what was lacking in all these definitions about law, for the purpose to develop a concept of Legal Pluralism, was that an overarching organizational approach was absent. While 'state law' had a clear source namely the state, Moore's "Semi-Autonomous Social Field" only described a certain social movement that could form the basis for the generation of legal norms. And basing a concept of Legal Pluralism like Girffiths did on Moore's definition, would trigger much criticism from legal scientists.

This is why, I want to link a notion of law with an organizational framework that could explain us how certain legal norms or systems, are being generated and enforced. Moreover, I will try to argue the importance to conceive law within an organization framework like, community or association. I will claim that Eugen Ehrlich's concept of "Living Law" is a kind of concept that could form the basis of this comprehensive concept of Legal Pluralism.⁵²

As it already appears in the title of his theory, "Living Law" is centred on the phenomenon of law and has law as its point of departure in scientific research, whereas "semi-autonomous social field" departs from the 'social field' as the point of research. Factually, there is not much difference among both theories, but their locus of research is different. While Ehrlich's theory fits best for legal and political research, Moore's account will be suitable for mainly anthropologists and other social scientists. This also explains for the great part, the "Malinowski Problem", which I have set forth above. If one takes the social phenomena as the focal point, at the certain moment every action will be

⁵² Eugen Ehrlich makes up together with Hans Kelsen and Carl Schmitt, the three prominent legal philosophers in the Germanic speaking countries. While Carl Schmitt comes from Germany, Hans Kelsen and Eugen Ehrlich are from Austria. We can see Eugen Ehrlich as the far representative of Savigny's Historical School together with Otto von Gierke, while Kelsen represented the Neo-Kantian School of universality and Carl Schmitt, Hobbesian and Austrian "Command of the sovereign". See, Friedrich Carl von Savigny, *Politik und neuere Legislationen : Materialien zum "Geist der Gesetzgebung"* 2000; Carl Schmitt, *Legality and Legitimation*, 2004; Hans Kelsen, *die Rheinische Rechtslehre*; Eugen Ehrlich, Ehrlich, Eugen (1936) *Fundamental Principles of the Sociology of Law*. Cambridge, MA: Harvard University Press (orig. 1912 *Grundlegung der Soziologie des Recht*); K. Alex Ziegert, *A Note on Eugen Ehrlich and the Production of Legal Knowledge*, 20 Sydney L. Rev. 108 1998; Ovid c. Lewis, *Synergic Jurisprudence and Eugen Ehrlich*, 4 N. Ky. L. Rev. 21 1977; Neil O. Littlefield, *Eugen Ehrlich fundamental Principle of the Sociology of Law*, 19 Me. L. Rev. 1 1967; Eugen Ehrlich, *Montesquieu and Sociological Jurisprudence*, 29 Harvard Law Review, 582 1915-1916

defined in its social context. Whereas, if we take “law” as the main course, the emphasis will be laid more on legal-normative phenomenon, instead of social behaviour as such.

As stressed earlier in the second paragraph, framing human behaviours according to a more calculable, mathematical normative ordering is not only easy to administer, but also easy to adjust, mould and direct human behaviour to a certain course. Changing the concept of law in a kind of non-essentialist way, does not help us further in understanding the essence of law, and the way legal rules are being perceived and accepted by individuals. Besides, even if one could unmistakably prove that ‘law’ is a logical construction’ which has an inherent exclusivity indebted in its vain, still the question is whether it matters if this ‘law’ would not have any recourse on the individual.

This is why we need a total revised and different approach to law, which conceives beyond normality and embraces all facets that contributes to the creation and enforcing of legal-normative rules. If we try to understand Ehrlich’s account of law only from the perspective of legal-normativity, than it is true that it is nothing else than a bundle of vague accumulation of facts, which does not give any clarity in the distinction between legal rules (law) and social rules.

But, if we try to, otherwise, conceive “Living Law” as Ehrlich himself did, from the perspective of the individual, as Vanden Linden also encountered in his second revised article about Legal Pluralism, than suddenly all these “vague facts” will start to come down.⁵³

As Vanden Linden mentioned in his revised Article, the main error he made in his previous article on Legal Pluralism, was that he took the state’s perspective to law, as the leading ground for his legal survey. Instead, he argued, we have to perceive law from the individual’s point of view. The individual is more inclined to see law as a social phenomenon than the state does, for whom law is nothing else than a tool to keep citizens under control.

He explains further that a “... man, as a member of many social networks, is constantly subjected to a dialectical process in which competing regulatory orders assert their power over him and strive to achieve autonomy from the others. Law is one of these regulatory orders and competes with them in order to assert its supremacy at the same time over the individual and other regulatory orders.”⁵⁴

This means that ‘law’, according to Ehrlich is perceived as “Living Law” connoting: “The living law is the law which dominates life itself even though it has not been posited in legal propositions. The source of our knowledge of this law is, first, the modern legal document; secondly, direct observation of life, of commerce, of customs and usages and of all associations, not only those that the law has recognised but also of those that it has overlooked and passed by, indeed even of those that it has disapproved.”⁵⁵

⁵³ Brian Tamanaha, A Non-Essentialist Version of Legal Pluralism, journal of Law and Society, Vol 27, Number 2, June 2000, p.301

⁵⁴ Jacques Vanden Linden, Return to Legal Pluralism; 20 years Later, 28 J. Legal Pluralism & Unofficial L. 151 1989, p.151

⁵⁵ Ehrlich, Eugen (1936) *Fundamental Principles of the Sociology of Law*. Cambridge, MA: Harvard University Press (orig. 1912 *Grundlegung der Soziologie des Recht*, p. 439

So instead of observing law from a social or legal scientist point of view, one has to determine law as emanating from a social environment. And this is what Eugen Ehrlich tries to define with his “Living Law”. Law is the result of a social process, but it is not only social in its essence. It is normative, but at the same time also institutional/organizational. What makes law precisely law can only be understood if one grasp the totality of this social process that takes place within a certain organizational or institutional framework, namely an association or a community.

Understanding “law” as a totality of social dynamism, will explain a lot about many legal issues that cannot be grasped with a mere logical and rational legal mentality. To illustrate this, I want to mention the way for example Sharia has been settled in United Kingdom.

The controversy about the Sharia Law stems mostly from a wrong perception and is limited to the endorsement of Shaira in totalitarian states like Iran or Saudi Arabia. However, this does not explain anything about the true nature of Sharia, which leans highly on social rules being practiced within a particular political environment. Before Sharia law can function as Law, it must enter first into a kind of a period of adjustment of two years in order to be adapted to social rules, existent in a particular area. Upon this adopted adapted social rules, legal rules (law) will consequently erupt.⁵⁶

In other words this example shows us clearly the inseparable relation between legal rules and social rules, as one whole social phenomena. This is why, the Sharia in United Kingdom would be a totally different kind of Sharia than the one in Kuwait, Saudi Arabia and Iran. This further explains, as explained above, why it is hard to ascertain ”Sharia Courts” since the distinction between religious values and legal enforcement are not separated. It is totally intertwined within the social nature of that particular community, within a particular country.

This brings me to my main contention about the suitability of “Living Law” , which is that this concept departs rather from a comprehensive totality of social dynamism than merely plain norms . More in particular, Ehrlich employs an approach that is very much in accord with my research question, since it detects not only legal-norms but everything that is related and which accommodates the creation and existence of legal norms, like institutional framework, enforcement and social rules that support the legal rules. In order to get a clear view about his “comprehensive” (“associational”) concept of law, I want to dwell a little bit more on Ehrlich’s account of law.⁵⁷

According to Eugen Ehrlich, “A norm ... must be recognized in the sense that men actually regulate their conduct according to it. A system of law or of ethics that no one gives heed to is like a fashion

⁵⁶ Yilmaz, I. (2000) ‘Muslim law in Britain: reflections in the socio-legal sphere and differential legal treatment’, *Journal of Muslim Minority Affairs*, 20(2) : 343± 50; Poulter, S.M. (1986) *English Law and Ethnic Minority Customs*. London: Butterworths; South Asian Muslim Law Today: An Overview Werner F. Menski; Shaykh Faisal, *Family Law, Minorities and Legal Pluralism: Should English Law give more recognition to Islamic Law?*; Maria Reiss, *The Materialization of Legal Pluralism in Britain: Why Shari’a Council Decisions Should be Non-Binding*, Arizona Journal of International & Comparative Law Vol. 26, No. 3

⁵⁷ Eugen Ehrlich, together with Gierke is also mentioned by Paul Schiff Berman as a possible alternative in trying to address Legal Pluralism from a political context. They merge, namely, political or institutional framework with legal framework. This means that departing from this perspective every legal system has to go together with a political or institutional system akin.

that no one follows. Only we must bear in mind that what has been said about the rule of conduct must not be applied to the norm of decision; for courts may at any time draw forth a legal proposition which has been slumbering for centuries and make it the basis of their decisions. And we must not conceive of this doctrine...as implying that the norm must be recognized by each individual. The norms operate through the social force which recognition by a social association imparts to them, not through recognition by the individual members of the association”⁵⁸

In other words, legal rules are contained by social rules within a society, and vice versa. Legal rules stems from the foundation of social values, custom, habits and religion and are nourished by those value systems. That is to say, legal rules, in order to have a normative effect on society/individual, has to be recognizable by a particular individual or the society as a whole. Otherwise, a legal-norm would not have any effect in practice and if enforced, would be acknowledged as an intrusion into their value-system.

Hence, legal rules (or law), are actually a kind of extracts of social reality or as Bouaventoura de Sousa Santos noted, “...the relations law entertains with social reality are much similar to those between maps and spatial reality. Indeed, laws are maps; written laws are cartographic maps; customary, informal laws are mental maps.”⁵⁹ The relationship between law and social rules can therefore not be discarded. Social rules form an eminent part of legal rules within a society, and therefore established the social nature of legal rules/law.

But if we have to accept this account of law, what would it entail for the purpose of governance? Can one really work with this concept of “living law”? Does it not actually confirms Kelsen’s argument that one cannot mix up “is” and “ought”, since descriptive theory cannot induce normative value, and so have no advantage for governance purposes?⁶⁰

I argue that we absolutely can work with this concept of “Living Law”, moreover what Ehrlich tries to depict is actually setting the limits for government interventions in social issues. More in particular, with “living Law” Ehrlich tried to outline the anatomy of how legal rules, which can be generated and enforced by and from society. As to governance is concerned, Ehrlich clearly contends that this whole anatomy of “Living Law” is part of a framework called community or association. As such, and hinging on Otto von Gierke’s political concept of associationalism,⁶¹ which I will elaborate in the next chapters, Ehrlich clearly argues for a borderline between the state and underlying communities and associations.

As Ehrlich further expresses on associations, “ It is not an essential element of the concept of law that it be created by the state, nor that it constitute the basis for the decisions of the courts or other

⁵⁸ Ehrlich, Eugen (1936) *Fundamental Principles of the Sociology of Law*. Cambridge, MA: Harvard University Press (orig. 1912 *Grundlegung der Soziologie des Recht*, p.167

⁵⁹ Boaventura de Sousa Santos, *Law: A Map of Misreading. Toward a Postmodern Conception of Law*, , Journal of Law and Society, Vol. 14, No. 3 (Autumn, 1987), pp. 279-302, p.5

⁶⁰ Hans Kelsen, *Die Rheine Rechtslehre*

⁶¹ Otto von Gierke, *Die Grundbegriffe des Staatsrechts und die neuesten Staatsrechtstheorien ; Naturrecht und deutsches Recht ; Die historische Rechtsschule und die Germanisten*, 1973

tribunals, nor that it be the basis of a legal compulsion consequent upon such a decision. A fourth element remains, and that will have to be the point of departure, i.e. the law is an ordering. It is the deathless merit of Gierke that he discovered this characteristic of law in the bodies which he called associations (Genossenschaften)...And herein lies the germ of a true and great conception of the nature of law. Just as we find the ordered community wherever we follow its traces, far beyond the limits set by Gierke, so we also find law everywhere, ordering and upholding every human association.”⁶²

According to Ehrlich these organic organizational frameworks (and natural governance systems) have their own dynamic in generating legal norms. Consequently, as to governance is concerned, Ehrlich departs from a more fragmented vision on governance, whereby different units within a political arena exerts their own authority. This does not have to be contrary to the central governments authority, in the contrary. It is conceived as true penetration of good-governance and democratic will. People are being governed on a micro level, which is more in concord with the local reality than centralized government.

The main emphasis in Ehrlich’s definition of law, or in his theory of living law, is that he argues that the social institutions were existent prior to the enacted statutes by nation-state. So he emphasises not so much on legal norms that create something but on institutions, which connotes the centralisation of society in Ehrlich’s notion of law. It is not the norms that create social institutions like marriage or contract or trade, but the other way round. It is these social institutions that are already existent, which constitutes already the normative foundation of these institutes. As he further argues:

”Is a legal system possible without Legal Provisions? In other words, is a legal system imaginable which consists of nothing other than the Social Order?”⁶³ This question must be answered in the affirmative if only for the reason that society is older than Legal Provisions and must have had some kind of ordering before Legal Provisions came into existence. This is why he correctly states that “Rules of conduct are social facts, the resultants of the forces that are operative in society, and can no more be considered separate and apart from society, in which they are operative, than the motion of the waves can be computed without considering the element in which they move”⁶⁴

This definition of law can be a suitable basis for the creation of a more comprehensive approach to law. With comprehensive approach to law, I try to denote, a totality of a legal phenomenon with all its social, legal, institutional dynamics that generates and upholds the legal phenomena. Moreover, I believe that law, as a social phenomenon, controlling and guiding human interrelationship, cannot be separated from its social context, in order to create a pure science of norms, as explained in the second

⁶² Ehrlich, Eugen (1936) *Fundamental Principles of the Sociology of Law*. Cambridge, MA: Harvard University Press (orig. 1912 *Grundlegung der Soziologie des Recht*, pp.23-25

⁶³ Roscoe Pound, *An appreciation of Eugen Ehrlich*, Harvard Law Review, vol. 36 Dec 1922 no 2p.132

⁶⁴ Ehrlich, Eugen (1936) *Fundamental Principles of the Sociology of Law*. Cambridge, MA: Harvard University Press (orig. 1912 *Grundlegung der Soziologie des Recht*, p.39

paragraph. Law, in Ehrlich's view, is being conceived as a totality of an organizational framework, namely that of an association or community.

According to Ehrlich a "social association" is: "a plurality of human being who, in their relations with one another, recognize certain rules of conduct as binding, and, generally at least, actually regulate their conduct according to them. These rules are of various kinds, and have various names: rules of law, of morals, of religion, of ethical customs, of honor, of decorum, of tact, of etiquette, of fashion."⁶⁵

The importance to depart from a comprehensive approach to law, like from associations and communities, is because it depicts the dynamic within this social units, which creates, maintains and enforces legal rules. These communities or associations are not rigid or separate constructions, but are flexible and can overlap with other organizations structures, like other communities, associations or state's structure.

As Ehrlich maintains: "All of us... are living within numberless, more or less compactly, occasionally quite loosely, organized associations, and our fate in life will, in the main, be conditioned by the kind of position we are able to achieve within them. It is clear that in this matter there must be reciprocity of services rendered. It is impossible for the associations to offer something to each one of its members unless each individual is at the same time a giver. And in fact all these associations-whether they are organized or unorganised, and whether they are called country, home, residence, religious communion, family, circle of friends, social life, political party, industrial association, or good will of a business- make certain demands in exchange for that which they give; and the social norms which prevail in these communities are nothing more than the universally valid precipitate of the claims which the latter make upon the individual... The social association, is the source of the coercive power, the sanction, of all social norms, of law no more than morality, ethical custom, religion, honor, decorum, etiquette, fashion, at least as far as the outward observance of the precepts is concerned..."

A man conducts himself according to law, chiefly because this is made imperative by his social relations. In this respect the legal norm does not differ from the other norms. The state is not the only association that exercises coercion; there is an untold number of associations in society that exercise it much more forcibly than the state."⁶⁶

1.6 Conclusion

My point in this chapter was to develop a comprehensive concept of legal pluralism, which I could employ for political theoretical (organizational/institutional) context. Particularly, I wanted to embrace

⁶⁵ Idem

⁶⁶ Ehrlich, Eugen (1936) *Fundamental Principles of the Sociology of Law*. Cambridge, MA: Harvard University Press (orig. 1912 *Grundlegung der Soziologie des Recht*, p.63-64

law as a totality of a whole social dynamism, as a 'social unit'. Instead of just scrutinizing on the legal-normative rules as such, I tried to develop a concept legal pluralism, which departed from an account of law that takes social units, like community and associations as the point of departure.

I argued that the current concept of legal pluralism was mainly based on social scientist endeavour to perceive law from a "social process". The result was that they perceived in every social action a legal action, blurring the whole concept of law as such.

The so called "Malinowski problem", as argued by Tamanaha, stressed this lacuna of the concept of "legal pluralism", because social definition of law, which they utilized was blurring the line between social action and law. The whole emphasis of social scientist was to, in the words Griffiths, "breaking the "stranglehold of the idea that what law", which is nation-state centred. But while doing this they went astray on demarcating on what really constituted law and what not.

It is true that law should not be perceived as emanating from nation state only, but what than makes "law" truly "law", and in which sense is this different than social behaviour? I tried to argue that we have to let loose the obsession we have with Legal-normativity and start to look broader in organization/institutional framework. The problems was that both social scientists who challenged nation-state law, as well legal scientists who were upholding nation-state law, were all concentrated on legal normatively. They only differed in approach and methods. While legal scientist took, abstract, objective and logical structure as their basis, social scientist on the other hand embarked on empirical and social data as their point of departure to grasp the concept of law.

With referring to Eugen Ehrlich's concept of "living law" I tried to argue that we should apply a broader concept of law, that only stresses the social embeddedness of law instead of trying to ascertain whether a certain behaviour should be determined as law or not. Moreover, trying to perceive law as a part of a social unit like association or community, enables us to locate the locus of law, within a social unit. Because each social unit contains a whole dynamism on its own that contributes to the creation of law.

In the next chapter, I will try to argue, which elements within social units like community or association will contribute to the eruption of law. I will emphasise on Trust, Values and Alternative Dispute Resolution, as the three elements with which one can locate law within a social unit.

Chapter 2 Community and Law: From Logic to Trust

2.1 Introduction

“A legal concept of community is devised to highlight the need for regulatory expression of communal relationships of trust; it recognizes the variety of these relationships and the diversity of forms of their expression. Consequently, it facilitates a pluralistic view of law. It recognizes the importance of order and coordination and the present, though not necessarily permanent, dominance of state law in defining and shaping the regulatory conditions of community.”⁶⁷

What made the concept of legal pluralism ambiguous and incomprehensible, was the lack of organizational and/or institutional framework. “Law” in Legal Pluralism was stripped off from its organizational/institutional background. Although many definitions and perspectives were represented, without any clear organizational framework, it was difficult and ambiguous to identify “law” within a social unit. Because of this, eventually, the definition of “law” in Legal Pluralism remained paradoxically enough “state centred”⁶⁸, since the state was the only organization present, who claimed to be the only (organizational) source of law. All other definitions, where just point of departure for a kind of anthropological or sociological inquiry without the emphasise on the organizational or institutional framework, which would generate those rules. This linkage between organization and legal rules, is unfortunately absent by many advocates of Legal Pluralism.

In this chapter, I want to emphasise on this organizational/institutional framework, and in particular, to make the link between “Community and Law”. I want to analyse how *community* or *association* generate legal norms (rules) and how they manage to maintain the legal order by their peculiar way of enforcement.

The purpose of this chapter is not to make any claim, instead, I merely want to elucidate how Community and Associations could generate law, hence, the purpose is to identify and locate “law” within these social units. Moreover, my aim is to emphasis on certain elements that takes place within the community framework, which would trigger the legal conscience and enforcement procedure from within. As Cotterrell puts it: “To link law and community is thus to explore continually shifting patterns of social variation expressed or reflected in legal diversity. It is to hold out the possibility of theorizing law as a social phenomenon that is something other, or something more, than the law of the nation state as a political society.”⁶⁹ Before I embark on outlining this process, I will first try to explore on the kind of definition of *community* I want to employ in this chapter.

The concept of *community* has been scrutinized from many fields, like sociology, anthropology, political science and economics. Since recently, even legal scholars started to show some interest in

⁶⁷ Roger Cotterrell, *A Legal Concept of Community*, 12 Can. J.L. & Soc. 75, 1997

⁶⁸ See Ido Shahar

⁶⁹ See Roger Cotterrell, p.78

the concept of *community* as an organizational form, which can accommodate legal norms. This is the result of the effects arisen from globalisation and the mobility factor, which makes it easy for certain communities to travel around the world and settling down. They are abiding by their own legal norms, culture, religion or other normative systems, which they took along with them.

In my attempt to identify the locus of law within the concept of *community*, I will first draw a conception of *community*, which I can apply. I will try to demarcate the concept in such a way that it resembles a 'social unit', which is autonomous and unified, bearing their own legal framework. A clear cut answer is something I cannot give, I will just try to clarify the concept and explain why I would adopt a certain kind of conception more than others.

Accordingly, I will pay emphasis on the distinction which Tönnies has made between *Gemeinschaft* and *Gesellschaft* (society), since it is within this dichotomy in which the concept *Gemeinschaft* (Community) can unfold itself. By discerning between *Gemeinschaft* and *Gesellschaft*, I can explain clearly the internal differences between law as we adopt in the modern society and law with a *community*.

Departing from the Tönnies distinction, one of my arguments to explain the locus of law in community, is to explain the difference of legal framework that underlies a *Gemeinschaft* and *Gesellschaft*. Namely, I will claim that the difference between these two frameworks are based on *Trust* on the one hand and *Logical* relationship, on the other.

Trust relationship is one the essential characteristic of a *community*, since it forms the basis for many actions, simply because men trust each other, either because of the kind of relationship they expose or the fact that their share the same value. I will explain this further in many aspects. I will try to explain for example why trust in economics is conceived as an important 'social capital'.

Furthermore, I will emphasise on the importance of value in maintaining and enforcing the *trust* relationship. Moreover, I will explain the difference between *Values* as opposed to merely (system) of *rules*. People from the same community, either religious or ideological, or from any other grounds, base they actions mainly on the same *values*. Those *values* are so important since it constitutes one the elements to be part from the community. *Values* are guiding lines that induces an individual to act in a certain way.

Eventually, I will try to explain in this chapter how the enforcement of this so-called, *trust* relationship and *values* are being endorsed and entrusted to a certain institution. *Alternative Dispute Resolution* explains, which methods can be adopted to enforce rules within a community. Since trust-based relationship constitutes the cornerstone of this relationship, the subsequent aim of ADR is the restoration of this trust-based relationship. In contrary to the kind of court-based justice-system we are familiar with, ADR is not based on mathematical construction of legal rules or legal reasoning, which will enforce justice. Instead they will employ all methods that will enable the restoration of trust between members, which underlies their relationship.

Since it is impossible to point to the source or resources of law within a community, by juxtaposing all the above mentioned three component to societies equivalent, namely *logic*, *rules* and *judicatory system*, I want to exemplify the locus of law within community.

2.2 Concept of *Community*

A *community* is, as I would delineate it, a social unit, which keeps its outer boundaries closed for outsiders to enter and insiders to leave. It is a social unit, which is a closed, unified system, and because of this it will provide advantages for their members. *Community* is by far not a romantic concept (as Teubner, David Nelken, Steven Brint argue)⁷⁰, but a concept which is as ancient as humanity and is founded the virtue to survive.

A *community* is established for people with sharing some common features which might be language, culture, religion, and profession and so on. In this sense, the community is therefore a closed system. It is made only for people identical on certain aspects, and does not have an open door policy or an exit strategy. In this sense it resembles, as Cotterrell made the comparison, with Carl Schmitt's⁷¹ Feind and Foe dichotomy. The difference between other *communities* is a matter that reinforces the identity of the *community*.

A more elaborate, but a quite simple definition of what community should denote, is provided by Tönnies, on whose conception of community I will base my exploration on the locus of law within community. Tönnies argues namely that "The group which is formed through this positive type of relationship is called an association (Verbindung) when conceived of as a thing of being which acts as a unit inwardly and outwardly. The relationship itself, and also the resulting association, is conceived of either as real and organic life- this is the essential characteristic of the *Gemeinschaft* (community)- or as imaginary and mechanical structure- this is the concept of *Gesellschaft* (society).⁷²

In the next chapter I will elaborate more on this dichotomy, which will be a kind of read threat of this chapter, in trying to depict Law in *community*. It suffice here to mention that according to Tönnies *community* distinguishes itself from society from being organic, and thus spontaneously created, while society is artificially established with an artificial structure.

Althusius on the other hand gives us a more political, and strangely enough a more sophisticated outline of what *community* signifies. According to him, "The community is an association formed by fixed laws and composed of many families and collegia living in the same place. It is elsewhere called a city in the broadest sense, or a body of many and diverse associations.--- Furthermore, this

⁷⁰ David Nelken, Eugen Ehrlich, Living Law, and Plural Legalities, Legal Pluralism, Privatisation of Law and Multiculturalism, Volume 9, Number 2 July 2008 Article 6; Günther Teubner, *Two Face of Janus: Rethinking Legal Pluralism*; Steven Brint, *Gemeinschaft Revisited: A Critique and Reconstruction of the Community Concept*,

⁷¹ Carl Schmitt, *Der Begriff des Politischen* (München 1927)

⁷² Talcot Parsons, *Theories of Society*, Tönnies "Gemeinschaft und Gesellschaft", p.191

community is either rural or urban. A rural community is composed of those who cultivate the fields and exercise rural functions.”⁷³

Steven Brint tries to give us a more elaborated, sociological account of what community actually entails and gives an detailed outline on which parts community is composed of. He defines community as “...aggregates of people who share common activities and/or beliefs and who are bound together principally by relations of affect, loyalty, common values, and/or personal concern (i.e. interest in the personalities and life events of one another. Motives of interaction are thus centrally important in this definition, as they were for Tönnies. However, at least one outcome of these motives is also important. Because of the relative informality and consummatory character of communal relations, communities are based on a sense of familiarity with others whose full personality is relatively well known and not predominantly shaped by formal role relations. Thus, while a sense of community can be sustained in aggregates of as many as tens of thousands, true communities of place are invariably relatively small. It is perhaps unnecessary to add that not all communal social relations are amicable; a sense of security in the face of disliked others is deeply characteristic of communal relations.”⁷⁴

Robert Sampson on the other hand tried to distinguish the concept of *community* further and gave a further clarification in how communities are erupted. He argues that “The systemic model of community social organization conceptualises the local community as a complex system of friendship and kinship networks and formal and informal associational ties rooted in family life and ongoing socialization process (Kasarda &Janowitz 1974). The term systemic highlights the theoretical focus on the system of social ties embedded within ecological, institutional, and normative community structures. The basic hypothesis derived firm this conceptualisation is that length of residence is the key exogenous factor that influences attitude and behaviour toward the community.”⁷⁵

Above, I have tried to give some definitions of the concept of community in order to have a kind of view in which way we have to look when we start to explore to the locus of law in community. A clear concept of “community and Law” approach is not given. It leans very much on sociological account of *community* and is therefore very much dependant on sociological description of *community*.

Still Cotterrell has made an attempt to provide at least a kind of guidelines of where to look at if we trie to apply the concept of community in legal perspective.

Cotterrell has tried to make a distinction in different forms of communities following Max Weber’s concept of community. He argues that: ”Following this schema, community can be associated, first, with habitual or traditional forms of interaction: with the often accidental circumstance that people find themselves coexisting in a shared environment. This is *traditional community*. It includes what sociologists often refer to as “local community”- the coexistence of people in a defined geographical space; a neighbourhood, for example. But an empirical correlate of traditional community is also

⁷³ Johannes Althusius, *Politica* (1614), p. 40

⁷⁴ Steven Brint, *Gemeinschaft Revisited: A Critique and Reconstruction of the Community Concept*, p.9

⁷⁵ Robert J. Sampson, *Linking the Micro- and Macrolevel Dimensions of Community Social Organization* 70 *Soc. F.* 43 1991-1992 p.45

found in the sharing of language. A linguistic community, in ordinary terminology, is a group of people who have a particular language or dialect in common. Often, of course, local and linguistic groups reinforce each other's identity. Secondly, community may be associated with a convergence of interest among a group. This is *instrumental community*, or community of interest. Its closest empirical correlate is a typical business community, or perhaps the original European Economic community. Thirdly, community may refer to the sharing of beliefs or values that stress solidarity and interdependence. This can be termed *community of beliefs*. Religious congregations, churches or sects of various kinds most obviously approximate this type. Finally, the uniting of individuals by their mutual affection may be thought of in terms of community. This type can be called *affective community*. The legal philosopher John Finnis has noted that this is the kind of community in which "groupness" in itself is most important; indeed, "the most intense form of community [is] the friendship of true friends." These four ideal types correlate indirectly with Max Weber's four ideal types of social action. Their formulation is an effort to extend Weber's typification of action into a typification of basic forms of collective involvement and interaction. Thus, traditional community correlates with Weber's type of traditional action, instrumental community with purpose-rational action, community of belief with value-rational action, and affective community with affective action."⁷⁶

Thus, the concept of community, as I am utilizing it in this chapter has nothing in common with the *communitarian* political ideology. This approach is not a political concept but a more sociological/anthropological one, which tries to determine the inner social organization that exists within the society. Society, as such is a concept which is emanated from a political theoretical approach that departs from the ruler-ruled dichotomy. However, society is not just a blank accumulation of individuals which are kept together by the state, in the contrary. Society is further demarcated by different groups, organizations communities and association which has a greater influence on shaping and influencing the individual than the state alone.

Society or 'Gesellschaft' as Tönnies phrased it, is a creation of state, which is comprised of a collection of different individuals altogether. Society is shaped in such way that it suits the governing structure of the state. This also explains why any other intermediary governing structures like communities are not allowed within the state, at least officially.

However, due to global changes around the world, which increased the mobility of different communities from third world countries to the west, this firm institution of a society got challenged somehow. Because of this demographic changes around the world, community as a concept gained importance in sociological research, into the nature of its institutional framework. Community, as a vital factor in society, has been ignored not only from a sociological point of view, (or at least not enough attention has been attached to this concept) but especially from legal point of view. Blood and

⁷⁶ Roger Cotterrell, *A Legal Concept of Community*, P.81 12 Can. J.L. & Soc. 75 1997, p.9

honour revenge is for example one of the customs, which is the result of communal bondage, which an immigrant has with its kin, or community, which can be traced all the way back to their village.

The importance of “Community and Law” approach is twofold. First of all it tries to exemplify the social and legal framework of that particular society. By having a clear picture of how this framework works, it enables the state, at least, to develop a policy that is adequate and effective enough to deal with problems that arises because of it. Especially in United Kingdom, Germany, France, The Netherlands and Scandinavian countries,, there is a need to understand how these community structures work, in order to deal with the consequences that arises because of the clash between the community structure and society. In this kind of situation, criminal or immigration law does not provide adequate solution to solve the conflict. They will only deal with the symptoms of the problems.

Secondly, “Community and Law” approach will enable us to understand ‘law’ as a socially embedded phenomenon, however without discarding the phenomenon of law as such. Law cannot be merely perceived as a social process, like social scientists has done. Being socially embedded means that it derives its legitimacy from the social environment, but it does in no way mean that it is a sociological phenomenon. This is why my aim in this chapter is to identify and locate “law” within the community structure instead of explaining the whole social process.

2.3 Tönnies Typology Between Gemeinschaft and Gesellschaft⁷⁷

2.3.1 The Theory of Tönnies and the distinction between Gesellschaft and Gemeinschaft

Tönnies typification of Gemeinschaft and Gesellschaft enables me to contrast the structural settings between community and society, in order to clarify the distinction between modern law and law within community. However, there are some minor remarks, which

I want to expose first, before embarking on the issue.

One of criticism against Tönnies’ analyses, which I want to refute, is the fact that his typification is simple, romantic and not appropriate for sociological, scientific research. As Brint asserted “Tönnies’ s highly connotative approach invited confusion about the defining coordinates of community, and it encouraged the tendency of subsequent writers either to romanticize or debunk community, rather than to approach the issue of community and community types in a rigorous analytical spirit.”⁷⁸ Because these typifications are not scientifically elaborated and outlined it just reflects certain sentiments of some who yearn for “the good old days”.

⁷⁷ Talcot Parsons, *Theories of Society*, Tönnies “*Gemeinschaft und Gesellschaft*”, p.191; Helmuth Plessner, René König und Joseph R. Gusfield, *Grenzen der Gemeinschaft*

⁷⁸ S. Brint, *Gemeinschaft Revisited: A Critique and Reconstruction of the Community Concept*, Sociological Theory, 2001, p.3

The problem with sociology and with certain institutions which has to be unravelled within sociology, is that one has to start with simple typification in order to embark scientifically on a particular issue. Making first steps in sociological inquiry requires simple typifications in order to demarcate the research object carefully. From there on one can continue exploring or clarifying it further, or outlining research area within a certain topic. Moreover, only after certain simple typifications one can continue doing some empirical scientific work, based on these typification.

Because “Community and Law” approach is still in its infancy, Tönnies’ typification will therefore also be used in my chapter in order to clarify certain elements, which exists within community structure as opposed to “society” structure”. This typification is not used as scientifically proven facts, but tools to embark on a certain research area. Since I want to exemplify how *community* as a structure generates legal-normative rules, it is therefore essential to me to put it against society’s structure. Only in this dichotomy we will understand how community can generate legal norms, because there is no other way. And from here on one can continue further to make his point by attaching an example to illustrate the theory that is developed.

Concerning the claim, which is generally aimed at the advocates of *community* approach (like Eugen Ehrlich) that Tönnies adheres to a kind of romantic nostalgic theory of community, is based on a presumption and cannot be derived from facts. As Assotionalists like Althusius, Gierke, Paul Hirst and Eugen Ehrlich has stressed, *community* as a concept is not ideal theory but based on reality and facts, which is all but romantic. Community is an organization of individuals who come together to cooperate. In its traditional, rural, peasant-like version, *community* aims at survival. Every sociologists is aware of the oppressive nature of communities, which might be oppressive against individuals. This is mainly the reason why community is unravelled, in order to understand how it functions. I also have to add that in a political environment in which community as sub-unit is precluded, it is off course the task of sociologists to put it back on the agenda again stressing on certain attention and stressing on its importance.

The alternative to Tönnies’s concept of community is that of Durkheim as proposed by Brint. According to Brint: “Durkheim’s work represents the most important alternative to Tönnies’s typological approach. Like Tönnies, Durkheim⁷⁹ was impressed by the importance of community relations for equipping human beings with social support and moral sentiments. Durkheim’s Conceptual breakthrough was to see community not as social structure or physical entity but as a set of variable properties of human interaction that could be found not only among tradition-bound peasants of small villages but also among the most sophisticated citizens of modern cities.”⁸⁰ For scientific sociological inquiry, I would agree with Brint and adopt Durkheim’s concept of community as an appropriate concept. However, Durkheim’s concept does not contribute to my

⁷⁹ Emile Durkheim, *The Elementary form of Religious Life*, transl. By Joseph Ward Swain; Mustafa Emirbayer, Emile Durkheim: Sociologist of Modernity, Blackwell Publishing

⁸⁰ See, Steven Brint, p.3

inquiry in identifying the locus of law within *community*. It would be an apt theoretical foundation for empirical research, but would not help me in explaining how *community* generates legal norms.

2.3.2 *Gemeinschaft and Gesellschaft*

According to Tönnies All intimate, private, and exclusive living together, so we discover, is understood as life in *Gemeinschaft* (community). *Gesellschaft* (Society) is public life-it is the world itself.” *Gemeinschaft*, according to Tönnies should therefore be perceived “...as a living organism, *Gesellschaft* (society) as a mechanical aggregate and artefact. Everything real is organic in so far as it can be conceived only as something related to the totality of reality and defined in its nature and movements by this totality.”⁸¹p.192

The importance and the necessity to address the sociological anatomy of communities is that (just like we have to address pluralistic legal systems in legal science), is the fact that the natural organizational structures, which already exists prior to societies structure, is being overshadowed by the society as an organizational structure. This also explain that when legal scholars or sociologists who are trying to explore in the nature of community as a natural organization, they are being blamed of being “romantic”.

Community as an organization is established based to serve “necessity” of people, while society is perceived as an artificial construction of the state to enable individuals to pursue their livelihood the way they please. This artificial construction is characterized by Logical construction between individuals. Logical relationships constitutes the cornerstone of *Gesellschaft* as depicted by Tönnies, and is artificial to the extent that the state has to maintain it by enforcing its power.

According to Tönnies, community or *Gemeinschaft* is created by “...blood, denoting unity of being, is developed and differentiated into *Gemeinschaft* of locality, which is based on a common habitat. A further differentiation leads to the *Gemeinschaft* of mind which implies only co-operation and co-ordinated action for a common goal.”⁸²

Departing from this definition he distinguishes community in “...1) kinship, (2) neighborhood, and (3) friendship as definite and meaningful derivations of these original categories.”⁸³ Although not exhaustive, this distinction provides us the “spheres” of influences, in which communities (or associations) might arise.

Living in a community emphasises on the “locality” or proximity of the environment. Everything is kept simple and compact in contrary to life in a society, *Gesellschaft*. In a *Gesellschaft* everything is endless, and big. Moreover, cosmopolitanism for example, can be perceived as a big society rather than a big community. Since cosmopolitans do not know each other and they also would not bother to

⁸¹ Talcot Parsons, *Theories of Society*, Tönnies “*Gemeinschaft und Gesellschaft*”, p.191; Helmuth Plessner, René König und Joseph R. Gusfield, *Grenzen der Gemeinschaft*,p.192

⁸² Idem

⁸³ Idem

know. Paradoxically this is why they are cosmopolitans. They reside everywhere, without getting affected by the environment. They can settle down and feel at home wherever they are.

Communities, in contrary to societies, are created on the "sameness" principle of their community members. They live in the same territory, they speak the same language, they have the same habits the same customs. As Sampson argues : "The ordinary human being, therefore- in the long run and for the average of cases-feels best and most cheerful if he is surrounded by his family and relatives. He is among his own (chez soi)"⁸⁴

Because community structure is total "Neighbourhood describes the general character of living together in the rural village. The proximity of dwellings, the communal fields, and even the mere contiguity of holdings necessitate many contacts of human beings and cause inurnment to and intimate knowledge of one another."⁸⁵

In general, compared to Gesellschaft, living outside a Gemeinschaft (or Gemeinschafts) is hardly to imagine. Community's can be seen as a kind of safe havens, where process of movements are relatively free but outside the safe circles of community, suddenly the envirmont becomes more dangerous and incomprehensible. While society orderings enable individuals to move in large amount of space, but with the side effect of being distracted from its surroundings, community on the other hand gives a certain freedom of action but within a confined spatial and social territory. Outside this territory, it is hard of communal member to interact. This also explains why communities are largely closed to outside world, but also

"All authority is characterized by particular and enhanced freedom and honor, and thus represents a specific sphere of will."⁸⁶

"These inequalities can be increased only to a certain limit, however, because as the unity of unequal beings would be dissolved: In case the superiors' legal power would become too great, their relation to the common sphere of right would become indifferent and without value and the inferiors' legal power would become too small and their relationship thereto unreal and insignificant."

"Reciprocal, binding sentiment as a peculiar will of a Gemeinschaft we shall call understanding (consensus)."

"In the same way it can be said that everything that conforms to the conception of a Gemeinschaft relationship and what in and for this situation has meaning."

"The real organ of understanding, through which it develops and improves, is language. Language given by means of gestures and sounds enables expression of pain and pleasure, fear and desire, and all other feelings and emotions to be imparted and understood."

⁸⁴ Robert J. Sampson, Linking the Micro- and Macrolevel Dimensions of Community Social Organziation 70 Soc. F. 43 1991-1992

⁸⁵ Idem

⁸⁶ Talcot Parsons, *Theories of Society*, Tönnies "Gemeinschaft und Gesellschaft", p.195

2.4 Trust, Values and Alternative Dispute Regulation

2.4.1 Trust versus Logic

Trust

Trust versus *Logic* resembles Tönnies's typification of *Gemeinschaft* versus *Gesellschaft* and Organic (natural) versus Artificial typification of social structures. Natural, is that what occurs out of nature, because of necessity or the requirements of the nature as such. Since human beings are "social beings", in nature they are forced to cooperate with each other and one reaches automatically to trust relationship, which exists between family members, between father and son, Husband and wife, neighbours and so on. These relationships are not voluntarily entered but entered because the nature urges people to collaborate and cooperate together. This leads consequentially to a situation in which people has to trust each other and create a system where they will *trust*.

Trust, in a community, is the natural glue that keeps the members naturally bonded and connected. This natural connection of *trust* is rediscovered by economical science as an advantageous element, which can lower the cost that goes along with business contracts. As Avner Greif argued "Reputation-based exchange is characterized by a low cost but a high marginal cost of exchanging with unfamiliar individuals. Law-based exchange, however, is characterized by the high fixed cost required to set up an effective legal system but the low marginal cost of establishing new exchange relationship."⁸⁷ This is why, as Kahan argued, "In this self-sustaining atmosphere of trust, reliance on costly incentive schemes becomes less necessary."⁸⁸

This advantage by way of *trust* in economical science, is called, social-capital. The trust relationship, which exists between parties, lowers the cost that usually goes along with the regular contract. If men trust each other, they will not make an appeal to the costly legal apparatus that is set in force in order to accommodate impersonal exchange. But what does social capital (in economical context) entail? Social capital according to Portes is described in the following way "Whereas economic capital is in people's bank accounts and human capital is inside their heads, social capital inheres in the structure of their relationships".⁸⁹ Contacts and networks are advantages that derives from social components, which benefits business contacts. As such trust is perceived as a social surplus that can be measured in economical terms.

⁸⁷ Avner Greif, *Impersonal Exchange Without Impartial Law: The Community Responsibility System*, 5 Chi. J. Int'l L. 109 2004-2005, p.3

⁸⁸ Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, Michigan Law Review, Vol. 102:71

⁸⁹ Portes, A. (1998) Social capital: Its origins and applications in modern sociology. *Annual Review of Sociology* 24 (1) pp.1-24

In this respect, it is argued that what contributes to trust-relationship is the fact of reciprocity between the parties. As Kahan has clearly mentioned, "...logic of collective action counsels the creation of appropriate external incentives, the logic of reciprocity suggests the importance of promoting *trust*"⁹⁰ Collective action, as mentioned by Kahan is triggered by collective goals and aims, these collective goals are in turn, supported and accommodated by values, which are shared commonly and which I will try to explain beneath. People trust each other because they know they belong to a certain "totality". As Olson argued:" "In collective-action settings, individuals adopt not a materially calculating posture but rather a richer, more emotionally nuanced *reciprocal* one. When they perceive that others are behaving cooperatively, individuals are moved by honor, altruism, and like dispositions to contribute to public goods even without the inducement of material incentives."⁹¹

These elements are not 'created' out of nothing, but is a natural result of having a kind of common goal. It is within this common aim in groups settings, that certain elements like honour, reciprocity and cooperation appears. What we try to do with sociological inquiry is to exemplify and identify these elements.

As Kahan maintained, "And often, though certainly not always trust is specially characteristic of affective relationships. Certainly, its existence tends to promote the affective (emotional) element in social relationships. Trust implies power and dependence; the person trusted has the power over the one who trusts, as long as trust lasts. But Community is not a matter of 'one way' trusting relationships....Trusting relationships in a community are necessarily reciprocal."⁹²

The relationship between reciprocity and trust is not one of enumeration but a kind of accumulation of elements. Both elements reinforces each other, that is to say, that trust enables reciprocity and the reciprocity, in itself, necessitates trust. Since there are many other social elements involved in a "social unity" that keeps the unit in a certain direction, these elements are not exhaustive. These are just some elements, which I brought in order to explain in where we could locate law in a social unit like "community".

As Olson further stressed in "The reciprocity theory, in contrast, sees individuals as moral and emotional reciprocators. Most persons think of themselves and want to be understood by others as cooperative and trustworthy and are thus willing to contribute their fair share to securing collective goods."⁹³

It is important to stress that members in a social units care more about long term expectations than short term. And for the sake of convenience, I like to claim that logical relationships, which I will explain hereunder, are based on short term expectations and outcome. That is why a clear decisions are desired rather than something ambiguous like restoring a relationship. The benefit of restoring a relationship is not something one would experience immediately and also the result is not as clear as in

⁹⁰ Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*

⁹¹ Mancur Olson the Logic of Collective Action 1965

⁹² Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*

⁹³ Idem

regular legal system, based on logic. Since logic based, regular legal system aims at regulating and systematizing every action of an individual, it makes every action of an individual immediately judge able.

Logic

Logical relationship, on the other hand, fills in the lacuna, which exist in, when one removes the trust element. Since trust creates certainty and predictability, one needs a substitute for this trust element, which is being found in the logical construction of legal rules (and logical and deductive reasoning). Logic is an apt way to create a system in which the individual on an impersonal basis (so without knowing each other) can enter into relationship. As Cotterrell put it : “Active interpersonal trust is largely replaced in many situations by a more passive confidence in impersonal systems (for example, financial, economic or political systems; or systems of activity represented by large business corporations or other organizations). Many of these social systems are defined, stabilized, and guaranteed by the law of the centralized state.”⁹⁴

To go a step further, one can even argue that the community responsibility system as Avner Greif defined it, could be even used for impersonal exchanges. In this case, it was the community as whole that stood guarantee for the dealings of the individual. As he argues “Mechanism enabling individuals to credibly communicate their social and personal identities are substituted for mechanisms for contract enforcement based on public information regarding past actions. Collective responsibility can thus foster impersonal exchange when past actions are not public information and personal identities cannot be credibly communicated across communal boundaries in the absence of collective responsibility:”⁹⁵

Logical construction, therefore, emancipates individuals from their environment and at least to a certain extent, gives them the presumption that a society can be build based on impersonal relationships between individuals. The logical axiomatic construction of logic, lies at the roots of our modern society with economics, or economical relationship as the groundwork for social relationship. Human beings are considered as *Homo Economicus* by Adam Smith,⁹⁶ which means that we, human beings, are entrusted with a rational mind to make the right decision for our self. As rational human beings, our decisions are logical and therefore mathematical. Economical science, which is dedicated in the study of the rational *homo economicus*’ social relationship with one another constructed a whole social relationship on merely mathematical formula. What they argue is that the way human beings act, is very logical and easy to be predicted. Human actions can be calculated beforehand and regulated.

⁹⁴ Roger Cotterrell, *A Legal Concept of Community*, P.81 12 Can. J.L. & Soc. 75 1997, p.33

⁹⁵ Avner Greif, *Impersonal Exchange Without Impartial Law: the Community Responsibility System*, 5 Chi. J. Int’l L. 109 2004-2005

⁹⁶ Adam Smith, *Wealth of Nations*

It is mainly on this presumption that the modern concept of law is founded on. The modern concept of law as Max Weber argued is the product of capitalism in which legal rules try to assure the flow of capital to a certain class in the society.⁹⁷

The so-called certainty, which the modern legal system is praised to have, is based on this logical system of rules, in which actions are framed in this so called "logical framework". Outside this logical order, anything else seems obscure and ambiguous.

Therefore, it is important to stress that logical methodology substitutes the loss of trust in impersonal relationships between partners, because "The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind."⁹⁸

Resembling law with mathematics allows men to predict and regulate human behaviour according to a beforehand, determined calculated rules. Moreover, law was considered as just a mathematical science. As Boonin has stressed "If Law was even compared with mathematics and the judge was considered a kind of geometrician, which implied that judges' decisions were as bound by rules and as logically necessary as mathematical proof."⁹⁹

As Von Jehrung clearly expressed this (and his) annoyance of the employment of logic in law, he argues that "This desire for logic that turns jurisprudence into legal mathematics is an error and arises from misunderstanding law. Life does not exist for the sake of concepts but concepts for the sake of life. It is not logic that is entitled to exist but what is claimed by life, by social relations, by the sense of justice-and logical necessity, or logical impossibility, is immaterial. One could have considered the Romans mad, if they had ever thought otherwise, if they had sacrificed the interests of life to the dialectics of the school."¹⁰⁰

The kind of picture that I want to draw in this paragraph about our modern concept of law, is very well illustrated by Duncan Kennedy. He argues that "Judgments of validity in modern "legal science" are (i) not judgments about a matter of fact, but correct or incorrect interpretations of the logical requirements of the meanings of the system of norms. They are (ii) not ethical judgments, because the logical coherence and gaplessness of the system of norms provides no warrant whatever of the moral desirability or moral (as opposed to legal) validity of the norm system as a whole or of any particular norm. They are (iii) "scientific" judgments, because validity is established according to interpretive procedures strictly bound by logic."¹⁰¹ As he further stressed "In this system, as I explained above, gaps are filled by the analysis of the system, presupposed to be internally coherent, to build a chain downward from

⁹⁷ See Max Weber, *Economy and Society*

⁹⁸ Leonard G. Boonin, Concerning the Relation Logic to Law, p.156

⁹⁹ Leonard G. Boonin, Concerning the Relation Logic to Law, p.156

¹⁰⁰ Rudolph von Jehrung, *Der Geist des Römischen Rechts* (1852)

¹⁰¹ Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, 55 *Hastings Law Journal* 1031 2003-2004

some unquestionably valid abstract provision, or upward to and then downward from some logically required though unenacted abstract provision.”¹⁰²

The way Logic keeps the systems sustained, by creating its own independent validity system (which enables legal positivist Philosophers like Kelsen, to claim that Legal Systems work on their own) by way axiomatic deduction, has made legal science earn the title of science. But in effect it has no direct relationship with the main goal of the purpose of law, namely to have a normative effect on individuals. Because of Logical validity system, less attention has been paid on the normative effect of law and its subsequent effect on the society. Which would in turn remind us, that law is not a science, but a social phenomenon, indebted in the society.

2.4.2 Values versus Rules

Values

The topic on values and rules will encompasses a whole encyclopaedia of books in order to outline and analyse it, reflecting on different scholarly perspectives, whether, (legal) philosophical, sociological or anthropological. This is utterly not my aim in this chapter. What I want to expose is how the underlying distinction of legal consciousness or the generation of legal norms between Community an society generates legal norms. It should help us to understand how for example, the Diamond Dealers Club, which I will explain in chapter three or the Jirga of Pashtunwali Afghans, do not use rules,- whether to not put in written legislative acts,- but base their drawings on values. While our modern concept of law is based on a logical system, which logical systemized (or logically reasoned) rules, whether written or not (court decision and/or legislative acts), in order to induce individuals to certain actions. Values contain intrinsic inducements by norms, while rules (might) contain extrinsic inducement by norms.

Values contain reason for human action, just like rules does. It forces people to act in a certain desired way. The totality of these reason are contained in values. Not all values are normative in nature, meaning that it will not induce individuals to act. But the totality of the values create an intrinsic normativeness, which will make human beings act in a certain way. The reason might be cultural, religious or based on certain business ethics, which the members are acquainted with.

Values can therefore be perceived as guidelines for actions to behave in a certain way. It does consist of norms, but these norms are contained in the totality of (the shell of) values, which are persuasive. This is why values (from a sociological point of view) can be perceived as a normative set of conducts, which are desired or required to be taken. In order to take up an

¹⁰² Idem p.36

inquiry into sociological nature of values, I have confined myself to Max Weber's theory of values for two reasons. First he makes a connection between incentives and actions. The importance of this method is that it provides us with a kind of inclination into where the law could reside in community. Since community members live according to certain values and not so much by legal-rules, it is important to understand how this unfolds in practice. Another reason for me to adopt Max Weber's theory is that his theory on values and actions, is a part of a comprehensive sociological inquiry into how the modern society is changing. This juxtaposition of different systems, is of importance for my research. In the previous paragraphs and in previous chapter I have already depicted a certain account of Max Weber upon law and logic.

Max Weber introduced the modern approach to sociology by scrutinizing the action of individuals. Instead of bluntly describing certain sociological features or concepts, Weber made an attempt to analyse human behaviour and how it would effect other fellow individuals. Based on this method, Weber made an attempt to portray certain incentives that lie behind human action. He made an initial distinction between *purpose-rational* and *value rational* action

He explains *purpose-rationality* and *value-rationality* in the following way: "[Social conduct may] be determined rationally and oriented toward an end. In that case it is determined by the expectation that objects in the world outside or other human beings will behave in a certain way, and by the use of such expectations as conditions of, or as means toward, the achievement of the actor's own, rationally desired and considered, aims. This case will be called *purpose-rational conduct*. Or, social conduct may be determined, second, by the conscious faith in the absolute worth of the conduct as such, independent of any aim, and measured by some such standard as ethics, aesthetics, or religion. This case will be called *value-rational conduct*."'¹⁰³

This highly elaborated outline of Max Weber, in which he tries to portray and link a comprehensive array of reasons to certain actions. This include both analysis of human behaviour based on irrational reasons as well as on rational reasons. Value-rational reasons for actions is conceived as irrational motives for certain actions. Value-rationality, in contrary to what the words project, are motives that make an appeal on emotions and believes. As he further clarifies, "From the standpoint of instrumental rationality, however, value rationality is always *irrational*, and increasingly so as the value to which the action is oriented is elevated

¹⁰³ Max Weber on Law in Economy and Society, (Max Rheinstein ed., Max Rheinstein and Edward Shils trans., Free Press 1954) (1925).

to the status of the absolute value. For as the *intrinsic value* of the action (pure conviction, beauty, absolute goodness, absolute devotion to duty) comes to the fore more unconditionally and exclusively, reflection on the consequences of the action diminishes.”¹⁰⁴ So compared to purpose rationality (instrumental rationality) he argues that value-rational reasons are “always irrational”. In a way human beings are driven both by rational purpose aimed reason as well as intuitive, emotional reasons.

Instead of just describing what value should entail, he connected those values with certain human action. In the end it is the action that counts. This is why Weber has classified six, so-called “value spheres” that would influence our conscience. As Oakes clearly enumerated: “Weber seems certain that there are precisely six such spheres, and no less confident as to what they are: religion, the economy, politics, aesthetics, the erotic (*die Erotik*) and intellectualism.”¹⁰⁵

Rules

Rules on the other hand are just systematically collected directives of human action, it constitutes guidelines in how one should behave. The validity of ‘rules’ as ‘rules’ lies both in the logical framing of the rule, logical systematisation with other rules and logical application. In all these rules’ validity stems from logical construction. Rules are just like values, a facilitation of norms, but they inducement are extrinsic in contrary to values, which are intrinsic. Rules are always being enforced from outside and needs to a effective enforcement institution.¹⁰⁶

According to Fuller, “Rules are systematic, public, products of perspective legislation, intelligible, consistent, feasible, and administered written.”¹⁰⁷ Rules are therefore norms, which are induced from outside by way of enforcement procedures. Without enforcement procedure, no one would feel inclined to obey the rules, or at least the majority of rules.

Kelsen on the other hand, brought up a more elaborated account of legal rules within a normative logical system, in his celebrated book called, *Die Reihne Rechtslehre*. He argues that a whole range of legal rules, hinges on a kind of “Grundnorm” (Basic norm), which function as a kind of an automatic validity system. Each rule is being scrutinise through other rules within the chain, up to the “Grundnorm”.

¹⁰⁴ Max Weber, *Economy and Society*, (1978) ed. Guenther Roth and Claus Wittich. Berkeley: University of California Press

¹⁰⁵ Guy Oakes, *Max Weber on Value Rationality and Value Spheres*, p.28

¹⁰⁶ See H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, (Clarendon Press, Oxford Press, 1983), Neil Mc Cormick, “the concept of law and ‘The Concept of Law’”, (1994)14 *Oxford Journal of Legal Studies*

¹⁰⁷ Carol J. *Greenhouse Looking at Culture, Looking for Rules*, Man, New Series, Vol. 17, No. 1 (Mar., 1982), pp. 58-73, p.60

According to Kelsen, “Eine Vielheit von Normen bildet eine Einheit, ein System, eine Ordnung, wenn ihre Geltung auf eine einzige Norm als Letzten Grund dieser Geltung zurückgeführt werden kann. Diese Grundnorm konstituiert als die gemeinsame Quelle die Einheit in der Vielheit aller eine Ordnung bildenden Normen. Und dass eine Norm zu einer bestimmten Ordnung gehört, geht nur daraus hervor, dass ihre Geltung auf die- diese Ordnung konstituierende- Grundnorm zurückgeführt werden kann. Nach der Art der Grundnorm, das heisst aber nach der Natur des obersten Geltungsprinzips lassen sich zwei verschiedene Arten von Ordnungen (Norm-systemen) unterscheiden. Die Normen der einen Art “gelten”, das heisst das von ihnen angegebene Verhalten der Menschen ist als gesollt anzusehen, kraft ihres Gehaltes: weil ihr Inhalt eine unmittelbar evidente Qualität hat, die ihm Geltung verleiht.”¹⁰⁸

Kelsen was one of the first legal positivists who tried to emphasise on the legal system that exist only out of legal rules, and finds its validity in the logical systematisation of those rules. According to Kelsen, legal rules (for Kelsen legal norms, and legal rules are interchangeable. Norm means “sollen”, “ought”). It suffice here to mention that legal rules is aimed conditioning a certain action and in this respect as Kelsen has put it constitutes to be an “ought”.¹⁰⁹

In contrary to legal-rules as we know, norms within values can be drawn from values, but they cannot exist outside the scope of values. Values constitute the foundation in which norms gets its meaning. As in legal semiotics’ conception of narativization explains, a legal rule can never be comprehended without the narrative context in which it resides.¹¹⁰

To illustrate this, one can mentioned the distinction between the Quran and Sharia rules. The Quran is the primary source for Muslim, which contain values for personal or group purposes. It gives direction on how one should live their lives, but can never be a source for governing purposes, since it does not contain any clear cut rules. In the contrary, the holy book is rather vague and ambiguous to be employed as a legal source, containing rules. The Sharia however is derived from the Quran, and contains only rules, which can be used for governing purposes. They are clear and ordered against a certain logical framework. Islamic jurisprudence is an independence science based on the Quran, but is not as original as the Quran itself. While Quran contain only values, rules that are derived from the Quran is gathered together in the Sharia.

2.4.3 Judicatory System versus Alternative Dispute Resolution

Alternative Dispute Resolution

¹⁰⁸ Hans Kelsen, *Rheine Rechtslehre*, Scientia Verlag Aalen, 1. Auflag p.62

¹⁰⁹ Carol J. Greenhouse, Looking at Culture, Looking for Rules, Man, New Series, Vol. 17, No. 1 (Mar., 1982), pp. 58-73 Published by: Royal Anthropological Institute of Great Britain. Greenhouse distinguishes between rules and norms in anthropological way. Although there is a difference between a rule and a norm, in order to make my point about the distinction between values and rules, I will not go too much into the distinction between rules and norm. In this case is suffice to mention that to Kelsen, “norm” meant “sollen”, thus rules.

¹¹⁰ Bernard Jackson, *Making Sense in Jurisprudence*, 1996, Bernard Jackson, Semiotics and Legal Theory, 1997

In the past decades the interest in Alternative Dispute Resolution has increased immensely, because of its cost and outcome effectivity. While ADR is considered to be a collection of extra-judicial methods for legal disputes, it can also be used for non legal or extra-legal disputes. Moreover, the roots of ADR lies in anthropological and sociological inquiries in alternative ways to reach for a solution, than by legal and judiciary methods. Since judiciary is expensive and takes quite longer than ADR, one started to adopt ADR in regular judicial conflicts likes business agreements, divorce procedure, so anything in which maintaining a good relationship becomes important.¹¹¹ This si why ADR emphasises more on methods that restores broken relationships than trying to adjudicate, which does not mean that adjudication is disregarded. Resorting relationships does not mean that it cures the relationship but it just makes it possible that a certain dialogue remains in order to achieve certain aims. This explains for example why mediation, as a from of ADR, is being employed in divorce cases.

Which does not mean that it cures the relationship but it at least tries to find a solution in which a certain kind of relationship can be maintained, in order to pursue certain duties. Like in divorce access with children, ADR is mainly adopted because it reduces a lot stress and harm to children and maintaining the contact between parents for the sake of children is essential. This is why ADR is widely endorsed in divorce cases, but also in business contracts.

ADR is a collection of possible methods for dispute resolution among which we can name *mediation*, *conciliation*, *negotiation* and *arbitration*.¹¹²

Starting with *arbitration*, *arbitration* is a direct alternative for state-structured judiciary system in which the judge is appointed to resolve the disputes which reach the court. The difference between the court procedure and arbitration lies mainly in the fact that the arbiter is chosen by both parties and the judge in the regular justice system, is appointed. What also matters in arbitration is that many cases that reach arbitration, are cases, which are founded on privately- drawn contracts or private legal systems, being agreed upon. So in essence, arbitration already bears a kind of particularity in this case. However, one cannot just assume arbitration only as “privately” installed judge. In the contrary. One can discern arbitration between *official* arbitration and *unofficial* arbitration. Official arbitration is always covered by official acts like the British Arbitration act.¹¹³ The subsequent courts or tribunals, which are founded upon those acts, like the Jewish Beth Din courts or the Muslim Arbitration Tribunal, are all based on this acts.¹¹⁴ Their decisions are therefore legally and officially binding. It is recognized by official institutions of the government.

¹¹¹ Robert Mnookin, *Alternative Dispute Resolution* Robert Mnookin, Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper series,p.2

¹¹² Gordon R. Woodman, *Alternative Law of Alternative Dispute Resolution*, 32 Cahiers de Droit. 3 1991

¹¹³ Maria Reiss, *The Materialization of Legal Pluralism in Britain: Why Shari'a Council Decisions should be non-binding?*

¹¹⁴ Shaykh Faiz *Family Law, minorities and legal pluralism: Should English Law give more recognition to Islamic Law?* Family Law, minorities and legal pluralism: should English Law give more recognition to Islamic Law;

Ihsan Yilmaz, *The challenge of post-modern legality and Muslim legal pluralism in England* Journal of Ethnic and Migration Studies Vol. 28, No. 2: 343, 354 April 2002

Mediation on the other hand is a method in which a conflict, a dispute or an agreement, whose terms has still to be settled, are solved. A third party, with an objective view on the matters and relationship, tries to find ways in which both parties would meet in the middle way and agree. The aim is not to inquire about the nature or the roots of the problem and make judgements (Like the judiciary or arbitration does), but instead to find an agreement between the parties who can find themselves in the agreement itself. Maintaining a solid enduring relationship is the main prerequisites in mediation. Because even if agreements are reached, the parties has to apply the terms of the agreements in practice. This is the reason why they both have to agree, and as long as they do not agree with one of the terms the mediation process will just continue. In the judiciary system however, people do not have to agree with the adjudication terms. The terms will just be enforced by the judge, by enforcement mechanisms like fine, or even imprisonment. .

Negotiation on the other hand shares the same characteristic and principles as *mediation* but is applied in commercial practices. In negotiation the parties do not want to solve a conflict or getting out of a ditch, instead they want to reach the most suitable contract or agreement for both parties as possible. They will try to get an agreement which is the most profitable for both parties. They mostly enter into negotiation with a prior set goals, which they want set through by way of negotiation. They can negotiate alone or if desired with a third person to guide the negotiations.¹¹⁵

Conciliation is a kind of *mediation* but its emphasise lies predominantly on post-conflict restoration of relationships. The kind of situations in which conciliation is being employed are mostly harsher than in mediation. While in mediation takes place in the middle of a conflict or just after the conflict, conciliation only happens long after the conflict has already made a lot damage for both parties. One can say that the parties who opt for conciliation are tired of the conflict and want to settle down the conflict.

After having given a kind of brief introduction into certain methods of ADR, I will now try to illustrate how ADR functions in practice. I will especially focus on non-official methods, in order to stress my arguments of self-governing, autonomous social units' like associations and communities. To illustrate how ADR functions in practice, especially in non-official, non-state way, I will use Afghanistan as an example. Afghanistan is characterized by the heavy presence of tribes, communities, clans and Kinships. The conflicts they resolve is very peculiar and with a logical mind, absolutely not comprehensible. Conflicts, need a thorough engagement in the subject manner. One cannot solve a conflict by merely logical deductions. So this is why they attach a lot of value on conflict prevention by way of adhering to certain values, very strictly¹¹⁶, which have to be preserved, and if than still a conflict erupts than recourse is been done to unconventional methods.

¹¹⁵ Gordon R. Woodman, *Alternative Law of Alternative Dispute Resolution*, 32 Cahiers de Droit. 3 1991

¹¹⁶ See Bernt Glatzer, *The Pashtun Tribal System*, Ch 10 in G. Pfeffer & D. K. Behera (ed.): *Concept of Tribal Society*

The importance of prevention of conflict, and conflict centeredness of ADR appears in the phrase of Ali Wardak where he stresses that “The primary concern in this case is to strike a balance between preventing the conflict from becoming a tribal enmity of revenge killing and the restoration of collective tribal honour.”¹¹⁷ The methods applied are simple but effective and adjusted to the problems at the floor. To illustrate a short example as stressed by Wardak in which Afghans try to solve their conflicts by arranged marriages between conflictions families. As he said, “Interestingly, in the last option of responding to murder, the offender and the victim's relatives (or their respective tribes) are not only reconciled by *jirga*, but become (new) relatives by marriage. But, the individual - a woman in this case - often pays the price for the tribe’s social survival in this patriarchal group-oriented society. This practice is not only in direct conflict with Afghan legal norms, but also a violation of the principles of Human Rights. This and the exclusion of women from *jirga* process are a reflection of the patriarchal social structure of Afghan society.”¹¹⁸

Here we find a very lucid combination of a practise, which is necessary in order to restore the relationship between certain families and the same time a value-judgement based on universalistic perception by... himself. Whether women’s right is being harmed is something that is not at stake. Who would care about women’s rights (or anybody’s right) if the whole community (-ies) is being threatened to be exterminated.

Group survival prevails above individual’s autonomy which is being protected by certain rights deriving from the constitution. As I will explain further in the next coming chapters about Afghanistan’s constitution, one of the main lacuna in all the past enacted constitution was the emphasis on rights, which did find any recourse within the society. .

Judicatory System

The judicatory system system is very much linked to the logical reasoning and systematisation of legal rules as I have depicted above. That is why in this paragraph there is not much to say except to stress a again the fact the judicatory system aims to try to ascertain issues in order to continue. Instead of “restoring the relationship” the judicatory system is stately imposed adjudication system, in which the emphasis is laid on reaching certain ‘goals’ or ‘results’ rather than restoring relationships.

As mentioned above, this is why the judges act as geometricians, simply because rules have to be applied according to certain logic. Everything that fall out of certain logic does not exist.

Whether we have the continental legal systems with its enacted codes and judiciary that applies it or the common law system, which has the fact finding judiciary (an active judiciary) and encoding of their judgements, in all these cases judgements are made according to certain logical reasoning.

Because, it is within this logical structure that certainty can be guaranteed.

¹¹⁷ Ali Wardak, *Jirga, A traditional Mechanism of conflict Resolution in Afghanistan*, p11

¹¹⁸ Idem

2.5 Conclusion

Defining law as being socially embedded, brings us automatically to the concept of community. Community as a concept provides us the necessary outer 'shell', which embraces the whole social dynamism within the context which contributes to the development of legal rules. The only thing which lawyers can do is only to try to locate how certain processes can contribute to the generating and maintain of legal rules within community.

In order to comprehend the phenomenon of "community and law" approach, it necessitates to change the mentality from in trying to find the locus of law. For this purpose, Tönnies theory and his typification between "Gemeinschaft" and "Gesellschaft" provides us with the necessary tools to explore where law resides in community.

By typifying in the same token the concepts, *Trust versus Logic*, *Values versus Rules*, *Alternative Dispute Resolution versus Judicatory system*, I am able to exemplify the locus of law in community.

Trust relation as we found out, constitutes one of the core foundations of the legal system within communities. In a trust relationship, which exist between family relatives, neighbours, and communities like in rural villages, enable a personal based exchange system, where the reputation of an individual, family or community, constitutes enough certainty to enter in to a "business" relationship. While in logical structure, logic has substituted the Trust relationship, by logical, mathematical reasoning, which establishes a kind of trust system for "impersonal exchange". It means for example that a foreigner can enter into business without even knowing the other (trade) partner well.

While Trust relationship is made possible by a value system, either religious or cultural, Logical system is sustained by a logical construction of enforceable rules. Values induce peoples behaviour by intrinsically, without a clear enforcement from outside. Whereas the logical system, with (legal) rules is extrinsic, and needs a clear organ which will enforce these rules. This explain for example why people who employ value system hardly use a code or a written system of (legal) rules, this is simply because they "know" how it is.

The final typification which illuminates us the centre of "law" within the community, is the typification between Alternative Dispute Resolution and Judicatory system. While the emphasis in the first one lies on how to restore the relationship between individuals or families, the latter just ascertains certain aggregation of facts, like Boonin calls it "like a geometric".

These typifications enables us to identify law within any community or association, instead of trying to analyse whether certain behaviour should be classified as law or not. Within this "community and law" approach, one can identify law, without really getting too much into detail about whether one behaviour should be called law or not. Since law is socially embedded, but that does not mean, as many social scientist argue, that law can be conceptualised as a "social process".

Chapter 3 Jewish Diamond Industry

3.1 Introduction

In the previous chapter I have tried to show how community organization could generate legal norms, as part of the internal dynamic of the community. I have made an attempt to make a thorough analysis of this internal dynamic, in order to make a point. Namely, that communities are comprehensive organizations that not only can generate legal norms but also maintain the legal order within the community. I have enumerated and outlined three elements, which I considered to be decisive, namely, Trust, Value, and ADR.

In order to illustrate this theoretical inquiry, I will try to utilize the Jewish diamond Industry as an example, so that the theory I have elaborate above, will be illuminated. The Diamond Industry is a unique example for this purpose, because it is an industry, which has maintained its own organizational structure for the last centuries and it is still characterized by its extra-legal structure that has dominated the diamond trade.

A peculiar aspect of this example is the intertwinement of both associational structure and communal structure with its values, customs and tradition.¹¹⁹ Since the diamond industry is largely dominated by ultra-orthodox Jews, their religious doctrine, tradition and family -and communal bonds, it has put its own stamp on the whole industry. This further explains why the whole business in the diamond industry cannot be comprehended with a conventional (contractual)-legal mind, but rather by a more illogical relationship based on trust, values and solving disputes, instead of exclamation of justice .

In this chapter I want to try to elucidate how trust among participants in the diamond business, like dealers, cutters, distributors or brokers, facilitates and regulates an exceptional business practice, which is very characteristic to the diamond industry. Moreover, the whole legal/normative relationship (business) among participants in this branch is based on three pillars, which are crucial and interrelated with each other. Trying to have a kind of parallel setting with the previous chapter, I will start off with discussing the importance of Trust and, in this case, the issue of (good) Reputation in the diamond industry. Since the whole industry evolves around the ability to get access to the credit market, having good reputation is indispensable for trading diamonds. A good reputation means a guarantee for

¹¹⁹ The difference between an Association and a Community, lies in the fact the first is linked to a professional collective only, whereas the latter is an overarching organization for family, clans and tribes.

conducted future business agreements. Moreover, without a good reputation a trader will be hampered to get access to the vital information and Credit Supply, which both will be explained.

The second pillar constitutes Values, which are shared within the diamond industry. These Values are both a mixture between those that are particular to the profession of the Diamond Industry as such, and are developed by the Diamond Industry in the past centuries. And there are values, which are brought in as being part of the Jewish community. I will explain by giving some examples how Jewish Values penetrate/permeated into the diamond industry.

Values represents the cornerstone of the industry, which is being upheld by the Diamond Dealers Club (A Bourse), as the central organization that control the whole business.

In the third Pillar I will explain more about the DDC (Diamond Dealers club) as the organization that is in charge to guarantee that the business goes according to the accorded values and habits. Moreover, the third Pillar is about dispute resolution and the role of the DCC in fulfilling this job. However, the duties of the DDC are not limited by dispute settlement only, but it does make up the core responsibility.

In order to illuminate more about how the diamond industry generally function, I would like to embark on this chapter with giving a brief introduction on how the diamond industry is organized and how it generally functions. I will argue how important “network effects” are in the Diamond Industry.

3.2 The Diamond Industry’s Chain of Network

3.2.1 Network Effects

“While networks may enjoy economies of scale and scope in *production*, the unique quality of a network is economies of scale and scope in *demand*. Economists refer to this phenomenon as “network effects”: the value of membership in a network is enhanced by an increase in the number of other members or in the other members’ usage of the network.”¹²⁰

Network effect is the advantage one draws from being a member of an organization with certain ties. Being a member, automatically gives the participant access to certain means like customary data, chain of infrastructure and the like. The advantages are part of just being a member.

The importance of Network and Network structures like social circles is that it has to be maintained and constitutes the cornerstone of the business. Since such an organizational structure carries the elements of exclusivity, it is not easy to enter in this social unit. The reason is that the structure itself is based on social elements like reputation and trust and this is something that has to be earned along the way.

The advantages of being a member can derive from very odd reasons like sharing the same language. “Language is characterized by network effects—the benefit derived from communicating in a

¹²⁰ Amitai Aviram, *Regulation by Network Effects*, p.1194; Amitai Aviram, *The Paradox of Spontaneous Formation of Private Legal Systems*

language increases significantly as more people are familiar with it.”¹²¹ As we will see in the next paragraphs, in the Jewish Diamond Industry “Mazel u Broche”, establishes an agreement between traders.

3.2.2 DeBeers Syndicate and the Diamond Industry Network

First of all, before I commence on exploring the internal dynamic of the Diamond industry I will try to explain the importance of Network effects. The Diamond industry is characterized by a very strict hierarchical structure, which is superseded by the DeBeers syndicate who distributes rough diamonds to dealers, cutters and brokers who add value to the rough diamond by their trade and cuttings. DeBeers syndicate who supposedly controls 65% of the rough diamond, distributes its diamond through its Diamond Trading Company to approximately 125 merchants, called sightholders who are not able to refrain the offer. Once an offer is renounced, the sightholder will not be invited for any future “sights”. The whole chain of network relations starts here at the heart of the rough diamond distribution.

This distribution takes place at “bourses”, trading halls for diamond merchants, which are spread throughout the world. These bourses “...provide an infrastructure that organizes a network of dealers. Bourses now serve as vital fountains of information and enable merchants to become familiar with potential business partners.”¹²² I will get to the importance of information, reputation and access to credit later on, it suffice her to mention that it comprises an essential part of the diamond business.

So the way rough diamonds find their way to the market, is controlled by the DeBeers Syndicate and ends eventually at the market after having been exchanged many times from traders.

3.3 Trust and Reputation

Trust is an important factor in the diamond industry since it represents the whole business, without it no any transaction will be conducted. Since contracts does not make up the usual business dealings in diamond trade, because of enclosure of valuable information, relational trust is its substitute. This trust reflects itself in “reputation” based commerce, which is characteristic in many “Private Legal Systems” and so, in Diamond industry.

¹²¹ Idem, p.1196

¹²² Barak Richman, *Ethnic Network, Extralegal Certainty, and Globalisation: Peering into the Diamond Industry*,

Forthcoming in *Legal Certainty Beyond the State*, Volkmar Gessner, ed. (Oxford, Hart Publishing) p.19; Barak D. Richman, *Ethnic Networks, Extralegal Certainty, and Globalisation: Peering into the Diamond Industry*

Reputation based commerce is one of the essentials in the so-called private legal systems which makes up the legal framework of associational structures. In his pivotal article about Private Legal Systems, Amitai Aviram states that “In analysing the institutions that mitigate opportunism, the private-ordering literature emphasizes two elements: repeated play and reputation.”¹²³

Both repeated-play and reputation are interconnected. Repeated-play denotes the desire to conduct business in the future together and as such today’s business is conducted with the purpose for future business. This entails subsequently the importance of reputation in Private Legal Systems, like the diamond industry, which I will elaborate here briefly.

3.3.1 Reputation

Reputation, constitutes the cornerstone of the diamond industry. A good reputation gives the dealer access to precious information about other dealers reputation, information about gemstones, access to credit and solvability. “Sustaining reputation-based exchange relies on mechanisms that inform all parties of the reputations, or past behavior, of potential business partners.”¹²⁴ This mechanism enables and maintains the trust relationship that prevails among diamond merchants.

One of the reason why this industry is marked by commerce by “reputation”, is that any other conventional way of doing business would damage the industry by causing unnecessary transaction cost and waste of time at court proceedings. As Lisa Berman has stated “It argues that, if commercial transactions in the diamond industry were governed solely by legally enforceable contracts under which the promisee could recover expectation damages in the event of breach, the market would be characterized by frequent, inefficient breach of contract. It attributes this inefficiency to the uncertainty of recovery, the way courts calculate damages, the time it takes to obtain judgement, and the fact that many diamantaries do not have ready access to capital markets.”¹²⁵ The importance of reputation in the diamond industry as a regulatory factor, is reflected by Richman emphasise on the so called” reputation mechanism”, in the diamond industry. According to Richman, the “reputation mechanism will induce cooperation of diamond dealer and other participants with an eye on along term relationship. As soon as a partner fails to commit its part of the agreement, this will break the “chain” in the trust relationship and harm the reputation. If a reputation is harmed, it will function as sign to others to either to abstain to do any business with this person or to be cautious. The first mechanism according to Richman, is “...the floor of the trading hall”. As I will get to this later more elaborate, on the trading floor one will find necessary valuable information about the real

¹²³ Amitai Aviram, p. 1193

¹²⁴ Barak D. Richman, *How community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York*, p.16 American Law & Economics Association Annual Meetings, Year 2005, paper 51

¹²⁵ Lisa Bernstein, Opting out of the Legal System: extralegal Contractual Relations in the Diamond Industry, *Journal of Legal Studies*, Vol XXI, Jan. 1992

incentives, characters and past dealing/business of the their trading partners. Hence, the function of a “trading floor”, is “...bustling with information about parties and market conditions, and some traders spend time on the trading floor just to keep abreast of available information.”¹²⁶

Another mechanism of reputation is by putting the picture on the wall of the trading hall of the DDC, of those who failed to fulfil the terms of the agreement. In case of any wrongdoing of a club member of him failing to fulfil his duties arising out of an agreement will make his picture be hanged in the trading hall. In other words, “...maintaining good standing as a DDC member – and preventing your picture from ever reaching the wall –also becomes well known and functions as an important information signal.”

Finally, there is another mechanism that shows how members are being forced to commit with the terms of the agreements, without the interference of the state. Since being in the Network enables the trader all kind of benefits, nobody wants to be known as a cheater. This is why all members are keen to have good standing. “The third necessary condition for an effective reputation mechanism is coordinated punishment. An individual will be deterred from cheating only if he knows that none of the diamond merchants will transact with him after he cheats.”¹²⁷

This is something very particular to associations and communities. Namely, since the organization provides certain exclusive benefits, it is in the individual members concern to do its utmost best to stay within the organization. It will become his duty and his concern to make sure he will not fall out of the Network, which he benefits from. In these kind of organizations (like communities and associations), ‘rights’ and ‘duties’ are interconnected. Without a ‘duty’ you will not obtain a ‘right’.

The reputation of a dealer is, furthermore, family based, which means that the business is not conducted among individuals but families. This is why certain family, community and religious values are very dominant and important in diamond business, since it establish the asset of future business. If the family has an indisputable reputation, this will enhance and contribute to good business relations for in the future. This is why the whole diamond business is centred around having a good reputation and it creates its own vicious circle. The reputation of the last family member, will influence many future business transaction in future generations. Since reputation is important nobody will harm their own reputation willingly and if some do, they will expelled from the bourse, in this case the DDC (Diamond Dealers Club (New York)). The DCC functions here as a kind of reputation watch authority.

“The elder enters into an agreement with the fallen dealer as a way to allow him to recover and rebuild a reputation. While reputations are fragile and extremely difficult to recover

¹²⁶ Idem, p.19

¹²⁷ Idem p. 27

once damaged, rehabilitation is sometimes possible and is substantially aided if a well respected industry member offers assistance”¹²⁸ The importance of reputation is clearly shown in how DDC/bourses pay attention on the revelation of diamond dealers who could not comply with the terms of their agreement

3.3.2 Information and Credit Supply

I have put this heading under the paragraph of Reputation, but it could have been even a part of the next chapter about Values. On the one hand, a good reputation gives access to essential information about the diamond trade and also to the credit market. On the other hand giving and receiving information are bound by certain cultural and religious values, even peculiar business values. As this example shows, information supply is an essential element in Diamond Industry’ business conduct, at the same time it show the underlying Value (system) that supports the whole information supply. “That frustrating experience – that is the kind of information I would share with my close colleagues and relatives. If they asked me about what kind of businessman this individual is, I’d tell them that he has given me some trouble. But truthfully, I would only share the information if I were asked – I wouldn’t spread it around on my own initiative. Also, I think I’d only share the information with people I knew well. If a colleague that I don’t know so well asked me about this person, I’d probably just say that I don’t know anything.”¹²⁹

Diamond industry chain of network relations, is, as I have mentioned above based on reputation, amongst others. The other to elements are access to information and credit. Knowing who is credible and trustworthy and not, is actually what the whole diamond business is about.

A diamond dealer cannot cope to do business with trade partner who has dodgy reputation. Doing business with someone who is not only trustworthy but at the same time also creditworthy, means a success in future business, because the relationship that is being entered is not for one time but for many deals in the future.

In order to maintain a good information flow, the Diamond Dealers Club supervises and educates traders in providing information. Since a wrong information can ruin the business of another trader. In one of the example of a Rabbi it becomes apparent how important a good information flow is and how much value is given to good information flow. In this example of a Rabbi, “a man goes before his Rabbi and admits to having spread harmful information about his neighbor. He asks the Rabbi what he should do to repent. The Rabbi says “You need to do the following: go home, find a feather pillow, and release the feathers into the wind.” The man follows the Rabbi’s instructions and returns the next day. The Rabbi then says, “Now, to gain forgiveness, you must go back to your home and retrieve all

¹²⁸ Barak D. Richman, *How community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York*, p.16 American Law & Economics Association Annual Meetings, Year 2005, paper 51, p.28

¹²⁹ Idem p.26

of the feathers.” “But Rabbi,” the man exclaims, “The feathers by now have scattered throughout the village!” “Precisely!” the Rabbi says. “And so too has the damage you have caused to your neighbour’s reputation.”¹³⁰

This is why the diamond traders are quite aloof in providing wrongful information, or even any information as long as they are certain it will not damage anybody wrongfully. They will hardly provide information to strangers. One has to bear in mind that the role how different values and especially religious values exert on the traders, are immensely. No legal system can maintain such an order as certain values do.

3.4 Values and the Diamond Industry

3.4 I Values

Good reputation is being supported by subsequent values that underlie a good reputation. Values play an important role in the diamond industry. Adhering to certain values contributes to the creation of good reputation, which in turn improves the trading position of a merchant. Additionally, adhering to certain values or the same values, contributes immensely to trust relationship, which is necessary in order to be in part of the Diamond Industry.

Certain kind of business manners, which we are used to, like putting agreements on paper, going to court in case of business dispute, does not occur in the Diamond Industry. It is solely based on a construction of chain of networks tied up through certain values and institutions that make sure these values are being sustained.

Next to special business custom or ethics, the Diamond Industry has also developed its own customs and ethics. Instead of putting an agreement on paper after having constructed by a lawyer, with signature, and agreement of the trading floor in the diamond industry goes along with the words, “Mazel u’broche”, which creates a binding agreement. This remind me of the animal market in the Netherlands, where shaking hands constitutes an effective agreement. These particular business dealings are also accepted by the Dutch law as legally enforceable “agreements”.

3.4.2 Community and its influence on the Diamond Industry

As mentioned in the introduction, the peculiarity of the diamond industry is that it intermingles communal values with associational structures. Although it looks peculiar, it is not as weird as it appears. Communal values, or culture, whether religious or traditional, enhances the effectiveness of norm enforcement and application. It increases the knits in the ties among members of the association

¹³⁰ Idem

more rigorously than without. As Avner Greif rightly states, “Common culture reduces costs involved in regulation in several ways. Since it creates a sense of belonging, it widens the scope of services provided by the network to include social gratification.”¹³¹

Therefore, the deterrence effect of exclusion from the network is greater because exclusion entails not only loss of business with network members, but also loss of social standing. “Common culture also provides members with knowledge about matters relevant to the business transacted over the network and standardizes this knowledge among the network members, thus reducing information asymmetry.”¹³²

Community connection and bondage creates cost advantage, which other “free mainstream business relationships”, does not have. Costs that goes along with good legal advice, accountancy, judiciary and all other thinkable administrative matters, are lacking in the community. Instead, trusting your fellow community members, based on reputation and the subsequent trust, substitutes the unnecessary and costly guarantees, which one should take in order to do business without flaws.

Moreover, besides the existence of merely relational ties and cost advantages, it also contributes immensely to the legal-moral conscience of the member. What is perceived as “wrong” in the community has a more pressing effect on the community-members, than when one would just consider it as administrative manner, which can be circumvented. For example, tax evasion. Or what “Economics and Law” scholarship advocates namely, if there is a financial advantage to be gained by breaching an agreement than that should be done.¹³³ Instead as Richman depicts, “Common culture may also add a psychological element to the enforcement of norms because a violation of the norms of one’s social group with which one empathizes or identifies may be perceived by oneself and by others as more morally wrong than violating the norms of more distant peoples or groups. Moreover, membership in a network may induce a sense of kinship that would increase the guilt associated with violating a norm that harms one’s “kin,” and may eliminate the ability to justify norm violation with an antipathy to “outsiders.”¹³⁴

The kind of inducement that community relational ties brings on members, is way more effective in the enforcement of values and rules that stems from it, than a logical ordered legal system. As I tried to exemplify in this chapter up till now, the strict business structure in the Diamond Industry, is merely based on relational ties (family or community), instead of abstract, logical and rational legal rules.

As Richman Asserted, “Moreover, family ties also connect Club members, as many members gain entry through the sponsorship of close relatives. In short, extended family and community networks cement the Club’s larger community and reinforce the intimate familiarity and interdependence that

¹³¹ Avner Greif, *Impersonal Exchange without Impartial Law: the Community Responsibility System*, 5 Chi. J. Int’l L. 109 2004-2005

¹³² Idem

¹³³ Richard Posner, *Economic Analysis of Law*, 1992

¹³⁴ Amitai Aviram, p.1179

Club members have with each other.”¹³⁵ Furthermore, “... , a common culture creates a unique good—esteem or social standing in the group—which can be a powerful motivator to follow the norms of the group.”¹³⁶

As explained in my previous chapter on “community and law” approach, the trust based relationship creates a cost advantage because there is no need to set up an artificial enforcement system. A trust relationship, which is based on either common values, common culture or common religion will reduce the cost in business interaction. As Amitai Aviram has stressed: “For all these reasons, common culture reduces the cost of enforcing norms.”¹³⁷ This is why, a “Part of the value in belonging to a common culture, however, is the difficulty in artificially producing it.”¹³⁸

3.5 Diamond Dealers Club and Alternative Dispute Resolution

The Diamond Dealers Club, as an organization fulfils the function of spill in the whole chain within the business. Being accepted by the DCC and being a member, means that many doors will get open. One would get access to information, traders contact, dispute settlement, and everything that is needed to trade well on the floor. It is hardly unthinkable to trade in diamond without being a member of the DDC.

The DDC is a “Bourse” like any other bourse, except it is situated in New York in one of the main Diamond centres of the world. As its name reveals it is truly ‘just’ a club, but having a huge impact on the running of the diamond business. The functions of the DDC are manifold, I will just mention some of them.

First of all the DDC is a meeting place for all diamond dealers, cutters and brokers who work in one of the chains in the diamond branch that starts off with rough diamond supplied by DeBeers syndicate until it reaches the jewellery. Participants in the different chain of the diamond industry meet each other in the “Club House”. The atmosphere is informal and pleasant, and does not carry any rigidity or formality.

This reminds me of the function, which Turkish coffeehouses had in the past and still have. Each profession had its own coffeehouse where they meet up, talk and try to get a job. But in a way one has to be accepted by the “coffeehouse”, otherwise one could not enter. Being a part of this coffeehouse meant that one had access to information, customers and solidarity. It was and it is a kind of clubhouse, labour organization, and employment office at the same time.

Although informal, the function, which DDC exercises are manifold. Moreover, its mainly because the informality of the DDC that it could operate on many fields at the same time. A second key duty of

¹³⁵ Barak D. Richman, *How community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York*, p.16 American Law & Economics Association Annual Meetings, Year 2005, paper 51, p.21

¹³⁶ Amitai Aviram, p.1179

¹³⁷ Idem

¹³⁸ Idem

the DDC is to function as the Arbiter in conflicts. Arbitration is important, since the whole business stands and fall on relationships. If a relationship brakes off, every effort has to be done to repair it. This explains why the participants rather opt for DDC's own arbitration than courts redemption.

In this respect, DDC requires a dealer to "...sign an agreement to submit all disputes arising from the diamond business between himself and another member to the club's arbitration system. The agreement to arbitrate is binding. Unless the club opts not to hear the case, the member may not seek redress of his grievances in court. If he does so, he will be fined or expelled from the club.

Furthermore, since the agreement to arbitration is binding, the court will not hear the case."¹³⁹

If we want to answer the question, why the Diamond Industry could survive for so many years, the reason has to be found in this aspect of the industry, namely the exclusivity of arbitration by DDC.

The exclusivity of the Diamond Industry in combination with information and credit supply services, enhances the importance of DDC and also in succeeding solve disputes. Since other possibilities to ask for redress are closed, adhering to the terms of DDC becomes essential .The authority of the DDC increases in this way and therefore, also in getting an appropriate result. As Berstein stressed,

"Accordingly, the true power of the DDC's *dispute resolution system* rests on the degree to which it *supports trust-based* exchange and can foreclose future transactions to uncooperative merchants. The DDC fulfills this role by facilitating information exchange and publicizing individual reputations"¹⁴⁰

At the same time, this function of arbitration goes hand in hand with DDC's function to maintain "good reputation" of the club members. It is important to stress again that all these functions are very much related with each other. As Richman has correctly put, "The purpose of the DDC's arbitration board is not to enforce contracts; it is to maintain the accuracy of reputations."¹⁴¹ If a dealer fails to commit to its agreement obligation, instead of going to file a suit at the state court, hic picture will be hanged in board room of the club. With this, all other dealers will be notified about who is trustable and who is not. In a business where everything evolves around trust this is highly effective and less expensive.

In this example, which Richman referred to in his Article, "... a dealer falsely accused another of stealing his stone. He later realized that he actually misplaced the stone and apologized to the dealer, but the accusation had already become common knowledge. The second dealer then brought the first before the arbitration committee for impugning his reputation, and the board ordered the false accuser to make a public apology and donate fifty thousand dollars to a Jewish charity."¹⁴²

¹³⁹ Lisa Bernstein, Opting out of the Legal System: extralegal Contractual Relations in the Diamond Industry, *Journal of Legal Studies*, Vol XXI, Jan. 1992

¹⁴⁰ *Idem*

¹⁴¹ Barak D. Richman, *How community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York*, p.16 American Law & Economics Association Annual Meetings, Year 2005, paper 51, p.28; see also Bernstein.

¹⁴² Barak D. Richman, *How community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York*, p.16 American Law & Economics Association Annual Meetings, Year 2005, paper 51, p.25

3.6 Conclusion

In this example I have tried to illustrate the “Community and Law Approach” would function practice, by explaining how the Diamond Industry functions. I have tried to show that within the Diamond Industry, three pillars, namely Trust (Reputation), Values and ADR constituted the core foundation on which the industry resides. In order to maintain the trust among dealers and cutters, both Values and DDC play an eminent part in upholding the whole associative structure of the diamond industry. The values, whether religious or communal outlined the structure of the diamond industry. Certain rules, and habits had to be maintained just because they were commonly shared. Even Rabbi’s played their part in upholding the values in the Diamond Industry.

On the other hand, DDC as ‘clubhouse’, operated as the spill in keeping the Diamond Industry exclusive and rigid organization. Thanks to this rigid and strictness, it could provide the required trust that was needed among dealers, in order to play the “game” accordingly. This explains why the Diamond Industry could survive for so many years, without being a part of the official state apparatus.

Chapter 4 The Harm Principle and Associationalism

4.1 Introduction

4.1.1 Introduction

One of the main posed objection against the application of “Community and Law” approach, is the position of the individual. It seems to the critiques, as if “Community and Law” approach would discard the position of the individual, as it would put the group interest above the individual interest. They argue above all that the individual would therefore be oppressed and it would not provide enough protection to safeguard individual’s rights.

As one can predict, the main objection stems from the liberal’s, because somehow “community” as a concept has a bitter taste to Liberals. Whether knowingly or not, “community” as a concept resembles to (us)them automatically to “communitarism” with which community approach has nothing to do with it at the first sight.¹⁴³

One of prominent criticism against “Community” approach stems from Will Kymlicka¹⁴⁴, and I will take his essay as introductory foundation for this chapter. In his essay about “Two Models of Pluralism and Tolerance”, one would get easily misled, because Kymlicka gives the impression as if he embraces the “Community” approach. Will Kymlicka claims namely, that besides John Rawls’ theory of “Religious Tolerance” which is based on reformation, there exist another form of religious toleration, which is far more sophisticated and better equipped to accommodate religious pluralism than Rawls’ is. He argues that “the Ottoman Millet System” constitutes a considerable and serious alternative to Rawlsian theory of religious tolerance.

Because, according to Kymlicka, within this “Ottoman Millet System”, “...the Muslims did not try to suppress the Jews, and vice versa, but they did suppress heretics within their own community. Heresy (questions in the orthodox interpretation of Muslim doctrine) and apostasy (abandoning one’s religious faith) were punishable crimes within the Muslim community. Restrictions on individual freedom of conscience also existed in the Jewish and

¹⁴³ <http://plato.stanford.edu/entries/communitarianism>

¹⁴⁴ Will Kymlicka is a prominent liberal philosophers whose interests lies in how to achieve a multicultural society. Thus a society in which citizens from different ethnical, cultural and religious groups can live together in a liberal society.

Christian communities. The millet system was, in effect, a federation of theocracies”¹⁴⁵ But he immediately adds to it that his “... aim is not to defend this second model. On the contrary, like Rawls, I believe that the liberal system of individual liberty is a more appropriate response to pluralism. My aim, rather, is to see what sorts of reasons liberals can give to defend their commitment to individual liberty. The ‘Obvious Lesson’ of the Wars of Religion is that diverse religions need to tolerate each other . It is less obvious why we must tolerate dissent within religious (or ethnic community).”¹⁴⁶

Although Kymlicka’s avowal provides me an appropriate point of departure for my chapter to explore and answer the issue of the individual’s autonomy within “community”, I do feel the need to address and correct an ill-founded argument in his essay, before I embark further on the issue of “individual’s autonomy” in “community”.

According to will Kymlicka, this “...second model of toleration...is based on group rights rather than individual liberty.”¹⁴⁷ The way he conceives the “Millet System” is from the angle of “rights system”. However, the Millet system in itself has nothing to do with a “group rights model” or any other rights models, since it was never been the purpose or the aim of the “millet system” to endorse a certain right¹⁴⁸. In the contrary, the Millet system was an alternative governance system enabling certain groups or community to govern themselves based on “groups autonomy” rather than on the “(individual)rights model”.

The angle from which he perceives the Millet system, is, as he mentions, from the “group rights model”. What the Millet system has facilitated in the Ottoman Empire was the group or community autonomy and was not aimed at attaching any right to anybody. Because the whole system was not based on a “rights model”. This is why his starting point is rather ill-founded, but understandable from his Liberal standpoint.

But nevertheless, the questions from his essay still remains, how can liberalism defend the rights of the individual, while at the same time providing the most probable autonomy for the groups/community? In other words, how can liberalism go hand in hand with pluralism?

¹⁴⁵ Will Kymlicka *Two Models of Pluralism and Tolerance*, *Analyse & Kritik*, 13 (1992), p. 33-56 , p.12

¹⁴⁶ *Idem* p.

¹⁴⁷ *Idem* p.

¹⁴⁸ See for “Millet System”, Daniel Goffman, *The Ottoman Empire and Early Modern Europe*, Cambridge Press 2002; Bernard Lewis, *Modern Türkiye’nin Dogusu*, Türk Tarih Kurumu; Amon Cohen, *Communal Legal entities in a Muslim setting Theory and Practice: The Jewish Community in Sixteenth-Century Jerusalem*, *Islamic Law and Society* 75 1996; Engin Deniz Akarlı and Abdul-Rahim Abu-Husayn., *Law and Communal Identity in Late Ottoman Lebanon* (in Light of Two Waqf Disputes in 1893-1912); Engin Deniz Akarlı, *Law in the MarketPlace:Istanbul, 1730-1840*, This Article has been Published in *Dispensing Justice in Islam: Qadis and their Judgements*, ed. By Muhammad Khalid Masud, Rudolph Peters, and David Powers (Leiden&Boston: Brill, 2006), pp. 245-70

4.1.2 Problem statement

As stated in the introduction my main ‘problem’ in this chapter, which I want to tackle is, how the position of the individual can be safeguarded in the “Community and Law” approach?

4.1.3 Outline

The structure of my argumentation is twofold. First I will provide an answer from the liberal perspective, and secondly from the associational perspective.

From the Liberal perspective, I will argue that John Stuart Mill’s Harm-Principle provides sufficient safeguard to protect individuals against unnecessary harm against others. The Harm-Principle, I will argue, has two dimensions. The first and the main dimension lies in the roots of the political philosophy itself, namely, the demarcation of the realm of the state and that of the society. I will call this “society’s autonomy”. By way “society’s autonomy”, the individual will be protected against any intervention from the state. This dimension is what I will call a passive one; the state has to refrain from acting.

On the other hand, another problem erupts namely, what about the individual’s autonomy within the society? How can we maintain individual’s autonomy within (oppressive) society? In order to maintain “individual’s autonomy”, the state has to act ‘actively’ in order to protect the individual. But the question we are faced with is, when the state should intervene in the protection of the individual? In other words, how should the state balance between the both ‘active’ and ‘passive’ dimension of the “Harm Principle”?

Since it is unfeasible to find appropriate ways for absolute protection of individual liberty with the Harm-principle, the aim is found ways of the utmost protection of individuals.

In my second argument I will claim that associationalism, departing from Aristotelian “individual as social animal”, emphasises on the individual as a social being. In this respect, the individual as such is not being discarded to the existence of the group according to associationalist. In the contrary, they argue that all these associations and communities are ways in which the individual unfolds himself. Without these associations and communities, the individual cannot exist. They argue that despite the fact the individual retains its individuality, in a way, as a social being an individual has to make concession for his own sake depending on the associations or communities he is a member of.

After a brief introduction into associationalism, I will try to analyse two versions of the individual within associationalism, namely that which represents the German Tradition, Otto von Gierke and that of the British tradition (of English/Political Pluralism) Harold Laski.

4.2 The Harm-Principle

4.2.1 Introduction into the Harm-Principle

“The subject of this Essay is not the so-called Liberty, of the Will, so unfortunately opposed to the misnamed doctrine of Philosophical Necessity: *but Civil, or Social Liberty: the nature and limits of the power which can be legitimately exercised by society over the individual*. A question seldom stated, and hardly ever discussed, in general terms, but which profoundly influences the practical controversies of the age by its latent presence, and is likely soon to make itself recognised as the vital question of the future. It is so far from being new, that, in a certain sense, it has divided mankind. Almost from the remotest ages: but in the stage of process into which the more closed portions of the species have now entered, it presents itself under new conditions, and requires a different and more fundamental treatment.”¹⁴⁹

“The struggle between Liberty and Authority is the most conspicuous feature in the proportions of history with which we are earliest familiar, particularly in that of Greece, Rome. and England. But in old times this contest was between subjects, or some classes of subjects, and the Government. By liberty, was meant protection against the tyrant of the political rulers.”

The peculiarity and the essence of the Harm principle is being emphasised by these two phrases of John Stuart Mill. On the one hand the harm principle is the evolutionary consequence in political philosophy, which has concentrated along centuries, in trying to find appropriate means to strike a balance in the relationship between the state and the society. How far can the state go in intervening in society? When should the state act and when refrain from action? How far should the influence of the state go regarding the governance of the society? This is what one could call “social autonomy”.

¹⁴⁹ John Stuart Mill, *On Liberty*, p.219

Another aspects that result from the above quoted phrase of Mill, is, when the autonomy of the society is being acknowledged, how far than might their influence go in respect to the individuals? Or in another words, when should the state intervene when the individual gets oppressed somehow by the society? One could consider this aspect as an exception on the first paragraph.

Yet, this paragraph is aimed at elaborating and emphasising on these two aspects of what is called the harm principle, namely the “social autonomy” and the “individual autonomy”.

While the first dimension clearly stresses the abstention of the state for any intervention in society, the second dimension, focuses on the other hand in intervening in the society, only when harm is caused on the individual.

The whole subject of the Harm principle is broad and there exist a vats literature on this issue. Instead of dwelling too much in this literature and getting dragged away, I want to claim two things.

The first one is that “social autonomy” (which is protected by passive dimension of the harm principle) as the driving force for a progressive society, constitutes the cornerstone of Mill’s Political Philosophy, and more in particular his conception of “harm principle”. I will argue that “social autonomy” is composed of “social organism” and secondly “utilitarian ethics”. The relationship between “social organism” and “utilitarian ethics” are like flesh and bones. While the “social organism” describes the “social framework” the utilitarian ethics emphasise on the values that keep individuals connected as a social being.

4.2.2 The Passive Dimension of the Harm Principle and The Social Autonomy

“To individuality should belong the part of life in which it is chiefly the individual that is interested; to society, the part which chiefly, interests society.”¹⁵⁰

The “autonomy of the society” is a concept which is much dwelled on by many prominent liberals like John Rawls¹⁵¹, Will Kymlicka¹⁵², Avishai Margalit¹⁵³ and Joseph Raz¹⁵⁴ amongst others. The dominant view which all these liberals share is that the liberal society would allow

¹⁵⁰ Idem, p.267

¹⁵¹ John Stuart Mill, *On Liberty*

¹⁵² John Rawls, *Political Liberalism*

¹⁵³ Liberalism and Right to Culture, Avishai Margalit and Moshe Halbertal, Margalit, Avishai, *Liberalism and the Right to Culture*, Social Research, 61:3 (1994:Fall)

¹⁵⁴ Joseph Raz, *The Morlaity of freedom*; W. Sadurski, *Joseph Raz on Liberal Neutrality and the Harm Principle*, Oxford Journal Legal studies, 1990

and acknowledge some cultural diversity in a political framework, whose main aim it is to protect individuals. In his interesting article, Margalit draw on some dilemma's which the state of Israel faced with, with different communities in Israel which put some burden on the existence of the Israeli state as a liberal society. The orthodox Jews on the one hand and the Israeli Arabs on the other hand, have their own "legitimate" ground to oppose the Israeli state, while at the same time it is the same state who has to acknowledge their communal freedom.

So, the question that arises in the liberal state is how far this so called "social autonomy" should reach. This has consequently triggered a whole range of a discipline on its own. I will not go into detail of the limits of the liberal state and the way or the mechanism that can contribute to this accommodation of the existence of the liberal state with "a social autonomy". But on the other hand, they do support the claim that "social autonomy" is a determined factor in Millian Philosophy.

Instead, I want to emphasize on the importance of the social autonomy as an important element and part of the "harm principle". In this paragraph, I want to confine myself to the argument that one aspect of the harm principle is the upholding and protecting the social autonomy against the state intervention. The "society" being made up of individuals, has to be protected against the state and as such, which the society fulfills in the initial phase. It is only in the second phase, namely when the society starts to be oppressive against it citizens that we reach a phase in which the intervention of the state is required, which I will deal in the second paragraph.

4.2.2.1 "Social organism" and "Social Autonomy"

The "social autonomy" in John Stuart Mill's theory is comprised of two components. One lies in the theory of perceiving society as an "organism" and the other one is the "utilitarian ethics." Both components are driven by the same goal, namely to achieve progress in society. Progress is been considered by Mill as the solely end goal to which the society should move.¹⁵⁵

While "social organism" depicts the own dynamics of the society which is the result of their own peculiar framework. "Utilitarian ethics" explains on the other hand the moral guidelines to progress, which the individuals should adhere in a society.

¹⁵⁵ Progress is conceived in its negative form as "not falling back", see *On Representative government*, Ch.1

First of all, the notion of ‘organism’ gives us the context in which we can place and comprehend the different notions he is using in political theory, like ‘individuality’, ‘society’ or ‘nationality’. It gives us above all, the scope in which we can unravel how the ‘mechanism’ of ‘motion’ or ‘progress’ works. Especially, how the ‘mechanism’ is linked to the interrelationship of different entities or elements within the ‘organism’. The interrelationship of different ‘entities’ is dependant on the common goal or ‘common purpose’. Or as Mill has put it bluntly: “the consensus is so complete (especially in modern history) that, in the filiation of one generation and the another, it is the whole which produces the whole rather than any part a part”¹⁵⁶

So, according to Mill, the elements are relative, if you take into consideration the greater whole to which it belongs to and constitutes a part of. As he has stressed in logic: to illustrate and clarify the concept of ‘organism’ he depicts it with the ‘anatomy of the physical body’¹⁵⁷, with its due phases of developments and constitution of ‘parts’ (or ‘entities’). The ‘organism’, first of all, resembles a tree, which grows in stages till it has reached its eventual shape.¹⁵⁸ The importance of this ‘evolution’ or the ‘growth’ of the ‘organism’ to its eventual state is mentioned *On Liberty*, where he outlines the relationship between the state/government and the society. As he continues to assert that a government “...where their governors should be an independent power, opposed in interest to themselves.” to a situation where the “...rulers should be identified with the people; that their interest and will should be the interest and will of the nation...”¹⁵⁹

Consequently, the notion of ‘organism’ is being used by Mill to explain social and political movements. He tries to create a scientific basis on which social and political sciences can be based on and regulated. Being rational means to Mill, applying scientific method of, for example algebra to understand the society and make it a science that can make prediction and calculation in social and political science.

He mentions further in *Logic* that “This preliminary aspect, therefore, of political science, of necessity supposes that (contrary to the existing habits of philosophers) each of the numerous elements of the social state, ceasing to be looked at independently and absolutely, shall be

¹⁵⁶ A System of Logic, Book VI Ch.X, p. 924

¹⁵⁷ A System of Logic, Book VI Ch.X p.918

¹⁵⁸ It is important to note that Mill’s use of the metaphor of ‘organism’ is just a method in understanding and constructing future human society and political order. In *On representative Government*, ch.1 p.4, he elaborates explicitly on the fact that political phenomenon is not a true organism neither a mechanism, but the both. It is namely an organism that needs (or is created) by human intervention.

¹⁵⁹ *On Liberty*, Ch.1 p. 2

always and exclusively considered relatively to all the other elements, with the whole of which it is united by mutual interdependence... It is, in the first place, the indispensable basis of the theory of social progress .¹⁶⁰

This means that the social elements comprised of the “the state”, “the society” and “the individual” would not be seen as three different components, but components who stands relative to each others, in the sense that they both have to serve a common goal as explained. Thus the society is one of the components who is autonomous but not independent from other component like the state or the individual. In the next chapter I will explain how the state in turn will intervene in order to protect the individual for unnecessary physical harm inflicted by other individuals. Except this exemption of intervention, the society moves by itself in its pursuit for progress.

He further states that: “The Empirical Laws of the Society are of two kinds; some are uniformities, some of succession”; or as he recalls Aguste Comte in Logic, it is the “conformably to the distinction in mechanics between conditions of equilibrium and those of movement;” “The first branch of the science ascertains the condition of stability in the social union: the second, the laws of progress”. These all belong to the, as he calls, “social organism”.¹⁶¹

4.2.2.2 Utilitarian ethics and Social Autonomy

“In proportion to the development of his individuality, each person becomes more valuable to himself, and is therefore capable of being more valuable to others. There is a greater fullness of life about his own existence, and when there is more life in the units there is more in the mass which is composed of them.”

Hence we have to consider the harm principle solely as a mechanism to intermingle between three institutions. These are the State, (the government), the society and the individual. The first pillar or dimension of the harm-principle is, and according to me the most essential one, is the autonomy of the society. Or in another words, the state’s duty to refrain form any intervention in the society. The society, which is comprised of individuals with a free mind, should be free to live according to their believes, conscience and reason. In this social autonomy we find the freedom which individuals, associations and communities derive to live according to their own convictions.

¹⁶⁰ A System of Logic, Book VI Ch.X p.918

¹⁶¹ A System of Logic, Book VI, Ch.X, p.918

The importance of the 'individual' to Mill, lies in the fact that he conceives the individual as the foundation for 'social progress'. Mill perceives the individual as the cornerstone of a progressive society and that is, individual improvement, to set the standard for social improvement. That is why 'freedom' is so important for Mill, in order to shape the condition in which the individual can develop their 'faculties' and to generate 'originality' in society.¹⁶²

The ethics of 'social progress' is called 'the Greatest Happiness Principle', and is, as I have mentioned above, generated by 'individual progress'. "The creed which accepts as the foundation of morals, Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure, and the absence of pain; by unhappiness, pain, and the privation of pleasure.. " According to Mill, morality is dependant on the actions of individual. And these actions are directed to contribute to 'happiness' and motivated by 'pleasure'. This is the foundation of utilitarian morality.

However, the distinction with the mainstream utilitarian philosophy is the distinction he makes of 'pleasures' between 'higher quality' and 'lower quality' of pleasures. While the 'lower quality' of pleasure appeal to the 'animal needs' of the individual, whereas the 'higher quality' is a stimulant to develop our 'faculties'. This does not mean that he wants every individual to become a philosopher, but that every individual should improve that what he can do or does best. Now how does the individual with 'higher pleasure', which he needs to improve himself, relate to the society as such? Are the individuals not atomistic and egoistic human beings? No, in the contrary.

Mill claims that in an order of mutuality, or (dialogical) interrelationship of entities, individuals are the ones who comprise the society, but in turn it's the society that also creates the individual. That is why 'originality' in society should be triggered and advocated/pleaded for, because that created in turn original 'individual'. And the reason is that: "There is no social phenomenon, which is not more or less influenced by every other part of the condition of the same society and therefore by every cause which is influencing every other of the contemporaneous social phenomena".¹⁶³

At a certain moment, the relationship between the individual and the society would be so intertwined with each other that you cannot argue anymore, whether the society or the individual is the most important element in the organism, since they are both equally important.

¹⁶² On Liberty, Ch.3 p. 30

¹⁶³ A System of Logic, Book VI Ch.X p. 899

All this erupts eventually in his 'general happiness principle', where he explains why individuals should obey the 'general happiness principle'. This is because "... there is this basis of powerful natural sentiment; and this it is which, when once the general happiness is recognized as the ethical standard, will constitute the strength of the utilitarian morality. This firm foundation is that of the social feelings of mankind; the desire to be in unity with our fellow creatures, which is already a powerful principle in human nature, and happily one of those which tend to become stronger, even without express inculcation, from the influences of advancing civilization. The social state is at once so natural, so necessary, and so habitual to man, that, except in some unusual circumstances or by an effort of voluntary abstraction, he never conceives himself otherwise than as a member of a body; and this association is riveted more and more, as mankind are further removed from the state of savage independence. Any condition, therefore, which is essential to a state of society, becomes more and more an inseparable part of every person's conception of the state of things which he is born into, and which is the destiny of a human being."¹⁶⁴

Consequently, we can argue from the abovementioned that individuals are not just mere atomistic human beings, but creatures that do relate to society in an interrelationship manner. The 'individual' should be free in order to improve themselves and develop their faculties, in order to be a part of a (accumulates) progressive society, kept in pace with originality, leading to a vicious circle or 'progress'.¹⁶⁵

The answer for this question we find in his book *On Representative Government*, where he mentions clearly that, it is the aim of the government "...to promote Progress."

Not only education is necessary to create a 'social union', but also 'loyalty' and 'a strong and active principle of cohesion among the members of the same community or state'. Particularly, the latest principle clarifies us, how Mill perceives the notion of 'nationality' both in relation to 'social union' and to 'government'.

. We mean a feeling of common interest among those who live under the same government, and are contained within the same natural or historical boundaries. We mean, that one part of the community do not consider themselves as foreigners with regard to another part; that they set a value on their connexion, feel that they are one people, that their lot is cast together, that

¹⁶⁴ Utilitarianism, Ch.3 p. 32

¹⁶⁵ It is important to note, that although Mill contains that individuals in society are 'united' in the totality of the society, influencing their action, however he rejects clearly the fact that individuals merge and become a part of the totality. In the contrary, although the society is indispensable for individuals, they will stay as individuals and will not become a part of the 'totality'. *A System of Logic*, Book 6, Ch.VII, p.879

evil to any of their fellow-countrymen is evil to themselves, and "do not desire selfishly to free themselves from their share of any common inconvenience by severing the connexion. ”

4.2.3 Active Dimension of the Harm Principle

We cannot comprehend the harm principle if we do not take both dimensions, simultaneously into account. Which means that we first have to acknowledge, as stated above the “society’s autonomy”, meaning that the state should initially abstain from any intervention in the society as such. This is actually what liberty should denote, according to Mill, namely the non-intervention of the state. Secondly, we have to ascertain in which circumstances the state might deviate from this principal rule. According to Mill, "the only purpose for which power can be rightful exercised over any member of a civilized community, against his will. is to prevent harm to others".¹⁶⁶ This active intervention in the society, is what I would call active dimension of the harm principle. The state could find appropriable reasons to take actions and disturb the natural settings of the society, if an individual’s autonomy is being breached. These natural settings, which triggers the spontaneous dynamism of progress in society. This is why we have to treat the active dimension of the harm principle with diligence. Instead of reframing it from an exception into a rule, the active dimension of the harm principle is solely installed to protect individuals in case of harm. As Vernon has correctly stressed the intention of John Stuart Mill, arguing that “Given that Mill wanted to restrict the scope of state action and that he believed that the state should prevent harm, what could be more natural than the conclusion that he wanted to restrict the range of the idea of harm? But what displays the mythical basis of this reading is that Mill did not restrict the range of harm”¹⁶⁷ The harm principle, so Vernon argues, is not invented to allow the state to take actions for the sake of anything ideal like, liberty or harm and the like. If one reads the active dimension of the harm principle with the previous passive dimension, one would understand that the state has first the obligation to refrain form action and only to act when it is necessary. Otherwise, as Vernon further, stressed ”if we expect a harm principle to tell us what Mill thinks should and should not be prohibited, we will be bitterly disappointed by what follows in his essay, for no known definition of ‘harm’ captures and excludes the cases which Mill apparently wants to capture and exclude.”¹⁶⁸

¹⁶⁶ John Stuart Mill, *On Liberty*, p.223; A. Epstein, *The Harm Principle And How It Grew Richard*, The University of Toronto Law Journal, Vol. 45, No. 4 (Autumn, 1995), pp. 369-417;

¹⁶⁷ Richard Vernon, *John Stuart Mill and Pornography*, Ethics, Volume 106, Issue 3 (April, 1996) p.626

¹⁶⁸ Idem

Personally I am in tune with Vernon and also believe that the harm principle would only be applied for urgent and limited cases, where the individual is in duress from his environment or other individuals. This brings us to the question: how?

Yet, this issue is taken up elaborately by Joel Feinberg¹⁶⁹, where he tried to reconceptualize harm principle in such a way that it can be employed for concrete case, notably criminal law. However, before I embark briefly on Feinberg's analyses I cannot continue further without stressing my disapproval of his analyses, for the same reasons I have quoted Vernon. But Feinberg does address important issues of facts which might be a nice beginning to commence on illustrating with kind what kind of question we might deal with when talking about harm principle.

In his celebrated book *The Moral Limits of the Criminal Law*, Feinberg outlined the guidelines in which the "harm principle" could unfold into concrete principles which can be employed in criminal law matters. His principle of "set-back of interest" clause, forms the foundation for further elaboration on whether or not, and to which cases harm principle should apply. The "set-back of interest" clause, amounts to framing anything as harmful, the moment it infringes or reduces another's interest in something. Although, still rather broad in its outset, it made the harm principle more tangible in concrete matters.

As Hamish Steward pointed out, it is not Feinberg's inclination to keep the harm principle broad in the contrary, in Steward's words: "But Feinberg does not argue that every set-back to interests should count as a reason for criminalization; instead, he imposes the following limit on the scope of the harm principle

1. The Harm Principle: It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is probably no other means that is equally effective at no greater cost to other values.

2. The Offense Principle: It is always a good reason in support of a proposed criminal prohibition that it is probably necessary to prevent serious offense to persons other than the actor and would probably be an effective means to that end if enacted."¹⁷⁰

In practice this outline would amount to unworkable dwellings into what would cause a harm and what not. To illustrate this I would like to recall John Gardner's¹⁷¹, example of rape. He

¹⁶⁹ Joel Feinberg, *The Moral Limits of the Criminal Law* (New York: Oxford University Press 1984); Joel Feinberg, *Harm to Others*

¹⁷⁰ Hamish Stewart *The Limits of the Harm Principle Criminal Law and Philosophy* (2010) 4, p.22

¹⁷¹ John Gardner and Stephen Shute, "The Wrongness of Rape," in Jeremy Horder (ed.), *Oxford Essays in Jurisprudence, Fourth Series* (Oxford: Oxford University

argued together with Shute, that rape in essence, does not necessary has to lead to harm. Because they argue that rape might be harmless, if the victim gets drugged or with other means. But still they argue that it would be criminal since it cause a wrongful act. These kind of discussion would lead to long and endless philosophical discussions, which has in reality nothing to do with Mill's intention.

Moreover, it will lead to paternalism¹⁷², which is absolutely not what one would read out of *On Liberty*. The reason for this awkward situation is related to the "liberal stance" as Dyzenhouse sets forth." First, liberals argue that the state is entitled to intervene coercively in individuals' lives on the basis of a narrow harm principle which permits governments so to act only in order to protect the physical integrity of individuals. "Second, liberals argue that the consumption of pornography is a matter of private, as opposed to public, morality. Liberals are committed to protecting the private because they want to respect a right of individual autonomy", "Third, Liberals are committed to a right of complete freedom of expression, which makes them hostile to any censorship whatsoever."¹⁷³ It is not so much the liberal stance which causes the problem, but the inability of liberals to refrain from idealism, like Dyzenhouse tried to do.

He argued for example, that this liberals stance is the weakest point of liberalism because it does not give any answer to how to deal with issues like pornography, which is harmful to women, according to Dyzenhouse. To make his point he refers to John Stuart Mill's *On Subjection of Women*¹⁷⁴.

The problems, which Feinbergs analysis, which put us through is that harm principle gets watered and got totally out of its order frame, leading to contradiction in the liberal philosophy. As Sadurski correctly phrased Sandel: "The problem for liberals is, to use the nice formula of Michael Sandel, how they can consistently "take pride in defending what they oppose": for instance, how can a liberal defend the right of individuals to read pornographic books while considering pornography distasteful, or support a woman's right to abortion without condoning the moral appropriateness of abortion, or defend the right of adult individuals to use drugs while recognizing that drugs may make one's life despicable and degrading."¹⁷⁵

Press, 2000), pp. 193–217.

¹⁷² John D. Hodson, *The Principle of Paternalism*, American Philosophical Quarterly, Vol. 14, No. 1 (Jan., 1977), pp. 61-69

¹⁷³ David Dyzenhaus, *John Stuart Mill and the Harm of Pornography*, Ethics 102 (April 1992) 533-536)

¹⁷⁴ John Stuart Mill, *On Subjection of Women*

¹⁷⁵ Wojciec H.Sadurski, *Moral Pluralism and Legal Neutrality*, Law and Philosophy Library; Vol.9 p.90

To conclude from what I have tried to depict, in order to prevent any ambiguity in the adoption of the harm principle, this is why I argued that the harm principle had two dimensions which have to be applied simultaneously. On the one hand the autonomy of the society should be respected. Moreover, this is the main rule which one could derive from the harm principle. And the second one is in order to prevent the individuals from unnecessary harm from others the state might intervene.

But how does this work in practice. As mentioned earlier, pornography is frequently used as test case to test the harm principle. But one could also mention the euthanasia, “cannibalism”¹⁷⁶, drugs and alcohol among others. What we have to bear in mind in applying the harm principle to these issues is not whether or not we perceive it as harm, but whether it is the duty of the state to intervene for such a harm when inflicted. This is essential in order to prevent paternalistic actions from the state.

It is initially not the state’s duty to impose certain values on the society as such. Moreover, this is the essence of the harm-principle. It is not so much to protect the individuals from any morally imposed on them, but the state should refrain herself from imposing values on the society as such

Why should drugs or euthanasia be prohibited? Moreover, if someone uses drugs or commits euthanasia who will be harmed? In case of drugs nobody will get harmed, until the moment a real harm will be inflicted. For example only when a junky robs or kills another person he is inflicting harm. The reason in itself is not important. One cannot say that because of this consequence one should prohibit drugs. Because what one disregards is the responsibility that comes along with social -and individual autonomy. It is first of all the society’s and individuals responsibility, not that of state. If it become the responsibility of the state, this would be paternalistic. It is not so much whether or not one finds despicable, but whose duty it is to uphold it? The society’s or the state’s?

The same question rises with the issue of euthanasia. Euthanasia is actually a kind of helping with suicide, because of unbearable situation of a disease. The prohibition of euthanasia in many countries is the result of religious and moral (or ethical) reasons. If someone, decides it would be better to commit euthanasia who are the others, whether the society or the state to intervene in this matter. One cannot find any good reason in liberal perspective, and especially from the harm principle, that someone else would be harmed when another person is coming euthanasia.

¹⁷⁶ <http://www.guardian.co.uk/world/2003/dec/04/germany.lukeharding>

In the same token, we can discuss the issue of abortion. The opponents of abortion argue that a real harm is inflicted on the unborn baby. They call this murder to an unborn child. Here again it does not matter how despicable this abortion is to someone, but the first responsible person is the one who wants the abortion and her partner. As long as they agree to pursue with the abortion, who is there to oppose and for what reason.

4.3 Otto von Gierke and Harold Laski: The Associationalist version on the Compatibility Between the Community Approach with Individualism

4.3.1 Associationalism

Associationalism or as Paul Hirst¹⁷⁷ tried to call it, *Associative Democracy*, is a political theory that emphasises on the importance of the *community* or the *associational* aspect within a political framework. As Hirst explains it “The political doctrine for such a system of groups or community self-governance is called associationalism or associative democracy. Allied with the organization of public services and welfare on an associationalist model, community self-governance would strengthen the roots of modern social organization and make a virtue of increasing moral and value pluralism”¹⁷⁸.

Without refuting the essence of the state, they do stress on the importance of *communities* and *associations* in all daily life governance of citizens. As a political theory this is a direct challenge against the mainstream political theory and thus the concept of state, which we are familiar with and which emanates from the sovereignty principle from Bodin and Hobbes. I will get to that by my analysis and application of Althusius’ political theory to Afghanistan in chapter six.

The kind of aspect of associationalism, which I want to depict in this chapter is the essence of the position of the individual in communities and associations as perceived by the associationalists. One of the common errors that is being made in the acknowledgement of

¹⁷⁷ Paul Hirst, *Associative Democracy: New Forms of Economic and Social Governance*; Paul Hirst, *From Statism to Pluralism: Democracy, Civil Society and Global Governance*; Paul Hirst (Ed.), *Associative Democracy: The Real Third Way*; Paul Hirst, *Renewing Democracy through Associations*, <http://www.essex.ac.uk/ECPR/events/jointsessions/paperarchive/turin/ws7/Hirst.pdf>; Paul Hirst, *Statism, Pluralism and Social Control*, the British Journal of Criminology, Vol.40, Issue2, pp.279-295

¹⁷⁸ Paul Hirst, *Statism, Pluralism and Social Control*, the British Journal of Criminology, Vol.40, Issue2, p.279

communities as a decisive factor in political and legal framework, is that it had to be necessarily oppressive to individuals. In this paragraph, I want to argue the opposite. Associationalism is a political theory, which has its roots in a true depiction of reality. And as such it tries to portray the human as a real being, which is according to associationalists a “social being”. Instead of holding onto an abstract “idea” of an “individual”, associationalists prefer a more practicable and real approach.

Associations or communities are established to serve for a particular purposes of the individual. It does not bear any legitimacy or existence in itself, but has a derived legitimacy of the individual, which lies at the roots of the association. As Althusius stressed it “Ever more decisively it appeared as an unavoidable basic element of the social contract theory that theoretically the community must be derived from the individual. If one wished to remain true to himself, he was obliged to cling to the principles that the individual man was older than the association, that every association was the product of a sum of individual acts, and that all corporate rights, including even the authority of the state, were abstracts of differentiated and combined individual rights.”¹⁷⁹

According to associationalists, the individual cannot be conceived as atomic being simply because they cannot sustain themselves alone. Individuals have to cooperate with each other in order to attain their individual goals. While survival lies at the core of (natural) communities, associations serve a particular individualistic goals. Althusius tried to explain in detail how this cooperation between individuals are indispensable for individual survival and the achievement of individual goals.

“For when he is born, destitute of all help, naked and defenceless, as if having lost all his goods in a shipwreck, he is cast forth into the hardships of this life, not able by his own efforts to reach a maternal breast, nor to endure the harshness of his condition, nor to move himself from the place where he was cast forth. By his weeping and tears, he can initiate nothing except the most miserable life, a very certain sign of pressing and immediate misfortune. Bereft of all counsel and aid, for which nevertheless he is then in greatest need, he is unable to help himself without the intervention and assistance of another. Even if he is well nourished in body, he cannot show forth the light of reason. Nor in his adulthood is he able to obtain in and by himself those outward goods he needs for a comfortable and holy life, or to provide by his own energies all the requirements of life. The energies and industry of many men are expended to procure and supply these things. Therefore, as long as he remains isolated and does not mingle in the society of men, he cannot live at all comfortably and well while lacking so many necessary and useful As an aid and remedy for this state of affairs is offered

¹⁷⁹ Johannes Althusius, *Politica*, p.105

him in symbiotic life, he is led, and almost impelled, to embrace it if he wants to live comfortably and well, even if he merely wants to live. Therein he is called upon to exercise and perform those virtues that are necessarily inactive except in this symbiosis. And so he begins to think by what means such symbiosis, from which he expects so many useful and enjoyable things, can be instituted, cultivated, and conserved. Concerning these matters we shall, by God's grace, speak in the following pages."¹⁸⁰

The associationalists emphasize on the importance of social units within the political framework, which all serve a certain purpose. Without associations they argue, the individual will get lost in expressing his will. Since expression of will can be considered to be done in one time, but in small steps. The relationship between the state and society leaves exactly that gap, which associationalist wants to fill. In other words, the will of the individual has to be filtered, the moment it reaches the 'state'. As Figgis puts it: "It is the denial at once of the fact of conscience, the institutions of religion, and the reality of family.... And though for the moment this orgy of state absolutism may be restrained by certain surviving institutions of freedom and by the facts of human life, the words here quoted show the danger those are in who surrender themselves blindly to those forces, which from Machiavelli through Hobbes and Bodin have come to dominant in politics and are at this moment dangerously ascendant owing to the horror of that very economic and industrial oppression which is the distinctive gift of modern capitalism to history."¹⁸¹

The individual will according to the associationalists cannot be conveyed directly to the state and needs therefore intermediary steps. This introductory analysis has paved the way for me to embark on Otto von Gierke and his version of associationalism and the position of the individual.

4.3.2 Otto von Gierke and the Genossenschaft-Theory

It was thanks to Otto von Gierke's political theory that Althusius' political theory of associationalism was revived. As a legal historian Otto von Gierke was very much interested in corporatist (associational) legal systems and tried to unravel the internal legal framework of corporation/associations. While emphasizing on the importance of the associations, Gierke did not disregard the importance of the state structure. State, according to many associationalists and especially to Von Gierke, constituted just one of the associations within associations.

¹⁸⁰ Johannes Althusius, *Politica*, p.29

¹⁸¹ John D. Lewis, *The Genossenschaftstheory of Otto von Gierke*, 1935, p.112

However, as a German representative of associationism, Gierke was very much influenced by Hegelian Organic Political theory.¹⁸² His view on associationism carries Hegelian elements. And in the same way Gierke believed that all the separate parts of associations are covered by a bigger unit called the state. However, in contrary to Hegel, Gierke's Organic Theory was less abstract, or not at all.

Gierke departed from a "double character" of the individual namely one part stresses the "particularity" of the individual while the other part the "social ability" of the individual. As he contends: "We proceed from the firmly established historical fact that man everywhere and at all times bears within himself the double character of existing as an individual in himself and as a member of a collective association. Neither of these characteristics without the other would have made human beings human beings. Neither the particularity of the individual nor his membership in the generality can be thought away without denying the nature of man...Man can have no self-consciousness without at the same time recognizing himself as a particular and as a part of generality...And in so far as we attribute purpose to existence, individual human life is neither mere self-purpose nor a mere means for the demands of the association; but we believe that the individual and the generality exists for themselves and at the same time for each other, and that the task of mankind lies in the establishing of harmony between the mutually complementary factors of the particular and the generality. From this point of view we must attribute to the human individual as well as to the human association full reality and a unitary character. For us, the individual existing for himself alone and drawing upon himself is a natural and real-life unit. But we find just as natural and just as real a unity of life in every human association which, by partially absorbing their individuality, binds a group of individuals together into a new and independent whole. For the significance of human existence could as little be created by a mere totalling of the lives of all individuals as it could be expressed by the picking out of single elements of associational life. This we find, above the level of individual existence a second, independent level of existence of human collective associations. Above the individual spirit, the individual will, the individual consciousness, we recognize in thousand-fold expressions of life, the real existence of common spirit, common will, and common consciousness. And not figuratively, but in the most real sense of the word, we speak of "communities" over single individuals."¹⁸³

¹⁸² See, John D. Lewis, *The Genossenschaftstheory of Otto von Gierke*, 1935

¹⁸³ John D. Lewis, *The Genossenschaftstheory of Otto von Gierke*, 1935p.60, Julia Stapleton, *English Pluralism as Cultural Definition: The Social and Political Thought of George Unwin*, *Journal of the History of Ideas*, Vol. 52, No. 4 (Oct. - Dec., 1991), (pp. 665-684) .p.669

Conclusively, it is important to stress that according to Gierke the individual does not evaporate in the totality, neither in that of association or of the state, but exist as an independent part next to that of the state. As he asserts "...since human existence is not exhausted in associational life, but is at the same time purpose for itself, we must recognize over against the state the individual as an original reality, existing for himself and bearing a purpose within himself. For it is only with part of his being that the single man belongs to the state as a member; the rest of his being remains completely untouched by the communal life of the state, and is the stuff of his free individuality. Thus state and the individual existence stand side by side as two independent spheres of life, of which neither, to be sure, can exist without the other and each points toward the other as its complement, but both of which, for all that, have their immediate purpose in themselves."¹⁸⁴

The individual according to Gierke holds two characteristics namely one is "being an individual" and the other is "being a part of a totality (social unit)". The individual cannot exist totality on its own like an atomic being, neither will he evaporated in the totality as such. The individual maintains a rather dialogical relationship with the association, in the sense they both influence each other. Without the individual there is no association, and without an association an individual cannot survive.

One of the essential difference between Liberal (Mill) individualism and that of Associationalist like Gierke, lies in the fact that liberals believe that individual 'will' can be directly conveyed to the state apparatus¹⁸⁵. Moreover, state is perceived as the collector of all the aggregate of individual will. The constituent political mechanism has the task to select and order/structure those (political) will in such a way that it can be processed.

Gierke however, believes that individual 'will' cannot be collected and be put in a bulk in order to create a "common will". In the contrary, he argues that the general will (of the state) is "... deliberately and intentionally created, and may even have been founded by a conscious act of will; but even then it is not a collection of individual wills, but the creative act of a general will which calls the state or the new state form into existence. There are no individuals who are simply individuals; no free, unbound, unhypothetical single wills, which could produce from the sum of their individualities the state will through self-restriction and self-renunciation. It would be better to say that these humans, stateless for the moment, which are represented as founders of a state, were always bound together politically in their thought

¹⁸⁴ Otto von Gierke, *Das Deutsche Genossenschaftsrecht*, Frederic William Maitland, *Political Theories of the Middle Age*, 1922P.173 Gierke

¹⁸⁵ John Stuart Mill, *On liberty and On Representative Government*

and will, and lacked only momentarily the outward realization of their state existence. Neither the idea of the state nor the determination to realize it could, therefore, have had its roots in the individual spirit; here also, the single active will does not appear as such, but as an element of the common will; and what we see is not a uniting of the wills of many individuals, but a unitary act of the general will residing in many individuals and formless only for the moment, which conformists won existence and creates for it a form.¹⁸⁶

Individual will, in Gierke's opinion, has to be "cut and polished" in order to reach the State apparatus. And this so called "cutting and polishing" occurs through associations and communities. And certainly, by way of consensus and adaptation to others 'will', the individual 'will', will be shaped. This "cutting and polishing" of the individual "will" will eventually lead to the establishment of a "personality". So in other words, it is not so much the individual or the individual "will", which gets the eminence by Gierke, but "personality".

In Gierke's opinion "One individual- and this individual not as the embodiment of an abstract idea, but as a *living personality*- is the *Master (Herr)* and himself represents the complete legal unity of the group. He appears as the head ; through him and in him the multiplicity is bound together. Law, order, and authority in the union come from him...he alone represents the union as such externally and internally..."¹⁸⁷

This phrase is truly essential in exemplifying the difference between Gierke's approach to individualism and that of Liberals. Gierke adheres here to a kind of Hegelian theory, which asserts that the individual develops through several phases in human society. First his individual capacities gets shaped and adjusted by the family, the community society, or in his words "and "civil society" and in the culmination thereof, the state. The state according to Hegel, constitute the climax of human civilization or the shaping of the individual will. Hence, the function of the state regarding Civil Society, is to shape and bring them under the umbrella of a common, shared goal. This does not mean that the particularity of Civil Society is being diminished, but that their faces are directed to the same end.

The Civil Society is the stage in which personal, private, interest comes together and merges into "particular" interest. This stage is considered as an eminent element within the "Political Organism" according to Hegel, since it is in this "unit" where selfish, economic and ethical values meet each other and try to interact.

As Hegel maintains, "These institutions..." namely the "family", the Civil Society" and the "state", "...comprise in detail the constitution, that is, the developed and actualized

¹⁸⁶ John D. Lewis, *The Genossenschaftstheory of Otto von Gierke*, 1935 p.172

¹⁸⁷ Otto von Gierke, *Das Deutsche Genossenschaftsrecht*, p.29

rationality. They are the steadfast basis of the state, determining the temper of individuals towards the state, and their confidence in it. They are, moreover, the foundation- stones of public freedom, because in them particular freedom, becomes realized in a rational form. They thus involve an intrinsic union of freedom and necessity.”¹⁸⁸ And as Nederman already has stressed in her article “...we may none the less affirm that the proper strength of the state lies in these associations.”¹⁸⁹

However, as mentioned above in Gierke we do not retrieve this strong metaphysical presence of the state. We see this approach to individuality as personality back in Gierke’s approach to individuality. The individual is into an abstract construction of what individuality should entail but as he mentions, the individual as a “real living being”, a personality

4.3.3 The Concept of the Individual According to Laski

In contrary to Von Gierke, the English Pluralists represented by Maitland, Harold Laski, John Neville Figgis and Cole, amongst others, follow a more anarchistic and socialistic version of associationalism.¹⁹⁰ This is because the English Associationalists carry much of the influence of many different intellectual and philosophical schools, which are mixed up with Associationalism. The most prominent influence that has put a stamp on the English society is Liberalism and the prevalence of the individual within the society. John Locke, Adam Smith, Bentham and John Stuart Mill, to mention a view, has all contributed and shaped the political arena in England. Consequently, as regard to the position of the individual within the English society, it is much more deeply rooted than any other societies in Europe.

On the other hand, as a consequence of industrialisation and the eruption of trade unions, has marked the English society as well, leading to a strange associative culture of common ideals and common movements. This explains for example why the English Associationalists, notably Cole (an anarcho-syndicalist) and late-Laski (who converted to socialism in a later stage of his career)had some strong affiliations with the socialist movement. Moreover, even Paul Hirst (Associative Democracy) was known for its Marxist-socialist past. We would therefore see those two influences back in Laski’s philosophy.

¹⁸⁸ G.W.F. Hegel, *Philosophy of Right*, Para.265 p.203

¹⁸⁹ Cary J. Nederman, *Sovereignty, War and the Corporation: Hegel on the Medieval Foundations of the Modern State*, p.516

¹⁹⁰ See, Julia Stapleton, *English Pluralism as Cultural Definition: The Social and Political Thought of George Unwin*, *Journal of the History of Ideas*, Vol. 52, No. 4 (Oct. - Dec., 1991), (pp. 665-684) ,p.669

It is also striking to observe similarities between Laski and John Stuart Mill, regarding the importance of the individual in their philosophies. As the English representative of associationalism, Laski is one of the most prominent political theorist from 20th century and has influenced the political landscape with his associationalist, anti-sovereignist concepts. Laski, as part of English Pluralist, took a prominent role in advocate of associationalism, especially in the Anglo-Saxon world..

Comparing to John Stuart Mill, we conceive resemblances in their believe that the individual constitutes the cornerstone of social progress, just like Mill, as stated in the previous paragraph. Social progress can only be achieved if the individuals are not being hampered in their development, not by the state nor by the society .As he states, “Freedom of thought, then, the modern state must regard as absolute; and that means freedom of thought whether on the part of the individual or of a social group. Nothing is more stupid than for the state to regard the individual and itself as the only entities of which account must be taken, or to suggest that other groups live by its good pleasure. That is to make the easy mistake of thinking that the activities of man in his relation t government exhaust his nature. It is a fatal error. The societies of men are spontaneous. They may well conflict with the state; but they will only ultimately suffer suppression if the need they supply is, in some equally adequate form, answered by the state itself. And it is tolerable clear that there are many such interests the state cannot serve.”¹⁹¹

However, in contrary to Mill, Laski shares the opinion that the individual mind and the individual will expresses itself to the fullest in memberships of associations and communities. While Mill feels the need to protect the individual from the oppression of the society to a certain extent, Laski on the other hand sees a genuine expression of individuality in membership of associations and communities. He argues“ first that liberty of thought and association- the two things are inextricably intertwined- is good in itself...” and “second, that its denial is always a means to the preservation of some special and, usually, sinister interest which cannot maintain itself in an atmosphere of freedom.”¹⁹²

Furthermore, “The greatest contribution that a citizen can make to the state is certainly this, that he should allow his mind freely to exercise itself upon its problems. Where the conscience of the individual is concerned the state must abate its demands; for no mind is in truth free once a penalty is attached to thought.”¹⁹³

¹⁹¹ Harold J. Laski, *Authority in the Modern State*, p.22

¹⁹² Harold J. Laski, *Freedom of Mind*, p.3

¹⁹³ Harold J. Laski, *Authority in the Modern State*, p.22

One can argue that Laski's political theory is through and through individualistic in essence with minor differences with Mill, as he describes his own political theory: "It is in fact an individualistic theory of the State-no pluralistic attitude can avoid that. But it is individualistic only insofar as it asks of man that he should be a social being. In the monist theory of the State there seems no guarantee that man will have any being at all. His personality, for him the most real of all things, is sacrificed to an idol which the merest knowledge of history would prove to have feet of clay."¹⁹⁴

Individualism to Laski, would not constitute in itself, a fair ground for a political theory. In that respect the individual 'will's' are too diverse and too complex to be aggregated and composed into a political theory. As he maintained: "We no longer believe that a simple individualism is the panacea for our ills. "the mere conflict of interest", said Ingram thirty years ago, "will never produce a well-ordered commonwealth of labour".¹⁹⁵

This also explains why he rejects the state as the sole protector for individual ('will's') because the state: "I am well enough aware that in any such voluntarism as this room is left for a hint of anarchy. To discredit the State seems like enough to dethroning it."¹⁹⁶

The reason is that Laski does not attach the essential position to the state as the guarding angel for all individual 'will's', simply because the state is not capable to fulfil all these individual 'will's'. He explains, "In that sense the basis of the state is clearly a reservoir of individualism because each will is something that ultimately is self-determined."¹⁹⁷

Instead, together with Gierke and many other associationalists, Laski asserts that "Man is a community-building animal: it is by reverent contact with Aristotle's fundamental observation that every political discussion must now begin. We start with the one compulsory form of human association-the state- as the centre of analysis."¹⁹⁸ Human beings did not come on earth as isolated entities, but as a "social animals", who will seek and make contact with each other in order to cooperate. And this evolves around, as Althusius already stipulated, by way 'communication' and 'consensus'.

According to Laski, the individual 'will', will unfold itself through membership in associations. Just like Gierke, the associations canalises the 'will' of the individual to a certain way. As he further mentions, "We represent a state as a vast series of concentric circles, each

¹⁹⁴ Harold J. Laski, *Studies in the Problem of Sovereignty*, p.18

¹⁹⁵ Harold J. Laski, *Authority in the Modern State*, p.13

¹⁹⁶ Harold J. Laski, *Studies in the Problem of Sovereignty*, p.18

¹⁹⁷ Idem

¹⁹⁸ Harold J. Laski, *Authority in the Modern State*, p.5

one enveloping the other, as we move from individual to family, from family to village, from village to county, thence to the all-embracing state.”¹⁹⁹

Just like Vanden Linden and Eugen Ehrlich's conception that the one should perceive law is not from the statist perspective but from the individual. And in this political theoretical context Laski argues that “... you must place your individual at the centre of things. You must regard him as linked to a variety of associations to which his personality attracts him. You must on this view admit that the state is only one of the associations to which he happens to belong, and give it exactly that pre-eminence-and no more- to which on the particular occasion of conflict. In my view it does not attempt to take that pre-eminence by force; it wins it by consent.”²⁰⁰

He shares the opinion that the individual's will cannot all be represented by the state. It requires intermediate organizations, associations and communities to sort of “filtering” the will of the individuals. Whatever reaches the state is that which has already been “filtered” by associations.

Despite the fact that he emphasises on the individual he believes that the only way the will of the individual can be represented is by way of associations. Here he denotes the desire of the state impose their will and to undermine the will of the individual. He considers “it is impossible to regard the state as capable, in any general view, of absorbing the whole loyalty of an individual.”²⁰¹

4.4 Conclusion

The harm principle provides essentially enough safeguard to protect the individual against oppression from within his own community. As such the harm principle contains two dimensions, which keeps each other in balance. One and foremost dimension is the so called passive dimension, which has to make sure that the state refrains from any intervention in the society.

This is because the society, which is contained of individuals, has to be free in order develop and move forward. This can only happen if the society is “autonomous” from the state. This so-called “society's autonomy”, denotes the autonomous dynamic, which exists within the

¹⁹⁹ Harold J. Laski, *Studies in the Problem of Sovereignty*, p.7

²⁰⁰ Harold J. Laski, *Studies in the Problem of Sovereignty*, p.15

²⁰¹ Harold J. Laski, *The Personality of Associations*, p.35

society, and which makes it move forward, into progress. “Autonomy of the society” is composed of both “social organism” and “utilitarian ethics”. While the first refers to the inner dynamic framework of society, the latter refers to the moral guidelines of progress, which should be shared among individuals within society.

The second dynamic or the so-called active dimension, has to make sure that the individual is protected against any unnecessary harm from within the society, by his fellow individuals. The state then has the duty to intervene in order to protect the individual. In this case the state has a restrained power to intervene, in which the state is only able to act, if there is physical harm inflicted on an individual.

In my second argument I have tried to expose that the individual within associationalism, attracts as much importance as in Liberalism. Associationalism, which is political theory that accommodates communities and associations, attaches an eminent role for individuality. Both in Gierke’s as well as Laski’s theory, the individual, comprises the foundation of any association and community. It is by way of communities and associations that individuals unfold themselves. However, this does not mean that they depart from the same atomic concept of individual, but a more Aristotelian individual as social animal.

Chapter 5 Afghanistan and its Failed Constitutional history

5.1 Introduction

“Since Afghanistan has an Islamic and traditional society, the implementation of constitutionalism represented a great challenge. The juxtaposition of the rule of Islam, traditions, statutory laws and other elements challenged its legitimacy, and these factors have always been a test for any constitution promulgated in Afghanistan.”²⁰²

In Afghanistan, many attempts have been made in order to establish a more centralized, modern government system. One of the essential elements in constructing and applying the modern concept of state is by way of constitution. Especially in the period, when Afghanistan has witnessed her first modern constitution, in 1923, Hans Kelsen’s theory of constitutional law attracted much attention.

A modern constitution has to demarcate clearly, by defining the duties, which the government obtains and the rights of the citizens. The importance of “Rechtstaat”, namely the “rule of law”, propelled around the world in that time, as the ultimate standard for establishing constitutions.²⁰³ Especially in the aftermath of the First World War, when several newly created, states erupted, Kelsen theory gained special importance because of his emphasize on the modern concept of state.

The current constitution of Afghanistan, which is constitutes the ninth in a row since 1923, has been approved in 2004, with the hope to establish a more solid foundation for a modern state, incorporating different religious and ethnic communities within Afghanistan. This constitution would be different than the previous one, which all has contributed to Afghanistan’s nomination as a “failed state”. Moreover, the question we have to ask here is whether the modern notion of the state suits the Afghan historical and geographical reality at all. According to Kandiyoti, the “..reason why we have imposed the modern political notion of the state on Afghanistan is not because of the need the international, global order has in the establishment of state structures, instead of something normal.”²⁰⁴

In this essay, I want to confine myself to the legal framework of Afghanistan and the complex legal environment, which these different constitutions have created and contributed

²⁰² Mohammad Hamid Saboory, *The Progress of Constitutionalism in Afghanistan*, p.6

²⁰³ Saïd Amir Arjomand Law, *Political Reconstruction and Constitutional Politics*, p.11

²⁰⁴ Deniz Kandiyoti, *The Politics of Gender and Reconstruction in Afghanistan*, United Nations Research Institute for Social Development, p2

to Afghanistan's nomination as a "failed state". I will not go deep in the historical and anthropological foundation, but will emphasize on the complexity of the legal framework. More in particular, I want to claim that the ambitious plan of imposing a centralist state system rendered a dead end in Afghanistan ambition to establish modern state system. Integrating different (local/religious) legal systems in a more unitary, centralist, constitutional framework of Afghanistan is the foundation of a "state in failure". And as long as this reality of the Afghan geography and demography, which is incompatible with the modern notion of state, is being ignored, the Afghan state will, paradoxically enough, always be remembered as a failed state.

In this essay I like to emphasize on the paradoxical situation of Legal Pluralism in Afghanistan. The issue here at stake is that Legal Pluralism, which asserts the existence of different legal systems with a geographical/political unity, does exist in Afghanistan, but in its "weakest sense."²⁰⁵ This means that some of the existent legal systems are being integrated in the centralist-statist legal system, but have contributed to the legal-complexity in Afghanistan. This legal complexity has been of the reasons which has contributed to distorting the proper functioning of the state.

By scrutinizing four of the nine Afghan constitutions, I want to try to exemplify how this "weakest" version of legal pluralism failed and contributed as well to the failure of the Afghan constitutions. Moreover, my overall claim will be that constitutionalism, and in its far end, modern-state concept, is incompatible with the Afghan reality. Which makes the Afghan state a de facto (perpetual) failed state.

5.2 Islam, state law and customary law

Like the founding father of Turkey, King Amanullah, which is considered as the leader of Afghanistan who has lead Afghanistan into modernity with the promulgation of the first constitution in 1923, made unfortunately the same mistake as Atatürk. Which is neglecting the reality of the demographic and geographical situation of their own country. However, this had more harsh consequences for Afghanistan than for Turkey,

The problems rise when one applies a modern abstract concept of state to a country, which is mainly inaccessible, even with the modern vehicles. And these people have already got their own norms and legal systems, which leans easily to the rural reality of Afghanistan. So

²⁰⁵ John Griffith, *What is Legal Pluralism*, p.4

why do they need an abstract system at all which cannot be applied to the factual situation on the ground?

Initially, it is a quite noble enterprise of Amanullah to integrate various legal systems in a modern constitution, with the aim of trying to modernize Afghanistan with law as a tool, which is called “legal instrumentalism”, on the one hand, and at the same time keeping, having a leeway for the Afghan reality.

As a concept, Legal Pluralism is quite paradoxical, since it presupposes that legal monism is a rule rather than an exception. Or As John Griffith has put it rightly, that “Legal centralism is myth. Legal Pluralism a fact”.²⁰⁶ Even in Europe customary law prevailed on a daily base, and regulated many businesses even in towns. It was only after the west-phalian treaty, the creation of modern state, the rise of napoleon legal systems in France, and parts of Germany and Holland, amongst others, that has triggered the rise of abstract, centralist legal systems, as the foundation of the modern state.

However, the problem we are faced with in Afghanistan in contrary to Europe is that the whole sociological development of urbanization amongst others, did not take place. With the result that the people of Afghanistan still are relying on tribal and religious rules up til now. The development of the people cannot be regulated by modern, abstract concepts and the use of law as a tool.

In this paragraph, I want to give a brief introduction in the three main legal systems in Afghanistan which are, Islamic Law, Customary Law and statutory law. After having clarified their role and their functions, I will continue trying to exemplify how different constitutions tried to deal with this legal systems and what kind of complexity it has triggered. And how their noble aim of introducing liberal democracy to Afghanistan and conciliating between different legal systems failed and constituted the failure of the constitution.

As Khuram put it rightly by stressing the point of the Jurist report, “...the bifurcation of the legal system into an official law and unofficial law has been a hallmark of Afghan legal history ever since attempts were made to introduce statutory laws.” The Jurists Report concludes by stating that “with some confidence that past experience would suggest that any attempt to implement and enforce secular statutory laws which depart from customary and/or Islamic law is liable to be met with protest and civil unrest.”²⁰⁷ This statement will be the

²⁰⁶ John Griffith, *What is Legal Pluralism*, p.4

²⁰⁷ Karim Khurram, *The Customary Laws of Afghanistan*, p.2

guiding line throughout my paper.

5.2.1 Islamic Law (Sharia):

Sharia is a religious legal system based on the Islamic Koran and the sayings of the Prophet Mohammed, which is called the Sunnah. The scope of Sharia ranges between public sphere to private sphere, such as hygiene, social matters, marriage, contract, finance. Islamic law is being distinguished between Fiqh, which means jurisprudence, and Sharia, legal principles, or law.

The main distinction in Sharia exists between different schools of interpretation and between different streams. First of all, Islam is divided between Shiites, who believe that the Prophet's son in Law Ali is his rightful predecessor, the Sunnites believed in the Caliph. Furthermore, within the Sunnites Islamic law has been divided into several schools, like the Shafi, Hanafi, Hanbali and Maliki Schools. Whereas, the Shiites adhere to the All these divisions in Sharia Schools make a unitary application and interpretation of Sharia rules much more complicated than it already is.

5.2.2 Customary Law (Pashtunwali):

The Afghan Customary Law is known as the and is related to the ethnic tribe of the Pashtun's. This customary law dates back to the ancient Arian ethnic tribe and has a solid base in the Afghan region and intertwined with the geographical surrounding. Therefore the Afghans rather rely to their tribes²⁰⁸ and customary law than to even Islamic or any other Legal regimes. Although, the Islamic law will come as close second.

The Afghans perceive the Pashtunwali and the Islamic law as two distinct legal systems. In daily life they are allowed to choose which law they want to apply to the particular case. A Pashtunwali is whole set of rules based on tradition/custom, with its own court system, organs and procedures. The formal structure of the Pashtunwali and the material structure resemble the underpinnings of the geography and the historical and cultural layers.

It is essential to stress that the Pashtunwali is not just a customary law, although it has an oral tradition instead of a written one, but it plays also a very eminent role in the daily life of the

²⁰⁸ Karim Khurram, *The Customary Laws of Afghanistan*, p.4

Pashtun and regulates also the relationships with other tribes and even ethnic groups. In this sense the influence of Pashtunwali reaches far beyond its presupposed scope and constitutes actually the heart of the Afghan society.

The essence of Pashtunwali appears clearly when we elaborate on the formal structure of the Pashtunwali of which the Jirgas constitutes the main foundation. Jirga's are a kind of councils, which settles disputes among members within tribes or between tribes. The history of the

Jirgas dates back to the period when Jirgas were known as peace missions, stressing the core job it had in dispute settlements.

The construction of the Jirga is aimed at the solution of disputes, based on a long term perspective. This approach is rather contrary to our modern notion of justice, which is more linked to retribution. Since dispute settlement wants to restore the mistrust and therefore the break within or among the tribes, curing scratches requires totally different approach than the one we have in our modern legal system. Consequently this role of the Jirgas as a council that settles disputes, or peace mission, earned a lot of respect and legitimacy among people. With the result that the decision of the Jirgas are regarded by the Afghans and they condemn those who do not accept.²⁰⁹

The Jirgas consists of wise men who have earned their reputation by their behavior and position they acquired within the tribe. Their say in the Jirga is equally unrewarded their position within the the tribe. When a dispute reaches the the Jiirga, the parties have to pay a certain amount of money, which is called *Baramta* or *Machilgha*, which is a kind of a Legal guarantee. This guarantee will either be kept by the Jirga members or be given to the other party, when one of the parties declined to obey the decision of the Jirga. The decisions of the Jirgas are based on prior decision, similar to the system of the precedents in the common Law countries and is called *Tselay*. *Tselay* also means decisions.²¹⁰ However the party has also the possibility to appeal to the decision which is called *Takhm*. The non-obedience to the decision of the *Takhm* will be punished

²⁰⁹ Karim Khurram, *The Customary Laws of Afghanistan*, p.5

²¹⁰ Karim Khurram, *The Customary Laws of Afghanistan*, p.8

5.3 Statutory law:

The modern statutory law entered the Afghan Legal landscape just after the promulgation of the first constitution in 1923 by king Amanullah. This period is also called the *Nizamnama* period. The *Pre-Nizamnama* period is characterized by statutory law that either clarifies the Islamic rules of the Sharia or give guidelines to courts in how to make decision in certain issues.

Islam does not preclude statutory enactments, it only limits the enactment by giving guidelines in which area enactments are possible. So essentially Islam does not exclude human legislation, it only limits its scope and guides it along the right lines. The areas in which human legislation is allowed are enactments dealing with interpretation of the Islamic rules, analogy and inference, and if the Sharia has not dealt with particular issue. Codes like *Asas al-Qudad* which give guidelines to courts or the *Siraj Al –Ahkam* which are administrative codes based on the Hanifi school in Islamic teachings are just two examples. These are not codifications which are autonomous enacted by the government based on their need to govern and to ground their policies. This only happened after 1923.²¹¹

The first so called “post-Nizamna period” has started with the promulgation of the first constitution of the Afghan Islamic Republic, the so called “Nizamna e-asasi” and dates back to 1923. This constitution is enacted by king Amanullah, which I will elaborate more later on. Here it suffices to mention that this constitution enabled the enactments of Nizamname in various fields of government. As Kamali has mentioned “...that the Constitution of 1923 in four ways: Firstly by introducing a partly elected and partly appointed body of 150 members, known as *Shura-e Dawlat* (State Council) whose main duty it was to draft and introduce the *Nizamnama* Legislation. Secondly it was proclaimed a duty of the courts and government offices to apply the *Nizamnamas* in general. Thirdly by enacting a specific provision which aimed at codifying the criminal law and replacing the *Shari-ajuristic* manual. And lastly, by assigning specific areas which were to be regulated under the *Nizamnamas*.”²¹²

The second period started from the promulgation of the “Usulname period”, which is characterized by a conservative drawback. It is promulgated by king Nadir Shah, by throwing

²¹¹ Mohammad Hashim Kamali, *Law in Afghanistan, a study of the Constitutions, Matrimonial Law, and the Judiciary*, p 36

²¹² Mohammad Hashim Kamali, *Law in Afghanistan, a study of the Constitutions, Matrimonial Law, and the Judiciary*, p.37

over King Amanullah.

Whereas the best period for enacting statutory law was the period that started from 1964 and called “the Qanun period”. This quite liberal period in contrary to the others, made for the first time statutory law prevail above the Islamic law. Only in case statutory law can give solution. Sharia law can be used as guidance in lawmaking.

5.3.1 The Constitution of 1923

The promulgation of the first constitution of Afghanistan was very much influenced by the Turkish efforts to modernize their own political framework. Just like Atatürk, the founder of modern Turkey, King Amanullah was also thrived by modernization process, and wanted to lead Afghanistan through 20th century. Like Atatürk, who was influenced by the “Young Turks” movement, King Amanullah was influenced by the “ young Afghan movements in Afghanistan who advocated for modernization in Afghanistan. However, the difference between Afghanistan and Turkey was that Turkey had developed some sociological institutions that, although with some problems especially in the east where the development of sociological institutions was lacking), did not cause much problem as in Afghanistan.

In contrary to Atatürk, King Amanullah realized that he cannot ignore the importance and the weight which Islam and tradition has in Afghanistan, and integrated it into the first modern (liberal) constitution of Afghanistan in 1923. The constitution aim was therefore twofold. On the one hand acknowledging the established reality and respect to ancient tradition and religious values, and on the other hand leading Afghanistan into modernity, and trying to reconcile both distinct worlds. Unfortunately this would not turn out to be so successful as one might think in the initially (especially when one compares to Turkey, one might think that it has to succeed)

The reason is that the aim of King Amanullah to modernize Afghanistan and make it a prosperous country in economical and in other ways, was a clear challenge to the tribal and religious leaders, who did everything to undermine the efforts of the constitution to seek for middle way between tradition and modernization.

However, these efforts of King Amanullah are not that noble as one would think initially. Because the King was aware of the fact that any attempt to modernization and structure would undermine the reign of the tribes. Moreover, despite the fact that King Amanullah did acknowledge the essence of tribal and religious life in the Afghan constitution, overall, he was

fighting against their dominance in the Afghan society.²¹³

In the end King Amanullah was thrown over and later abdicated, because he resisted the claim and the pressure of various religious leaders to remain power. Issues like, stressing the Hanifi school in the constitution restricting other schools of islam, or religions, and tribal issues make his power decline.

5.3.2 The Constitution of 1931

As a result, king Nadir Shah who followed up King Amanullah, and in order to please the conservative religious and tribal unrest in loosing power, King Nadir Shah proclaimed the Sharia as the law of the land and made the Hanifi school the leading Islamic theological school in the country. Although article one of the constitution guaranteed the right of minor religious groups, with the condition that their practice did not disturb the public peace.

This one step backward is a very striking example of how political centralist power are vulnerable to minor tribal or religious groups, so the religious reality of the country. A political can not disregard this social dimension of a country, no matter how noble his pursuance actually is. The step which Nadir shah took should therefore also not be attributed to his personal standpoint as such, but about his acknowledgement of these forces in Afghanistan and the adjustment of political framework accordingly. The next constitution is again in this regard a quite liberal constitution and a step forward, in the hope to try establish again, at least partly, a democratic order in Afghanistan.

5.3.3 The Constitution of 1964

The new constitution of 1964 can be seen as another step in the constitutional and political development of Afghanistan. In order to establish (again) some structure in the rather fragmented political environment of Afghanistan, especially during the constitution which was promulgated by King Nadir Shah, King Zahir Shah introduced a new constitution in 1964. This constitution had to consolidate the state power by centralizing political power, and at the same time replacing it by more democracy. This meant in turn that the population of Afghanistan had to be consulted in the establishment of the new constitution but also in case

²¹³ Mohammad Hashim Kamali, *Law in Afghanistan, a study of the Constitutions, Matrimonial Law, and the Judiciary*, p.5

of policy making. So this means that the Jirga regained its power back again after a period of abstention. This politicization of the Afghan society was again not that easy. How can one replace a chaotic, tribal order into a more centralist and structured power?

One of the main element was stressing the pluralist nature of the Afghan society and the democracy. (Art 32 of the Constitution), but also stressing the importance of equality among ethnic groups and religious groups in Afghanistan. Not only did he strive for equality between groupings but also between men and women. However, this constitution also failed mainly because the Afghan society was not able to carry all those reforms. Especially because many contradiction in the constitutions, which was ambitiously put in by the King could not be long lasted. For example, by stating that the Sharia law was the law of Afghanistan but at the same time making the statutory law prevail above Sharia law.

5.3.4 The 2004 Constitution

After again an era of chaos, war and instability, which is paradoxically enough the reality of Afghanistan, which many of us in western Europe has to accept, another attempt was made to impose the modern system of state on Afghanistan, by promulgating another (9th) constitution of Afghanistan in 2004. The seeds of this constitution was set in Bonn 15 December 2001 and is know as the Bonn agreement. Let alone the fact that one has to question whether such a constitution is worth while after many attempts, but the fact that it has been constructed in such a short time does not give any hope. Like Rubin has mentioned in his Article: “But two and a half years—the time frame of the Bonn Agreement—could hardly suffice to turn a failed state into a stable democracy.”²¹⁴

Although it is a quite ambitious constitution by including the participation of a wide range of groups residing in Afghanistan, and therefore making this constitution as one of the most democratic constitution since decades, after many attempts one cannot be too hopeful. ” The 2004 Constitution incorporates many new features which were not included in any of the previous constitutions. Islam, traditionalism, nationalism, state law, and all the main factors which for centuries constituted the fibre of Afghan social and legal order have been now incorporated in the 2004 Constitution, as is reflected in the preamble.”, as Rubin said.²¹⁵

²¹⁴ Barnett R. Rubin, *Crafting a Constitution for Afghanistan* , p.6

²¹⁵ Barnett R. Rubin, *Crafting a Constitution for Afghanistan*, p.19

Regarding ethnic pluralism, the new constitution clearly mentions the different ethnic fraction that exists in Afghanistan (Art.4 of the Constitution), and has even made other languages like Uzbeki, Turkmani, Baluchi, Pashai, Nuristani and Pamiri official, besides Pashtun (Art. 16 of the Constitution). The reason for referring to different ethnic groups, is the hope to include these groups in the newly created Afghan state and society, in the hope that conflict as has been seen in the past will not erupt.

However, as in previous constitutions, too much of ambition leads to conflict between provisions. While on the hand mentioning the importance of Islamic law, it is not really that trustworthy to mention that it will uphold the provisions of International human Rights Treaties.

The problem we face with constitution is that they are rational whereas facts based on reality are mostly irrational and therefore not be grasped in a rational construction, how noble a constitution is. The same counts for this constitution which is highly noble and done with best intentions, but without having any perception of reality in Afghanistan, it is doomed to fail. Otherwise, they would not bother to construct another constitution which be the basis for another chaos sooner or later.

Delegates hoped that this relatively liberal Islamic constitution would provide a framework for the long task of consolidating basic state structures, as the country struggled to emerge from decades of anti-Soviet jihad, interfractional and interethnic civil war, and wars of conquest and resistance by and against the radical Islamists of the Taliban movement.

5.4 Conclusion

In the previous paragraphs I have tried to show how difficult it is to keep a system of legal pluralism in the constitution, if the societal structure itself is already chaotic and disordered due to its geographical and demographical nature. As long as this nature has not been changed, any effort to establish a modern state, and the application of Legal Pluralism, (in its “weakest” notion (integrated)) will not bring about the desired result of consolidation and centralization of political power. Moreover, it will be the basis for more civil unrest, chaos and retardation.

As we could observe in the several constitutions, which I have tried to analyze a bit, they have tried to include more or less the diverse legal systems in the constitution but they all resulted in chaos and disorder. Any other solution like monist legal system would have resulted in a dictatorship, with the eventual chaos. In any case, Legal Pluralism cannot be

exerted as tool for the purposes of the state to control, rule and direct the society. Any attempt to that is paradoxically enough, an infringement in the democratic nature of the society, which is able to rule their tribe or community by themselves. If there would have been a need from below, so from the tribes, that consequently, a modern state will be created, instead of imposed like it has been done many times from above.

This is why we have to reject the abuse of legal pluralism for political purposes like abovementioned. Legal Pluralism, as a scholarship, is more an observation of the factual situation, which has to be maintained, instead of integrating it into a system of legal, instrumental tools aimed at directing in “social engineering projects”.

Chapter 6 Althusius and Social-Federalism in Afghanistan

6.1 Introduction

6.1.1 Introduction

In the previous chapter I have tried to expound why all seven constitutions in Afghanistan has failed and ousted my fear that recently adopted constitution will also fail. I have tried to give a kind of historical survey into the structure of those constitutions from more liberal to religious, from pluralist to central. What all this constitutions had in common is the intention to centralize the governing institutions, either in the short or long run. By-passing the centuries old cultural, tribal and communal structures, which has governed Afghanistan until the 21st century, has left the country into ruins.

Anthropologically, Afghan society could be called a “complex society”, since the rural order is being disrupted by other artificial structures, like that of different attempt that has made to impose a certain constitution on the Afghan people. The question at stake is not so much whether or not one could turn Afghanistan into a modern liberal democracy, which has always, intentionally or unintentionally been the aim. But instead, one should wonder whether there is an order that can be exerted, in which the Afghans would feel more comfortable to live in, which suits their custom, dealings and the way of life they lived until recently.

As Simonson rightly observed in his remarks about the current constitution, “Clearly, Afghanistan’s constitution describes aspirations more than realities on the ground.”²¹⁶ Despite the fact that this was already known when the constitution of 2004 was drawn, there were probably no any convincing theory available, which could concur against the mainstream theories about constitutions and state (-building) theories. The only dichotomy that existed was that between so-called anarchy (or statelessness) and the existence of a state, modelled against western-examples, which was considered as the standard to which a perfect functioning state should adhere to. There were no alternatives, or at least convincing alternatives that could be employed. This is why I want to make an attempt to introduce a theory, which is a serious challenge and an alternative to the current theories about state and state-building and one that can be easily applied to complex fragmented and dissolved societies like that in Afghanistan.

However, since this enterprise would take a whole book, if not series of books, I want to confine myself instead to one thesis chapter, in explaining how and which theory could turn Afghanistan into a stable state This is why I have to confine myself, initially, to fundamental questions, just to explain the foundation of this theory as a point of departure. My purpose is therefore to set forth how Althusius theory of “Societal federalism” (and “popular sovereignty”) would provide us a different perspective

²¹⁶ Sven Gunnar Simonson, *Ethnicising Afghanistan?: inclusion and exclusion in post-Bonn institution building*, Third World Quarterly, Vol. 25, No. 4, pp. 707–729, 2004 p.7

at the locus of political power and how this would help us, not only to understand Afghanistan's situation, but also to establish a least some sort of stability for Afghan population. We need a theory, to put it in Würtembergers words, :“Da eine für anerkennungswürdig gehaltene politische Ordnung ein wesentliches Element politischer Stabilität darstellt, befasst sich die Legimitätsfrage mit jenen Prinzipien, die den Staat im innersten zusammenhalt”²¹⁷.

One of the characteristic of Althusius' political theory of sovereignty, is that it does not lay the emphasis on a hierarchical structure between those that are governed and those who governs, but more on a horizontal framework. The government is just another “association” like any other. Each association or community holds political power and there relationship with each other and is at equal footings. But as well as with the association as the association itself, they are created to make social life easy.

This last chapter will be an illustration of what I have tried to explicate in the previous chapters, in my quest to find the answer to my research question. With redefining the concept of Legal Pluralism, in a broad way, it would embrace a larger prospect of law than confining to legal norms alone. This brought me to the theory of “community and Law” approach and I tried to identify the locus of law in communities. With my example of the Jewish diamond industry I have consequently tried to illustrate this theory to a certain extent.

In order to refute the general criticism against the “community” approach from the liberal point of view, I have tried to argue that both liberal harm principle as well the theory of associationalism, - which is a political framework that accommodates communities- provides enough safeguard for the individuals against oppression from within the community.

This brought me ultimately to apply the theory to the current problem of Afghanistan, as a “failed state”. First, I have tried to give a survey of a part of the constitutional history of Afghanistan. My main assumption was that the universalistic tendencies has made all these constitutions failed, with or without applying (weak) Legal Pluralism. In this chapter I will concentrate on the alternative theory on political theory and on the concept of sovereignty.

6.1.2 Problem Statement

My claim in this chapter is that we need a political framework that accommodates the fragmented society in Afghanistan, instead of structure that aims at consolidating the fragmented structure, even if that is in the longer run. I will therefore argue that the theory of societal federalism will be a suitable remedy in case of Afghanistan. More in particular, we have to switch from the Bodinian/Hobbesian

²¹⁷ Rechtstheorie. Beheft 7, Politische Theorie des Johanneses Althusius, p.557

conception of sovereignty to that of popular sovereignty, as it is asserted by Althusius. Unfortunately, I will only explain the theory of Althusius’.

6.1.3 Outline

I have framed the chapter into three parts to make it a little bit comprehensive, since Althusius’ political philosophy is everything except comprehensible in analytical way. My main aim in this chapter is actually to show why Althusius’ political philosophy of societal federalism (or his concept of “popular sovereignty”) is applicable to Afghanistan and why it will obtain more result than what has been procured until now.

In the first paragraph, I will give a short introduction in the political and social environment of Afghanistan, and gradually arguing and exemplifying that there is a need to take Afghanistan’s social fragmentation into account and to develop a political theory that will accommodate this fragmentation. So, the aim of my first chapter is to stress the necessity of inventing a political theory that is acceptable by all social units, which Afghanistan is made up of.

One of my arguments in this first paragraph is that, by referring to Lijpharts “Consociational Democracy”, as a theory that is developed on the soil of Althusius’ theory, how important Althusius’ theory is and can be, for state building, and bringing stability in socially and politically fragmented countries, just like Afghanistan.

In the next paragraph, my argument will be that what makes Althusius’ political philosophy different than what we have known until now, is his theory of “popular sovereignty”. Instead of laying the sovereignty -so political power- outside the society, vesting it in an individual or in an organ, his concept of sovereignty resides within the social units themselves, counting them within the political framework. In other words, social units are part and parcel of the whole political enterprise, instead of being outside the process.

The order within ‘symbiosis’ is being regulated by mechanisms like “communication” and “contracts”. Both mechanisms are interrelated with each other. By way of communication each individual expresses their wishes and intention. With a contract, it becomes a socially binding contract and enforceable. The importance of both communication and contract in symbiosis, in Althusius’ theory is to refute the claim that Althusius’ theory of associationalism (societal federalism) hampers individuality.

But why should the social units become a part of the political framework? Shouldn’t they be guided towards a certain centralizing goal, instead of letting them guide their own life? Is it not better to have a Leviathan or a democratic Leviathan, that controls the whole society? Is this not otherwise leading to anarchy?

I will explain that the concept of ‘symbiosis’, which is peculiar to Althusius’ theory, explains why this will not lead to anarchy. And the reason is that Althusius’ lays the importance on “social life” and the way ‘symbiote’ (the participants of this ‘symbiosis’), interrelate with each other, that constitutes

the heart of his political theory/philosophy. The relationship between the ‘symbiotes’ are being organized/managed through “communication” and “consensus”.

So, to stress again, in ‘symbiosis’ lies the reason why “popular sovereignty” will not lead to anarchy.

But how then will they uphold order? How will all these social units cooperate with each other?

Before I explain this relationship I will elaborate on the social units themselves, and just explicate what Althusius comprises under a ‘family’, a ‘community’, a ‘kinship’ or an ‘association’. This paragraph will only explain certain social units and what Althusius actually means with it. So in a way Althusius gives a “face”, a political meaning to all social units, which exists in Afghanistan.

The social and political relationship between those social units are being upheld by a theory called “subsidiarity principle”, which denotes that decisions that concerns the lower units should be taken by those units only. In other words, if a matter concerns the family, than a kinship or a community should not intervene with those matters. Every social unit has their own duties and rights.

6.2 The Afghan (Social and Political)Reality of the Constitution

6.2.1 Introduction

In the chapter about Afghanistan’s past constitutions (and legal pluralism), I have tried to argue that there has always been a gap between the intention of the constitutions to elevate Afghanistan into modernity, and the reality on the floor. Afghanistan and its rural landscape had already created a century old culture and order, which was working fine and still works. A constitution should not induce a certain idealism or wishes, but create order based on reality, what is possible and what is available.

The social reality of Afghanistan is signed by ethnical, tribal and communal fragmentations, whereby each social unit has imposed/implemented its own political order. In a way, Afghanistan is constituted by small political orders, which are bonded together by mutual assistance and need. Any structure that aims at reshuffling the existent order will face resistance, as it happened many times with British and Soviet invasions, but also with internal endeavour to establish a new centralized political order. This resistance is even elevated by Althusius as a right, namely, a *Ius Resistentia*, which I will further explain in the next paragraphs.

As to political structure is concerned, since king Amanullah instalment and his attempts to create a modern Afghan state, all efforts has been put in drawing a constitution that enables to centralize the political forces and subsequently to establish a centralized political organization, with its ensuing institutions. As mentioned earlier, while drawing the new constitution the parties were both aware of the failure of these constitutions and the reason why, namely the highly fragmented society. As Hamish Nixon already has stressed, “The current modernization project could meet a similar fate if

Afghan elites and their foreign backers ignore traditional and more recently ascendant power-brokers, work at cross-purposes, and diverge from the immense political and technical requirements of democratic state-building.”²¹⁸

This means that if not enough importance is given to the fragmented structure and if it is not taken into account, while constructing Afghanistan’s political future, then it seems as if this attempt will again fail. The reality of Afghanistan will consequently only allow a federal model as the politically participating parties already conveyed their wishes for this form of government.

Simonsen has already stressed in his article, that during the proceedings before the enactment of the constitution of 2004, the question was whether or not to adjust the politics of Afghanistan to the reality on the floor. He says the following about this: “During much of 2003 there was great speculation in the country as to whether the Constitutional Drafting Committee would adjust to reality and recommend a federal model to the Constitutional Loya Jirga.”²¹⁹

Notwithstanding the awareness of this reality, because of power politics purposes they persisted on the establishment of a strong government for the same reason as one should actually refrain from it. And the reason was because “... the insistence of the President of the Transitional Administration, Hamid Karzai, and his allies that in the present unstable circumstances, which are likely to persist in the foreseeable future, Afghanistan cannot afford a weak and fragmented central authority.”²²⁰

So, it is not something that is unknown, moreover, it was a rational choice which is being made since decades, in order to serve certain interests and goals instead of maintaining the stability in Afghanistan and consequently, of the region itself. But how can we frame this ‘reality’ politically? Which political theory would give us enough inclination to apply with the desired result? Since all the theories which are at our disposal, depart from a centralist approach (even the federalist models to a certain extent), we need therefore a theory that will include all parties within a demarcated territory. One of the theories that is created in order to be applied for those political and socially shattered societies, is the so-called ‘Consociational Democracy’ by Arendt Lijphart.²²¹

6.2.2 Arendt Lijphardt and Consociationalism

According to Lijphart’s Consociational Democracy, a transitory period is required, which can overcome the chaotic conflictious war-period. Instead of vesting all the power in one party, this approach favours power-sharing among different parties, the aftermath of a conflict. His theory is characterized by four main political institutions, namely the establishment of a grand coalition, a

²¹⁸ Hamish Nixon, *Building Democracy in Afghanistan: The Statebuilding Agenda and International Engagement*, *International Peacekeeping*, 14: 1, 26 — 40, p.14

²¹⁹ See, Simonsen, pp. 9-10

²²⁰ Simonsen, p.8

²²¹ Arend Lijphart, *Consociational Democracy*, *World Politics*, Vol. 21, No.2 (Jan., 1969), 207-225; Ian Lustick, *Stability in Deeply Divided Societies: Consociationalism Versus Control*, in *World Politics*, p.225

mutual veto, a proportional representation and segmental autonomy (Lijphart) A consociational democracy is a type of democracy, which emphasizes on the importance of power-sharing among different segments in society²²² (Power-Sharing and Postconflict Peace Periods Helga Malmin Binningsbø). Nevertheless, the eventual aim of consociational democracy on a long run, is again, to establish a modern state such as in Europe. So it's a kind of temporal, technical solution to bridge the fragile period after the conflict. In that sense it has nothing in common with the real intention of Althusius' theory, on which it claims to be based on.

.But still, Lijphardt's theory gives me sufficient grounds to argue and conclude, how much Althusius' theory would be applicable in Afghanistan's case. Even if his simulated theory by Lijphardt could bring peace and order in conflict-zones, than how effective would his actual theory be in case of Afghanistan or any countries like Afghanistan?

Power sharing, as we have acknowledged and which is explicated by Lijphard, or at least decentralization of political power, is indispensable for a stable, long-lasting state-institutions, especially in a fragmented societies like Afghanistan. Moreover, the question is whether centralization of political power (centralization of administration) is a plausible mean to attain control and establish good governance. Would government policies not better fall in place when the governance structure is split in several ethnical, tribal or even territorial constituencies, in order to penetrate good governance? Especially in Afghanistan?

6.2.3 *Afghanistan and Pashtunwali*

The relevance of Althusius' political theory in this respect is perfectly put by Hüglin, who describes his theory in the following way: "Althusius for the last time fully incorporated the medieval system of corporate and regional group life into political theory, but for the first-and last-time gave it a modern constitutional stability."²²³

Applied in our Afghan example, Althusius' theory, would enable to frame this kind of peasant life in Afghanistan into a modern framework and giving it at least a meaning and a place. The Afghan rural life is characterized by customary law and its due model of governance, which is based on group formations and dispute resolutions.

One of the ancient customary law that is present in Afghanistan, amongst others, is the so-called Pashtunwali, the customary law of the Pashtuns, and it is known for its odd though effective way of

²²² Helga Malmin Binningsbo, *Power-Sharing and Postconflict Peace Periods*, http://www.prio.no/files/file48120_binningsbo_aug2006.pdf p.2

²²³ Thomas Hüglin, Johannes Althusius: Medieval Constitutionalist or Modern Federalist? *Publius*, Vol. 9, No. 4, Federalism as Grand Design (Autumn, 1979), pp. 9-41, p33

solving disputes, keeping and enforcing order.²²⁴ I will not give a full outline of the Pashtunwali, but just enough elucidation to understand and to place Althusius' theory when I start to analyse it.

'Jirga's' for example, are the councils in Afghanistan who have the duty to govern a certain tribe, family, village or any other communities. The decisions of the Jirga are considered to be law and has a legal effect. Furthermore, it also functions as a kind of arbitrary court, trying to solve disputes. Just like in the DDC in the diamond industry, Jirga's aim is to repair the broken relations. The goal of the Jirga in its judicial function is to solve relationships and declare justice.

But "..., the centrality of *jirga* in the resolution of tribal conflicts in accordance to tribal customs has, sometimes, been interpreted as a challenge to the authority of the central state. It has, therefore, been considered as a rival to the state by certain governments in Afghan history."²²⁵

Therefore, instead of conceiving Jirga's as threat to "central governments", we have to include them into a political framework where they can retain their own communal autonomy, by enforcing their own legal systems, habits and culture the way they did for centuries. Instead of inducing them to change centuries old order for an order that is artificially, philosophically (analytically) created. "The Jirga' matches the social-economical "social life" and serves the needs of the population."²²⁶

Since they are connected and bound by interrelational ties, Jirga's main concern is to "restore" the relationship. This is brief portray how the Afghan society looks like from Pashtun Perspective.

6.3 Societal Federalism and the Political Philosophy of Althusius

6.3.1 Introduction

One of the difficulty in Althusius' political philosophy is to analyse it in an analytical way, in order to make it more comprehensible theoretically. Because by making his theory more analytical, and comparing it with other prominent philosophers, we would go astray to the importance of his theory in practice. Because his theory is already complicated enough by integrating "peasant life" into political framework. But still I will make an attempt by commencing in explaining his concept of sovereignty, and try to juxtapose this with the kind of sovereignty, which has influenced our political philosophy nowadays, namely that of Hobbes and Bodin.

²²⁴ Muhammad Junaid, *Living the Code of Honour: Pashtunwali and Entrepreneurial Identity of Afghans in Peshawar*; Bernt Glatzer, *The Pashtun Tribal System* Concept of Tribal Society Chapter 10 in: In G. Pfeffer & D. K. Behera (eds.): (Contemporary Society: Tribal Studies, Vol 5). New Delhi: Concept Publishers, 2002, pp 265-282.; Bernt Glatzer, *Zum Pashtunwali als ethnischem Selbstportrait* [Beitrag zu: Günter Best & Reinhart Köbler (Hg): *Subjekte und Systeme: Soziologische und anthropologische Annäherungen. Festschrift für Christian Sigraist zum 65 Geburtstag.*

Frankfurt:IKO-Verlag, 2000: 93-102.]; Palwasha Kakar, *Tribal Law of Pashtunwali and Women's Legislative Authority*

²²⁵ Ali Wardak, *Jirga, A traditional Mechanism of Conflict Resolution in Afghanistan*, p.4

²²⁶ Idem

But before I embark on the explanation of Althusius' Societal-Federalism, I will start elucidating the heart of political power namely that of sovereignty. Only then we will comprehend the differences between Althusius' political philosophy with those who has dominated our mainstream political theory, notably Bodin and Hobbes.

6.3.2 *The concept of Sovereignty*

The concept of "sovereignty" has been the first attempt to establish an independent platform on which a whole political theory could lean on. It was first brought up by Bodin, whose aim it was consolidate all power to "issue laws", in one institution. It was a political theoretical masterpiece in which the framework for political power of issuing laws were stated, without any recourse being made to religion or any perched theories. The concept of sovereignty, which is derived from the Romans²²⁷, enabled to establish a theory about "enforcing laws", that stood on its own.

The need to construct this consolidated theory of political power, was the result of political fragmented environment after the so-called "investiture controversy"²²⁸, and the aftermath which was characterized by Feudalism, in which the power of kings and dukes were not clear and clarified enough to exert the necessary power. Bodin's conception of sovereign made an end to this controversy by vesting all the power (the power to issue laws) to a supreme power.

He created an autonomous "shelf" (layer) on which the "land" could rest on. All subsequent political theories could evolve, because of this concept of sovereignty developed by Bodin. According to Bodin, the absolute ruler has the ultimate power over the territorial realm, which means the territorium itself.

According to Bodin the ruler cannot be bound by any law or legal rules. As he maintains: "Those who are sovereign must not be subject to the authority of anyone else. . . . This is why the law says that the prince must be excluded from the power of law. . . . The law of the prince depends exclusively upon his pure and sincere will."²²⁹

Bodin further clarifies why the sovereign should not be bound by law, which he himself has created. He explains, "For as the great sovraigne God, cannot make another God equall unto himselfe, considering that he is of infinit power and greatness, and that there cannot bee two infinit things, as is by naturall demonstrations manifest: so also may wee say, that the prince whom we have set down as theimage of God, cannot make a subject equal unto himself."²³⁰

The sovereign conception of Bodin departs from a so-called territorial realm, which means that the prince/ the ruler controls the territory which he is ruling. The sovereignty according to Bodin, is

²²⁷ Helene M.Halter, *Bodin and althusius on the theory of Sovereignty*, p.19

²²⁸ R. C. van Caenegem, *Legal History: a European Perspective*

²²⁹ Jean Bodin, *The Six Bookes of a Commonweale*, (Cambridge: Harvard University Press, 1962), The First Booke, Ch. II, 2.

²³⁰ Jean Bodin, *The Six Bookes of a Commonweale*, (Cambridge: Harvard University Press, 1962), The First Booke, Ch. X, p. 155

territorially linked and is absolute. The sovereign rules his territory with indivisible and absolute power. However, still Bodin retains a kind of duality between the political society and civil society. The importance of Bodin in modernization of governing institutions, is the centralization of governmental institutions and managing to construct a hierarchical structure, which replaced the old divinity related structure of governance.

The king rules his own territory while the citizens have power over their own realm. The peculiarity of Bodin is that he endows the ruler (king/sovereign) the power to rule over his territory. However, as Althusius maintains, this two-tone power structure is contradictory since it creates two sovereigns at the same time, instead of one. Althusius argues that “Bodin defends the opposite position by distinguishing between the sovereignty of the realm and of the ruler. But if sovereignty is therefore twofold, of the realm and of the king, as Bodin says, “I ask which is greater and superior to the other? It cannot be denied that the greater is that which constitutes the other and is immortal in its foundation, and that this is the people.”²³¹

This so called duality in political power between the realm of the territory and citizens has been solved by Hobbes, who has therefore been heralded as the first modern political philosopher, and the founder of legal positivism and sociology. The way Hobbes reasoned is going slightly further than Bodin and its based on the nominalistic philosophy, which avows that God has left the earth to rational human beings, who are able to construct their own world order according to their own rational capacity. This is also why Hobbes has been considered as a political nominalist²³². Hobbes political philosophy of the great Leviathan is made in order “to keep all in awe”, for the sake of peace. Because all individuals has the same equal rational capacities and hopes and desires, all these rational individuals will sooner or later clash. That is why, for the sake of their own well-being, they have to submit themselves, to a “god on earth” the Leviathan, by way of a covenant. Only than, so only when a “Leviathan” takes power over the citizens, by transferring the sovereignty to him, they will achieve piece.

Since individuals bear the same rational capacities, “From this equality of ability, ariseth equality of hope in the attaining of our ends. And therefore if any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies; and in the way to their end, which is principally their own conservation, and sometimes their delectation only, eandevour to destroy, or subdue one another.” In order to prevent rational human beings to go in war with each other, they have relinquish their rights to supreme power namely the sovereign, who will protect their rights in name of those individuals. A commonwealth, or a state, “...is said to be instituted, when a multitude of men do agree, and covenant, every one, with every one, that to whatsoever man, or assembly of men, shall be given by the major part, the right to present the person of them all, that s to say, to be their representative; every one, as well he that voted for it, as he that voted against it, shall authorize

²³¹ Althusius, *Politica*, p.55

²³² See, J.W.N. Watkins, *Philosophy and Politics in Hobbes*, The Philosophical Quarterly, Vol 5, No.19, April, 1955

all the actions and judgements, of that man, or assembly of men, in the same manner, as if they were his own, to the end, to live peaceably amongst themselves, and be protected against other men.”²³³ By vesting the sovereign power to an individual outside the society, and conferring him the supreme power to enact laws, and who is also not bound by the same laws, was the beginning of the constitution of the modern state, which resembles as Carl Schmitt said “ a secularisation of theology”.²³⁴ God, did leave the earth, but was superseded by individuals who are rational beings, and could control and govern the territorial and social realm by (supreme) sovereign power. Eventually, what has been created is a top to bottom power structure, whereby God has left the earth, and cleared the way for rational human beings. This was the beginning of positive law, with John Austin as first philosopher of positive law. Positive law, was a kind of inauguration, or completion of vesting law outside the society.

6.3.3 Althusius and his Concept of Sovereignty

“The less the power of those who rule, the more lasting and stable the imperium is and remains. For power circumscribed by definite laws does not exalt itself to the ruin of subjects, is not dissolute, and does not degenerate into tyranny.”²³⁵

In contrary to Bodin, Althusius places the political power, ‘sovereignty’, within association or community. The reason he gives is that, these associations bear “social life” and should therefore maintain the political power. The reason for vesting the sovereignty within the society (community and association), is, as he explains, “We have thus far spoken of the first part of special right of sovereignty, namely, the right established to procure the material necessities of life.”²³⁶ As I will enunciate further in the next section, “that which procure ‘social life’”, is called symbiosis and carries the heart of politics in Althusian political theory.

In Althusius’ view, “This right of the realm, or right of sovereignty, does not belong to individual members, but to all members joined together and to the entire associated body of the realm. For as universal association can be constituted not by one member, but by all the members together, so the right is said to be the property not of individual members, but of the members jointly.”²³⁷ Therefore, “...what is owed to the whole is not owed to individuals, and what the whole owes individuals do not owe. Whence it follows that the use and ownership of this right belong neither to one person nor to individual members, but to the members of the realm jointly. By their common consent, they are able to establish and set in order matters pertaining to it. And what they have once set in order is to be

²³³ Thomas Hobbes, *Leviathan*, p.159

²³⁴ Carl Schmitt, *Political Theology II: The Myth of the Political closure of any Theology*

²³⁵ Althusius, *Politica* <http://oll.libertyfund.org/Home3/EBook.php?recordID=0002>, p.68

²³⁶ Idem, p.63

²³⁷ Idem, p.54

maintained and followed, unless something else pleases the common will. For as the whole body is related to the individual citizens, and can rule, restrain, and direct each member, so the people rules each citizen.”²³⁸

In other words, to define the concept of “popular sovereignty” Althusius” explains, “Thus, sovereignty can be defined as co-proprietorship by all the society members of the goods and the rights of the association. The sovereign is neither the proprietor nor the life-tenant, since sovereignty, in principle and in fact, belongs to the people represented by the collegial organization of the federated members. The sovereign is only the “dispenser, the administrator, or the proxy” of the laws of the association.”²³⁹

This Althusian concept of sovereignty, can therefore be considered as a straightforward attack to Bodin’s concept of sovereignty, which he perceives as deceiving and inaccurate. In his own concept of sovereignty, Althusius attaches political power to “the people”: “This means essentially that it is “people” which will have the right to judge about what they want and how they want to live their live. The people, or the associated members of the realm, have the power of establishing this right of the realm and of binding themselves to it.”²⁴⁰

In this respect Althusius differs rigidly with Bodin on the locus of political power. As he describes and clarifies his distinction with Bodin, “Bodin disagrees with our judgment by which supreme power is attributed to the realm or universal association. He says that the right of sovereignty, which we have called the right of the realm, is a supreme and perpetual power limited neither by law nor by time. I recognize neither of these two attributes of the right of sovereignty, in the sense Bodin intends them, as genuine. For this right of sovereignty is not the supreme power; neither is it perpetual or above law.”²⁴¹

I cannot stress enough on this quoted phrase of Althusius, in which he unmistakably sets out the eminent difference between his concept of sovereignty and that of Bodin. Political power should not be consolidated in the hands of one individual (or institution), but should belong on that part of the society, which deals with “social life”. It constitutes the fundamental framework of his political theory of the so-called “societal federalism”, which I will outline hereunder.

He considers Bodin’s concept of sovereignty as a blanc cheque for a “robbers band “ as he argues, “Note the argument of Romans 13: the minister of God is for your good. If he is the minister of God, he can do nothing contrary to the commandment given by his Lord. Indeed, an absolute and supreme power standing above all laws is called tyrannical. Bartolus says, “great is Caesar, but greater is the truth.” Augustine says, “when justice is taken away, what are realms except great bands of robbers?”

²³⁸ Idem, p.54

²³⁹ Idem, p.29

²⁴⁰ Idem, p.54

²⁴¹ Idem, p.55

On this point, however, not even Bodin disagrees with us. For he does not release the power he calls supreme from the imperium of divine and natural law.”²⁴²

Another eloquent detail which is worth to mention, is the link, that is assumed to exist between Althusius’ “popular sovereignty” with that of Rousseau. Because of the similarity in their concept of sovereignty, there arose a confusion about Althusius’ concept of “popular sovereignty” and that of Rousseau. One started to interpret Althusius’ popular sovereignty as a “parliamentary democratic” theory just like Rousseau. This reading is based on a misconception, since Althusius’ Popular sovereignty denotes in essence, “popular governance”.²⁴³ While Rousseau’s “popular sovereignty” succeeded and complied with Bodin’s and Hobbes’ account of sovereignty, Althusius, opposes this reading of sovereignty rigorously. It is this reading of sovereignty, which aims at centralization of political power by consolidation all the power in one institution (individual).

We can conclude from the above elaborated outline that Althusius’ concept of “popular sovereignty”, constitutes the cornerstone of his political theory called “societal federalism”. This concept of sovereignty differs in this aspect with Bodin and Hobbes, that the society, by way of communities and associations, retain their political power. Political power should not be centralized, but in the contrary, fragmented. This is the crucial difference between Althusian Political philosophy and that of Bodin and Hobbes.

As Hüglin concluded, “Finally, through the extension of royal administration, centralization of power, market formation, and the unification of law with the state and its identification with a precise territory, sovereignty became associated with the state, which gradually reduced local autonomy.”²⁴⁴

6.3.4 The ‘Symbiosis’

‘Symbiosis’ constitutes the heart of Althusius’ political philosophy, which departs from a “bottom to top approach” Moreover, it will contribute to a better understanding of the concept of “popular sovereignty” and furthermore, it will illuminate his theory of “societal federalism” elaborately. According to Althusius: “Politics is the Art of Association (*consociandi*) men for the purpose of establishing, cultivating, and conserving social life among them. Whence it is called “symbiotics.” The subject matter of politics is therefore association, in which the symbiotes pledge themselves each to

²⁴² Idem

²⁴³ See, Alain de Benoist, p.51: Much more interesting is the comparison between Althusius’ and Rousseau’s ideas. Although Rousseau does not quote Althusius directly, Gierke claims that Rousseau read and used Althusius’ *Politica methodice*

²⁴⁴ Thomas Hueglin, *Johannes Althusius: Medieval Constitutionalist or Modern Federalist?* Publius, Vol. 9, No. 4, Federalism as Grand Design (Autumn, 1979), p.18

the other, by explicit or tacit agreement, to mutual communication of whatever is useful and necessary for the harmonious exercise of social life.”²⁴⁵

‘Symbiosis’ is, to put it bluntly, the way daily life is organized, handled and dealt with by people in a giving territorial surrounding, somewhere. As he further states “This essence of “symbiosis” is the real life or the way human beings has settled down there own habits and daily duties.”²⁴⁶ What they do on a daily basis, is what constitutes the centre of political power.

Moreover, whatever there is on the floor constitutes reality to Althusius and has to be respected, instead of changing the reality based on a theoretical, abstract ideals. In other words, in symbiosis lies the essence of the ‘acceptance of the way certain things are’, instead of the endeavour to transpose it. ‘Symbiosis’ is crucial a element in Althusius’ political philosophy, because it is only symbiosis, which elevates or introduces the “peasant life” into political theoretical framework. It makes it possible for political inquiry and structure, instead of doing the reverse. Or as I have put in my introduction, it brings politics back to the “particularity”, instead of the particularity into “politics”. But what do I mean by that, “bringing the politics back to particularity?”

According to Althusius’, “ The end of political “symbiotic” man is holy, just, comfortable, and happy symbiosis, a life lacking nothing either necessary or useful. Truly, in living this life no man is self-sufficient, or adequately endowed by nature.”²⁴⁷ The simplicity of political life is hereby expressed, stressing that whatever is out there existent in the social unit, should be perceived as politics. This assertion in reading Althusius political theory is reaffirmed by Hüglin who even argued that “--- the purpose of economic activity is the acquisition of whatever is necessary for food and clothing; the subject of politics is pious and just symbiosis; its end is the governing and preserving of association and symbiotic life. Because from politics alone arises the wisdom for governing and administering even the family, all symbiotic association and life is essentially, authentically, and generically political. But not every symbiotic association is public.”²⁴⁸

We have to bear in mind that whatever Althusius’s tries to portray as “real life” does not contain any value position towards “real- life” as such. Which means that Althusius’ political theory is not idealistic, in the sense that he does not attain hypothesis to achieve a potential utopia. In the contrary. real social life will have its own conflict, trouble and issues. Whatever Althusius argues with ‘symbiosis’ is that real life has already his own structure, in living a social life, which has to be respected. It is in this organizational form, commenced with family, clans, communities, tribes and so on, that social life is organized in several levels. Both these levels, which I will explain further on, its natural continuation of that what gathers to get together to serve the needs of others that are inferior.

²⁴⁵ Althusius, *Politica*, p.5

²⁴⁶ Idem, p.28

²⁴⁷ Idem

²⁴⁸ Thomas Hueglin, *Johannes Althusius: Medieval Constitutionalist or Modern Federalist?* Publius, Vol. 9, No. 4, Federalism as Grand Design (Autumn, 1979), p.16; see also Althusius, p.35

The essence of ‘symbiosis’ for Althusian Political theory lies in its function as to include factual situation (or the community and law approach, which I have elaborated above) a political significance. Symbiosis is the conceptualisation of this empirical statement into something tangible in theoretical approach.

The clue is that an order already exists in the shape of family, community or associations, and this communal bond, are tied up by mutual (social) contracts, which I will get to that later on. In this respect it suffices to mention that contractual relationship according to Althusius constitutes the official communication of free will of individuals to each other that shapes the bonding character. As he states, “The symbiotes are co-workers who, by the bond of an associating and uniting agreement, communicate among themselves whatever is appropriate for a comfortable life of soul and body. In other words, they are participants or partners in a common life.” So they are part of the “symbiosis”, in order to survive. Basically this is what Althusius’ tries to explain. Because for Althusius “more than for Aristotle, man is a social animal, and the symbiotic life is for him so natural that without it he could not realize himself. . . . Thus, this is not free choice, but an *absolute necessity*, which pushes the individual toward the vital core that gives him more than social life: life *tout court*.”²⁴⁹

A ‘symbiosis’ is an essential element of life and social life in particular. The individual cannot live on its own in an atomistic way. Simply because the individual, according to Althusius, cannot survive. As he maintains “The longer an individual lives isolated, the more impossible it becomes for him to settle and live honestly And since the remedy seems to be in symbiotic life, he is driven and almost forced to embrace it. . . . If he wants to live in a simple manner, it is the latter [symbiotic life] that will require him to utilize all of his virtues, which remain inactive outside of this union.”²⁵⁰

Because, “For when he is born, destitute of all help, naked and defenseless, as if having lost all his goods in a shipwreck, he is cast forth into the hardships of this life, not able by his own efforts to reach a maternal breast, nor to endure the harshness of his condition, nor to move himself from the place where he was cast forth. By his weeping and tears, he can initiate nothing except the most miserable life, a very certain sign of pressing and immediate misfortune. Bereft of all counsel and aid, for which nevertheless he is then in greatest need, he is unable to help himself without the intervention and assistance of another. Even if he is well nourished in body, he cannot show forth the light of reason. Nor in his adulthood is he able to obtain in and by himself those outward goods he needs for a comfortable and holy life, or to provide by his own energies all the requirements of life. The energies and industry of many men are expended to procure and supply these things. Therefore, as long as he remains isolated and does not mingle in the society of men, he cannot live at all comfortably and well while lacking so many necessary and useful As an aid and remedy for this state of affairs is offered

²⁴⁹ Thomas Hueglin, *Johannes Althusius: Medieval Constitutionalist or Modern Federalist?* Publius, Vol. 9, No. 4, Federalism as Grand Design (Autumn, 1979), p.16; see also Althusius, p.35

²⁵⁰ Alain de Benoist, *The First Federalist: Johannes Althusius*, p.32

him in symbiotic life, he is led, and almost impelled, to embrace it if he wants to live comfortably and well, even if he merely wants to live. Therein he is called upon to exercise and perform those virtues that are necessarily inactive except in this symbiosis. And so he begins to think by what means such symbiosis, from which he expects so many useful and enjoyable things, can be instituted, cultivated, and conserved. Concerning these matters we shall, by God's grace, speak in the following pages."²⁵¹

To wrap up, 'symbiosis' constitutes the anatomy of Althusian "popular sovereignty". The way social life is organized constitutes the foundation of Althusius' concept of sovereignty. Individuals are born as a 'social animal', and therefore need to cooperate with other individuals in order to survive.

"Symbiosis", however, does not preclude the existence of the individual in the political realm. It only stresses the need of cooperation among each other.

6.3.5 *Communication and Contract*

As Elazar already pointed out in the introduction to Althusius' work, "The foundations of Althusius' political philosophy are covenantal through and through. (covenant) is the only basis for legitimate political organization."²⁵²

First of all 'contract', to Althusius, is the confirmation of agreements that is the result of 'communication' among the 'symbiotes. The foundation of the relationship between 'symbiotes' should therefore be framed as 'communication' and 'contracts' together, since contract evolves out of 'communication'. It is "The pact or covenant is then the philosophical fundament of the basic relationship among men. Althusius calls this relationship symbiosis, characterized by "communicatio" and "consensus." It is much more than a contract in its literal sense, not a bargain among individual interests, but a concept of living together in mutual benevolence organized politically in a plurality of social organizations."²⁵³

'Communication' is the tool with which 'consensus' is reached among individuals. And 'consensus' is necessary if individuals want to cooperate together in a social unit. This explains why contract theory, or as he calls 'social contract theory', is essential to Althusian political theory.

His "social contract theory" should not be confused with Hobbesian or Lockean contract theory, because in Althusius' theory, it is not a hypothetical contract between the ruler and people, but a contract between individuals and social units among each other As Alian de Benoist rightly stressed,

²⁵¹ Althusius, *Politica*, p.29

²⁵² Idem, p.15 (Daniel J. Elazar)

²⁵³ Thomas Hueglin, *Johannes Althusius: Medieval Constitutionalist or Modern Federalist?* Publius, Vol. 9, No. 4, Federalism as Grand Design (Autumn, 1979), p.16; see also Althusius, p.14

“For Althusius, however, the “social pact” is not the result of individual egoism and its tendency to make contracts on the basis of personal interest, but rather the result of the natural disposition of people to reciprocal sympathy based on shared values. In this sense, his doctrine is incompatible with methodological individualism.”²⁵⁴

Contract in Althusius's political theory has a different function than in other mainstream political philosophies. While the theories from Hobbes to Locke and from Rousseau to Rawls are mainly hypothetical presumptions, in order to embark from there on to a political theory, Althusius on the other hand departs from how inter-human relationships work in reality. And according to Althusius it is the contract between individual and associations that constitutes the foundation of symbiosis and of his associationalist political philosophy.

Althusius discerns between the so called “Herrschaftsvertrag” and “Sozialer Vertrag”. As Otto von Gierke stated: “Althusius legt seiner Theorie die bis ans Ende des vorigen Jahrhunderts herrschend gebliebene, ja überhaupt erst von Hobbes angefochtene Zerreißung der den Staat angeblich konstituierenden Willensvorgänge in die beiden Glieder des Gesellschaftsvertrages und des Herrschaftsvertrages zu Grunde”²⁵⁵ The first one is what we used to call “social contract”, namely the kind of contract one makes between the ruler and the people. But I have to stress that even in this form of contract, it is a “real” contract and not a hypothetical one like with Hobbes, Locke and Rousseau. Althusian contract theory resembles the kind of contract one makes in marriages between two individuals. They are real contracts, attaching real duties and rights to both individuals. The same with the “Herrschaftsvertrag”.

6.3.6 *The Political order of Associations and Communities*

Hence, the reason why sovereignty should belong to the association, is because the real political power belongs there where “social life” unfolds. “Social life”, or as he calls it “symbiosis”, represents the true depiction of how people regulate their own life. It is a place where individual minds come together, where by way “consensus” and “contract” relationship are being put. This whole enterprise is what Althusius calls “popular sovereignty”.

If sovereignty is enclosed within social units, like associations and communities, then how would a political order look like with associations? How would the political framework be able to regulate all these small associations and communities? This is what Althusius calls “societal federalism”. It is a kind of federal structure based on associations and communities. Before I go further in explaining this

²⁵⁴ Alain de Benoist, *The First Federalist: Johannes Althusius* p.26

²⁵⁵ Otto von Gierke, *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien: zugleich ein Beitrag zur Geschichte der Rechtsystematik* p.76

political framework of “societal federalism”, I first want to outline the several social units as he explains.

As mentioned above, internally, a social unit is comprised by “communication” and covenants” among symbiotics. This structure within the social units is also practice among the social units. So Althusius’ framework for an associational political theory is as he described “The material of politics is the aggregate of precepts for communicating those things, services, and right that we bring together, each fairly and properly according to his ability, for symbiosis and the common advantage of the social life.”²⁵⁶

Again, the focal point in Althusius’ political theory is the way in which those social units interrelate with each other. In other words, it clarifies the theory of “societal-federalism”. But before I embark on explaining how societal federalism functions according to Althusius, I will just clarify the different conceptions that take part in this political framework of societal federalism by Althusius.

With the private association Althusius wants to denote all those associations that came into being in a ‘natural’ way. Which means families, kinships communities of families and Kinships, but also ethnical or religious communities, would all fall under this branch. Althusius maintains that: ”There are two types of simple and private association. The first is natural, and the second is civil. The private and natural symbiotic association is one in which married persons, blood relatives, and in-laws, in response to a natural affection and necessity, agree to a definite communication among themselves. Whence this individual, natural, necessary, economic, and domestic society is said to be contracted permanently among these symbiotic allies of life, with the same boundaries as life itself. Therefore it is rightly called the most intense society, friendship, relationship, and union, the seedbed of every other symbiotic association. Whence these symbiotic allies are called relatives, kinsmen, and friends.”

²⁵⁷

So, natural associations are relationships and bondages that has arisen due to natural chain of circumstances and not by a rational construction, like forming a ‘bakery guild’ or trade union. What makes all these natural associations like families and kinships have in common is the fact these ”..simple and private natural association is nourished, fostered, and conserved by private functions and occupations through which these associated symbiotes communicate each to the other every aid and assistance needed in this symbiosis. They do this according to the judgment of the chief and the laws of good order and proper discipline prescribed by him for inferior symbiotes. These functions are either agricultural, industrial, or commercial. ... Moreover, there are two kinds of private and natural domestic association. The first is conjugal , and the second is kinship . The conjugal association and symbiosis is one in which the husband and wife, who are bound each to the other, communicate the advantages and responsibilities of married life...”

²⁵⁶ Johannes Althusius, *Politica*, 1614, p.31

²⁵⁷ Idem, p.34

This is of course very relevant to our example of Afghanistan, where we have many tribes, kinships communities, kinships and clans who shape the political geography of the country. According to Althusius they all bear a political power, simply because they maintain symbiosis, living of “social life”. He explains that a “Kinship associations--is one in which relatives and in-laws are united for the purpose of communicating advantages and responsibilities. This association arises from at least three persons, but it can be conserved by fewer. Frequently it consists of a much larger number. ... He is called the leader of the family or of any clan of people, who is placed over such a family or clan, and who has the right to coerce the persons of his family individually and collectively. ...”²⁵⁸

Kinships as association is something we see often in Afghanistan. Moreover, one might even argue that the whole region surrounding Afghanistan like Pakistan Iran the Middle east even the Balkans and Afrika, or even a large part of Asia is characterized by “Kinships”.

The way these Kinships exercise their political powers evolves very naturally. For example in the Kurdish clan system (ashiret) or (larger) families, one might find spontaneous council meetings if an important decision has to be taken that concerns the family. The way those councils are composed of depends on experience and the position of the family member. Age and their subsequent respectable position is important to take serious part in these councils.

The political nature and the economical (household linkage) could explain us a lot about there relation between (large families and their illegal activities to attain financial means. Either in Afghanistan, Turkey or Italy. As Althusius maintained, “The responsibilities of the family and relationship are services and works that the member owes to his kinsman, such as forethought, care, and defense of the family and of the members of the household. ... The leadership in meeting these responsibilities rests upon the paterfamilias as master and head of his family. ... Upon the older members of the family rests the duty of correcting and reprehending their younger kinsmen for mistakes of youthful indiscretion and hotheadedness. ...”²⁵⁹

A community is on the other hand a kind of collection of families and kinships, clans, who live together in a demarcated area. What binds them together is the similarities on the ground where they live, language the same destiny but also, the same history by living in the same neighbourhood or village, and trust. “The community”, according to Althusius, is “an association formed by fixed laws and composed of many families and collegia living in the same place. It is elsewhere called a city in the broadest sense, or a body of many and diverse associations.--- Furthermore, this community is either rural or urban. A rural community is composed of those who cultivate the fields and exercise rural functions. ”²⁶⁰

²⁵⁸ Idem, p.35

²⁵⁹ Idem, p.40

²⁶⁰ Idem, p.41

Next to natural association which erupts out of nature, we have “created” or “civil associations”. He explains civil association as follows: “Civil association--That is to say, they agree among themselves by common consent on a manner of ruling and obeying for the utility both of the whole body and of its individuals.----bakers, etc— “The types of collegia vary according to the circumstance of persons, crafts and functions. Today there are collegia of bakers, tailors, builders, merchants, coiners of money, as well as philosophers, theologians, government officials, and others that every city needs for the proper functioning of its social life.” In other words, “An urban community is composed of those who practice industrial functions and pursuits while living an urban life.”²⁶¹

Next to private associations like ‘natural’ -or ‘civil’ associations we find public associations. These public associations are crucial, since they are attached with “public duties, which we would call the government nowadays (in opposition to state). They are assigned with the duty to deal with public affairs, but they are in associational essence not higher or lower than any other private association. Although the private unions are also part of Althusius’ political theory, since they bear sovereignty within themselves, public associations are the ones that are externally political active, meaning that they would exert, as we would call it today, public functions. Applying public duties is not something left for private associations, but public associations, like city council, or village councils, those are associations that are set in forth in order to fulfil a public duty. The linkage between private and public associations are very well put by Althusius who proclaims that: ”With this discussion of the civil and private association, we turn now to the public association. For human society develops from private to public association by the definite steps and progressions of small societies. The public association exists when many private associations are linked together for the purpose of establishing an inclusive political order. It can be called a community, an associated body, or the pre-eminent political association. It is permitted and approved by the law of nations.”²⁶²

It is essential to note that Althusius’ political theory is characterized by associations only, which means that the power of a public association lies in the hand of other associations together. In other words, we trace here the real essence of a political system, “from bottom to top” instead of “top to bottom”. The whole system is characterized by contracts and consent, from all the way down in the chain, from family to the top, which is “the Commonwealth”- association. Because the accountability is done to the lower associations and their existence lies in the hands of other members (or members), any public policy that is being employed is executed in such a way the order that stays the closest to the receiving social unit has the duty. This is also called “subsidiary principle”.

²⁶¹ Idem, p.41

²⁶² Idem, p.39

6.3.7 Social-Federalism and Subsidiarity

Althusius made the distinction between public and private associations. While private associations deal with private matters, public associations with private matters. Althusian political framework comes down to a well ordered political structure among those associations, in which their relationship with each other are regulated in an appropriate manner. One of the core principle in his theory is the so-called Subsidiarity principle, which is currently the core leading principle in European Union matters. In other words, "The articulation of and equilibrium between different levels is guaranteed by the principle of subsidiarity."²⁶³

Subsidiarity connotes, as Althusius himself explains that "Superior to every member, he is inferior to the whole that he presides over, whose opinions are his obligation."²⁶⁴ Every unit is responsible for its own matters, and no unit should intervene in matters that does not belong to its power. Higher social units should only take up those duties which are left by the lower ones. "Politically, the principle of subsidiarity signifies that higher levels must always be limited in the sense that they do not intervene unless and until a lower level is unable to carry out a required task. This is a principle of equilibrium and regulation that aims to keep initiatives at the lower level, and to protect them from being subsumed by those above."²⁶⁵

Althusius theory of societal federalism is characterized by so-called "subsidiarity principle".

Subsidiarity principle connotes that "...constitutionally the ruler is subordinate to the association as the constitutive body, and legally he is restricted to a general administration within the constitutional frame, leaving the sphere of the "singuli" to self-determination."²⁶⁶

The ordering "societal Federalism" is not similar to the regular federalism which we are acquainted with. In the regular federalism, the hierarchical structured institutions are administration of central governance, which are decentralized. Moreover, they all constitute an administrative sub-unit with a whole political framework. One might claim that the so-called Althusian Public associations might be ordered in such a hierarchical way but not necessarily. The essential guiding line is not the hierarchical structure but the subsidiary principle. If a unit does not need any other unit to reside above him than there is no need.

²⁶³ Alain de Benoist, *The First Federalist: Johannes Althusius*, p.33

²⁶⁴ Alain de Benoist, *The First Federalist: Johannes Althusius*, p.35

²⁶⁵ Idem, p.55

²⁶⁶ Thomas Hueglin, *Johannes Althusius: Medieval Constitutionalist or Modern Federalist?* Publius, Vol. 9, No. 4, Federalism as Grand Design (Autumn, 1979), pp. 9-41; p21

6.4 Conclusion

The main question I posed in my introduction was how to establish political stability in Afghanistan, after many wars and failed constitutions. I argued in this chapter that Althusius' concept of "societal federalism" would bring stability in the already, by tribal, ethnical and communal diversity fragmented society. Instead of trying to centralizes the government, one should try to elevate, as Althusius called it, 'peasant life' to political theory. This can only be achieved by attaching sovereignty not to an individual outside the society, but vesting it within the social units themselves. Each social units is at the same time a political unit.

With his concept of "popular sovereignty", Althusius tried to argue how social units retained political power. One of the elements of popular sovereignty is "symbiosis", or "social life". He argued that "social life" beard political essence because it was the true depiction of how individuals interrelated with each other. The way they interrelate is by way of 'communication' and 'consensus'. In this way a true and natural cooperative relationship will evolve, and this again constitutes the cornerstone of Althusian political philosophy.

The social units, which he discerns between public and private associations, comprises his whole political landscape. The theory of "societal federalism" is concentrated on the relationship between all those social units with each other. The focal principle that regulates the relationship between associations is called "subsidiarity principle", which connotes that higher units should only deal with issues, which the lower social units (associations) cannot handle.

Conclusion

“How could Legal Pluralism Liberate citizens from oppressive value systems imposed by the state?” This research question was my point of departure from, which I embarked on my journey in finding the answer. I came to the conclusion that Legal Pluralism can only liberate citizens from oppressive value systems imposed by the (nation) state, only by way adopting legal and political system of “social units”, or communities and associations.

The first step I took, is to analyse the concept of legal pluralism and try to develop a comprehensive and solid concept of legal pluralism, which I can apply in my solving my research question, For this purpose I concluded that in the application of the concept of legal pluralism one should not be obsessed with legal- normative rules and focus on the normative side, but try to see it more comprehensively, including the organizational-institutional framework in which legal rules are generated and accommodated.

This could be the only solution to circumvent the ambiguity, misconception and the analytical folly of Legal Pluralism, which was rightly stated by Tamanaha and Merry. However, Tamanaha’s solution to develop a non-essential conception of law” could not contribute to a solid definition of law on which legal pluralism could apply.

This is why I argued, first of all, that it is not so much the state law, but the inclination and the belief that law has to be logical in its framework, from which we have to abstain. Only than we could conceive law as socially embedded, and try to grasp the phenomenon of law as a part of a whole process. This brought me to Eugen Ehrlich’s conception of law, which I have endorsed as a suitable conception of law on which my comprehensive concept of legal pluralism could be based on.

The reason I gave was that Eugen Ehrlich’s account of “living law” embarked from an institutional-organizational framework, namely social units’ like communities and association. He argued that law is a product of the totality of a ‘social unit’, managing that the totality of social rules accommodates the whole legal system, but this does not mean that legal rules has to be equated with social rules.

After having concluded the fact that Eugen Ehrlich’s account of Living Law would be a suitable basis to underlie the concept of legal pluralism, in the second chapter I continued further in analysing how community or association could generate legal systems.

In my exploration in locating the locus of law with community I embarked on the rather newly developed “ community and Law” approach, and employed the typification of Ferdinand Tönnies, in trying to locate the locus of law. I concentrated on three elements, namely, *Trust*, *Values* and *Alternative Dispute Resolution* as the three elements which (simultaneously) constitute the locus where law could be found in a community system. I juxtaposed these elements against three elements, which can be conceived as characteristics of our mainstream modern concept of law, namely *Logic*, *Rules* and *Judiciary* system.

By way of juxtaposing these elements, it would appear eventually how “community and law” approach functions and how to locate law in communities and social units. Instead of concentrating on, whether certain behaviour is legal or not, by pointing on these enumerated elements one could trace the legal source within a community system.

In order to illuminate this I have used the Jewish Diamond Industry in order to illuminate how those so called “community and law approach” functions in practice. The reason why the Diamond Industry could retain its autonomy for so many years from the nation state, is by application of their system or regulation. The diamond Industry is characterized by a system of Trust and Reputation, a Value systems which is mainly based on Jewish and family values, and on the function of the bourses (DCC in New York) as an organ that exerts the alternative Dispute Resolution process amongst others.

After this analysis on “community and Law” approach, I tried to refute the main arguments against community approach by predominantly liberals.

I commenced this chapter with a short introduction of Kymlicka’s grievances on Millet systems. As an answer to Kymlicka’s grievances that the individual community would oppress the individual, I posed two arguments against his assertion. The first argument I used, was that the harm principle constituted enough protection to protect the individual against unnecessary harm to fellow individuals.

But for the proper use of the harm principle, I argued that one could trace two dimension with John Stuart Mill’s Harm-principle. One, and the foremost dimension is the so called, “Passive Dimension” With Passive Dimension I denoted that the state should refrain from any intervention in the society. The second dimension, namely the active dimension” constituted the active intervention in the society in order to protect the individualist unnecessary harm from other individuals, but has to be employed with diligence.

Having developed a concept of Legal Pluralism and having described the way “Community and Law” approach functions, and refuting the criticism against community approach from liberal point of view, I reached the stage in which I tried to apply the result of my research question to Afghanistan.

Initially, I gave brief outlines about the four of the nine constitution which Afghanistan has, and explained why these constitutions have failed. My argument was that all these constitutions, whether or not inhibiting (weak) Legal Pluralism, aimed at centralization of power, in short or longer run. This is why all these constitutions has failed.

I concluded my thesis with a chapter on Althusius’ theory of “Societal Federalism”, which emphasises on a political framework that enables and accommodates the existence of communities and associations.

The social units, which he discerns between public and private associations, comprises his whole political landscape. The theory of “societal federalism” is concentrated on the relationship between all those social units with each other. The focal principle that regulates the relationship between associations is called “subsidiarity principle”, which connotes that higher units should only deal with

issues, which the lower social units (associations) cannot handle. The way these “social units” are ordered, is called” societal federalism”.