Law as a resource in agrarian struggles

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PREFACE

In this book we present some of the research in the field of agrarian law undertaken by staff members and junior (PhD) researchers of our department during recent years. Since our field of study covers law as it relates to agriculture and rural development in Europe and third world countries, the individual contributions cover a wide range of problems, both in terms of the topics chosen and their geographic location. In addition, most papers aim to contribute to the more general theoretical and methodological problems which we face in the study of law in society. The occasion for publishing this book is that our department in its present form has now existed for ten years, and that we have created our own custom of celebrating every five years. We also did this five years ago, in 1986, with the book *Recht in ontwikkeling: Tien agrarisch-rechtelijke opstellen* (Deventer: Kluwer, 1986). The present book differs from the first in several respects, which characterize the developments which have taken place in our department since then.

In the first place, we have chosen to write in English, reflecting the increasing international orientation of all our staff members. While this has always been the case for those of us who specialize in third world problems, those concerned with Dutch and European agrarian law have increasingly been involved in international contacts and their work on the role of law in Dutch agricultural and environmental issues has drawn the interest and curiosity of foreign researchers.

In the second place, our present book is far more voluminous than the 1986 one. This reflects the increasing number of young PhD researchers who are attached to our department.

In the third place, the academic background of our contributors differs considerably to those in 1968. This again is mainly due to our young researchers, most of whom come from disciplines other than law: social anthropology, development sociology, tropical plant science, nutrition, economy, tropical irrigation science, environmental hygiene and geodesy.

Their research and our common discussions have enriched our work at the university considerably. Since the significance of law in rural and agricultural life cannot be based solely on the methodological tool kit of legal science, our work requires approaches from social scientific theory and methodology. It also requires knowledge and analyses developed within the agronomic sciences. Most contributors adopt a transdisciplinary approach which integrates scientific insights developed in other academic disciplines to arrive at a deeper understanding of the social and economic problems in agriculture and environment of which law is just one, albeit an important one. This is the way we

understand our task at Wageningen Agricultural University: To make law visible to students and colleagues with no formal training in law and to show its relevance for understanding the social, economic and technological problems with which we are all concerned.

We gratefully acknowledge the help given by various people in publishing this volume. Chris Martin and Ann Long were kind enough to improve our English. Astrid van Rooij, Lida Menkman and Ellen Scheijgrond helped with the typing and the lay out of the manuscript. Piet Holleman helped us with the maps and the LEB Fund was kind enough to contribute financially to the editing and publication of the book.

Department of Agrarian Law
Wageningen Agricultural University

INTRODUCTION: UNDERSTANDING AGRARIAN LAW IN SOCIETY

Franz von Benda-Beckmann[1)]

The struggle for law

Agricultural life and rural development are rich and complex fields of legal regulation and social practice. Rules, principles and procedures address farmers, traders and agrarian interest groups as well as politicians, law makers, administrative officials and judges. They lay down the general structures for the legitimate control over and access to the means of existence and production and establish legitimate social and economic interests in natural, technical and human resources, in land, water, crops, animals and people. They provide legitimate forms for the transfer of such resources, whether by allocation, exchange, sale or inheritance; and they also regulate the marketing and trade of agricultural products. Besides, rules also establish offices, organizations and institutions through which legitimate power can be exercised by authoritative rule- and decision making. Law also provides the means through which such claims and obligations can be effectuated.

Since much law defines and allocates economic and political resources, and endows its definitions and allocations with general legitimacy, control over the interpretation of the existing law and over the making of new law is seen and treated as an important asset in social, economic and political life. Law therefore easily becomes the *subject* of social struggle. At the same time, law is an important *medium* of political, economic and social struggles. Struggles over the definition and control of scarce resources - of land, water, labour, technology, political power - to a large extent are carried out in legal form, when social actors (parliamentary law makers, lobbyists, interest groups, political parties and farmers) for whatever reasons try to insert their own social, economic or political interests into legal regulation or into actual decision making. The power to make legal rules or to give authoritative interpretations of existing rules thus forms a *resource* in social interaction[2)].

All struggles take place in contexts formed by ecological conditions and interrelated sets of social relationships and institutions which have been developed prior to any specific interaction. Law is also part of these contexts, since it forms the normative dimension of these relationships. It provides the persons engaged in social practices with a repertoire of motivations and reasons, a means to rationalize and justify their interests and (inter)actions, but

it potentially also constrains their behaviour at the same time (see Giddens, 1984; F. von Benda-Beckmann, 1989).

This may sound rather abstract, and indeed it will remain abstract as long as we talk in terms of "law" only. For the concept of "law", however defined in detail, is no more than a cover term for a wide variety of social phenomena, which may have no more in common than their "law-ness", their publicly asserted validity and legitimacy in a given social formation. What is summarized through this term becomes much more concrete once we consider these actual phenomena. The contributions in this book alone provide a considerable variety: forms of organized cooperation (Hospes) and trade association (Van Eldijk), land and water resource rights (Brouwer; Von Benda-Beckmann & Taale; Ampt-Riksen & Van de Ven; Spiertz), positions of political and rule making authority (Vel; Spiertz; Van der Velde), spheres of public policy making (Van Tatenhove & Liefferink; Hospes; Brouwer), manure legislation (Brussaard & Haerkens), tenancy law and environmental management contracts (Walda). Law, in this concrete sense, not only consists of rules, principles and procedures, that pertain to, and are external to social practices and institutions; law is also embodied within institionalized social practices and resources: in actual cooperatives, in owned rice fields or clove trees, or positions of authority. Once we envisage law as what it actually is, the idea that it may be a resource, and a medium and subject of social struggle, can no longer come as a surprise.

Research areas

The individual contributions show many such struggles. The struggles take many forms. They range from open conflicts to skilful negotiations, and end, if at all, in different ways. They take place in different arenas, involve different constellations of parties, and concern different issues. A number of contributions show us conflicts over land and political power in third world village life: struggles over land and trees between autochtonous Ambonese villagers and Butonese immigrants (Von Benda-Beckmann & Taale), or between a Sumbanese village head and a development worker (Vel), in the relationships between the sexes and generations of pastoralists in rural Mali (De Bruijn & Van Dijk), in the interaction between Balinese and Sri Lankan bureaucrats and farmers (Spiertz), Sierra Leonese market traders (Van Eldijk) and Indian bureaucrats and citizens (Mooij). Other contributions show us struggles in wider, more encompassing arenas structured by nation states and international relationships. Hospes describes policy struggles between international develop-

ment agencies. We see how Portuguese lawyers and politicians struggle about the proper understanding and policy towards communal village grounds (Brouwer), and how, at national and local levels, the Dutch and Indonesian government attempt to protect nature through nature preservation legislation (Ampt-Riksen and Van de Ven). We hear about the Dutch government legislating against the pollution of agricultural ground from manure (Brussaard & Haerkens), and how it aims to engage farmers into to a shared responsibility towards nature preservation through changes in the land lease law and individual contracts (Walda). We also see how government departments, and at the level of the European Community, nation states, create "the environment" as a new policy and regulatory field (Van Tatenhove & Liefferink). Finally, Van der Velde shows how such European legal regulations are interpreted, transformed and evaded quite differently in different member states.

The contributions also reflect the major research themes in our department.

1. The social organisation of rights to the resources rural people need for subsistence and income and the organisation of marketing and trade, form a central research theme. Land and tree resources are the central subject in the contributions of Von Benda-Beckmann & Taale, Van de Ven & Ampt-Riksen, and Brouwer. Their main emphasis is on struggles for these resources and the role which law plays in such struggles. In the pastoralist society described by De Bruijn & Van Dijk, cattle and agricultural land are central, while water management organisation on Bali and Sri Lanka is described and analyzed by Spiertz. Problems of social security of agriculturalists and pastoralists, a central theme for a large cluster of research projects in our department, is given specific attention by De Bruijn & Van Dijk, and Von Benda-Beckmann & Taale. Hospes and Van Eldijk focus more on the organisation of cooperation and trade.

2. Another major set of research themes concerns problems of environmental degradation and nature protection, and the tensions which have emerged between the interests in environmental protection and agricultural production. Much research turns around the questions of how social processes contributing to the degradation of natural resources are affected or mediated by existing normative frameworks, and how new rule making might contribute to an improvement of ecological and socio-economic conditions. In this book, this is addressed by several authors from different perspectives. Van Tatenhove & Liefferink reconstruct the emergence of "environmental problems" as a separate field of policy and legal regulation in the Netherlands and in the Europe-

an Community. Brussaard & Haerkens describe the Dutch government's successive attempts to control and push back the degradation of agricultural land caused by excessive manuring. Ampt-Riksen & Van de Ven describe attempts to create buffer zones between areas of intensive agriculture and protected nature areas in Kerinci, Indonesia, and Winterswijk in the Netherlands. Walda shows how the problem of nature conservation is tackled by means of reshaping the law of tenancy of agricultural land where the Dutch government attempts to shift obligations to protect nature to individual farmers. Finally, De Bruijn & Van Dijk confront us with the social consequences of the ongoing degradation of agricultural land in Mali.

3. Specific attention is also given to the social processes through which legal policies are constructed and implemented by administrative agencies and private persons or organisations - another important complex of research in our department. A number of papers - those of Van Tatenhove & Liefferink, Brouwer, Brussaard & Haerkens, Walda, Ampt-Riksen & Van de Ven - deal with these problems primarily at state levels and look at the public actors concerned.

4. Formalized decision making processes are the central concern in Mooij's, Spiertz' and Van der Velde's contributions. They are primarily concerned with the quality of decision making processes and the ways in which public officials use or abuse their legally established position and the power which it gives them, but they also analyze these practices in relation to the government's task to further development in accordance with legal regulation.

What all the contributions make clear is that agricultural production, whether for subsistence or the market, the use of land, water and other resources can never fully be understood unless the social significance of legal regulation is adequately grasped. They make clear that this significance cannot be understood unless the idea is taken into account that law is, at one and the same time, a resource, a medium and subject of social struggle, and part of the context of such struggles. This is why we have made the perspective upon "law as resource" and "struggles for law" the major threads in our book.

Theoretical concerns

Cross-cutting these arenas and fields of problems in which the struggles for law are situated, the contributions address a number of recurrent problems of a more theoretical and methodological character. We cannot claim to present a comparative theory in this book. Only a few papers are explicit comparative exercises, such as those of Ampt-Riksen & Van de Ven, Spiertz and Van Tatenhove & Liefferink. However, most contributions have been written with a comparative perspective in mind and open up the road to a comparative analysis of similarities and differences. They prevent us from making too easy generalizations based upon any particular instance or country, and allow us to take distance from the ideas and functions associated with law in our own society. In our view, this is particularly important because what people associate with law, and what they tend to regard as the functions of law, is usually largely informed by the ways in which this is conceived in their own contemporary society, which makes it inclined to be ethnocentric and highly ideological.

"Most lawyers", as Cotterrell recently noted (1989, p.1), "have little difficulty in recognizing 'law' as a clearly identifiable field, and no deep reflection on the matter seems necessary. Treated as the lawyer's practical art or as the special expertise possessed by a legal profession, law seems an area of knowledge and practice with well understood unifying features and distinctive character." In the normal conditions of political and legal practice there is little need to think systematically about the character of law-in-general, or to pose broad questions about the nature of legal institutions. Consequently, thinking about law, of both legal professionals and the general public remains vague and diffuse. The dominant view of law is expressed in a core-cluster of ideas (see also Hunt, 1978). One is the idea that law forms a rather well integrated and consistent whole of rules and regulations, that these rules are largely representative of all citizens' values and express, at least as far as it is possible, ideas of social justice. Another important idea is that these regulations provide security, in the sense that the general rules of law provide predictability and certainty for the actual order in society, as legally recognized rights and obligations will be protected and enforced by society's mechanisms of the administration of law. Finally, the legitimate authority to make and implement laws is seen as the privilege or monopoly of the state apparatus representing the state's citizens' common good as a neutral agency above partisan economic and political interests. Such conceptualisations of law and social practices not merely form a problem in legal science or social theory, but also constitute an eminent practical and political problem as well, because such assumptions seem to underly governments' or other development planners' efforts to order and re-

order social and economic life through legislation or other forms of legal regulation (legal engineering).

The idea that law is a cover term hiding a complex and often incoherent variety of legal forms which constitute resources to be struggled over, or to be used in the pursuit of individual or group interests, does not fit well into these assumptions. In the following, three elements of these common associations will be briefly discussed and illustrated with what the contributions in this book have to show: the simplicity of law, ways of relating law to behaviour, and its use in public policy.

The complexities of law

Any simple conception of law is at best the expression of an ideal, at worst, it is by itself a resource for those who use it to obscure the actual nature of law. It certainly does not provide a good guide for scientific description and analysis.

This is the case already if one is inclined to restrict "law" to what can be specified as "state law", the normative schemes and regulations which are "legal" in terms of the sources of law recognized by dogmatic legal science and state administrative agencies. Unity and consistency, though frequently postulated, are largely absent. Neither the state, nor government apparatus, are monolithic blocs constituting "one source of law". "State", as the source of law, in fact consists of many different sources within the state apparatus. They may operate at the same level of political integration, such as the different departments of agriculture, environment etc., or at different levels of the state organisation like the national, provincial, and community levels, or at national and international levels. Their respective rules represent different, and often conflictive political and economic interests, as Brussaard & Haerkens and also Walda show with respect to different Dutch ministries representing the opposing interests of agriculture and environmental protection. Legal complexity has dramatically increased in European countries through rule making by the organs of the European Community, of which the contributions of Van der Velde and of Tatenhove & Liefferink offer some glimpses. The legal ambiguities and insecurity resulting from the addition of thousands of pages of EG regulations to national laws have become proverbial, and so has the knowledge that they work out in clearly different ways in the different nation states (Van der Velde). The contradictions are sometimes so glaring that even classical legal scientists can no longer proclaim to be able to make them consistent through legal scientific interpretations.

Legal complexity takes different forms in Third World states. While the association between law and nation state has been taken over from the colonial rulers and has become dominant among third world politicians and legal scientists, this association is not yet exclusive. Other bodies of legal conceptions, for examples religious or traditional laws which have their own bases of legitimation, are still partially recognized as "valid" law in terms of the government legal system[3]. But even where such systems are not recognized as "law" by the state law makers and academic legal science, they have often lost little of their social force. The absence of recognition in the official state system may be counterbalanced by their continued validity within other social organisations, such as village societies or religious communities, which themselves may deny the validity of the state's law (see F. von Benda-Beckmann, 1990). This is evidenced clearly in the contributions dealing with third world situations, in particular in the contributions of Vel, Von Benda-Beckmann & Taale, De Bruijn & Van Dijk, and Ampt-Riksen & Van de Ven. This multiplicity of legal orders means that social and economic relationships, control over land, water, trees and people, forms of economic enterprise and family organization, or the legitimate power to make, interpret and apply law are constructed differently in multiple legal systems. However, as Spiertz, and Von Benda-Beckmann & Taale stress in their contributions, "customary law" also should not be assumed to be a consistent whole. For one, it is different according to the organisation in which it is maintained and changed, in village settings, administrative decision making, state courts or in academic discussions. As has frequently been shown for African and Asian situations, so-called customary or traditional law have been created or invented by legal scientists and state court judges (see F. von Benda-Beckmann, 1984; F. and K. von Benda-Beckmann, 1985; Fitzpatrick, 1984; Woodman, 1985). In Brouwer's discussion of the "representations" of the Portguese communal village lands, the *baldios*, these different processes of conceptualizing and interpretation of "customary" legal forms by politicians, law makers, local officials and farmers become clearly visible. The same goes for interpretations of traditional forms of irrigation management on Bali and Sri Lanka (Spiertz). We also see it with respect to land and tree rights on Ambon, where Indonesian state courts and villagers use quite different versions of adat law (Von Benda-Beckmann & Taale). Secondly, as the contributions of Von Benda-Beckmann & Taale and of Vel show, even within one and the same setting there may be different versions of local law coexisting, their relative significance varying with the political strength of the persons asserting their validity (see also F. and K. von Benda-Beckmann, 1988, 1991).

Besides the different normative orders which encompass more or less all social life, there are in most societies mixed, hybrid forms, compounded from elements of different legal systems. Ambonese adat for centuries has been an amalgam of colonial and autochtonous regulations, and the same applies to the *subak* and *bethma* rule versions described by Spiertz, the religious legitimations on Sumba (Vel), and the trade regulations of the market traders in Sierra Leone (Van Eldijk). While such law compounded from elements of different legal orders may be characteristic for third world states, there are multitudes of regulatory mixes consisting of public and private regulation both in European and third world states. Normative regulation and sanctioning mechanisms develop in most institutions and relational and interactive networks (called semi-autonomous fields by Moore, 1973). In third world countries, development projects often introduce their own legal system (see K. von Benda-Beckmann, 1991). While the spatial existence of such "project" law may be limited to a small area such as a village (in the case described by Vel), its social significance is often greater than that of the official state legal rules (see also F. and K. von Benda-Beckmann, 1991). As Mooij shows in her contribution, such rules also develop within the institutions of the state bureaucracy itself. This is not particular to the Indian bureaucracy, but has been observed in Dutch bureaucratic institutions as well (see e.g. Wassenberg, 1987).

How one deals with these different forms of normative regulation conceptually, is a matter of scientific taste and methodological perspective. Even the most dogmatic lawyers will not deny that there is, in most societies, a variety of normative orders and sub-orders. Neither will they deny that such orders may influence people's behaviour. But they do not call such other orders "law" because these other orders do not correspond to the criteria of valid law upon which the order of state law and legal science is founded, and they will not see it as their task to research and theorize about such matters. From their point of view, these other orders, by definition, cannot be more than "social norms", conventions, customary or informal rules which live in a "lesser" conceptual world, and belong to other fields of academic labour. Taking the lawyers' view, however, means that the analyst subordinates him- or herself under the dominant model, and takes over the ruling definition of law not only as a political and ideological statement about the hierarchical ordering of normative orders, but also as a descriptive and analytical tool, which is then inevitably coloured by this model. The alternative to the lawyers' view, which is taken by many authors in this book, is to take distance from these normative criteria given by state law and legal science, and to adopt an analytical, social scientific approach. In such an approach, the criteria for the public validity of a normative order given by state law and legal science are not the exclusive ones, but

appear as mere variations besides others, based for instance on religion, tradition, or consensus. In such an approach, also other normative orders surface as "law" conceptually (see Griffiths, 1986; Vanderlinden, 1989; F. von Benda-Beckmann, 1990). Particularly authors writing about third world situations tend to capture such complexity of rules and institutions with the concept of "legal pluralism"[4], and this approach has also been frequently extended to the analysis of law in European and American industrialized states (see Moore, 1973; Griffiths, 1986; Henry, 1985; Merry, 1988). Such conceptual use has been criticized since it runs the danger of casting the conceptual net too wide and may lead to overlooking important differences between legal phenomena or normative systems, in their official validity, sanctioning potential and political dominance (Merry, 1988; Starr & Collier, 1989)[5]. However, this need not follow from such an approach. If the concrete social phenomena are specified, if one talks about specific acts of legislation, about individual articles of such acts, about authoritative decision making in courts or other administrative agencies, or the legal system as a whole, or about rules of Ambonese adat, of religious legal rules or those introduced by a development project, there is little room for conceptual confusion. Besides such a broad, analytical conception of law and legal pluralism helps us to obtain better insight into the social significance of normative orders for agriculture and rural life, as is also illustrated in several contributions in this book. In particular, it shows us that some struggles are about which law should be valid, which political constitution or which economic institutions should be legitimate; a struggle not just for law, but also between legal systems. It shows that debates about the "proper definition of law" are part of these struggles (F. and K. von Benda-Beckmann, 1988; Maddock, 1990).

Rules and practices in context: the social significance of law

If there is one lesson to be learnt from history and scientific research alike, it is that the social significance of law cannot be derived from the conceptualisations and objectives which are inscribed into and/or associated with the legal texts themselves. Law does not do things by itself, whatever objectives or functions may be associated with it. What law is, what functions it has, what its relations with agricultural practices and other social factors are, must be studied in concrete situations and in processes of change. Taking account of normative complexity - whether or not we call it legal pluralism - is an essential precondition for understanding the relations between law and social practice. Interrelations between law and practice cannot be reduced to simple

relations between state law and behaviour. The simplicity of the gap-approach and the classical distinction between ought and is, ideal and practice, through which scholars address the disparity/congruence between ideal rules and practices, becomes particularly visible (see Abel, 1980; Nelken, 1981; F. von Benda-Beckmann, 1990). Attention to legal complexity forces us to see social practices - clove production, rice cultivation, water management, nature conservation, and administrative decision making - in the totality of the complex normative world. And it forces us to question to which elements of that world people orient their behaviour, which legal procedures they adopt, voluntarily or under constraint, and to which elements they refer when they rationalize and justify their claims and interests (see also F. von Benda-Beckmann, 1989). More concretely we see it in this book in the legal modes through which Indonesian villagers conceptualize and transfer property rights (Von Benda-Beckmann & Taale), or establish positions of public authority (Vel), or how traders in Sierra Leone organize the financial basis for trade or settling disputes of behaviour (Van Eldijk). Mooij's contribution in this volume is quite illustrative in this respect. In her critical discussion of the concept of corruption she points out that corruption is not just individual deviant behaviour, but an institutionalized practice, itself governed by rules which have been generated within the institutional context. The individual official is bound up in contrary, yet strongly interdependent rules, in which the official model, the Weberian legally organized rational bureaucratic structure may have lost all its significance except that of a resource to defend positions of power and authority.

Normative complexity opens up choices between legal forms ordering social and economic relations differently and between procedures controlled by different decision makers. People can "shop" for the most promising normative idiom (Spiertz, 1989) or forum of decision making (K. von Benda-Beckmann, 1981), however constrained these choices may be. In his contribution on cooperative development policy, Hospes extends the shopping metaphor to "formula shopping": to situations where the legally relevant labels for organized cooperation become exchangeable and adapted to the conditions of the "development market" of the period. Vel's desciption of the conflict between the Sumbanese village head and the development worker is perhaps the most vivid illustration of such activities. The main actors constantly make references to different normative systems to rationalize and justify their position of authority and their claims to the correct solution of the problem at hand. Here, legal pluralism is, indeed, an "arsenal of weapons" as Vel says.

The official statuses which normative orders have here may matter considerably. They also are part of the context which structures people's strategies and

influences their choices. It makes a difference if people act in a situation of overt legal pluralism like in Indonesia or one of "secret" legal pluralism (Mooij). In the latter case, actors are much more constrained since open choices between normative orders - the official law and the internal regulation of "corruption" - cannot be made in public. Decision makers have to fall back upon the government legal system in order to rationalize and justify their decisions, even if they were guided by another normative order or by motives contrary to the official state order. As Van der Velde shows, such justifications tend to explode the logic of the legal regulations in question. The general idea that "decisions according to the law" have been "determined by" the law, can no longer be upheld. The impression of arbitrariness is created and can no longer be camouflaged; the trust of the public in the *Rechtsstaat*-administration is undermined. In third world situations, on the other hand, whole legal systems become mobilized against each other, and this gives people the opportunity to justify their "deviation" from one, e.g. the government legal system, with their "conformity" to another, e.g. adat system.

But situations of legal pluralism, however contradictory the rules of the different abstract rule sets may be, need not lead to opposition and choice. In actual practices - other than those of experts who restate the systems in their pure and distinct form - elements from state, religious and traditional legal systems may be combined to form new, hybrid forms of law (see Fitzpatrick, 1984; F. von Benda-Beckmann, 1983). Rather than choosing between opposing normative criteria for the validity or permissibility of social action (marriage, inheritance etc.), people may clothe their actions with normative validity in more than one system. This also plays a role in politics when people, like Vel's Umbu Hapi, invest themselves with the dignity of normative leadership in adat, religious and state law terms. To stay with her metaphor, the combatants need not choose between dagger and sword to fight their legal battles, but may use both weapons. Accumulations of legal elements is the central theme in Spiertz' contribution, in which he shows how on Bali and in Sri Lanka the same concepts for irrigation water management (*subak* or *bethma*) can be "stuffed" with meanings derived from different legal systems. In Spiertz' words, the concepts *subak* and *bethma* then turn out to be "trusted, but empty forms, which on the one hand can be filled with various interests as ingredients, and on the other be consumed without necessarily recognizing its actual contents". There are a number of interesting parallels in some of the other contributions. The notions of *baldio*, the Portuguese communal village resources, entertained in the discussions and politics of Portuguese law makers and social scientists are quite different from those actualized in the *baldio* management and exploitation at village level. We can see similar processes in the ways in which

the concept of "cooperative" is used in the dialogues and policy struggles of development agencies (Hospes), and the politics of inclusion and exclusion (are self-help organisations also cooperatives?) to which Spiertz refers.

All these examples forcefully bring home two further messages which are not self-evident: First, what law is and what its consequences are, is highly contextual, depending on the social setting in which it is interpreted and used. Interpretations of *subak* or *baldio*, of Ambonese land and tree rights, but also of "environmental problems" or "pollution" are different in different contexts. These contexts are rarely independent of each other and usually there will be lines of mutual influence, for instance between the interpretations of *baldios* by Portuguese legislators and famers, or between Indonesian state court interpretations of adat law and villager versions of adat (see Von Benda-Beckmann & Taale). But the question as to what extent such divergent contextual uses are interdependent is an important *empirical* question, which cannot be answered by dogmatic normative interpretations of how they should be.

Secondly, these examples show that one-to-one correlations between distinct normative forms and categories of social actors or interests cannot be made. Recourse to "tradition", to *subak* or *baldios*, or to "private, non-state self-regulation" can be made by government politicians and administrative officials, and the use of traditional law need not be in the interest of local population groups. State law, on the other hand, may be freely used by "traditonal" village people in the pursuit of local interests. The law uses of the Ambonese and Butonese villagers in the contribution of Von Benda-Beckmann & Taale are perhaps the clearest illustration of this point.

The contributions which describe and analyze local struggles also show that recourse to law, or the skilful exploitation of the possibilities of a plural legal system, is rarely open for everyone in the same way. Nor is the degree to which actors are actually constrained by the legal and institutional complexity in which their interactions are embedded the same for each or all of them. The relative success with which social actors can influence legislation and the enforcement of legislation, employ judicial institutions or otherwise secure their rights, varies considerably with a variety of factors, among which their economic and political position is perhaps the most important[6]. Vel shows this when drawing attention to the weaker persons whose positions are at stake in the struggle between the two local leaders in the village. But we see this equally clearly in the struggles and almost Kafka-like experiences of Dutch citizens with their own state administration (Van der Velde), or the struggles between Ambonese and Butonese villagers in Von Benda-Beckmann & Taale's

paper. In the sad stories from Mali with which De Bruijn & Van Dijk confront us, we see large differences in the ways in which legal norms and standards become influential for the economic position of men and women among the Jallobe.

This makes clear that the potential of law as strategic resource, and as structures of constraint, should not be overemphasized. Social and political struggles are not only carried out in terms of law and in the arena's in which struggles about law making and implementation take place. Nor is law the only or most important resource in such struggles; economic and political power resources may play a more important role.

Government policy

All these observations also hold true when we move to those persons and institutions who are entrusted with (or who have usurped) law making and application at state level. Although they command the legitimate power positions to make and implement law, their actual capacity to do so is limited. The objectives of law are usually too pure and too grand, and rarely achieved in practice. The contributions in the volume illustrate this in abundance. This is specifically so in those contributions which discuss government policy through law, whether of Dutch manure legislation, Portuguese baldio legislation, or European rule making (Van der Velde). It is also obvious in the case described by Hospes, where government and international donor agencies create or restructure cooperatives. Here, the package of promises was almost grotesquely grand, while in social practice "government support of these cooperatives has been the kiss of death for small rural producers". But we see it also in those contributions which do not explicitly focus on this question but which describe the relative inefficiency of state government laws like the Basic Agrarian Law or the Local Government Law in Ambonese village society (see Von Benda-Beckmann & Taale; also Spiertz, Vel, and De Bruijn & Van Dijk).

It would, of course, be naive to expect otherwise, given the enormous complexity of social and economic organisation. Law making takes place in complex webs of social, economic and political relationships which constrain the legislative processes and contents of law. Brussaard & Haerkens show how the contradictory economic interests of agriculture and ecological interests of environmental protection are voiced and pushed forward by sections of the population or organized pressure groups and have to be taken into account in the shaping of Dutch manure legislation. Van Tatenhove & Liefferink show similar problems at the level of EC rule making. Even if presented as a well

planned and consistent endeavour, what is made into law is usually a compromise, and rarely adequate to the actual needs for change. The legal system itself constitutes an important constraining factor as well. Although the consistency of the legal system is an ideal rather than a description of the actual system, it forces law makers to at least approach this ideal. In his discussion of the Dutch Land Lease Act, Walda shows these near-inextricable problems.

Implementation, the processes through which the legally structured forms of behaviour are to be translated into social practices, are also rarely able to reach the objectives expressed in the legal policies. General regulations, administrative decisions and court judgements, once they leave the institutional "legal" context in which they are made, become immersed in many "semi-autonomous fields" in which their "legal currency" (Wickham, 1990) may lose much or all of its value (see Moore, 1973; K. von Benda-Beckmann, 1985). Usually, what has been decided at planning and legislative levels becomes transformed, by the addressees of the regulations and decisions, but also by officials who re-interpret and possibly distort the meaning so that what members of the target groups are actually brought in contact with is quite different from the orginal model and intention (see also Long, 1989; F. von Benda-Beckmann et al., 1989; F. von Benda-Beckmann, 1989). Much depends on the powers of persuasion and the credibility of the new legal messages and their messengers, their actual strategies and on the amount of force which law makers are willing or able to mobilize in the policing of their new regulations. And it also depends on the relative power of those who are addressed by the new regulations, who may openly oppose or neutralize the regulations, or silently resist them (see Scott, 1986). As Van der Velde shows with respect to European Community regulations and court decisions concerning milk quota in the Netherlands, and as Mooij in her discussion of corruption emphasizes even more strongly, it may be government institutions themselves which undo the effects which should follow from government legislation or court decisions through fraudulent or corrupt practices.

Since the social and economic objectives coupled to legislation are only rarely reached, law, and policy through law, become involved in a vicious circle in which undesirable social and economic conditions are attributed to insufficient or ineffective legal regulation, which has then to be remedied by the government by making new law and correcting the apparent shortcomings of previous legal regulations. Law becomes "scape-goat and magic charm" (F. von Benda-Beckmann, 1989). Unwelcome social and economic or political conditions are blamed on inadequate legal regulation, and new legal regulations are proposed to change things for the better. The greater a government's regulato-

ry appetite, the greater the inevitable shortcomings of regulation, and the greater the renewed efforts to overcome these shortcomings by new regulation; the greater also the inconsistencies and the weaker the confidence which it inspires in good government. The Dutch manure legislation described by Brussaard & Haerkens provides a striking example. There is little difference in this respect between the Dutch government and those of third world States.

Given the abundant evidence of the insufficient "steering capacity" of government regulations, politicians and government agencies seek new ways for dealing with the impasse of unmanageable overregulation into which they have brought themselves in cooperation with too many successful interest groups. Government regulation is increasingly regarded less as an independent and exclusive policy instrument and more as a divided task for public-governmental and private initiatives (*"horizontaal bestuur"*, see K. von Benda-Beckmann & Hoekema (eds)., 1987). New policy instruments like convenants/gentlemen-agreements are increasingly used to formalize such cooperation in government. Walda in particular throws light upon the new management agreements with which the Dutch government tries to engage farmers and environmental organisations in sharing responsibility for nature preservation. Also in developing countries, a more participatory, contractual approach is increasingly advocated. Besides the pragmatic advantages, such participation of the population can be advertised as an increase in the democratic content of government. But it is also a means to free government from the constitutional constraints which are put on the exercise of power by the executive branch of the state. With Van der Velde's words, it may help to maintain the freedom of "international negotiation [about EG rules], where diplomacy flourishes as the art of vagueness". Even then such deregulation and recognition and promotion of self-regulative activities still remain subject to the constraints which result from the legal and political system itself. The transfer of regulatory powers to organisations other than the government must be legitimate, i.e. there must be a chain of transfers of powers which can be accounted for in terms of government law, and which at the same time allows for legal control through the delegating agency. Self-regulation must be regulated, and then is inevitably transformed. In this way, previous forms of self-regulation, like cooperatives, development projects or nature management agreements are made part of the master-scheme of societal regulation, and government influence extends to levels of social organisation to which it formerly had little direct connection (see Abel, 1982).

What role, then, do the legal models play in government policy, and to what degree are politicians and legislators influenced by them?

Looking at government policies and their rationales, we may conclude that their theory of government (in the sense of Van Tatenhove & Liefferink) is heavily influenced by simplistic conceptions of law and the working of legal rules. In third world development policies in particular, mistaken assumptions about the working of legal models in European societies play an important role (see F. von Benda-Beckmann, 1983; Griffiths, 1983). Hospes shows the false historical comparisons which underly most third world legal development policies. Cooperatives are seen as an instrument to combate rural poverty based on the assumed function cooperatives had in European rural development. However, in European history they have been rather the product of economic recovery and growth, not its historical precondition. The same assumptions about historical causality underly the introduction of modern, "rational" bureaucracies and laws and individual ownership rights, seen by many as a precondition for good government and economic take-off in rural agricultural production[7]. Similar misconceptions pertain to the understanding of the causes underlying the situation to be changed by new law. In third world countries, much blame is put on local customary laws, which are thought to impede social and economic change, an assumption which in its generality has been proven to be mistaken[8].

Such superficial assumptions are often caused by lack of knowledge, not only of how present situations have come into existence, but even of how they are. Brouwer's account of the representations of *baldios* among Portuguese politicians, which are far removed from actual *baldio* practices, are a good example in this book. Ignorance about the conditions one wants to change is common, and research therefore important. But as Quarles van Ufford (1988) has convincingly shown with respect to development policy bureaucracies, such ignorance is also wilfully constructed: existing knowledge and scientific insight is consciously repressed and not taken into account, because it may lead to unwelcome policy changes or throw bad light upon the planning and implementing institutions themselves. Here again, there is no great difference between Dutch and third world politics. The degree of pollution and the ecological consequences of the Dutch agricultural policies, for instance, were largely predicted years ago. The political climate, however, was such that politicians did not want to take them into account.

It would, on the other hand, also be naive to assume that the legal engineers, the policy and law makers, would be often unaware of the inherent limitations of their regulatory enterprises. The ever new attempts to change by regulation, though embellished by optimistic political rhetoric and public policy theories, are probably often meant as no more than modest attempts at "tinkering"

(Merryman, 1977), to bring about at least some small changes, or induce some long-term changes, to "muddle through". Political electoral considerations, but also the constraint to rationalize and justify policy in terms of law, will usually lead to more promises being made and attached to legislation than could reasonably be expected to be realistic. We should, therefore, not identify the consequences of legislation that are really intended with what politicians announce in parliament or in the media. We must always assume that besides the official, public statements, there will always be hidden agendas. In some cases, like those of overtly corrupt practices, such hidden agendas will be so publicly known that the pure language of law and its social and economic ideals will no longer appeal to and be believed by those subject to these regulations. In other cases, law may have been a rather successful means in the hands of governing elites, a point which in recent years has repeatedly been made with respect to colonial and post-colonial "development" policies for rural areas (Okoth-Ogendo, 1984; Greenberg, 1980; Snyder, 1980; Fitzpatrick, 1980).

We must also not confuse actual legal regulations with the economic and social objectives that become associated with them in the public rhetoric of politicians and the media (see Allott, 1980). Also, in non-corrupt situations, legal regulation and planning always leave room for a variety of practices, all of them with different social consequences, yet all "in line" with the regulations. Land reforms, which open up the possibility of land transfers, will work out very differently where land is transferred on a large scale to where it is not. Whether corrupt practices encourage or prevent such transfers, does not by itself change those economic effects.

Such hidden agendas, however, will also inevitably have their unintended and uncontrollable consequences. This is "normal" under any circumstances, and therefore need not lead us to conspiracy theories or general distrust. It is also difficult to research. Yet if we wish to come to a realistic understanding of the significance of law as policy instrument, we ourselves may not start off from false premises. Rediscovering time and again that legal policies do not achieve their objectives, that agrarian laws are not observed in practice and that they have unintended consequences is not sufficient. We must make clear that the frequent identification between unintended and unpredictable consequences by policy makers is not an innocent one but just a justification for policies which are not based on an adequate knowledge or which do not seriously intend to honour what they proclaim. Many "unintended consequences" are predictable, and have indeed been predicted. Thus it has been pointed out frequently that land reforms are not profitable to small farmers, but mainly profit rich farmers and civil servants.

Struggling with agrarian law

The foregoing considerations must have an impact on our own practices and struggles with agrarian law, too. What then are the conclusions which we ourselves draw ?

In the first place, they tell us that we cannot accept an image of "agrarian law" as a relatively sharply demarcated field of regulation or academic practice (see Brussaard 1987; F. von Benda-Beckmann, 1983). We cannot take our lead from what is labelled "agrarian law" by politicians and law makers, or by legal scientists operating in the world of legal science which is still oriented to the classical division of labour between legal specialisms. Agrarian law is the totality of law relevant for social practices in agriculture and rural development. Agrarian law cuts through many complexes of rules and regulations which have been institutionalized as distinct fields of academic labour in legal faculties like private or public law, land and labour law etc., and which are often fragmented and structured by the legislative competence of different ministries. Even official state agrarian law is a summary of largely unco-ordinated and often contradictory elements from various subfields of public and private law, and the mass of relevant legal phenomena becomes overwhelmingly large if we think in terms of legal pluralism.

In the second place, it means that we cannot be content with an inventory of agrarian law and its proper interpretations according to the methodology of legal science. These are important, no doubt, but for us they are a means rather than an end in itself. The end is to make a contribution to a better understanding of the social significance of law, since this is important for understanding present agricultural practices and rural life and attempt to change them, not only for ourselves, but especially for academics and practitioners in other fields of science or policy. It also means making cautious suggestions ourselves how problems should be tackled. We must withstand the seduction to make and believe in our own magic charms. While we also may have ideals about how agriculture and rural life should be, we should not be carried away by them but explore the margins of what, related to ideal objectives of social justice and economic progress, will always be "lesser evils" rather than the fulfillment of such dreams (F. von Benda-Beckmann, 1983).

For such research we must draw upon and develop ourselves social-scientific approaches to law in addition to what can be learnt from conventional legal science. Besides, we have to integrate our findings and theoretical considerations with those which have been developed in other disciplines. Our position at the Agricultural University gives us a unique opportunity to do so. As the

contributions in this book, written by authors who are no legal or socio-legal scholars, show, this is not a one-way exchange.

Notes

1) I wish to thank all contributors to this book for their critical and constructive comments on earlier versions of this introduction.
2) Galanter (1981) speaks of law as "bargaining" and "regulatory endowments", Turk (1976) as "a weapon in social conflict."
3) This has been called "weak" legal pluralism by Griffiths, 1986. For further accounts of legal pluralism, see F. von Benda-Beckmann, 1970; Vanderlinden, 1971; Hooker, 1975; Merry, 1988.
4) There is an extensive literature on legal pluralism, both from a legal and social science point of view. For a recent comprehensive overview see Merry, 1988; see also Hooker, 1975; Vanderlinden, 1971, 1989; F. von Benda-Beckmann, 1970, 1983; Griffiths, 1986.
5) At this point, however, it should not be forgotten that definitions of the concepts of law, oriented at "state law", are notoriously tautological, inconsistent and controversial, see F. von Benda-Beckmann, 1990 with further references.
6) See Galanter, 1974; Black, 1976; Nader & Todd (eds.), 1978; K. von Benda-Beckmann, 1981; F. von Benda-Beckmann, 1985; Griffiths, 1983; Schuyt, Groenendijk & Sloot, 1976; recently Klijn, 1991.
7) On the idea of legal engineering with the help of "modern, western" law, and the assumption that customary laws hinder development, see Könz, 1969; Hager, 1974; Howard, 1976. For critical analyses of these ideas, see already Van Vollenhoven, 1915. See further Burg, 1977; Merryman, 1977; Fitzpatrick, 1980; Snyder, 1980; Greenberg, 1980; Griffiths, 1983; F. von Benda-Beckmann 1983, 1989.
8) Various studies have shown that considerable social and economic changes have occurred in third world rural areas, which were possible in the terms of customary laws, or which led to changes in them, see Snyder, 1977; F. and K. von Benda-Beckmann, 1985. See also F. von Benda-Beckmann, 1983 for further references.

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UMBU HAPI VERSUS UMBU VINCENT
Legal pluralism as an arsenal in village combats.

Jacqueline Vel

Introduction

Sumba is one of the most unattractive islands of Indonesia, according to a tourist guide referring to the swarms of mosquitos and poor transport- and tourist facilities. In their own way development experts looking for possible development projects agree : "Poor soils, generally arid conditions, and lack of suitable water storage for irrigation, combined with steep terrains in higher rainfall areas offer limited scope for agriculture. There are neither mineral nor extensive forest resources to support the development of extractive industries, and generally sparse populations offer limited market potential for broadly based urban development" (Corner, 1989, p. 179). The history of Sumba also reflects the unattractiveness of the island for people from other areas. The Dutch East Indian Company never showed interest in Sumba because of the lack of profitable trade opportunities. In the second part of the nineteenth century the Dutch colonial government settled on Sumba, but only after the pacification in 1910 could one speak of a central government on the island. Even for the protestant missions Sumba was not very attractive having only a small population the majority of which lived in the unaccessible mountain area. The mission started its work on Sumba in 1880 and for many years the missionaries only operated in the coastal areas. In the mountains the sumbanese population lived according to their own tradition, organized in fairly autonomous clans, and subsisting through swidden agriculture. The consequence of the "unattractiveness" of Sumba is that the history of outside influence on its society is relatively recent.

From 1910 onwards, outside influence was becoming more evident in the mountain areas. The government introduced taxes involving the rural population in the cash economy and market exchange. The church gained influence on the rural population by opening up schools in the mountain area. Through their children the people learned about the new religion, and the new skills of reading and writing were introduced. As the influence of the church increased more churches were built. A new set of norms and rules was gradually established. Influence of the central government on daily life in the mountain areas beyond mere tax-payment grew after the independent Indonesian government had established village governments in 1960. Through village government the

local population became more accessible for government programmes. With the increase of outside influence on the society of the mountain areas of Sumba gradually legal pluralism[1] emerges. The rules of custom and tradition are still valid, but they are no longer the only rules. The government and the church each brought their own normative order, valid in its own domain, and represented by its own leader.

From 1984 to 1990 I lived with my husband and children in a small village -Wailanda- in the mountain area of Sumba. We were working in a development project of the protestant church of Sumba (*Gereja Kristen Sumba*). The ultimate aim of our small development organization was to bring about changes in local society that would improve living conditions of its members, particularly the poorest. With this aim in mind we represented a new force in the arena of village politics: although we never presented ourselves as radicals we were certainly disturbing the existing order. With the ideas, aims and working strategies introduced in the village, another distinct normative order was established.

In this article I want to show how development intervention can be analyzed through the study of legal pluralism. Development intervention introduces new rules and resources. The more attractive the resources are for the local population the more important the rules of the development organization will become in village life, and the stronger the position of the leaders of the development organization will be in local politics. Problems arise when a matter occurring in the village can be handled according to the rules from different normative orders that contradict each other. What will happen? Who is able to decide which rule will be obeyed?

The story "Umbu Hapi versus Umbu Vincent" provides an elaborate example of how a development organization introduces another set of rules and norms in the existing legal repertoire pertaining to its area of competence. It shows how the staff of the development organization acquire an important position in village politics and that this position requires active participation in the strategic use of various types of law. Analytically these types of law are not of the same kind, but at the local level they have equal weight. The case study deals with a conflict between two powerful people in Wailanda: the village head and the leader of the development organization. Trying to find a solution to this conflict a struggle for power evolved, which took place alternatively in the arenas of custom and tradition, government and the church. Opting for one of the arena's was not a matter of morality -of choosing what is just, true or equitable- but more a matter of trying out different strategies in order to find the one that would be most favourable to personal power and status.

Legal pluralism is used as an arsenal in this village combat. Another important matter that will be illustrated in the case study concerns access to different types of law. The powerful people in the village are able to manipulate the legal repertoire according to their interests but the less privileged are not able to negotiate rules favourable to their interests. They do not have access to the arsenal of legal pluralism.

The arsenal

The central question of this article is how development intervention is confronted by the existing legal repertoire and how the actors subsequently make use of the various available types of law[2]. In which way does the development organization add another normative order to the legal repertoire? Do the people from Wailanda choose to be an adherent of one normative order in particular? Or do they adopt a pragmatic strategy of "forum shopping", i.e. letting their choice of one of the orders "depend on the situation"[3]? Before answering this question it is necessary to explain more about the legal repertoire that is available in Wailanda. This repertoire consists of different normative orders. In general a normative order is a collection of rules and values that share the same source of validity. In order to be able to distinguish different normative orders in an empirical situation the general definition is not sufficient but has to be supplemented with a more detailed way of characterizing normative orders. I will use three types of characteristics.

The basis of validity

There are two interpretations of "the basis of validity". The first interpretation answers the question what should (universally, in general) be the basis on which this order is founded? No specific empirical data are required to answer this question. The second version poses another question: what is the basis of validity of this order for the villagers in Wailanda? Or: what gives this particular normative order authority? In Wailanda there is great difference between these two types of validity bases.

Ordering institutions

Each normative order makes use of its own institutions: e.g. religious law is used in meetings of the church council, state law is applied by the village government etc. The existence of different normative orders implies the

existence of different types of social organization. The story of Umbu Hapi versus Umbu Vincent illustrates that an individual actor can have a superior position when the first normative order is declared valid and an inferior position if the second normative order applies.

Access

The third type of characteristic of a normative order is who is able to make use of the rules and institutions that belong to a specific normative order? Do all the villagers have access or just the ones who are members of the church, or who are related to government officials?

This empirical definition of a normative order is in accordance with the conception of law as power: "a set of resources for which people contend and with which they are better able to promote their own ideas and interests against others, given the necessity of working out and preserving accommodative relationships with strangers" (Turk, 1978, p. 218). Using the concept of normative order in this broad way, placed in the reality of the local context, it is possible to distinguish in Wailanda a separate normative order represented by the development organization.

The weapons

In the case study Umbu Hapi and Umbu Vincent make use of the resources of four normative orders. These can be labeled "adat", the state, the church and the development organization. In this paragraph I will distinguish these orders making use of the three types of criteria: basis of validity, ordering institutions and access. The description will make clear that the content of a normative order as conceived by the inhabitants of Wailanda is quite different from the general content of the normative order with the same label.

Adat

"Adat is the word used in Indonesia to refer to indigenous culture, values and traditions" (Burns, 1989) Adat is the oldest of the normative orders in Wailanda. Starting in childhood one learns about adat, listening to the stories of the elders, attending ceremonies, hearing people talk about disputes and how they should be solved, catching gossip, and developing a sensitivity to what is right and what is wrong. Adat is not kept in books as written law. Although - as a strategy of resistance against government or other institutions or people from

outside- villagers present their adat law as if it were a system of strict rules and prescriptions that do not allow deviations, adat is "much more complex, flexible and negotiable than peasants make bureaucrats believe" (F. von Benda-Beckmann, 1989). The habit of negotiating is an important and strong element of adat; it means that people are used to having different options in one situation, and not to having a strict rule that is valid in all cases and uniform for all persons (as is claimed for state law (Griffiths, 1986)).

It is difficult to name the general validity basis of adat, because being folk-law its content is never universally valid. In the context of Wailanda two very important values can be mentioned as the official version of the basis of validity: (a) the continuity and survival of the clan as the purpose of daily activities (b) worship of the deceased elders , who act as intermediaries (marapu) between the living relatives and God. The latter value shows that adat is rooted in traditional religion : acceptance of the adat rules largely depends on what religion holds to be right and wrong, and on the fear of sanctions imposed by the marapu. The former value is of great importance in daily life. The central importance of the clan implies the acceptance of family relations -kinship and affinity- as the determinant of social conduct. People think of others in terms of relationships: once the relationship between two people is clear, the appropriate conduct is clear too. The relationship determines what gifts are appropriate for exchange, what kind of services you are entitled to receive or obliged to give; it also determines the penalty in cases of dispute settlement.

In the case of adat the basis of validity coincides with the source of authority of adat from the angle of the village elders. But for women and the young there is a second source of authority: adat rules are imposed by unequal power relations. Older men own the land and cattle, their wives and children are dependant. Power over cattle and land enables the older men to exploit women and the young. Adat rules are used as tools in exercising this power, for example in the case of marriage, where adat prescribes that a man should pay a bride price of cattle to the family of his bride. The village leaders in matters of adat are the clan elders (of different clans that have their residence in the "desa"). Not every old man will become a clan elder. It depends on social status (descent) and on economic status -the ability to give material support in exchange for moral support or subordination-. Shrewdness is an important asset of successful adat leaders. The leaders are always assisted by spokesmen -"wunang"- who master the art of ritual speech and who do the actual negotiating.

The two main actors in the case study have a very different position according to adat. Umbu Hapi is one of the elders in his clan, and since the ones

who according to descent would be superior to him do not live in the village anymore, he is the most influential of his clan. Vincent is a foreigner, neither having any real family relations in the village, nor belonging to any clan. Through fictive kinship Umbu Hapi can act as Vincents brother-in-law.

The state

The clearest representation of the state in the village is the village government. The concept of central government is relatively new on Sumba, where traditionally clans were autonomous. History of central government started in 1914 with the arrival of the Dutch Colonial Government. This government appointed "raja"s: they chose a leader of one of the influential clans of an area to be the official indigenous leader of the area. His main task was to collect taxes. The rajas of the area of Wailanda were all members of the clan of Umbu Hapi, the last of them being Umbu Hapi's great uncle, his grandfathers brother. The direct descendants of the raja all left the area to go to university and find a living elsewhere in Indonesia. Umbu Hapi is the most influential clan member residing in Wailanda and tradition supports the idea of choosing him as "kepala desa", the highest ranking government representative in the village.

The general basis of validity of the state order is the constitution, and in the indonesian case the "Moral Pancasila", official government doctrine. Most villagers in Sumba are not familiar with official state law. What trickles down to village level are local versions of state development law which often have nothing to do with the original version (F. von Benda-Beckmann, 1989). For the villagers state law is what local government officials say it is or what they force the people to do. From the villagers point of view there are several different sources of government authority: (a) (the threat of) violence and (b) the "Moral Pancasila" and (c) the prospect of subsidies, jobs and relations with government officials that provide access to money. Violence is in Wailanda not monopolized by the state, but it is a very common means used by all authorities to punish disobedient subordinates: men beat their wives, parents beat their children, teachers beat pupils; when a thief is caught he will be beaten first before he is handed over to the local police, who in their turn will beat him first before anything else happens. State violence is known and feared by the villagers, especially when performed by the army. Recently on several occasions the army joined in government programmes, promoting family planning, dry land farming and horticulture in order to make the message more convincing. The "Moral Pancasila" is the name for the doctrine of the Indonesian Government that is carefully taught to the village population, from the nursery school to weekly courses for the village population and refresher

courses for all government officials. The school is a very important means for spreading central government doctrine. The third source of government authority is the possibility of material gain for people who are active supporters of the government. Good relations with government officials can result in subsidies, jobs or other privileges.

Government officials in Wailanda always claim that state law and government rules are more valid than all other kinds of law. But they usually adopt the strategy of solving matters "secara keluarga" -in the way relatives do- first, which means in a harmonious way, using adat law. Only if the parties involved are not able to settle the matter in a way that is satisfactory for themselves will the government impose its state law. For the government officials themselves it is not easy to act as a state representative only, because usually they are completely entangled in adat arrangements themselves, having family relationships with one or more of the parties involved in the matter. The distinction often made in literature (e.g. see F. von Benda-Beckmann, 1989) between bureaucrats and villagers is too strict to be applied in Wailanda. It would be more appropriate to see the government officials in Wailanda as "villagers with some government privileges".

In Wailanda the government is regarded as an institution that acts top-down: the village government gathers the people without telling why. For example the village agriculture extension officer calls meetings to explain a new government program. Only in special cases where people from outside the village are involved, or when matters can not be settled "secara keluarga" are the services of the village government called upon.

The church

Speaking of a normative order it would be more appropriate to refer to religion rather than to the church. But because I want to describe the local religious normative order the label "church" is more appropriate. The local church is the ordering institution of a set of norms and rules that are a mixture of the protestant church's religious law and traditional religion.

The traditional religion is animism that is usually referred to as "marapu"[4]. People believe that there is a God , an abstract power that is the source of life, "the father and the mother of the world". The "marapu" -spirits- act as intermediaries between the living and God. "Marapu see to it that people will not disturb the established order, take care that people confine themselves to the long established ways, and they are dreaded for it. The maintenance of the established order is essential for harmony in the total cosmos, including the visible and the invisible world. To preserve this harmony is the sense of life.

All religious acts, all sacrifice and prayer, all ceremonies are meant to restore or perpetuate harmony" (Wielenga, 1949, p. 70)[5]. Together with the establishment of a school in Wailanda, christianity was introduced. The first converts were pupils of the school. The teachers actively searched for pupils amongst the influential families of the village; gaining the support of a local leader would mean having a way in to a whole section of the population. The missions of the protestant church were the only providers of schooling on Sumba. Receiving formal education implied being converted to (protestant) christianity. Consequently being educated, making progress, became assets associated with being a christian.

Up to the 1970's Christians were a minority on Sumba. They applied the rules as they were taught by the Dutch missionaries quite strictly, anxious to distinguish themselves clearly from the heathens. From the end of the seventies, the number of protestants started to grow faster. The congregation of Wailanda consisted of 300 persons in 1962, about 700 in 1970 and about 2000 in 1980. Umbu Hapi and his family joined in 1978[6]. Gradually the meaning of conversion changed: conversion used to be the difficult choice, made after several years of Bible study and training in the practical meaning of the christian way of life, to become a servant of the Lord and abstain from all customs and practices that were not compatible with the "new way of life". As the number of protestants increased, so did their influence. They were no longer a minority having to fight for their existence; they became a majority. More than ever it is considered backward and old fashioned to be an adherent of the marapu-religion. The government recognizes only five official religions (islam, hinduism, buddhism, catholic and protestant christianity), and being an adherent of one of these 5 religions is a prerequisite for passing exams (in Wailanda), or to be appointed a government official. Recently conversion, to put it very cynically, became a transfer from one statistical category to the other. The choice between one of the religious categories, protestant, catholic or marapu, is little more than choice between the social categories of their adherents. For villagers in Wailanda there is often no choice at all, since they will follow those they are most dependant on (clan leader, buffalo owner, father-in-law etc). Whatever the choice is, from my experience it has little to do with matters of belief[7]. One consequence is that the values that belong to the religious normative order valid in Wailanda originate from a mixture of different religions. People are members of either the catholic or the protestant church social organization. Their religious leaders are the members of the church council. On the other hand most of the new members, as far as their beliefs are concerned, are still adherents of the marapu religion, although they do not practice the rituals anymore. The distinctions between what christians

believe and what adherents of marapu believe fade; marapu-religion is eroding and simultaneously the christian churches grow, but the new members are not familiar yet with the content of the new religion.

With regard to the institutions of the religious normative order important changes took place over the last few years. The main institution of the church on village level is the church council. Members of the church council used to be chosen according to their merits as christians; but recently the criteria have shifted and people tend to choose church elders who already hold a position as leaders in government or in adat, even when they have just been converted. The second important institution of the church is the school (SD and SMP). When the school was founded in the first part of this century by the missionaries its first and most important aim was to teach children to read the Bible. Gradually government influence increased and now the school can be regarded as a tool for spreading the values and norms belonging to the church as well as the ones belonging to the state normative order.

A complicating factor in the case study is that Umbu Hapi and Umbu Vincent both have distinct definitions of "the church". The above story holds true for Umbu Hapi, but Umbu Vincent only regards this as charactaristic of the local church. Administratively he is a member of the local congregation, but his loyalty is to the dutch churches, and even more specifically, to the small group of congregations that interpret the Bible in a way that matches his own conviction. Theologically there is a wide gap. The confusing factor is that the church they are both members of is one of a universal group of churches that are the same in name, but in practice are very different. In matters concerning the church Umbu Hapi and Vincent are both referring to "the rules" of "our church" but in fact they are referring to different normative orders.

The development organization

It seems odd to put "the development organization" in a list of normative orders, because the organization we refer to is so much smaller than "the church" or "the state". And it is not very common to think of a small development organization as active in shaping law. Analytically "the development organization" order is not of the same type as the religious or the state normative order. The latter have universal systems of rules; their official bases of validity are written down and their rules can be known by all who take the trouble to study the texts. Empirically, in the specific context if Wailanda, the different normative orders of adat, state, church and development organization are equivalent. From the villagers' point of view they all represent a totality of values and rules; and each of the four orders is represented in the village by its

own institution(s). They all are a source of legitimate authority.

Here "the development organization" is used as a label to distinguish a set of values, rules and norms that are produced by the local development organization[8]. One general value put forward by development organizations is that of progress. Everyone should strive to improve his or her situation, such as to produce more food, to acquire land, to reduce the pollution of the environment. Although often -and this is certainly true for the development organization in Wailanda- there is no detailed, written definition of what "improvement" means and what the exact targets are that the organization tries to achieve, there is an impressive list of things that should be changed in order to "improve the situation". In striving for progress, the development organization opposes the orders shaped by adat and marapu-religion. Another essential value promoted -at least in theory- by development organization's is that of democracy. Farmers should organize themselves democratically, be free to choose for themselves whether they want to join an organization, with whom they want to cooperate, and what they would like to do. In Wailanda this was vigourously put into practice by PPM, the local development organization. The ways adopted by the Indonesian government, and the social organization, cooperation and leadership the local population is used to are not compatible at all with the democratic ways promoted by the development organization.

From the villagers' point of view the development organization has other sources of authority. Why would people in Wailanda accept the rules of the development organization, or be willing to change their ways in accordance with the ideas promoted by the development organization? A first and honest answer is that there are always expectations of material gain through a development project. Initially this is probably one of the main motives for people to participate in the development activities. Umbu Hapi provides an example: he invited PPM to reside in his village expecting this would improve his personal material situation. A second cause of authority that gradually developed after a few years is the fact that PPM provided some alternatives for exploitative relationships. This was done by stimulating farmers' organizations, and these farmers' organizations were protected against negative pressure from inside or outside the village by the staff of PPM. For shrewd village leaders, PPM also presented a new road to power, because of its relationships with higher level bureaucrats, higher level church authorities and farmers organizations elsewhere.

The fact that the church-owned development organization is depicted as creating its own normative order different from that of the church as such needs further explanation. The development organization in Wailanda is owned by the church. Formally it is a executive unit of a foundation of the Protestant

Church of Sumba (GKS). In fact it is rather autonomous, especially since the donor church in the Netherlands provides funds directly -without the mediation of other parts of the church bureaucracy-. As regards content the development organization holds a distinctive position too: being most concerned with practice it has a quite different way of interpreting the Bible than most of the people employed by the GKS who are more inclined towards preaching the Word. In Wailanda the development organization and the church (GKS) are regarded as two different institutions; usually they coexist and sometimes their leaders are in open conflict.

Umbu Hapi versus Umbu Vincent

From 1984 until 1990 we lived in a village called Wailanda. The village is small, with only 1100 inhabitants. We worked for a small development project of the protestant church of Sumba (Gereja Kristen Sumba), called PPM; the project center was located in Wailanda from 1978. The village head -kepala desa- of Wailanda, Umbu Hapi, had received PPM with open arms, expecting that this would be the projects of his dreams, bringing status, wealth and power to his village and most importantly to himself. He was disappointed. PPM preferred to work with the poorer sections of the village population, and showed a quite calvinistic morality on spending money or giving credit and gifts. His disappointment turned into disapproval when it transpired that the people involved in PPM started to become opinion leaders in the village. This was a real threat to his power. Because for his daily livelihood he largely depended on this power over the village population, he used every available opportunity to harm the people from PPM, especially its leaders.

From 1984 until 1989 my husband -"pak Vincent"- was project leader of PPM. This was meant to be a temporary position only and the main task was to look for a Indonesian project leader. In order to avoid the project staff becoming too dependant in their work and initiatives on the leader, the quite unfamiliar ways of democracy were adopted. This was another type of alternative to the ways of leaders that are usually adopted in Wailanda, and therefore another threat to the kepala desa.

Apart from being employed in PPM we also lived our private life in Wailanda. This included our being neighbours to the families who lived on the south side of the village, and straightforward members of the local congregation of the church, as well as inhabitants of the desa. We did not have servants in our house but "anak piara", foster children; three girls and two boys between the ages of 15 and 24 years lived in our house, did most of the domestic work and, being members of a missionary's household, were supposed to pick up some education.

One of the foster daughters was called Kapi. After leaving school she had stayed with the kepala desa, Umbu Hapi, for a year to take care of their youngest daughter. She did not receive any reward for the work other than food and shelter; the kepala desa did not feel obliged to give her more because he considered Kapi to be his "sister". Genealogically she is the Umbu

Hapi's fathers sisters daughter, but since Kapi's father never succeeded in paying off the bride price for her mother, the clan of her mother still holds the right to give Kapi in marriage and to receive the bride price that will be paid for her. As she was staying with the kepala desa she was very aware of his anxiety to marry her off and therefore did not feel at ease. When the kepala desa's baby daughter was taken from Wailanda to be raised by relatives in town, Kapi went home to her parents. After a few months she asked whether she could come and stay with us; for Kapi the work is our house was less tiring than the work for her parents, the food was better and it was fun and exciting to stay with foreigners. We accepted Kapi because we could use more help in the house, and Kapi's sister-in-law as a representative of her family handed her over to us.

The period of living together quite pleasantly came to an abrupt end in July 1987 when I discovered that Kapi was pregnant. "Who was responsible?" was my first question, and she revealed that it was a boy from a neighbouring village, and that it had happened at her sisters house during our holidays. I was very displeased, because apparently we had failed to be able to provide a safe home for unmarried girls, and even more because I liked her very much and I could see what trouble and unhappiness she was in for. Not being familiar yet with the appropriate conduct in these matters I decided to visit Kapi's mother and sister-in-law informally. The sister-in-law was out when I came; the mother showed her disapproval with the situation of her daughter. Not that she was very sad about her being pregnant; not that she was angry with me, because all people in Wailanda agree that "it is easier to guard a herd of buffaloes, than to guard your young daughter". She was sad because the father of the child was a poor boy who obviously could not pay much of a bride price for Kapi. She told me that they had already had discussions about this subject with Kapi when it became clear that the two of them were having an affair.

After getting advice from sumbanese friends we decided to bring Kapi back to her parents, just the way she came, which means informally, without any gift exchange or meals or other ceremonies. But every time we had made an appointment or tried to do so, her brother and sister-in-law -the ones who were supposed to receive her- were out. In the end, after a week of failing to meet the right relatives, I brought Kapi to her brothers' house and left her there to stay.

In the meantime there had been a number of consultations between Kapi's brother and sister-in-law and Umbu Hapi. In a family gathering organized by Umbu Hapi the one Kapi had mentioned as being the father of her child denied it. Then it was said that one of our foster-sons -called Tena- was the father of her child. Therefore Umbu Hapi had advised Kapi's family not to take her back, but to leave her at our house in order to make their argument stronger. Now we were not only regarded as parents of Kapi, sharers of the loss caused by the events, but also as parents of the one who caused the events, and therefore responsible for the loss for Kapi's family. We did not agree with this accusation and our foster son firmly denied that he had had anything to do with Kapi's pregnancy. Umbu Hapi, ignoring Vincent's objections, announced a meeting at our house to settle the matter. What he had in mind was to incriminate our foster-son as the father of Kapi's child and sentence him and the ones responsible for him to pay either a full bride price

or a compensation for the devaluation of Kapi as a marriageable daughter.

In 1984, just after our arrival in Wailanda, the kepala desa had already arranged family-ties between his family and us. When we invited him and his family to attend our house-warming party, his father suggested to come "secara adat" -with a group, carrying gifts for ceremonial exchange-. In our ignorance, looking forward to experiencing some indigenous culture, we accepted his offer. His adat group carried a pig and a handwoven cloth, we accepted, and gave a horse, a buffalo and a mamuli in exchange. But the most important implication of this event was that we accepted the relationship with the clan of Umbu Hapi as if they were "yera" (bride-givers) and we were "ngabawini" (bride takers).

For the meeting he proposed now in order to settle the matter concerning Kapi, Umbu Hapi had thought up a good plan: his messenger added that we should wait at home for them to come, together with our kepala dusun (head of the our neighbourhood) who usually acts as the head of the clan that lives on our side of the village and who had always been a great advisor to us in adat matters. The advantage here for the kepala desa was that in this way there would clearly be the two parties as required for adat negotiations present, and our main advisor would be subordinate in the village-government staff. The second member of our party suggested by the kepala desa had a subordinate position too. Fearing an adat-trap we invited two church elders, the kepala dusun as representative of the local government, and three sumbanese colleagues of PPM, who volunteered to be our indigenous solicitors and do the creative questioning and thinking.

The delegation representing the party of the kepala desa consisted of a number of people who were invited to speak on behalf of the" large family of Umbu Hapi". Neither the kepala desa himself nor Kapi's brother nor her father were present. They brought Kapi with the intention of offering her back to us. After the spokesmen of both parties had explained their intentions for this meeting, opportunity was given to ask questions and discuss the matter. Tena was invited to react openly on the accusation and he absolutelly denied. Kapi was asked to give her story on the events that caused her pregnancy; she told that our foster-son was the father of her child and she added that "it" had happened about one year ago. When she was asked whether this was the last time she had intercourse with him, she said yes. Because most of the people present at this meeting had better knowledge about the facts on human reproduction than Kapi obviously had, it was clear that Umbu Hapi had lost the argument. The spokesmen tried to bring the meeting elegantly to an end, but it was hard for Umbu Hapi's group to conceal their disappointment and anger towards Kapi. When they left they took Kapi back home.

At Kapi's home Umbu Hapi was waiting. At night a boy came to our house conveying the message that Vincent was expected in the office of the village head "the day after tomorrow at eight o'clock". Kapi's brother had lodged a complaint with the village government. No more than being guests of the indonesian people, with only temporary visa, we were keen to keep good relation with the government -in general-. But being fed up with spending so much time on settling disputes that are invented by people who keen on causing trouble for PPM, Vincent decided to visit the bupati, the head of the district government, of west Sumba in order to complain about the kepala desa

of our village.

When Vincent arrived in the office of the kepala desa had already renounced his original intention on making an angry speech and forcing Vincent, as an ordinary village inhabitant, to settle the conflict with Kapi's family by paying a penalty to them. Although Vincent had not yet succeeded in visiting the bupati just the rumor of this plan had been enough to cause hesitation amongst the village government. The other members of the village government staff disagreed with the kepala desa and found that his approach was ill-conceived since foreigners could not be considered just ordinary village inhabitants; whenever problems occurred with foreigners higher government officials would have to be consulted and the matter would be dealt with by SOSPOL. With Vincent already being there the kepala desa was in a delicate position. He explained again in mild words that he was displeased with the situation that had emerged between Kapi's and Vincent' family and that he would like to see it resolved. As a way out they nominated a third person who was accepted by all to resolve the issue. This final decision was more a way of avoiding being forced to make statements, than an actual plan for settling the matter. The third person was never asked to execute the task he was chosen for. One or two weeks afterwards Vincent met the bupati at a party in the house of the bupati's father. Vincent was accompanied by the secretary of the board of PPM, a very intelligent and influential lady, who is closely related to the bupati. The bupati listened to their story and replied that he would not take any action for the time being; he addressed his cousin, the secretary of the Board, with his advice that the Board should try to intervene if things got out of hand. But he added that in the event of the Boards' intervention being unsuccessful he would be willing to intervene personally.

After a few weeks Umbu Buto - the kepala dusun of our part of the village- came to our house with a new proposal; it was his own idea and had the approval of the kepala desa. Maybe we could have a meeting at Kapi's brothers house to settle the matter. This meeting should include a "hand-washing"-ceremony to show in a proper adat-way that we had nothing to do with the pregnancy of Kapi and that all responsibility is handed back to the family. The gifts that we should provide in this ceremony would be a horse, a sarong and a mamuli. Although this proposal could be seen as a nice gesture, a way out to peace, we did not accept it, because the accusation was still false and therefore we did not want to pay any penalty in whatever way. We were afraid that to agree on a "hand-washing"-ceremony would be equivalent to accepting that this matter should be settled within the sphere of adat, and surrender ourselves into the hands of adat experts and their interpretation of what is equitable and just.

So the problem neither reached a solution through adat nor through the village government. For nearly half a year nothing happened. Kapi delivered her baby in september, a son, and she stayed with her brother. I went to visit her, and there did not seem to be problems with Kapi or her small family.

In February 1988 our foster-son -the one who was accused of being the father of Kapi's child- wanted to marry in church. His marriage was already arranged according to adat, and he and his wife submitted a request for religious blessing. After this request had been announced in church, the congregations' council received a letter, sent by Kapi's brother stating that

there were "legitimate objections" to the proposed marriage in church. According to the letter our foster-son was still regarded as the father of Kapi's child and, unless the matter was resolved properly, Kapi and her family would object to the proposed marriage. The church elder who received the letter had left it at home, which was no problem since the kepala desa himself entered the council's meeting in order to explain the contents of the letter. He also explained what was considered to be a proper way to resolve the matter: at least one horse and a sarong should be given to Kapi's family. After the service the church council called Vincent and our foster son for a small meeting. They explained the matter and said that Tena had to make peace with Kapi's family first before he could marry in church. Vincent replied that Tena and he were willing to make peace as christians, which means by immaterial ways of showing regret about things that have happened; but he also said that he would never agree to give a horse and a sarong as a condition for marriage in church.

Tension increased and both parties were disinclined to surrender. After two weeks of refusing to participate in the peacemaking ceremony as proposed by the opposing party, Tena and his wife decided to revoke their request for religious blessing and to postpone their marriage in church until better times. The church council decided that Tena from that time on was not allowed to partake of the Lords Supper, since he refused to make peace with Kapi's family. To give moral support, Vincent and I decided to abstain from the Lords Supper too. This is one of the most serious punishments the church council, in a Sumbanese context, can give to the members of the congregation.

Because a large part of the congregation council did not feel a ease with this situation, either because they did not like the kepala desa, or because they did not approve of this way of using church rules, it was decided that Tena was allowed to marry in church in his own village, 10 km away from Wailanda. He was also allowed to partake of the Lords Supper in his own village. Since this village and Wailanda all belong to one congregation the decision did not make sense to us, but it worked in practice. We did not have to surrender, Tena could marry in church, and the kepala desa would not lose face in public.

When we were on leave in Holland Tena and his wife married in church in their own village. Our absence was a good excuse to have the ceremony in the village of Tena's parents, and in this way it would not seem too much of an acceptance of the strange ways of the church council, and a surrender to Umbu Hapi. In Wailanda Tena was still not allowed to partake of the Lord's Supper. In the meantime Umbu Hapi was chosen and appointed as a church elder, as a member of the church council. Apparently there was no objection to his nomination because of his part in the conflict between Kapi's family and Tena's party.

In July 1988 Umbu Hapi tried to marry Kapi off. He wanted to give her in marriage to a boy who already stayed at Kapi's brothers house for a long time. He was a boy of low descent and by no means able to pay a sufficient bride price for Kapi. The marriage would imply that he would stay permanently with Kapi's family, working for them in a position of total subordination. Kapi did not agree at all with this plan and she ran off with her son to the house of her uncle. She refused to return to her brother's house until the candidate-husband had left and Umbu Hapi had assured her that she did not have to marry him.

In December 1988 Kapi and her son were baptized in church. They were two of more than two thousand people who were baptized on that day in the congregation of Wailanda. Umbu Hapi had encouraged her to take part, as a member of the church council, and as village head, because the large increase in the number of members of the protestant church was applauded by the district government authorities. This political pressure was decisive for the Kapi's baptism at this particular day. The fact that she was baptized should not be interpreted as a sign of peace towards our party in the conflict. Umbu Hapi was very silent about Kapi's participation in the event.

In 1989 Umbu Hapi and his family faced many problems. One of his houses burned down and the stock of maize was lost; his wife suffered from strange skin diseases and some people said it was leprosy; his youngest son had a very severe attack of malaria, that nearly killed him and left him in hospital for nearly a month. Umbu Hapi sensed that this was a punishment from God, and that he should change his ways in order to escape from further punishments. After his son had recovered he organized a large thanksgiving party. We, "Umbu" Vincent, our colleagues from PPM and myself, were invited, much to our surprise. We attended the party and we and all the other guests were edified to leave all bad feelings behind and start living as good christians.

But this was not enough to put an end to the conflict. The decision of the church council that Tena was not allowed to partake of the Lord's Supper was not withdrawn. Therefore we tried to arrange a peacemaking ceremony "in a christian way" which means without giving a horse or anything else. After a while Umbu Hapi agreed and the meeting was held at his house. The fact that we would be leaving from Wailanda within a short period also accelerated reconciliation. Being on good terms with us again, the father of Umbu Hapi ordered us to come and visit him before we left Wailanda, in order to ask his permission, being Vincents' father in law, to travel back to our own country. Reluctantly we accepted the greedy old man's invitation and as a good son in law Vincent brought Umbu Hapi's father a horse and a mamuli.
The conflict was settled and we could go home in peace.

The village combat

In the case study there are two main actors. Umbu Hapi and "Umbu" Vincent. They are both aware of the existence of a legal repertoire[9]. They also know that their access to the elements of the repertoire is not equal. This access depends on the position one takes in the hierarchy complementary to a normative order. Each actor carefully assesses his position according to the criteria of different normative orders, and compares this to the position of his opponent. If , within the sphere of one normative order, the difference is large it is a good strategy for the one with the best position to opt for this normative order. Umbu Hapi assessed his position in adat much higher than the position of Vincent and he choose to fight in the arena of adat first. Vincent realized

his bad position and tried very hard to escape from the sphere of adat. It was only the lack of good arguments that caused Umbu Hapi to lose. In his assessment of positions in the sphere of government he made a mistake in overlooking the fact that Vincent had access to higher levels of government than the village level.

If the difference in position is not very clear, it is a better strategy to combine elements of different normative orders. The story of Umbu Hapi versus Umbu Vincent presents the example of a church rule combined with an adat prescription: our foster-son could only marry in church when he made peace with Kapi's family using the proper adat way first. The former strategy could be called forum shopping, but the latter, of combining elements, is something else: the actor does not choose between different orders or institutions but he actively creates a mixture that suits his purpose or interest best. Each actor is adopting this strategy individually. The settlement that is agreed upon in case of dispute is then the optimal acceptable converging point of the normative mixture created in the case study by Umbu Hapi and the normative mixture created by Umbu Vincent. Hence legal pluralism is used in the way that serves the actors best interest. It can be a tool to create adherents, or to mobilize a target group, or a weapon in village politics.

In order to be able to generalize this conclusion two riders should be added. The first is that people are not free in every matter to choose what kind of rules are applicable. For a number of matters there is consensus in Wailanda with regard to the superior validity of one particular normative order. Marriage should be contracted according to the rules of adat; robbery and theft are matters for which state law is found most suitable. This does not mean that all cases are dealt with under the normative order preferred for the category they fall into. But it means the arrangements have this normative order as a starting point and that its rules play a decisive role.

The second rider concerns access to the use of different normative orders and their institutions. This point can be illustrated by looking at the reverse side of the story. In the case study attention is focussed on the two main actors who are in fact village leaders. But there are two other important actors: Kapi and the foster-son. How does legal pluralism work for them? They are not able to play a very active role in making their own normative mixture. Kapi does not have access to services of the government, since the government representative is Umbu Hapi, who will only use his power as village head on behalf of Kapi when he feels inclined to do so as the head of her clan. She has no access to services of the church or the church council, since she is not an official member of the church. Being an unmarried girl she has a bad position in adat too; she is called "paberang tabu uhu" which means, the one who's rice-

plate will be broken, and this refers to the fact that girls are destined to leave the house in order to stay with their husband. As long as she is a member of the household of her parents her personal rights are minimal. Resistance is her only weapon: to elope with the husband of her own choice, to run away from home or to threaten to commit suicide. For our foster-son the situation is comparable in this case. He has no access to the services of the government since his opponent is the government representative. With his low social status he automatically is subordinated by the church council, that does not pay attention to his objections even if he dared to have some. In this case his strength is that he is a member of "the party" of Umbu Vincent, which means he does not have to enter the arena of struggle as an individual, but is regarded as a subordinate of a powerful person. On the one hand our foster son was the object of a power struggle between Umbu Hapi and Umbu Vincent, and probably he never would have had the same troubles if he had not been our foster-son. On the other hand becoming an active adherent of one of the powerful people in the village is a way of broadening access to institutions and power.

My conclusion from this reverse side of the story is that forum shopping is a strategy that is only adoptable by those who have access to the different institutions constituting legal pluralism. The consequence for people who lack access is not very favourable. If rights and legal services become negotiable and when there is no institution or force willing or able to ensure rights and access to legal services to all persons, eventually legal services or rights will be traded off just like economic or social services. In that case forum shopping requires a full purse, and people with an empty purse will return empty handed.

Development intervention and legal pluralism

The story of Umbu Hapi and Umbu Vincent illustrates that when a development organization enters a village it starts to participate in village politics. The development organization has ideas about what the village population should do, and about the ways they should adopt. Through extension education, stimulating new organizations and the execution of activities the development organization spreads its ideas and creates adherents. These ideas can be quite different from the ideas of the local leaders. A new normative order is created by the development organization. The development organization is not a neutral outsider in village politics. Consequently a struggle for power can evolve in which each party bases its arguments on its own normative mixture.

In composing the most favourable normative mixture local leaders adopt three different stances respecting the development organization:

(a)Cooperation with the development organization. In this option the local leader chooses to adopt (a part of) the normative order of the development organization. If the activities are successful it will be advantageous to be associated with the development organization. It also opens the possibility of acquiring another leadership-position: leader or chairman of the farmers' organization that cooperates with the development organization.

(b)The option of silent resistance, in which the local leader does not cooperate with the development organization but adopts a passive attitude towards the development organization and its activities.

(c)The third option for local leaders is to try to incapacitate the development organization staff to undermine their power. One of the ways adopted is to draw the staff members into the local social order, creating (symbolic) personal relationships with them. Once the staff members accept the honor of being related to the villagers, they consequently have to accept the rules valid for relatives, which can be quite pleasant and comfortable if it implies support and assistance from relatives; but it also can mean that they have to subject themselves to the leader of the family.

In short these options represent different sequences of normative orders. The first option gives a superior position to the development organization-order. The last option gives priority to the "adat"-order in which kinship is used as tool in ordering society. In the course of time the relative importance of different normative orders within a specific context can change. It is likely that in new areas people start by using the option of silent resistance, and then, when they have decided whether they like the development project or not, opt for the first or third option.

Staff of a development organization might be inclined to regard each village leader as representing the normative order he is associated with: the religious leader with the religious community, the village head with the government etc. This is misleading because each leader actively mixes normative orders and uses the mixture to consolidate his power and interests. This also holds true for the development organization-leaders themselves who use state law, church law or adat when it suits them. Using the concept of legal pluralism one is able to see that participation in development has two sides: "development" as a competing normative order participates in the local legal

repertoire, people from the village take parts of the development normative order that suit their own interests, and development workers use parts of the other orders when they find it necessary or when they are forced by the local population to do so.

Notes

1) Legal pluralism is the presence in a social field of more than one legal order (Griffiths, 1986).
2) Legal repertoire is used to refer to the dituation of legal pluralism in a specific context (F. von Benda-Beckmann, 1989).
3) Forum shopping is used to refer to a situation that can be described as follows: "When fields of jurisdiction of different institutions overlap, disputants can choose between these institutions. They base their choice on what they hope the outcome of the dispute will be (however vague and ill-founded their expectations may be)" (K. von Benda-Beckmann, 1984).
4) "Marapu" is a word that is hard to translate in another language. For Sumbanese anything that is referred to as "marapu" is something that belongs to the invisible world, (van Dijk, 1939) the world of gods and spirits, the world of the deceased.
5) My own translation.
6) The number of church members -officially registered by the church itself- can be compared to a total population of about 10.000 people in the area of (the congregation of) Wailanda.
7) In December 1988 the number of members of the congregation of Wailanda (GKS) doubled. On one day 2563 people were baptized. This was the result of a large evangelization campaign initiated by protestant politicians in town who hoped this campaign would result in members for their church and supporters for their politics.
8) "Development activities are rationalized and justified in terms of models. These models roughly consist of two components: (1) structures of institutional organization and action which provide options or directives for the activities of bureaucrats or villagers (the latter usually being the "target group") ,or for joint activities of both; and (2) rationalizations and justifications of these behavioral structures in terms of their supposed social consequences. The models are normative, in their behavioral programme, their goals and their underlying legitimation. In other words, development projects have the form of law." (F. von Benda-Beckmann, 1989).
9) See footnote 2.

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CHANGING FULANI-SOCIETY AND SOCIAL SECURITY*)

Mirjam de Bruijn and Han van Dijk

Introduction

'Haidou and his wife have seven children. Their herd is decimated. After all the drought periods and some diseases in their herd, only 6 cows and a few goats remain. This year in january, we visited them in Duwari, he had to sell one more cows to buy millet for his wife, two daughters (12 and 10 years old) and two sons (14 and 7 years old), who live with him. Last year his eldest son left, looking for work elsewhere and leaving his wife behind. They do not know where he is, neither did he send any money nor a message. His daughter-in-law returned to her parents, who are asking for a divorce if Haidu's son did not return soon. After the harvest his second son also left, to look for work and to find his elder brother. His eldest daughter has married a *Koumbeejo*[1)] man and lives as a *Koumbeejo* in Duwari. For Haidou this was terrible. His daughter has chosen to leave the Fulbe-culture, or was she forced to ...? This year Haidou worked very hard on his field, together with his third son, who now herds the cows in Duwari. He really 'fought' for his harvest, working day and night. He had a good harvest compared to others, but still not sufficient to feed his family. They have no milk as the cows have dried up. So milk is a luxury in his family and they only eat once a day. After the rainy season he sent his third son into the bush to gather wild grains, which is rather exceptional for Fulani. Haidou hopes his two eldest sons will come back the next rainy season to work on the land. Tilling the soil becomes too heavy for him and his third son alone, Haidou being 60 and already and old man without strength because of the ravages of hunger. He does not want his daughters to help him, neither with cultivating nor with herding the cows.'

The case of Haidou and his family shows us the reality of Fulani society, a culture of proud cattle-breeding people in Central Mali, as it is for many families nowadays. In this article we will show a part of the background of this reality.

The data presented in this paper were gathered during the first period of our fieldwork in Mali. Therefore this paper gives only tentative results of an on-going research project. In this paper we try to show a number of aspects of the very rapid social change in Fulani society, with special attention to the role of norms and values in this process. Here we will only deal with the agro-pastoralist group, the *Jallobe*, being the most marginalised group in terms of

access to government institutions, aid programmes by NGO's and international donors.

In general Fulani-society in Central-Mali is under a great deal of pressure. Due to the droughts of the past decades the natural environment is deteriorating rapidly. Many Fulani agro-pastoralists have gradually lost their cattle, which was their main subsistence base, and were forced to cultivate more land. Due to the colonial state and the modern Malian state they have lost most of their political dominance. Agriculturalists have occupied large tracts of their valuable pastures and turned them into croplands. They were incorporated into a monetary market economy, which undermined their traditional way of obtaining cereals by bartering milk for millet, and also lead to a loss of the symbiotic relations they had with agricultural groups. In addition they were exposed to all kinds of new forms of state extraction like fines by the Forestry Service, school fees, and contributions to development interventions they did not want. Gradually they lost the rights to their pastures, which they had defended for centuries against outside invaders like the Twareg and the Mossi and are forced by the government to tolerate outsiders on their pastures precisely when they need them most (cf. De Bruijn & Van Dijk, forthcoming).

Thus we can say that Fulani society was and is in a process of rapid social change, which is at this moment, a change for the worst. This has meant, as will be shown in this paper, a decline in social security for certain groups in Fulani society. One aspect of social security is the cluster of norms and value systems guiding the behaviour of various categories of people and their application in day to day life (see Von Benda-Beckmann et al., 1988). In this paper we try to show what the influence is of the environmental changes affecting Fulani society on these norms and values and what impact the norms and values have on the attitude of the people towards the changes and hence towards social security. Of course, these norms and values are interpreted in a different way by various groups in society, due to their different tasks, their different roles and their position in the power structure (e.g. men, women, young and old people). As a consequence social security and the changes therein will differ for various groups in society, leading to differential access to production assets such as land, cattle and watering points, food, and alternative employment opportunities.

The research area

The fieldwork on which this article is based has been carried out in Serma in a village of agropastoralist Fulani, in the cercle of Douentza, Mali (see also

Gallais, 1975). It belongs to a series of villages and hamlets located at the border of the slopes of the Inselberge, which stretch from the northern edge of the Bandiagara escarpment at Douentza to Mount Hombori, 150 km to the east. Locally this region is called *Hayre* which refers to the Inselberge. South of the village is a strip of dunes, some 40 km wide *(Seno-Mango)*, where valuable pasture land is available. The Fulani are not the only ethnic group in the area. To the west and east there are villages of Dogon and *Houmbebe* in between the hamlets of the Fulani. Some 25 km to the north, numerous villages of *Rimaibe*, Dogon and the villages of the ruling elite of the Fulani border the mountain slopes. The Fulani-herders south of the Seno-Mango border, close to some *Houmbebe* villages, have become dependent on the cattle of the *Houmbebe* for their livelihood.

Serma is essentially a group of rainy season camps around a village of cultivators (*Rimaibe*, ex-slaves of the Fulani). Fulani as well as *Rimaibe* cultivate fields in this area. The camps are located at a certain distance from the fields, to prevent cattle and goats damaging the crops. After the harvest a number of families live on transhumance. Other families stay in the village area the whole year, and just move their homestead from their rainy season camp to their fields or to a well nearby. The fields of the *Jallobe* are mostly situated on the sandy soils, which are easy to cultivate. This means that even if there is not too much rain they can still obtain a harvest of millet, the main staple crop, because of the relatively high water retention capacity of these soils. On the contrary *Rimaibe* cultivators choose to cultivate heavier soils with less water retention capacity, but a higher natural fertility. Like the *Houmbebe*, the *Rimaibe* mobilise their whole family, men, women and children, for cultivation. Among the Jallobe only men perform agricultural work. In addition *Jallobe* men seem to spend less time and effort on their fields than their *Rimaibe* fellow villagers, and a considerable number of young *Jallobe* men are needed to herd the cattle during the cultivating season. Nonetheless *Rimaibe* as well as *Jallobe* are not able to produce sufficient cereals to meet the subsistence needs of their households, although *Rimaibe* households attain a higher level of production. The village and probably the whole region produces well below its needs.

This year the harvest was bad, due to periodic failure of the rains. Other plagues attacked the millet like: duststorms, grasshoppers, all other kinds of insects and birds. Last year there was no harvest in the region because of a devastating attack of grasshoppers, which destroyed the whole crop. Reviewing the last twenty years, the village and probably the whole region is a chronic deficit area. This has meant that the *Jallobe* had to sell lots of animals to buy grains to feed their families in addition to the cattle that were lost during the

droughts. By now their herds are decimated. Normally the cattle is kept for the milk, which is consumed by the family or bartered for grains by the women. But as the herds have been depleted and the quality of the pastures has diminished the cows do no longer yield enough milk, to cope with the cereal deficit. Periods like this are known to the Fulani from earlier times. But this period is longer and the problems seem much more persistent.

Historical background

In the 19th century the Fulani were politically and militarily the dominant group in this area. Several Fulani-chiefs (Dallah, Boni) ruled the territory down to the border of what is now Burkina Faso. The other ethnic groups, dominated by the Fulani, paid taxes to the Fulani in the form of cereals, cattle, slaves, crafts and bush products. In return, the Fulani-chiefdoms offered protection against invaders and safeguarded the smooth functioning of trade systems.

Fulani-society proper consisted of an amalgam of distinct social categories. The chiefdoms were ruled by a ruling elite. Closely associated with them were a group of traders who acted as advisors to the chiefs and intermediaries with outside groups in political relations and trade. A group of marabouts formed an Islamic religious class, providing the elite with amulets and blessings to help them in warfare and in propagating chiefdoms. At the same time the marabouts were the official scribes of the chiefdoms keeping records of historical events and judgements of infractions against Islamic law. Slaves (*Rimaibe*), the most important labour force in the chiefdoms, were divided into two categories: one consisted of the war captives (men and women) who were attached to specific individuals of the ruling elite and the associated groups (and also the soldiers, *Jallobe*), they were put to work on the land of these individuals or performed household tasks; the second comprised slave villages. Subjugated in the course of the establishment of the chiefdoms, these villages were left intact and had to deliver a large part of their produce to the capital of the chiefdom. In addition to these social categories of people a number of cast-groups exist performing all kinds of tasks such as blacksmithing, weaving, and leatherwork.

As we have seen Fulani society consists in large part of non-pastoralist groups. Yet very little attention has been paid to these non-pastoralist groups. This neglect is based on the assumption that pastoralists are the dominant group in Fulani-society. We have reasons to believe they are now and previously were not. Of course, the *Jallobe* has very important functions in the chiefdoms. They constituted a large part of the army of the Fulani-chiefdoms,

infantry as well as cavalry and they were considered fierce fighters. They also kept a limited number of slaves, to perform the arduous tasks of watering the cattle during the dry season and the cropping of millet in the rainy season. After successful raids on neighbouring chiefdoms they shared in the county consisting of cattle and slaves. But slaves participating in the raids were also rewarded so that even slaves could possess slaves. Their remaining task was to herd the cattle of the elite and the associated groups in addition to their own cattle.

But how prominent was their role in political and military affairs, apart from their contributions to the army and the economy? They were not, for example, represented at the court of the chief, in contrast to the other groups. They did not deal with outsiders on their own initiative, nor did they engage in trade. Intermarriage with the elite, which belongs to a different patrilineal clan or lineage, was and is rare. Marriage with outsiders was and is prohibited by a strong ideology of 'Fulaniness', or nobleness, whereas the ruling elite intermarried with marabout-families, slaves, neighbouring Sonrai ruling families and even Dogon who were considered pagans, in order to form political alliances. Moreover, like other social categories, they payed tribute to their chiefs.

This position of relative isolation from the outside world persisted during colonial times. The French colonial government took the elite as representatives of Fulani society and through them they introduced new rules. This resulted in important changes for the *Jallobe*, although they didn't have direct contact with the new rulers. The French abolition of slavery in the *Hayre*, only became effective after World War II. For the elite, but also for the *Jallobe* this had a profound impact, because they lost an important labour force. The introduction of the French education system, forced labour, forestry service and modern agriculture, did not have much influence on the *Jallobe* because their elite shielded them from these measures. In return, the *Jallobe* provided the elite with cattle and other gifts. Children of the elite and of their ex-slaves however, did participate in the colonial system of education, military recruitment and forced labour. With respect to the judical system the same happened. In the court, where a mixture of French and Islamic law was used, they were represented by their chiefs. Again the *Jallobe* were effectively kept apart and they followed the advice of their chief.

After the independence of Mali in 1960 the chiefs of the Fulani in the *Hayre* lost part of their power. After World War II they were represented in the government by relatives, but after independence they were eliminated from the political arena. In the *Hayre* the old structure of Fulani society still persists to a great extent. All new developments like projects and veterinary services are introduced via the chief and do not directly reach the *Jallobe*. Up till the

present the *Jallobe* do not attend school and try to avoid all kind of taxes except the tributes to their chief, who mediates between them and the post-colonial government.

The *Jallobe* were thus effectively blocked from having an independent power in the chiefdoms and from forming independent ties with the colonial and modern state and aid organisations. Ideologically this was sanctioned by the special relation between the elite and *Jallobe*, which is explained in the founding myths of the chiefdoms.

Norms, values and institutions relevant to social security

As we have seen the *Jallobe* have an isolated position in the political hierarchy of Fulani-society. As a consequence they have little room for manoeuvre left and cannot resort to political means to improve their situation. The only space left lies in their own cultural rules, norms and values and in the manipulation of this complex. The central elements in this ideological complex can be expressed by three terms: *Pulaaku, Dimu, Yaage* (see Dupire, 1971; Riesman, 1977; Bocquené, 1986 for a more thorough description of Fulani ideology).

Pulaaku (fulaniness) and *Dimu* (nobleness) are strongly related. They both prescribe rules for men and women on how to behave and rules about the division of labour. The values inherent in these concepts are a mixture of traditional and Islamic ideology. Nobleness is attached to a high position in the social hierarchy. As such it gives an important definition of the group boundaries with Fulani society: *Jallobe* have *Dimu*, *Rimaibe* have not; the elite also has *Dimu*, so in the ideological hierarchy they are part of the same stratum as the *Jallobe*. A noble has to follow the way of *Pulaaku*, which refers for example to restraints on eating and drinking, or to an idea of beauty. *Pulaaku* is also associated with the herding of cattle. Tilling the soil is considered unworthy for a noble, as is any hard physical labour.

Pulaaku and *Dimu* include all kind of restrictions on womens behaviour. Although the specific requirements of the nomadic way of life give them some liberty. For them bartering milk for millet was considered a proper way to behave. Among the pastoralists women had a relatively strong position. According to Islamic law, women were allowed to own cattle, and were indeed given cattle at birth and at marriage. Moreover, their activities in the marketing of milk, provided a substantial part of household income and they could dispose of their own monetary or commodity resources to buy commodities for their household and children and themselves. Women's labour is organised more individually than men's labour. There is hardly any co-operation between

women, except between co-wives of the same man, if they get on well together, or with daughters-in-law. *Pulaaku* and *Dimu* do not allow women to do hard physical labour like tilling the soil, watering the cattle or gathering bush products. As a consequence, they have no property rights in fields, or wells, which are exclusively owned by men. Men are less restricted in their activities. Their ideal is to herd cattle when they are young and to be idle when they are older. Although they consider tilling the soil unworthy, they are obliged to cultivate, because theirs is the obligation to feed their families when there is insufficient milk to procure cereals by bartering. Another important reason to cultivate is so that the family will not have to sell cattle to buy cereals.

Of course, the extent to which one is able to adhere to these rules depends on one's social position and one's wealth. With the abolition of slavery under the French colonial regime only the very wealthy or powerful were able to maintain a high degree of *Dimu*. *Dimu* has become related to islamic values, you are more noble as a follower of Islam. The *Jallobe* do not really follow these Islamic rules, it is more a matter for their elite. Still, Islamic values do influence the work ethic and property rights. They give more emphasis on rights of men than rights of women, although the rights of women are recognised.

Dimu and *Pulaaku* give rules for the group as a whole and some rough rules for behaviour. *Yaage* handles more the interrelations within the group, and defines behaviour towards others for each individual. *Yaage* includes shame, respect and also fear. *Yaage* prescribes how to behave towards different categories of kin, inlaws, and strangers, which people to avoid and which people to relate to. The rules for behaviour derived from this concept pervade all social relations, and are also essential in maintaining group boundaries. A few examples are the avoidance relationship between husband and wife: the respect young people have to show towards old people; avoidance of 'strangers'; both men and women having to take care of their parents when they are old, out of respect towards them; a son-in-law offering presents to his parents-in-law from time to time, and a daughter-in-law being a good help in the household of her parents-in-law. As is shown by these examples *Yaage* defines rights and duties within social relations and in this way provides a framework for who should help whom in times of need. Kinship relations are the most important in this respect since one should avoid strangers as much as possible. Likewise, accepting help from strangers is considered shameful. It also defines power relations between different groups based on gender and age.

These three concepts described give rules for the behaviour of individuals towards individuals or for the inter group behaviour. This includes rules that guarantee social security for individuals.

Among the *Jallobe* we also found two communal institutions which provide social security. The description of these institutions gives us a glimpse of the current situation in Fulani society. In theory there are two institutions but they have never been important in Fulani society because of the pastoral production system, which precludes a high degree of economic co-operation between larger groups. Not surprisingly both communal social security institutions have their origins in Islam. In the people's description they do not explicitly refer to the three concepts discussed above, but it is clear they are part of the legalization of these institutions in society.

The most important institution is the 'zakat' the Islamic tax, which depends on the welfare of the community. The *zakat* serves to sustain the imam of the village. What is left is distributed among the poor. Everybody is obliged to contribute his *zakat* if his or her wealth reaches a certain amount. Because of the poor harvests and the small number of animals left, hardly anything remains to distribute after the imam has taken his share. One could also question the effectiveness of this institution in redistributing wealth, as it is fairly easy for the chief and the imam to manipulate the distribution.

Another institution is the communal provision of farm labour to the old and disabled in the rainy season. This institution, however, has fallen into disuse. There are too many people who should be taken care of and there are hardly any young men left to provide the necessary labour. Men also indicated that they needed all their strength to cultivate their own fields, because in most years there is not sufficient food in the growing season to allow extra work.

Social security in practice: some examples

In this section we will discuss how a number of families and individuals cope with earning a living and how their lives have been affected by the processes of change we have already mentioned. The choice of cases has been made at random. Poor as well as well-off families were selected. Striking is the low number of families that still have a 'normal' composition.

Let us first explain the situation of Haidou a little more. A Haidou has very few alternatives. He has hardly any cattle left. He cannot rely on his sons; they have left and do not send any money. In normal times the in-laws of his eldest son should support him, but they prefer to look for a more prosperous husband for their daughter. The *Koumbeejo* husband of his eldest daughter should be able to support his family, but Haidou does not want to consider this option because his son-in-law is not a Fulani. The only way to survive this year will be to sell more cattle to buy millet. In the meantime they follow a

strategy of partial starvation. They will eat as little as possible to save as much food as possible to be able to cultivate in the rainy season. Haidou still adheres to fulaniness, i.e. he does not allow his wife and daughters to cultivate and does not want to rely on strangers. His sons, however, did not share this orientation. They have left, which Haidou accepts because he has nothing to offer. There are no cattle to herd and there is no food.

A complete opposite example is how old Yacouba and his wife, both between 70 and 80 years old, are supported by their adult and married children. They do have a rather big family herd, now property of the sons of Yacouba (and some animals for his daughters). They were lucky in 1985, which was a very bad year for the cattle keepers, but Yacouba's family were able to resume half of their herd. In the rainy season they stay together in Serma, in the cattle camp Koyo. In the dry season some sons go on transhumance to villages of the *Houmbebe* to the west. Some stay near Serma in Yarama where the Jallobe themselves dug a well about 35 years ago. They divide their herd and they keep their stock of millet. Yacouba works each year on his own land. This year he did not harvest, but he was sure his sons would give him millet. His wife comes every other day in the rainy season right up to half-way through the dry season, to the small *Rimaibe* village to barter a big calebash of sour milk for cereals or money. The milk she gets from her sons. This year they were transported on donkeys to Yarama to stay with their son during the dry season. Other sons who went on transhumance regularly came on the back of their camel to Yarama to visit their parents.

Jeneba is an old widow. She has only daughters. Her sons-in-law are poor and are not able to support her. She has no son to support her. Nobody cultivates the field that she inherited from her late husband. This year she tried to cultivate it herself, but as she was old, unexperienced and lacked strength, the harvest was almost nil. For a while a grand-son gave her food, but he left when the harvest was finished, to look for work elsewhere as a shepherd. At the beginning of the dry season she went to Boni with one of her daughters. After one month her husband decided to move on, because the food situation in Boni became critical. Jeneba was forced to return to Serma. Back in Serma she decided to go to Duwari where she has some friends among the *Houmbe-be*. The chief of Serma and a marabout however, did not allow her to go. An old woman should not travel on her own and seek refuge with outsiders. The marabout supported her a little, but that was hardly sufficient to live on.

As will be clear from the example of Jeneba and to a lesser extent Haidou, it becomes difficult for older people to survive. Normally they should be taken care of by their sons as in the case of Jacouba. When there are no sons, the

sons of your brothers or of the husband's brothers in case of a woman should care for one. In-laws are also counted on in times of need. In our examples only relations of mutual assistence between close kin, parents-sons, function. For Haidou the absence of his sons is a mixed blessing. They do not form an additional burden on his resources, but at the same time he is bereft of the labour he needs to cultivate cereals. Apparently men are freer to roam around to look for work and income than women. No-one frowns on the absence of the sons of Haidou and even if their departure is definitive it is not considered a problem, because it is quite normal to leave older people behind to look for pastures and opportunities to barter milk. When asked about this, young men will say there is nothing left to do and nothing to be gained by staying behind. Cultural rules for women are more strictly applied as is shown in the example of Jeneba. It is considered improper for her to take refuge among the *Houmbebe*. When women are left without kin to support them and when they do have to roam around, they stay within the area and have to seek refuge with people who are considered noble.

Since 1985 Inna lived in Duwari with her two daughters. Her husband died in 1985 when they were in Duwari. Then they also lost all their cattle. She has no sons and all her brothers died. Her sister-in-law (wife of a deceased brother of her husband) lives in Wuro Bogga, a cattle camp of Serma, with her sons who take care of her. These sons of her husband's brother should take care of her. They know she stays in Duwari near the *Houmbebe*, but they never asked her to come back and rejoin the family. In Duwari she tries to earn a living working for the *Houmbebe*. She is not yet very old, but her strength has gone and she looks like an old woman. The only work *Houmbebe* have for her and her daughters is repairing calabashes. For the reparation of 4 calabashes, which takes one person at least two days, she receives 25 FCFA (which could buy one meal of millet for one person). Together they manage to eat once in two days. In other years she received more, but this year the *Houmbebe*'s harvest was bad. Inna has no land, her husband's fields were inherited by the sons of her husbands' brothers. And even if she had had land, there is nobody who can work on it, as Jallobe women they will not work on the land. The second daughter of Inna is married and has a daughter, but her mother-in-law will not live with her husband's family. Her in-laws have no cows of their own, and only herd the cattle of a *Koumbeejo*. They cannot support another woman and her child. The eldest daughter decided in the end to leave Duwari and look for work elsewhere. She passed the camp of her aunt, Wuro Bogga, but did not receive any help. In town, in Boni, she could not find any regular work. Many others left Boni because of the bad harvest.

The women in these examples, although destitute, remain in the area. Nor do they take up cultivating, which would alleviate their burden considerably. Inna is completely without protection. Even her youngest daughter who has borne a child to her husband is not taken care of by her in-laws. Her oldest daughter decided to go away, but even then she does not leave the area. She tries to find work with their old elite in Boni.

The cases above seem to suggest that the position of women, young and old alike is more difficult than the position of men, because of the norms present in Fulani society. We will elaborate a little further on this theme by adding two examples.

Mariamma is 40 years old. She married Yuno 20 years ago. She took one cow and one female calf with her, inherited from her father, to the camp of Yuno. Yuno gave her three cows, her *fute*[2], and milking rights on other animals. After ten years she was a rich woman, because of all the offspring of her own animals and of her *fute*. At the birth of her two first sons she gave both a bull and a calf. Her two younger daughters did not receive anything at their birth, because by then her animals had perished in the droughts. Her husband sold ten of her animals after 1973 to buy millet, without asking for her consent. He did not only sell the offspring of her *fute*, but also the animals she inherited from her parents. All her other animals died in the drought of 1985. This year Mariamma did not barter any milk. All of it was consumed by her own family or given away. She receives the milk of her unmarried son's cows. Officially Yuno could not sell his wife's animals because he still had enough animals of his own. Traditional rules, but also Islamic rules do not allow such actions. But Yuno did it anyway leaving Mariamma with the altenative staying with him or protesting and leaving her husband and children, who would remain with him. She almost decided to leave him when he married a third wife. He paid the marriage (3 cows) with the animals of his eldest son, i.e. the animals of Mariamma. But where could she go? Her own family is not able to support her. And, what may be more important, she does not want to leave her children. If she leaves them behind, she cannot expect their support when she grows older. Who is going to grow millet for her? She does not possess any fields.

We met Koumbaare in Serma alone with her two small children. Her co-wife stayed near Duwari, 40 kilometers to the south, where she went on transhumance with her father and mother. Their husband, Ahmadou, who studied the Koran and calls himself marabout, left for Bamako to work as Koranic teacher. The millet he cultivated was left in Serma with his second wife Koumbaare. His mere 4 cows stayed in the herd of his father-in-law, with

his first wife. Koumbaare knows she cannot survive until the next harvest on the millet her husband left for her. If necessary she will leave Serma to look for food elsewhere. There is also the risk that her husband will not come back an experience she had a few times before. As she does not possess any fields and as she is not allowed to make soap or Makary (ingredient for sauces) as *Rimaibe* women do, the only way for her to survive is to remain married, have children and wait for her husband to return. The alternative is to move to town to do small tasks in the households of richer people.

These examples show that even when women are married they have no secure position and are totally dependent on the whims of their husbands. If the husband wants to make use of the resourves of his wife he can do so, even if it is against Islamic law. This is acknowledged by the man, though they offer no explanation or justification. In all the above cases, women are limited in their possibilities by norms and cultural values of the same kind that men are consciously breaking. Possibly the power balance between husband and wife very much depends on the size of herd. If the herd is sufficiently large the interests of the wife are safeguarded. There are also indications that the position of women is further eroding because of the high numbers of outmigrating young men. Women cannot easily break up their marriage and find another husband, which was indeed a possibility in the past.

Discussion

The cases we selected are by no means exceptional in our research area. Even among the elite, who do not belong to the ruling families cases like this can be found, as well as among *Rimaibe*. Very few families and/or individuals are able to sustain themselves without supplementary income or contingent emergency resources. Mutual help within the group is almost absent, and if present as in the case of Yacouba and his wife, it is between close kin, mostly from sons to parents. The obvious reason for the problems these people face is the near destruction of the economic base of society. The crisis is the result of the rapid degradation of the natural environment and the general political and economic crisis in Mali. The crisis in Fulani-society is not limited to cattle herding, but extends into other production systems particularly cereal farming and gathering. The crisis is even moral; real life is quite different from the values that provide the framework for social life.

As the examples show, the crisis does not affect everybody to the same extent. In the upper echelons of Fulani-society survival depends necessarily on

political relations. The *Jallobe* do not maintain relationships with government institutions nor with development organizations. These relationships are monopolised by their elite. They do not want their children to go to school, they paid the headmaster not to enlist their children, so they are not represented at government level. In short, they lack the means to manipulate higher levels in society. As a consequence they have to cope with the crisis with their own cultural means implied in the concepts *Yaage, Dimu,* and Pulaaku. It seems as if these values hinder pastoralists in adapting swiftly to the on-going changes, because they belong to a reality which was gradually destroyed. For example women seem to be more negatively affected by the crisis than men. Women are not allowed to take up new activities, although in some cases they would like to. When their husbands are still present they explicitly forbid their wives to cultivate or even to chase birds from the fields, even if this means that half of the crop is lost, such as happened in the case of Mariamma. The consequence is that more animals have to be sold, eroding further the position of women.

Men have more opportunities to cope with these problems. They may look for jobs elsewhere, as herders or as marabouts (the sons of Haidu) and are allowed to stay away for years, leaving their families behind. Officially they leave to earn money, to feed their families. It is however quite common for them to return empty handed, because employment opportunities have become quite limited. Some men never return, and the only way a woman can cope is by asking for a divorce, in order to marry another husband (e.g. the case of Kumbaare, and of the wife of the eldest son of Haidu). In theory, the men could intensify cereal production, cultivating more land, working harder etc. Several of the older men indeed follow this strategy (see the case of Haidou). Younger men (e.g. the sons of Haidou and the husband of Kumbaare), however, attracted by the outside world, and having little chance of becoming real cattle herders, prefer to leave and try their luck as a herder in another region. In a lot of cases they never return, and even marry where they settle.

Old people fall victim to the negation of the cultural values implied in *Yaage* and kinship. As can be seen from the example of Yacouba (and there are other examples), old people are taken care of if resources are sufficient. Without resources, and without close kin with resources, old people are forced to look after themselves. On the other hand they are not allowed to break *Yaage*, when it endangers the maintenance of *Dimu* vis-à-vis other groups, as was the case with Jeneba. Old people insist that *Yaage* prescribes that they be taken care of. Young people do not mention the subject or just say they do not have the means. It is also common to see small children teasing their grand-

parents. As a result old people have to seek refuge with marabouts and even outsiders among the *Houmbebe*, something they consider extremely shameful.

In some respects the behaviour of the *Jallobe* may seem somewhat irrational. Why do they cultivate so little? Why do women not cultivate when there is no cattle? Why do the men leave women, children and their elders behind without taking care of them? These questions are extremely difficult to answer as the survival of people is at stake and the *Jallobe* seem to create their own famine conditions for part of the population by sticking to their cultural values in some cases, and by denying them in others. Moreover one gets the impression that this manipulation of values depends on the power structure with the men at the apex.

To get some sort of answer one should investigate the viability of other coping strategies such as the intensification of cereal farming. Historically the region is a cattle raising region. Increased cereal farming may be ecologically unsound and may even lead to a further deterioration of the fragile ecosystem. Moreover there are indications that the increase in cereal farming is threatening the possibilities for cattle raising, as the best pastures are gradually turned into agricultural land. So, maybe it is more rational to have the most productive group in society roam the country to earn cash in ecologically more favoured regions. At the same time the burden on present resources in the area is relieved by the departure of a number of individuals and the neglect of unproductive people. To a certain extent this outmigration enables a number of people to pursue the traditional path of pastoralism so that the core of Fulani society, including its values, survives. This reasoning is of course a type of functionalist cultural ecology which cannot be proven and finds no justification in the way people themselves perceive the problem. Theirs is the burden to cope with their harsh living conditions, leading to a lot of misery and people left completely on their own. They are tasting the bitter fruits of the Sahelian crisis.

The conclusion on social security in Fulani-society is not a happy one. In the Fulani-society we studied, social security as prescribed by the social values of *Dimu, Pulaaku* and *Yaage* does not work any longer for some sections of society. We see differentiation along the lines of age and gender. Furthermore we see a progressive individualisation making the circles of people that take care for each other smaller. For many people this means they are left totally on their own, without the help of people who under normal conditions should offer them some help.

Notes

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1) The *Houmbebe* (sing. *Koumbeejo*) are commonly regarded as Dogon, although they are culturally different and have probably a different origin.
2) *Fute*: cows, which a husband gives to his wife at marriage. These cows are considered the property of the wife.

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THE CHANGING LAWS OF HOSPITALITY
Guest labourers in the political economy of rural legal pluralism

Franz von Benda-Beckmann and Tanja Taale

Introduction

Like many European countries, many third world countries have "guest populations", people who have migrated, voluntarily or involuntarily, to live in communities other than those in which they were born and grew up. They do not only live in urban areas, but also in rural and mainly agricultural areas. Such foreign populations usually live under difficult conditions. They often have no means of subsistence other than their own labour. Access to housing and to possibilities of earning their living through subsistence and market production may be difficult. Either there may be no market mechanisms at all which would offer access to land, or the immigrants may be too poor to acquire it even if it were possible. Moreover, as foreigners they may be in a legal position which makes access to these resources difficult or impossible. The immigrants' dependence on the hospitality of the host country may be even stronger in situations in which they encounter crises, fall ill, loose their means of earning their living, become old or lose their parents, spouses or children. Even if mechanisms of social security are available to deal with crisis and distress, these mechanisms will not normally be automatically accessible to them. And it can often be observed that the worse their social and economic position is, the less well liked by their hosts they tend to become. Here again, there are parallels between industrialized European states and rural communities in third world states.

The existence of such immigrant populations has important implications for development policies. Due to distinctions in legal position, large sections of the rural population have a very different position in the processes of production and distribution of agricultural products, and for the same reason they are likely to react differently to governments' or other development agents' attempts to influence the local agricultural systems. Moreover, in situations of increasing scarcity of political and economic goods, competition over the rights to allocate and exploit such resources tends to increase (see for West Africa, Hart 1982, p. 139 & 147). Hospitality will then turn to hostility which may seriously affect agricultural production and political stability.

The conditions for the social existence of guest populations are largely set by the law of the host country. We shall here summarize these laws as "the

laws of hospitality". The laws of hospitality define the legal status of "guest" and "host", their respective and mutual rights, options, and obligations, the guests' possibilities of acquiring political, social and economic rights and opportunities, both in situations of "normalcy" and of distress and crisis. They also lay down the conditions and procedures under which "guests" can change their status from being a guest to one of a normal member of the community, with the same rights, obligations and opportunities as other members of the (former) host community.

In rural areas in the third world these laws of hospitality are complex. Political, economic and social rights and opportunities are usually defined by parallel, and often contradictory legal regulations which stem from different sources of rule making and maintenance. The most relevant sources in this respect are the state organization and its law, and the local political community with its local regulations (local, folk, customary law). Who will be considered a "foreigner", a "guest" and a "host" in terms of these systems often differs. In state organizations the basic notion is "citizenship" which in principle gives the same basis for rights throughout the citizenship-territory, and which may only discriminate against non-citizens. Local communities often have their own criteria for community or village membership, which, contrary to state law, usually are more exclusive. Their relevant political universe is the smaller political territory as defined by their own constitutional law, in which citizen rights may be restricted to persons having descended from the original settler population, and in which incorporation into the village community may be conditional upon other social relationships than common (state) citizenship, like adoption into a local kinship group. The distinct systems of law briefly indicated here thus may have quite different criteria for giving residence, work permits and ownership permits.

The significance which ethnicity acquires in the laws of hospitality varies accordingly. State laws and their notions of citizenship largely deny the political and economic relevance of ethnicity and as a consequence ethnic differences become largely invisible as far as citizens are concerned. Since the political significance of ethnicity is denied in the field of law, ethnicity does not, and is not allowed to show up in governmental relevant knowledge. As a result little attention can be given to the factor of ethnicity in development politics[1]. When on the ground studies "rediscover" ethnicity as an important, albeit contingent factor, ethnicity can only acquire relevance in the social economic, political and cultural domains. In these domains, studies of "situational use of ethnicity" have shown that the degree to which ethnicity as a relation is emphasized or deemphasized, depends on the context of the wider constellation of economic, social and political relations, and on the objectives of the

actors. On that basis it has been argued that there is nothing like a cultural determinism leading people to association on the basis of ethnicity. Rather, ethnicity is seen to result from internal relations of association, shared culture and history, and is contextual (see Reitz, 1980; McKay, 1982; Vermeulen, 1984; Nanlohy, 1990, p. 117). While such analyses are plausible, they neglect the significance which ethnicity may be given in the sphere of law[2]. On the one hand this legal significance may also be highly negotiable and contextual, on the other hand it will also be inscribed in, and mediated by the legal rules in question. It therefore also acquires structural (though not deterministic) character forming a possible constraint or resource in interethnic relations, independent from the internal relations of association so strongly emphasized by studies of situational use of ethnicity.

With the increasing interpenetration of state and local folk laws characteristic for most regions in third world states it is rare, however, that one of the systems has achieved or retained absolute predominance. As in other pluralist situations one finds varying degrees of relative significance of the different constitutional systems. One accordingly finds a very complex correlation between manifestations of ethnicity and the plural systems of law. This was also the case in Hila, a village situated on the island of Ambon in the Central Moluccas, Indonesia. Voluntary immigrants from Buton constituted approximately a third part of the population of Hila and discrimination of Butonese immigrants by ethnic Ambonese residents of the village probably is the most evident form of ethnicity here. Generally, on Ambon little attention was given to Butonese-Ambonese relationships by those not directly concerned outside the villages[3]. It was common knowledge that Butonese constituted a significant part of the rural population, and that their agriculture was quite different from the Ambonese, and that increasingly conflicts about land and trees had resulted in violent outbursts in which people had been killed. Yet no efforts were made to research this situation. Differences between Ambonese and Butonese tended to be explained by means of cultural and ethnic stereotypes, "the Ambonese are lazy, the Butonese are industrious". Individual policy-makers, government officials, extension workers, etc. were well aware of a difference in ethnicity and the impact this was likely to have on their professional activities. Ethnicity, perceived as specific cultural traits of Butonese in comparison to Ambonese, made the former more susceptible to development efforts and state policies. But no attention was given to the laws of hospitality which largely structured the economic activities of the Butonese and the increasing economic and political conflicts. Discrimination of Butonese, however, is not the only manifestation of ethnicity in Hila. Ethnic differentiations among the Ambonese villagers themselves play an important role in the

political and social organization of the village, and are a principal source of conflict in all struggles over the command of resources.

In this article we want to describe and analyse the changing, plural laws of hospitality in Hila and put them into their political and economic context[4]. We shall first describe these regulations and the political and economic factors in past and present which have determined village membership. After that we shall pay attention to the economic rights which have been and are derived from village membership. Then, by focussing upon the relationships between Ambonese and Butonese in particular we intend to assess the relative significance of state law and Ambonese adat for future developments in interethnic relationships in Hila. As we regard the field of interethnic relationships well suited to explain the need for a deeper understanding of legal pluralism, at the end of this article we will elaborate on the wider implications which this study has for socio-legal methodology and development policy.

The political and economic constitution of Hila

Political organization

The political organization of Ambonese villages, *negeri*, has been an amalgam of adat principles and government regulations ever since the Dutch East Indies Company (VOC) ordered the Ambonese population to settle in coastal villages during the second half of the 17th century[5]. Different government laws (from the Dutch East Indies Company, the colonial state, and the Republic of Indonesia), Islamic law, traditional adat laws and various forms of self-regulation have co-existed, influenced each other, and changed. There is little left from the pre-colonial adat in its undiluted form[6], and historical forms of local Ambonese law have been repeatedly transformed by government regulation allegedly being based upon, or being in accordance with adat[7]. However, these combined forms of adat and VOC or colonial regulation have been redefined and recategorized as "adat", both by the villagers and by state institutions, and are contrasted to "government law". It is in this sense that references to adat have to be understood here.

The development of the political organization of the Ambonese *negeri* is characterized by several changes in which immigration has always played an important role. Almost all ethnic Ambonese in Hila are descendants from people who have migrated to Hila at some moment of history. The people considered to be the original inhabitants of the island (Alifuru, who themselves may have migrated to Ambon from Seram earlier) lived in mountain villages.

Most probably in the 15th century, at the time that cloves were brought to Ambon, coastal villages were established by immigrant clans from Ternate, Java and other islands in the Indonesian archipelago, who engaged in clove production and trade. Hila was one of the economically and politically most important coastal villages. Its clans were the ones which first fought, and later cooperated with the Dutch, and they formed the first "original" clans in the coastal village of Hila whose emerging political structure, like that of other coastal villages, was strongly influenced by the Dutch.

The inhabitants of the mountain villages only gradually settled on the coast, mostly during the second half of the 17th century, establishing their own villages or joining already existing coastal villages. In the case of Hila, this at first led to a "double village", an association of the old coastal Hila (non Alifuru) and the former (Alifuru) villages of Marsapal and Senalu. The latter seem to have retained some autonomy in the beginning by having their own village hall and mosque, but they were gradually incorporated into the village of Hila which was dominated by the coastal clans. Administratively, this double village gradually became the present village of Hila, with a territory of about 30 square kilometers.

Under Dutch influence, the political-administrative structure of the *negeri* was reorganized. *Soa* became political-administrative associations of clans, headed by a *soa* chief (*kepala soa*). The patrilineal clans (*rumah tau*, *mata rumah* or *fam*), or clan subdivisions, were also organized to form *dati* units. Such social units consisted of the *anak dati* (the direct descendants of full *dati* members) and *tulung dati* ("associated" *dati* members who had a lesser status than the full *dati* members) under a *dati* head (*kepala dati*). While the existence of *dati* in pre-Dutch times is unclear, in the 17th century the Dutch transformed the *dati* into those units responsible for forced labour and forced cultivation of cloves (see Knaap, 1987; Taale, 1988). As a compensation for the forced supply of labour and clove, *datis* were alloted specifically marked parts of the village territory, mainly sago gardens, to be used for the subsistence needs of their members. In this way, *datis* were transformed into land holding subclans. The meaning of *dati*-groups as social units seems to have changed considerably in the course of time. In the 17th century, it referred to extended families, averaging 10 persons (see Knaap, 1987). In the mid 19th century when *dati* groups and property were registered by the Dutch, *dati* already referred to larger groups, but clans would still consist of several *dati*. Ultimately it referred to whole clans (*fam/rumah tau*) (see Taale, 1990; Kriekhoff, 1991 for Christian villages).

The most influential government institutions were, and are, the *raja*, the village chief, and the *soa* heads. The offices of *raja* and *kepala soa* are the

privileges of specific clans according to adat, but for centuries they have been appointed, and often also selected, by organs of the state government. Traditionally, the village chief was assisted by the village council, *saniri negeri*, consisting of the *soa* and *dati* heads, a village secretary and some other officials such as the *kewang*, the village forest overseer. Since Indonesia's independence, there have been successive local government reforms, introducing new governmental bodies on village level. Following the most recent local government legislation of 1979, the LKMD (*Lembaga Ketahanan Masyarakat Desa*) was introduced as the new official village council, with the LMD (*Lembaga Masyarakat Desa*) as a sort of first chamber. The *raja* and *kepala soa* have been integrated into these new governmental bodies as chairman and members of the LMD.

Village membership

Village membership, and the rights and obligations flowing from it, is subject to two different sets of rules and principles. According to local government regulations, Indonesian nationals acquire village membership by their registration as village residents. Ethnicity (with the exception of persons of Chinese descent) or birth in a different part of Indonesia has no bearing on the exercise of the full political and socio-economic rights which persons have according to Indonesian law[8].

But for political and economic rights in village affairs, village membership in terms of the adat constitution was and still is essential. In Hila, village membership in adat terms means that a person or a group of persons has become member of a *soa*. A further precondition is that the persons have to be Islamic. The adat constitution is Islamic in the sense that the acquisition of full political and economic rights and the invidivual mechanisms through which it can come about, requires conversion to Islam. Through conversion, individual foreigner-Christians can become village members, if they are incorporated into a *soa*. Persons incorporated into the *soa* system were supposed to live in the residential area of their *soa*[9].

People not incorporated into the *soa* system have no full political rights as far as village political matters are concerned. While the *raja* must be chosen by the village population, and the candidate be approved and appointed by higher government authorities on district level according to local government regulation, the Ambonese villagers have retained two important adat elements in actual election procedures. In the selection of possible candidates for the *raja*-ship, adat descent still plays a major role: the candidates must come from a *raja* clan. In Hila, only two clans, Lating Nustapi and Ollong, are regarded as

having this right. Besides, the Ambonese villages have, at least up to 1988, been able to restrict voting rights to those who have been fully accepted into the village according to the adat constitution. Until 1988, strangers and in particular the great number of Butonese therefore have not been able to participate in the elections of the village head (see also below). In national elections, however, all village residents do vote.

Soa membership comes automatically with membership in a *rumah tau* which is already a member of a *soa*. Incorporation into *rumah tau*, through birth, marriage or adoption is the primary mechanism to obtain village membership for individual females. Individual men could be incorporated in this way too. But individual Ambonese men can also retain their clanship and name, and "found" Hila branches of their original clan. Their *soa* then will be that of the *rumah tau* member with whom they are married. In such cases, the establishment of a new clan may be a longer process, a *rumah tau* in the technical sense may only start to emerge in the second or third generation. Families or larger groups could also be incorporated in these ways.

The ways in which these forms of incorporation were actually practised have largely depended upon the status of the newcomers. Many of the new *rumah tau* in Hila have come into existence through intermarriage of higher ranking clans (*raja* clans or clans known for their religious prominence) between villages. Men of such clans marrying into Hila, or children of Hila women married in other villages who returned to Hila usually established their own *rumah tau*. People of lesser status would rather be incorporated into an existing *rumah tau*. If possible, this would be done on the basis of real or putative kinship relations dating back to the earlier migration history of the Central Moluccas. A special case was the descendants of (former) slaves who were associated with the clan of their master.

Whether people were incorporated into a *rumah tau*, or left to establish their own *rumah tau* also depended on the political and economic conditions of the time of their coming. At the time in which the system of forced cultivation and labour based upon *dati* was still operative, it was in the interest of host clans to increase their manpower by incorporating foreigners, while at later times incorporation into *rumah tau* could lead to unwelcome claims on the *rumah tau* resources.

Being of common Ambonese/Moluccan origin will facilitate the acquisition of village membership in terms of the adat constitution, but is not an absolute condition for it. There were a number of ethnically distinct newcomers who were not incorporated this way, among them the greatest number of civil servants (mainly teachers) living in the villages. But ethnically different persons (Butonese, Buginese, Javanese, Minangkabau) can also be incorporated in the

soa system. This often happens with individuals, or with the children of ethnically different males who had married in the village. In this case, the founding of an own clan would be an exception for persons who have a high status, like the Asagaf family (originally Arabic) who were asked to remain in the village as Imam of the mosque, and similar principles may have obtained earlier for people of ethnic Chinese descent in the 17th or 18th centuries.

The two numerically most important categories of immigrants in the Hila area, the "Hila Christians" and the Butonese, were not incorporated in the adat constitution. The Christians were brought to Hila when the Dutch built Fort Amsterdam, one of their main strongholds at the nothern coast of the island. They served as soldiers and servants of the Dutch garrison, and had the status of *"burghers"*, freemen in the sense that they were not subject to the *dati* obligations like the rest of the village population. Later when the *dati* system was abolished, and also after Indonesia's independence, the Hila *Kristen* (at present numbering between 300 and 400 persons) were not incorporated into the Hila or Kaitetu adat system, although their residential quarter (*kampung Kristen*) has more or less connected the residential centres of Hila and Kaitetu for nearly 400 years (see figure 1[10]). Their religious status and, most probably, also their claims to more economic resources and political power which incorporation would bring has so far prevented their incorporation.

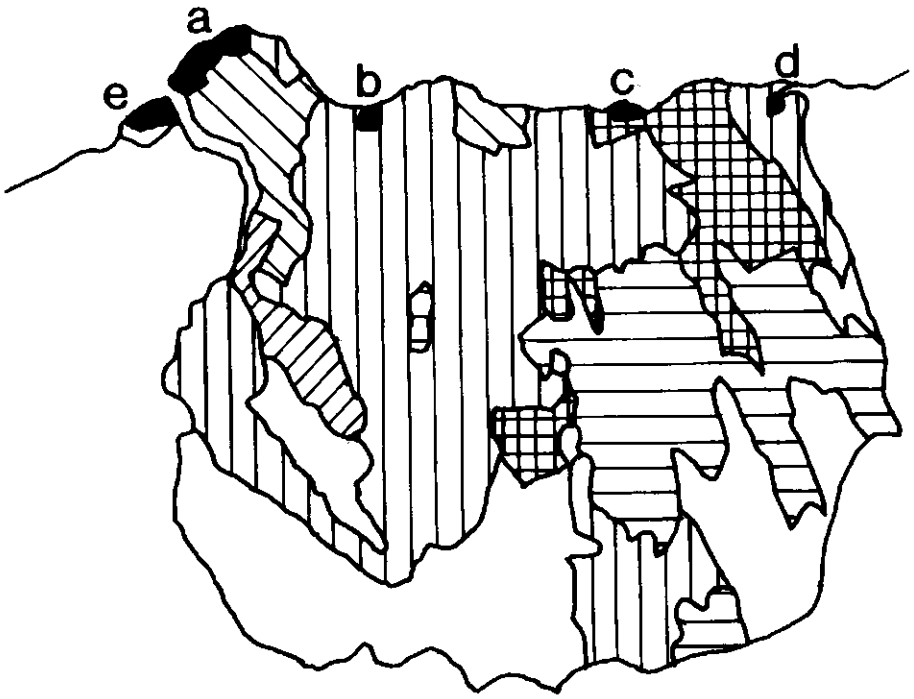
In the case of the Butonese, who in 1986 numbered about 1,700 of a total population of 4,400 in Hila, it was not primarily their ethnic distinctiveness that prevented incorporation - although this was suggested by many Ambonese villagers. The reasons for their non-incorporation rather can be found in their large numbers and in the social and economic conditions prevailing at the time of their immigration which we shall describe in more detail in this paper.

Access to land and trees

Ambonese adat law

The organisation of control of, access to and transactions over land and trees, are still predominantly based upon the local Ambonese law (adat, the regulations of the ancestors). Its validity is also recognized by the administration and the Indonesian state courts[11]. The land laws introduced by the various governments have locally either been absorbed into adat, or are rejected by the majority of the population[12]. All land within the village boundaries is considered to be "adat land", under the legitimate control of the village government, the *soa*, groups of heirs or individuals, or of *dati* (clan segments)[13].

Figure 1: Land use by population group on the village territory of Hila



a) Hila village core (Ambonese)
b) Tahoku (Butonese)
c) Waitomu (Butonese)
d) Mamua (Butonese)
e) Kaitetu (Ambonese)

Hila Christians
Islamic Ambonese
Butonese
Mixed: Christians/Islamic Ambonese
Mixed: Butonese/Ambonese
Uncultivated land
Settlements

An important characteristic of Ambonese law is the "principle of horizontal division", according to which rights to land and to trees or gardens are distinguished, and can be held by different social units. Closely connected to the political history of Hila, however, two different versions of adat (adat) law with respect to the control and allocation rights over land and trees have developed.

The standard version of adat law which has been systematized by the colonial adat law science and the courts, was strongly attached to the status which the coastal villages had in the Dutch colonial system and was largely modelled on conditions in Christian villages. In this system, the *dati* units and the *negeri* became important land holding units. The *dati* head is supposed to control and administer the use made of *dati* property. In principle, each *dati* member is entitled to use *dati* land for agricultural subsistence activities. Once a *dati* member has made a garden or planted trees on *dati* land, these become his property, his *perusahan*, of which he can dispose freely and which after his death becomes inherited property, *pusaka*, for his or her heirs. Inheritance rules are basically bilateral, with a strong flavour of Islamic law which favours male over female heirs. The *pusaka* rights pertain to the crops planted on the land; the land, however, remains under the control of the *dati*. Should a *dati* become extinct, according to the standard version of Ambonese adat (also supported by the state courts as valid adat law) the *dati* land falls to the village and can be newly allotted, or otherwise used by the village government. Land which has not (yet) the status of *dati*, *pusaka* or *perusah* is under the right of avail of the village government as village land (see Holleman, 1923). Such previously unexploited land held by the village (*tanah negeri*) follows the same principles mentioned above. Once a cultivator has made a garden or planted trees with the consent of the village government, these become his or her individual property, and, after death, *pusaka*. According to classic adat (apparently already obsolete in the 1920's, see Holleman, 1923) also in these cases the village retained a residual right to the land. However, in more recent times, *perusahan* and *pusaka* come close to full ownership rights on both trees and land. *Perusah* crops and land can be sold, sales being reported as early as the 18th century (see F. and K. von Benda-Beckmann, 1991a).

The other version, Hila adat, reflects much more the political history of Hila in which mountain villages and the coastal settlement gradually became one village. It gives greater recognition to the rights which the mountain clans had to land and tree gardens in the area before coastal Hila became dominant. It differs from the above description in two important respects. One concerns the status of uncultivated land (*ewang*), which is considered to be village land in the standard adat law version. In Hila, most of the still uncultivated land is not held to be under the control of the village government, but under control of the *soa* or the leading *soa* clans[14]. The other concerns the amount and significance of *dati* lands. It seems that in Islamic villages, *dati* land never had the size and significance which it had in Christian villages (see Holleman, 1923, Kriekhoff, 1991). Most of the larger garden complexes (*dusun*) seem to have been treated as clan or *soa* land, or, after cultivation and inheritance, as

pusaka rather than *dati* (see Taale, 1990; F. and K. von Benda-Beckmann, 1991a).

In Hila, both adat versions have co-existed and mutually influenced each other, and continue to do so. As figures 2a and 2b show, these different versions yield quite different property constitutions. Different rights to the same land or garden belong to different individuals or groups, depending on whether the property is treated as *pusaka*, *dati* or village land. Since these categories can be imposed on the same property, and may have different consequences in standard adat law and Hila adat, "adat law" has a very ambiguous character, and Hila villagers exploit these ambiguities in their property strategies. Typical conflicts would revolve the question of whether a garden complex (*dusun*) was *dati* land and rights to it could be traced through patrilineal inheritance only, or whether it was *pusaka* in which case inheritance rights could be traced bilaterally. Or, the persons of the *raja* clans holding or aspiring the position of village head would emphasize the official version in which extinct *dati* land should fall back to the village and could be allocated anew by the government, whereas others would emphasize that there could be no question of an extinct line of heirs because the land was *pusaka*. Other conflicts would concern the question of whether permission to uncultivated land has to be asked from the village government as village land, or whether the land in question was under the control of a *soa* or clan (see F. and K. von Benda-Beckmann, 1991a). The respective public prominence of the different adat law versions, and their significance in decision making processes about land have varied historically, and have largely depended on the relative position which their protagonists had in the respective political constellation.

The laws of hospitality

The notion of stranger or newcomer, *pendatang*, is a relative notion. While there are important differences between persons and groups not incorporated into the *soa* system and those who are (see below), there were, and there remain important distinctions between original clans and immigrants who have been incorporated into the adat system. These distinctions, however, were located at the levels of clan-internal and/or interclan relationships. The differences between the original mountain clans and the coastal clans is still visible in some ritual and socio-economic divisions. Even the *raja* clans still acknowledge to some extent that the mountain clans were the original lords of the land to whom they "owed" their own land, a factor which has contributed to the situation that the Hila government never fully asserted rights to the uncultivated land in the area of the former mountain villages[15]. There has

Figure 2a: The legal status of land according to adat law

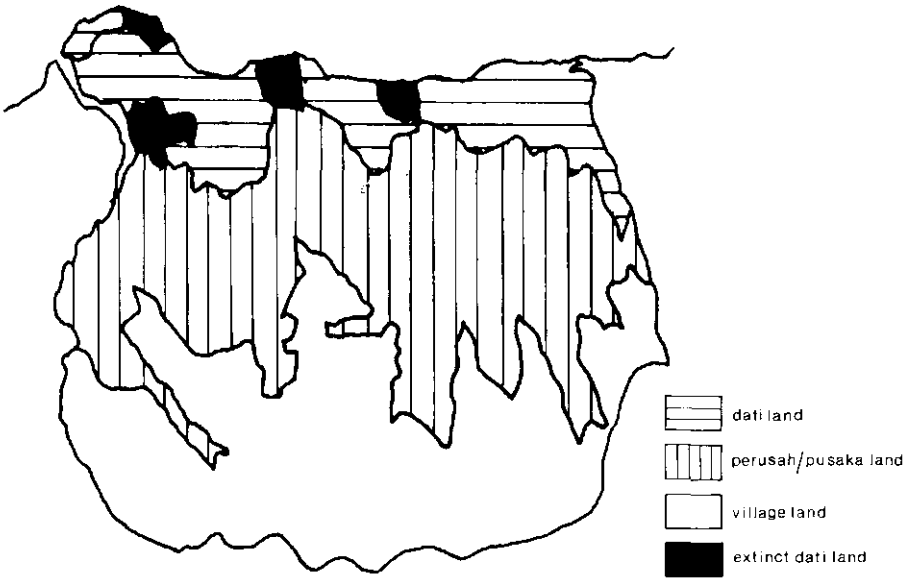
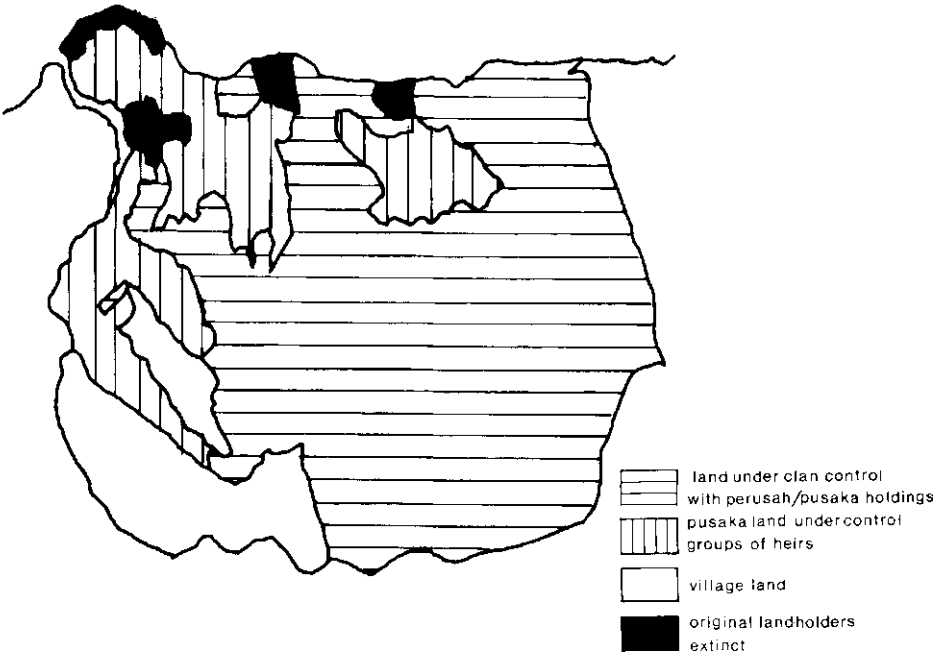


Figure 2b: The legal status of land according to village adat



been a near reversal in the control of vital economic resources. Formerly, the coastal clans were able to assume control of most land close to the settlement centre, in particular of the lowlands. The large mass of the territory of the later unified village of Hila, more distant and more located in the hills, remained under the unquestioned control of the clans of the *soa* Senalu and Marsapal. It is this land which now becomes increasingly interesting economically, since the area around the settlement core has become densely populated, and the residential area has grown considerably at the cost of horticultural usage.

Later immigrant groups who moved in after the consolidation of the coastal village were given larger grants of land by the original settlers as their own *pusaka* or *dati* (whatever the dominant interpretation at that time). While such land was for their own exploitation in continuity, it established a kind of patron-client relation between the earlier and the late comer clans, and specific obligations of help and support in ceremonial matters. In contemporary Hila, such relations are still largely acknowledged. In the case of incorporation into a clan, the distinctions between the original descendants and latecomers are also remembered. They become relevant in making decisions about the allocation of uncultivated clan land and in inheritance questions concerning *perusah-pusaka* complexes established before the latecomers settled in Hila. This in particular is relevant in the case of the descendants of former slaves who had been adopted into a clan.

Yet all persons incorporated into the adat village system, whatever their internal differentiations, were clearly distinguished from not incorporated strangers. The latter become subject to Ambonese adat in relations with Ambonese, and do not have the same legal status in Ambonese adat. In particular, they do not have the right of free access to uncultivated land, since they do not hold land in their own right. The fundamental principles of the law of hospitality were such that whatever rights strangers could acquire would be temporary. In particular, according to adat, they could not acquire the right to plant perennials, which at present entails clove trees. This principle used to be valid in Hila, as in all other Ambonese villages. For gardens for annual crops permission must be asked from the owners. As a rule (normative and statistically) the permission is given. The right to make and to profit from the garden is seen as temporary and subject to termination should the Ambonese owners want the land back. According to Ambonese informants, such cases occur occasionally. In the case of good relationships the Ambonese will offer the stranger another piece of land. In cases of conflicts, however, the relationship usually is terminated. In the case of temporary gardens no counterprestation is demanded[16].

Also for housing sites strangers are obliged to ask permission from the holders of the land. The permission to build temporary houses is invariably given, and no counterprestation has to be given. "Temporary" houses are those built with *gabah-gabah*, the strong leaf stalks of the sago palm leaves, and with wood. To obtain permission to build a stone house, which is considered to be "permanent", the land has to be bought[17].

Ambonese adat also governed labour relationships. Labour relationships between immigrant strangers, mostly Butonese, occur in quite specific contexts. Traditionally, the Butonese have worked in the clove harvest in Hila when there is sufficient labour demand. This is usually done on the basis of wage labour, not on the basis of the traditional Ambonese system of share-harvesting (*panta bakul*). Butonese may also take over the task of watching over the trees of their land-patrons in the area close to their *kampung*.

Ambonese-Butonese relationships

The Butonese lived in three separate *kampung* which had gradually come into existence. The earliest settlers came as seasonal workers in the clove harvest in the late 19th century and settled in Mamua, on the border of the neighbouring village of Wakal, about 6 kms distance from the Hila village core (see figure 1). In the 1930's and 1940's there was a new wave of immigration, and a new part of the village territory was settled at Waitomu, about 4 kms from the Hila residential area. In the 1960's, three Butonese families started yet another Butonese settlement at Tahoku, at about 2 kms from the village core[18].

For the regulation of their internal relationships, the Butonese rely largely upon their own adat[19]. Politically, they are subject to the village government of Hila. However, they have a degree of formally regulated autonomy in their own *kampung* internal affairs[20]. They are not incorporated into the political adat constitution[21]. The common religion - both Ambonese and Butonese are Islamic - does not serve as means to unify or integrate the two groups (see F. von Benda-Beckmann, 1988)[22]. Besides the territorial segregation and political subordination, there was also social segregation. There are not many social relationships between Ambonese and Butonese[23]. Intermarriage is almost non-existent. Nearly all Butonese marry within their own *kampung* (see F. von Benda-Beckmann, 1991a).

When the Butonese arrived in the Hila territory, they could not claim any rights to economic resources of their own. They depended on the Ambonese for access to land, both for housing sites and for agricultural production. It seems that in the early settlement phases, there were hardly any problems

between the Ambonese and the Butonese newcomers. The Butonese *kampung* marked and guarded village borders. Besides, the Hila villagers saw it as desirable that at certain intervals there existed new small inhabited areas along the dangerous roads or paths along the coast. Land was still plentiful, and the land in the hills originally used by the Butonese for agriculture was too far from the village centre to be really economically attractive to the Ambonese (see figure 1). It is also suggested that the Butonese were welcomed because of their knowledge and experience with coconut palms, the cultivation of which was expanded early in the 20th century (Wigboldus, personal communication).

This situation changed only gradually. When in the 1950's and 1960's, the rule "that Butonese could not plant clove trees", lost its mandatory force, it seems that nobody really cared very much if the Butonese planted some clove trees, since cloves did not play a great role in the Ambonese economy during these two decades (see Van Fraassen, 1972). A new situation developed when in the 1970's the price for cloves started to rise dramatically, and clove tree cultivation expanded. Land suitable for clove cultivation, and land which had been planted with cloves by Butonese, became increasingly attractive economically. Also, the population increase in both Ambonese and Butonese settlement areas, and the continuing Butonese immigration gradually led to greater pressure on agricultural land. This was particularly the case for the Butonese settled along the (improved) coastal road which tied the coastal villages to the city of Ambon, the administrative and commercial centre of the island. The land in the hills used by the Butonese was usually close to their settlements, and thus the most accessible from the road. The same is also true for those Ambonese who wanted, or were forced to expand their agricultural activities. Villagers or clans in Hila and also in other villages suddenly "discovered" that clove trees had been planted on their land, often without "proper" permission, and they attempted to get their share.

There is, however, considerable variation between the three Butonese *kampung*. The older the relationships between Ambonese and Butonese are, the more multi-stranded they are, and the less they have been dominated by financial-economic considerations. Thus the Butonese in Mamua, the oldest and most distant settlement, where Ambonese-Butonese inter-family relationships in many cases have already endured three generations, seem to have the least problems with their Ambonese patrons. The current prices quoted for housing sites are lower, and actual payments less frequent. In Tahoku, on the other hand, the relationships started at a time in which village economic life was already rather monetized. In these cases, Ambonese-Butonese relations did not have the time to develop into multiplex patron-client relationships; the pure financial-economic aspects dominate. Prices for house sites are higher

and commonly demanded in full. The permission for temporary houses is increasingly tied to the payment of *uang rokok*, "money for cigarettes", which can run up to 15,000 *rupiah*. Butonese in Tahoku complain that even the land upon which they wanted to build their mosque and land to be used for graveyards should be paid for in money - a very improper thing to do also in the eyes of those Ambonese who had relationships with Butonese in Mamua. Also the terms of share-planting arrangements seem to be more favourable in Mamua than they are in Waitomu or Tahuku. The duration and the historical depth of the relationships in a less-monetized economy, here coincides with spatial distance. However, spatial distance seems to play an independent role in affecting the nature of Ambonese-Butonese relationships. Some aspects which would "soften" the severity of the financial-economic strand of the relationship in the case of Mamua would be less strong or absent in the case of Tahoku. In the case of Mamua, the Butonese have the additional functions of border guards and of providing a welcome stop-over on the road, a place where at night lights burn and drive off bad spirits, a place to have a smoke and a chat. Besides, the land in the Mamua region is too farflung to be really economically attractive. It demanded a march of an hour and a half along the coastal road. Besides, the Butonese help in protecting the trees of the Ambonese against theft. In the closer Tahoku, on the other hand, the pressure on the land is much higher, both on the coast where the territorial expansion of Hila (see figure 1) already nearly borders the settlement of Tahoku, and in the cultivable hill area (see also F. & K. von Benda-Beckmann, 1991b).

In the 1960's an important change occurred in the laws of hospitality: the general prohibition on strangers to planting clove trees was gradually abandoned, and was made subject to arrangements between Ambonese landowners and Butonese farmers. Some general principles have developed for these arrangements. When an Ambonese is approached by a Butonese with the request to plant trees, consent is given. Specific and detailed agreements are rarely made. Usually it is said "let us see and wait, and afterwards we shall divide". "Afterwards" usually is after several (5-7) years when the trees start to bear fruit. At that time, one knows how many trees have died in the meantime and one can divide the exact number of healthy trees. Standards of division are flexible, and they seem to change. A division of two thirds for the Butonese, one third for the Ambonese seems to have been standard in the 1950's and 60's, but it has gradually moved to 50:50. Some Butonese complained that a one third/two thirds division had been vaguely mentioned when they planted, but when the time of division came, division into equal parts was demanded.

A different type of arrangement for tree planting and sharing has developed, apparently when during the 1970's the village government also wanted

its share and asserted village rights to waste land as village land. Village land, whether village or *soa* land, is freely accessible only to Hila villagers in terms of adat citizen(*soa*)ship. Foreigners/outsiders do not have free access. In cases, or areas where "village land" is concerned - the area south of the main settlement of Hila - the standard process of a Butonese starting to work and then sharing with an Ambonese could lead to difficulties, since it could be claimed by the village government that the Butonese usurped citizen-rights rather than having patron-client relations with Hila families or clans, by clearing uncultivated land without permission from the village government. In order to avoid such difficulties, smart villagers have invented the "labour contract" construction. A villager makes a labour contract with a Butonese for the planting of trees. The trees become the property (*perusahan*) of the Hila villager. When the trees start to bear fruit, the Hila villagers "sells" part of the trees to the Butonese as "wage".

Legal and political strategies and counterstrategies

Although much agricultural life, land and tree use is rather peaceful, a potential for conflict about redemarcation and reallocation threatens most of the land. While formerly this did not present a grave problem, the growing land scarcity leads the Ambonese to increasingly frequent attempts to regain control of the land which the Butonese use for their agricultural and horticultural activities. While the potential for such conflicts about rights has always been there, it had largely been dormant because there was neither the desire nor the resources to exploit the land. Land scarcity, the increasing monetary value of land and the booming clove price in the 1970's have triggered off scores of new disputes between Ambonese villagers, and between villagers and the village government. The relations between Ambonese and Butonese, in particular, have become increasingly strained, and characterized by a history of disputes, fights, and the burning of houses and trees (see also F. von Benda-Beckmann, 1991a).

The exploitation of adat law ambiguity

The Butonese are faced with a complex, constantly changing and sometimes contradictory body of rights, with different holders of rights and village functionaries. Their own rights to land and trees are relatively unstable and uncertain. The temporary nature of their rights becomes increasingly problematic. This goes for vegetable gardens but also for land planted with cash trees, since

it is uncertain whether after the trees die out, they will be able to exercise any further rights on the land. Besides, the deferral of making a sharing agreement adds to the uncertainty.

The increasing scarcity of land, together with the negotiability of their rights to tree gardens, has also opened up the Pandora's box of Ambonese adat law's ambiguity. Whether land and trees should be divided in share planting arrangements becomes increasingly raised in property struggles. The validity of the principle of horizontal division becomes particularly relevant in conflicts between Ambonese and Butonese. For if the principle of horizontal division is abandoned, the Butonese can acquire land rights of their own "also under adat law" (see also Taale, 1990). In conflicts with Butonese, the Ambonese mostly maintain the classic adat version in which rights to land and to the trees or other crops on the land, can be distinct, but in disputes amongst themselves they also dispute the continuing validity of the principle. In the Ambon state courts, no consistent affirmation of the old, nor of a clear cut new interpretation of these adat principles has as yet developed[24].

Also the question whether land is village land, *dati* or *pusaka* land becomes increasingly significant economically, and different Ambonese persons or groups would be the beneficiaries depending on the prevailing interpretation. There are many instances in the 1960's and 1970's in which Butonese obtained permission from the *kewang* and *raja* to cultivate "village land", and where later other villagers claimed the same land as their own *dati* or *pusaka* land, complaining that they had never been asked permission, and demanding compensation, the division of trees, or the return of the land. The *raja* or *kewang* would give such permission, usually in return for a financial contribution. The Butonese would plant, and when his trees started to bear fruit he would be detected by those villagers/clans who maintained that the land was theirs, that the village government had had no right to grant permission, and that the Butonese worked on "their" land and therefore should divide the proceeds with them. More often than not, such instances would become public after the *raja* or *kewang* had been deposed from their offices, and everybody could put blame on them (this was standard practice in Hila, where the last *kewang* apparently had made a lucrative business with such land grants to Butonese, but left for Java when the thing blew up). But the situation is difficult enough even without the interference of the village government. Since the land usually belongs to larger family groups, and, in the case of *pusaka*, to persons of different clans, there can be a large number of different clan segments, who may all have their own ideas as to whom the land belongs and how the property should be divided. And the number of claimants tends to increase with the number of trees in question. The Butonese in these cases are

not just confronted with uncertainty, but also with multiple demands (for other migration areas, see World Bank, 1988).

The Butonese have not become mere victims of such struggles, but have also learnt to exploit the uncertainties in the Ambonese adat system to their own advantage, in particular those resulting from the different versions of adat which vest allocation control in the village government, *soa* or *dati* groups respectively. In disputes over tree gardens and housing sites, they avow that of course the land under dispute is not theirs and that they are prepared to divide the trees. But they demand that the question to whom the trees belong, and with whom they should share, should be sorted out first. And they exploit the trees until this problem is solved. They can further exploit the fact that, pending the final decision by the village government or court, there is no "neutral" place to store the harvest, and that the probability is high "that the mice will eat", that the gains will "somehow disappear" (see for a more detailed analysis F. von Benda-Beckmann, 1991a). The more money is involved, the greater will be the number of claimants, and the greater the probability that the claimants will need time, perhaps even a court decision, to sort out their problems[25].

There is also a good chance that one of the claimants, or, in the case of land situated in village border regions, one of the village governments, will make an alliance with the Butonese party against the other Ambonese claimants. What so far to our knowledge are incidental cases, may develop into a pattern: strategic coalitions between individual Ambonese and Butonese, aiming at reducing the claims of the Ambonese party's kinsfolk to a share in land and in trees. For the help of the Butonese in these struggles, Ambonese (would-be) owners may well consent to the division and/or the registration of the land (see F. von Benda-Beckmann, 1991b).

This is more or less what happened with respect to local political rights. During the years 1985/86 when *raja* elections were imminent, the sub-district heads we talked to still confessed that they would not dare to let the Butonese vote because they feared violent reactions from the Ambonese. In the final phase of the election campaign, however, one candidate and his support group pushed the issue of Butonese voting rights, basing this claim on the official local government law - in order to win Butonese support for his own candidature, as was asserted in the village. The other candidates, one of whom had to rely on his state law based legitimation for his candidature anyway, had to follow suit. The direction of the local political change is unclear as yet but what is clear is that a political landslide has occurred, and that village electoral politics have entered a new phase.

Withdrawing from the hold of adat

The Butonese understandably also attempt to extricate themselves from the grip of Ambonese adat. One possible means of doing so is to engage in economic activities in which they are less constrained by the relations of subordination legitimized through Ambonese adat, like fishing and vegetable farming. A further important development is the increased occurrence of clove tree or harvest pledging by Butonese (*sewa pohon*) from Ambonese tree owners. These arrangements are basically the same as those of the Ambonese. The trees are pledged for one or more seasons (usually no more than three seasons) for a specified amount of cash which is paid when the agreement is made. The pledger then has the right to harvest the trees. However, only "good" seasons are counted as seasons relevant in terms of the contract. If the trees should bear no cloves, or very few, the harvest is not counted and usually carried out by the tree owner. In this way the Butonese can exploit the economic profitability of clove production without incurring the conflicts and risks attached to share-planting arrangements (see F. von Benda-Beckmann, 1991b).

Another strategy is to invoke the national agrarian law with its ownership rights and written form of land transactions which puts land owners on an equal legal footing. In the 1960's there had been active attempts to get their land registered and certificated under the basic land law. But then, according to some Butonese, "the coup came [the allegedly communist attempt to take over the government which led to a massive persecution and killing of communists, and to the new Suharto government], and these measures were undone by the government". The new-order government needed the support of the local elites and distrusted all too egalitarian and socialist objectives which could be, and had been, pursued in the name of the agrarian law. In discussion, and also in the Ambonese-Butonese court cases, the Butonese stress that the uncultivated land which they have been cultivating, had the status of state land, under the control of the state through its Offices of Agrarian Affairs, and not under the village government or even smaller groups like the *soa*. The courts still deal inconsistently with this problem[26]. There is evidence that the situation will change in the direction of greater pressure from the government towards registration. From 1965 until recently, the Ambonese have profited from the fact that the Basic Agrarian Law has been associated with socialist and communist policies. However, this is history now. Land registration now is increasingly associated with economic modernisation, and the government has pushed forward the PRONA registration programme (see Prakoso & Purwanto, 1985). Although the possibility to register house sites and bought land exists

now, too, most Butonese think that they are not strong enough to overcome the unwillingness of the Ambonese and the Ambonese village government, which has to cooperate in registration processes, without the help of higher government agencies.

In their struggles for economic resources and political equality they therefore look for support from the state government rather than from their Ambonese land lords. In the sphere of government extension and intervention in agriculture, there is also a quite different pattern of constructive cooperation with the government. In each of the Butonese *kampung*, there is a rather successful farmers' group (*kelompok tani*) working together with the officer of the Department of Agriculture on experimental fields, while no such farmers' groups have been successfully established among the Ambonese. The Butonese make use of the government's credit scheme for the improvement of vegetable cultivation, and they pay back their loans. The Ambonese, on the other hand, do not want to get entangled in government credit schemes. It is also not surprising that nearly 100% of the Butonese vote for GOLKAR, the state party of functional groups - while a majority (1982) or strong minority (1987) of the Ambonese villagers supports the religious opposition party (P3).

Conclusions

The situation on Ambon presents us with complex and changing constellations of legal pluralism in which the laws of hospitality and the meaning of ethnicity vary considerably. We have seen that the Ambonese laws of hospitality not only affect the social, economic and political position of hosts and guests, but that they also largely structure agricultural production and increase political inter-ethnic tension. Ethnicity plays an important role in the laws of hospitality and in economic and political processes. But it is not ethnic difference as such which would automatically lead to discriminatory treatment in Ambonese law. Ethnic strangers *can* be incorporated into the adat constitution. It is factors such as the size of immigrant groups, their status, and the economic and political conditions at the time of immigration which are much more influential in incorporation or non-incorporation than their ethnic status. Neither as a social characteristic of persons, nor given more specific meaning in legal structures like the laws of hospitality is ethnicity determinate, nor is it unchageable. The considerable variation in the relationship between Ambonese and Butonese villagers in Hila, historically and among the different Butonese settlements, show us that quite different social and economic practices go well together with the same legal rules. As the recent political history of the village shows,

change in these factors can also lead to changes in the relative significance of the normative elements (adat/state) of which the laws of hospitality consist. Yet the significance of ethnicity cannot be reduced to the situational or contextual. Once incorporated into law, it also assumes a structural character which transcends individual situations and which is common to all contexts. Whatever the differences in Ambonese-Butonese relationships have been, the relationships were always shaped by the fact that the Butonese are strangers not incorporated into the adat constitutional system.

We have also seen that the Ambonese versions of adat law and their adat constitution with its laws of hospitality, but also the laws of the Indonesian state have multiple functions in the economic and political relationships between the Ambonese village population, Butonese immigrant groups, and the agencies of the Indonesian state. The Indonesian Local Government Law and the Basic Agrarian Law are used by state agencies to bring political and economic life under state control. The Ambonese villagers use their own law in order to shield themselves against the claims of the state to more extended control over natural and human resources. Simultaneously, Ambonese adat is maintained to rationalize and justify relations of dominance and oppression over the immigrant Butonese. For the Ambonese, their adat law is both a "jurisprudence of insurgency and of oppression", to borrow the words from Tigar and Levy (1977). For the Butonese, on the other hand, the state and its law is one of the most promising avenues in their local economic and political struggle, not directed at the state, but at the Ambonese, in order to obtain full political and economic rights.

However, while the Ambonese have still been able to maintain their adat as a valid system, it is they themselves who threaten to irrevocably weaken their own system, by "selling it out". While the influence of government and government law (Local Government Law and Basic Agrarian Law) should not be discounted, it is mainly the political and economic dynamic of the village population itself which is at the root of the decreasing use and significance of Ambonese adat. Giving the Butonese voting rights at the last *raja* elections has probably set into motion an irrevocable development. The state government may have exerted some pressure in the same direction, but the sub-district head in Hila so far had not yet dared to impose the local government regulations about village head elections against a solid opposition of all villagers. The ambiguities and changes in Ambonese adat and in their economic and political practices have direct consequences for Ambonese-Butonese relationships. The Ambonese find it increasingly difficult to control the Butonese as a separate and subordinate legal category.

The more general lesson is that situations of legal pluralism cannot be understood within a simple framework in which descriptions and analyses of the relationships between state law and the local normative systems of rural populations are set into a context in which both systems are opposed to each other (see F. von Benda-Beckmann, 1991). In the first place, concepts like "state law" or "folk law" for descriptive and analytical purposes are no more than superficial cover terms. Quite different forms of normative ordering can hide behind those terms: local law (cognitive and normative conceptions) as understood and maintained by village people and local leaders, but also "customary" (or adat) law as interpreted and applied by state administrative and judicial institutions. Different versions of such adat can be operative in the same village[27]. In the second place, and this is the more relevant, because the realms of state and local folk law usually cover a membership which has quite heterogenous and often contradictory interests, there need be no one to one correlation between legal form and the political and economic interests of actor groups. The coexistence of a plural normative and institutional repertoire offers opportunities for many actor groups to pursue different economic and political objectives. State law may not only be an instrument of oppression wielded by state agencies in their attempts to control and develop rural populations but may be used to pursue local, traditional economic and political interests. The recourse to "tradition" and traditional laws, on the other hand, is not uncommonly an important means by which governments express and legitimate their own policy objectives (see Abel, 1982, Spiertz, 1990, and in this volume). Local customary law rarely expresses the values and aspirations of *all* members of rural populations. Also local customary law can be "imposed" law for certain categories of the rural population, and this may particularly be the case in the field of inter-ethnic relations in rural areas, in the relationships between "hosts" and "strangers"[28]. The field of inter-ethnic relations is therefore a particularly complex situation, well suited to explicate the need of a deeper understanding of legal pluralism and its implications for development policy.

Notes

1) It is also an area which still is under-researched and under-theorized. While the problem area has been mentioned in accounts of transmigration programs and of spontaneous migration (see World Bank, 1988, p. 91 ff. for Indonesia), it has mainly been confined to (the planning and analysis of) large scale transmigration projects (see World Bank, 1988, p. 91 ff.) and to the (state) regulation of ethnic minorities with a distinct occupational status (Chinese, Lebanese, Jews) working in urban areas (see Nanlohy, 1990). Spontaneous migration and the problems resulting from the intricate legal situation, especially with regard to the access to

land, are acknowledged in the World Bank Report on Transmigration in Indonesia (1988, p. 134 ff.). The inability to find appropriate land and obtain legal title to it (land tenure, land registration, the cost of land) has been diagnosed as the major constraint limiting settlement (1988, p. 135). For exceptions, in which special attention is given to the problem see Hart, 1982 for West Africa; Cooper, 1987 for East Africa.

2) Note that where studies of ethnicity and ethnic minority groups have paid attention to folk law, the approach often is one of a "legal dualism", in which immigrants' ethnic law is contrasted with the law of the state. Ethnic law then is treated as expressing the interests and values of the ethnic minority, as in some studies of immigrant populations in Europe or the United States (see for instance Strijbosch, 1985).

3) The exact number of Butonese on Ambon is not known, since ethnic differences are not relevant in official Indonesian statistics. Concrete data could be obtained in the villages themselves, but nobody made an effort to do so. No statistics were available, on the basis of which the rural population, the size of their households, the size of the area under agricultural production or the crops produced could be differentiated. Regional development projects, partly set up and funded by Dutch development aid, worked on the basis of statistical averages, and they took no notice of the economic and political problems.

4) The research on which this paper is based was carried out in the context of a research project on "law and rural social security in developing countries" of the Department of Agrarian Law, Agricultural University Wageningen, and the Department of Social Sciences, Erasmus University Rotterdam. Field research was done in 1985 and 1986 by F. von Benda-Beckmann (Wageningen) and K. von Benda-Beckmann (Rotterdam). T. Taale and A. Brouwer, both senior students at that time, did field research in 1987-1988. The research took place under the auspices of LIPI and was locally sponsored by the Law Faculty of Universitas Pattimura, Ambon.

5) We have described the political and economic organisation of Hila in more detail in F. von Benda-Beckmann, 1991a; see also Taale, 1990 and Brouwer, 1989.

6) Instances of such precolonial structures still exist, like the *kepala soa* structure, the political regulation of the mosques etc., see also Van Fraassen, 1972.

7) For historical accounts of Ambon, see Rumphius, 1910; Manusama, 1977; Knaap, 1987 and the Dutch 17th and 18th century accounts edited by Knaap 1987 (ed.). The best colonial account of Ambonese land and tree law is Holleman, 1923. See for the importance of Islamic law, F. and K. von Benda-Beckmann, 1988 and F. von Benda-Beckmann, 1988.

8) According to the Regulations of the Minister of Internal Affairs (section 6, *Peraturan Menteri Dalam Negeri*, 6 - 1981), persons having reached the age of 17 years who have been registered as village residents for at least 6 months (and have not been involved in activities detrimental to the interests of the state) have voting rights. Candidates must be between 25 and 60 years old, and must have been registered as village residents for at least two years, except if they have been born in the village (section 7). See Unang Sunardjo, 1984.

9) *Soa*, like *kampung* in other areas in Indonesia, had, to varying degrees, also assumed a territorial meaning.

10) The maps have been adapted from those in Taale, 1990.

11) For more detailed descriptions see F. von Benda-Beckmann, 1986, 1990; Taale, 1990; Kriekhoff, 1991; Pengadilan Tinggi Maluku, 1981. There is considerable disagreement among Indonesian scholars of agrarian law on the degree to which such "adat land" is still recognized after the introduction of the Basic Agrarian Law, see Kriekhoff, 1991; Boedi Harsono, 1986. Yet whatever the dominant opinion of the legal scientists may be, the state courts, up to the Supreme Court of Indonesia, still use Ambonese adat law in these matters.

12) More often than not, land and crop/tree transactions are concluded orally, or a written agreement is witnessed by the village chief. In rare cases, people go to the sub-district head, *Camat*, in order to make up a formal sales document (*akte jual beli*), as provided by the legislation. But this is not usually taken to the Office of Agrarian Affairs (*Kantor Agraria*) in order to obtain a formal ownership title (see F. von Benda-Beckmann, 1986).

13) Except for a brief period preceding the 1965 coup, the state government has not, generally speaking, attempted to assert its own rights of control over uncultivated land as state land (*tanah negara*).
14) Already in the 1920's it was reported that in Hila (contrary to most other Islamic or Christian villages on Ambon) it was not mandatory to seek the permission of the village government if one wanted to cultivate *ewang* land (Adatrechtsbundel 24, p. 369).
15) The differences in social rank - the Alifuru clans were looked down by the others as primitive and backward, there was no intermarriage etc. - have widely disappeared during the last two decades.
16) Both Ambonese and Butonese were emphatic that nothing was ever asked or given either. There is no obligation for Butonese to bring a share of their produce to their Ambonese land-patrons, and apparently they rarely do so. However, when some share is demanded by Ambonese coming to the Butonese *kampung*, "it should be given". We observed many instances when Ambonese passing through and stopping briefly in a *kampung*, would ask for some fruit or vegetables. This is done, but, as Butonese made clear in interviews, they resent such requests.
17) Nowadays, prices are considerable, varying from 300,000 to 500,000 *rupiah* for a plot of about 15x20 meters. In 1985 1 US$ was worth approximately 1,000 *rupiah*.
18) In Kaitetu, roughly half of the total village population were Butonese who lived in the *kampung* Kalauly, about 3 kms from Kaitetu village.
19) However, certain types of relationships (marriage) nowadays require some intervention of state institutions like the Office of Religious Affairs (*Kantor Urusan Agama*). Disputes between Butonese in the Butonese *kampung* were handled within their *kampung* through their own authorities. The village government was not used as a forum for dispute settlement, and neither were the state courts.
20) The three *kampung* have their own *kepala kampung* and also their own LKMD. The *kepala kampung* represents his *kampung* population vis-à-vis the village government. But the Butonese have no representation in the Hila village government; none of the functionaries of the sections of the LKMD is Butonese.
21) A similar situation obtained in the neighbouring village of Kaitetu. However, in some villages Butonese have been incorporated as full citizens after some generations of residence, like in Tulehu, see Hospes, 1991; F. and K. von Benda-Beckmann, 1991b.
22) Each Butonese settlement has its own mosque, and participation in religious rituals and the collection and distribution of the religious alms (*zakat*) are generally *kampung* specific.
23) More intensive forms of social and economic cooperation with Butonese were developed by some Ambonese villagers. These were, however, "outsiders" who led their economic and social life largely outside the purely (Ambonese) village sphere. The Ambonese men who had married Butonese women as their first wives, went to live in their wives' *kampung*. One of the Ambonese who regularly operated a fishing team (about 20 persons) had moved to live halfway between the village core and the Butonese *kampung* Tahoku. He had several Butonese fishermen from Tahoku in his team.
24) See the court cases discussed in F. and K. von Benda-Beckmann, 1991a.
25) We have described some of such cases in F. and K. von Benda-Beckmann, 1991a and F. von Benda-Beckmann, 1991a.
26) See the cases discussed in F. and K. von Benda-Beckmann, 1991a.
27) The same holds true for state law and religious law, see also F. von Benda-Beckmann 1984, and 1988.
28) Studies critically examining local traditional laws, focussing on gender and age differences, have shown that "folk law" often turns out to be the law of senior males (Chanock 1976; Seidman & Seidman, 1984) and that recourse to state law and its un-traditional values can be a resource in the struggle for emancipation (Conn & Langdon 1988). See more generally Morse & Woodman, 1987.

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BETWEEN CANNIBALISM AND PLURALISM: ON THE CONSTRUCTION OF LEGAL FRAMEWORKS IN IRRIGATION MANAGEMENT IN BALI AND SRI LANKA

H.L.J. Spiertz

Some people cannot bear
to have a brick layed flat
if it looked better upright
(freely adopted from Iris Origo,
in: The Merchant of Prato).

Introduction

This contribution will touch on an aspect of legal phenomena in society which I, tentatively, call here the (ac)cumulation of law. In speaking about law as something that can cumulate and be accumulated, I take the perspective that law, if taken in the sense of the dominant claims to validity of actions and relations in a given social arena, would represent a pool of resources. Law, in this sense, is a reservoir of assets, objects of value and competition, which can be appropriated and which, like wealth or reputation, generate power and authority for those who command the larger share of it. In the sixties, e.g., the prevailing images of an ongoing accumulation (monopolization) of legal power on the part of state-agencies even induced some anthropologists to speak of processes of cannibalization of the other regulative resources and regulating mechanisms in society (Diamond, 1973). But, having found, eventually, that most of the alleged victims of this legal cannibalism, were never in fact really swallowed after all, or that if they were, they still managed to spring to life again in one form or other, legal anthropology started to develop the concept of legal pluralism as one of its main paradigmatical frameworks.

Notions of legal cannibalism and legal pluralism both stem from a conceptual problem that follows from a contradiction between the empirical co-existence of fundamentally different normative and regulative orders in society, and the overlapping of the social domains to which these orders pertain, i.e., the domains for which people assert the validity of such orders. It is not difficult to recognize that the notions of the sustained multiplicity of social forms that lie

behind the idea of legal pluralism represent a more plausible conceptualization than the simplistic and short-lived notion of legal cannibalism. Still, it certainly does not in every respect offer the most elegant solution to the conceptual dilemmas involved. For a start, one may justifyably object to some of the implications of stretching out the meaning of the word 'legal' far beyond its meaning in normal life. One may regret this not only for the obvious semantic and ideological reasons. There may be valid reasons to speak of 'legal' pluralism in the specific context of exposing the centralist aspirations and ideology of the legal system (the lawyers' or the cannibals' system). But, once the legal system has so been exposed as a folk system among other, law-like, folk systems (F. von Benda-Beckmann, 1991), one may wonder whether it is expedient after all to continue applying the adjective 'legal' to all these folk systems.

Putting emphasis on 'legal' as a generic quality of the various orders in society, however sensible and analytically useful, tends to convey notions of co-ordination rather than complexity or compoundedness. Uneasiness with this flaw in conceptions of legal pluralism has induced Fitzpatrick, e.g., to make an argument for a more radical understanding of legal pluralism, which he calls 'plurality of law'. The concept of plurality of law means to stress the element of a necessary plurality in the constitution of law, whether it concerns state law or non-state law. As Fitzpatrick puts it, his concept of plurality 'encompasses not just, or not so much, a discrete and persisting difference *of* legal orders, but the complex, mutually defining interaction *between them*' (Fitzpatrick, 1983; print in italics: HS). In this conception the 'dominant' state law, for instance, can be seen in great part, as constituted through other, 'subordinate' orders. In many respects, moreover, it can be seen as maintainable only in as far as it is accomodated by its 'subordinate' legal orders.

To adopt a conception of interaction between legal orders by which they mutually constitute each other, demarcate their spheres of validity as well as draw upon each others' powers of legitimation, in my view, clearly calls for paying more serious attention also to the phenomena of construction, or (ac)cumulation of validity (legalities) taking place in society's multiple arenas of interest management. If legal, or whichever authoritative rules, are conceived of as actually being constituted (and continuously re-constituted) in society's numerous arenas of interest management, the 'legal matter' can be seen as a pool of resources; a pool containing all sorts of building materials by which validity (legality) of positions and actions is constructed. Moreover, if one maintains the idea of the mutual constitution of legal systems and sub-systems, such accumulation of law can not be considered a random, or a

fundamentally voluntary matter. The point seems important since a tendency to voluntarism is plainly a component of our more 'classic' conceptions of legal pluralism.

In a sense still borrowing its research questions from its object of study[1], which means questioning law instead of society's arenas of interest management, early conceptions of legal pluralism started out from a multiplicity of basically separate and identifiable legal systems and forums, between which people were conceptualized as making choices in the pursuit of validity for actions and relations. Still, it is common knowledge, documented also in many case-studies on legal pluralism, that in the reality of social arenas the appropriation (of the bigger share) of validity or legality is seldom a matter to be achieved by reference to one normative system only, to one *or* the other system. Even Diamond's cannibal, the state legal order itself, is not self-subsistent in this respect. It constantly has to draw also upon normative resources that belong to, i.e., are (allegedly) generated and maintained within, its co-orders in society (cf. Fitzpatrick, 1983). A perspective, therefore, that focusses on pluralism among systems and plurality of actor-choices, however revealing and sensitizing, seems to me a backstage rumble-tumble if compared with the arenas where competition, cumulation, and appropriation of validity is mainly achieved by mixing and compounding whatever repertoires that are feasible. There, after all, choice may in fact boil down to little more then the need to construct the right normative combination, in view of the forums involved in the specific arena of interest management at stake.

I will discuss in this paper two examples which may illustrate the above. We will witness (briefly) how in the domains of irrigation management in Bali and Sri Lanka, the relevant legal frameworks are constructed. Both cases have in common that because of local socio-political contexts, the idioms of traditionality (and traditional law) have become the point around which the ordering processes in the arenas of irrigation management converge. Still the cases are different not only with regard to their socio-cultural settings, but also regarding their technological and organizational contexts, as well as the nature of the traditional management structures involved, and the extent to which these were socially reproduced in the past. As will become clear, however, the cases are complementary in that they let us see how local actors, government agents, project managers, farmers, etc., strive to integrate a multiplicity of interests, normative parameters and constraints in a context of discourse which is seen as the most beneficial within the arena at hand.

Bethma on Sri Lanka[2]

Reports on Sri Lanka irrigation systems use to pay a good deal of attention to the merits of an allegedly indigenous form of local water management which is called the *bethma* system. Bethma is understood, mainly, as a traditional way by which farmers in the dry zone of Sri Lanka have temporarily redistributed access to land and water during the yearly dry season. Starting with Leach's work on the Sri Lanka village of Pul Eliya and its irrigation system (Leach, 1961) subsequent research on the subject of bethma has resulted in a number of rather incomplete and confusing conceptualizations of the bethma institutional complex and its socio-organizational implications.

Taking the general idea as conveyed by most authors for a starting point, bethma operates by confining the areas and the total acreage to be irrigated in case the expected amounts of water are not sufficient to irrigate a whole irrigation command area. As water shortages use to occur in the dry season, the arrangement would apply in the dry season mainly, and the area to be selected for bethma cultivation would logically be the top end of the respective irrigation schemes. Besides being a means of limiting the areas and acreage to be cultivated, the concept of bethma also appears to involve a redistributionary mechanism curbing the economic inequalities that would arise from the recurrent exclusion of part of the irrigation community from the production proces.

Bethma cultivation in its 'pure' form, as described by, a.o., Leach and Uphoff (Leach, 1961; Uphoff et al., 1981), seems to have been based on a specific set of land tenure arrangements which defined ownership of arable land in terms of access to three separate fields, one in the irrigation top-end area, one in the middle section, and one at the tail end of the scheme. Since, as local law would have it, any transfers of land would have to include the three sections together, every landowner in the scheme would ipse facto (or ipse jure) have access to the top end irrigation section, and be able to take part in the production process under bethma conditions also.

That law and social fact should not be mixed up is already demonstrated by Leach when he proceeds to make a distinction between the 'real' bethma and, what he calls a secondary type of bethma. This second type, which is considered by Leach to represent a product of government agency rather than an original grass-roots organizational form, would involve a mode of obligatory land sharing to the effect that for the duration of the bethma season the top end landowners would share their land with the waterless tail enders of the scheme[3]. Such a temporary redistribution of the irrigated land within the area suited for bethma cultivation, would enable also the tail end farmers who

possess no top end fields, to take part in the production proces. Whether or not this second bethma model is historically rooted in local tradition, the idea of making optimal use of scarce water, practiced in combination with some mechanisms ensuring a more or less equitable access to the agricultural resources, is consistent with the bethma concept.

While most authors conceptualize bethma as a form of temporary redistribution of land among the farmers in a given irrigation command area, meant to prevent top end versus tail end conflicts from obstructing an efficient dry season water management, there are major differences among them regarding the actual implications of the institution. As is pointed out by de Jong (de Jong, 1989) the records on the matter vary from sweeping statements affirming a harmonious and egalitarian social order, to more mundane claims of temporary land redistribution according to which the additional amount of land which tail enders receive in the bethma area would depend on the amounts of land they possessed in the top end already or on simply paying for access. A plausible explanation for the bethma practice is offered, moreover, by some authors who state that it especially helped to ensure a village its seeds for the next wet season. Therefore, not all farmers would have to be included in bethma production. As, in local land tenure relations, the landowners were obliged to provide the seed-imputs mere tenants were probably never included in the bethma regime at all (Abeyratne & Perera, 1986).

Anyhow, whenever the above authors discuss the bethma concepts, they also point out that presently bethma, as a grass roots form of social organization of irrigation, is hardly practiced anymore. Be that as it may, it does not alter the fact that the bethma model is still an important factor in contemporary Sri Lanka irrigation contexts. Its present importance, however, is not so much based on local custom as on government irrigation development policies. In part perhaps in the wake of World Bank Reports stating that: "bethma is an impressive way of ensuring equity" (World Bank, 1985), or influenced by proclamations stressing that "the new watermanagement programs should, where feasible, build upon established practices and accepted rules..." (World Bank, 1981), Sri Lanka irrigation rehabilitation programs (VIRP) have embraced a policy aiming at the re-introduction of the bethma institutions in community irrigation management. Still, though nominally representing an authentic Sri Lankan community irrigation institution, the more specific contents of the bethma cognitive and normative structures have remained largely unknown, that is, if it would have been possible at all to identify them in these terms out of a specific time and space. As it seems now, bethma, by having become part of a politically dominant discursive repertoire which stresses traditionality and

indigenousness, has, in a sense, survived and won a new prestige 'out of context'[4]. It may be not too surprising then if the actual contents and significance of bethma rhetoric were to prove quite different in bureaucrats' and farmers' social settings.

Let us have a look, therefore, at what in effect the bethma promotion efforts brought about at the local levels of irrigation water management. The data on the matter is taken from a 1989 field research by de Jong in two villages in the dry zone of Sri Lanka, Anuradhapura District, North Central Province. Both villages have been subject to an irrigation rehabilitation program which includes the promotion of chili cultivation during the dry season. In order to implement this program bethma has been promoted by the irrigation authorities as representing the ideal organizational and institutional formula. Thus, for more than a decade now, special sets of rules, claiming to derive from the old, indigenous bethma institutional frameworks, have again become part of the normative contexts of dry season irrigation management and land distribution in the local arenas of irrigation administration and farmers interests.

From about 1978 irrigation personel were increasingly pressured by their superiors to act on the prevailing irrigation development policy and back up bethma cultivation in their command areas. On the other hand, bethma being considered a traditional grass-roots institution, the formulation of the precise rules that local irrigation personnel were expected to implement were left fairly vague. From a general policy viewpoint this is precisely part one of the advantages of promoting bethma. It constituted an authoritative repertoire of normative communication between the various levels of irrigation management without actually binding anybody's hands[5].

The implementation of bethma, as the policy was called, was left to the lowest ranking irrigation officials: the local Cultivation Officers (CO's). But the general reference to the people's 'own traditional laws of bethma', which may at first have meant little more than some vague reminiscenses of old practices, was fixed now by a combination of authority deriving from patrimony and tradition rhetoric and state policy. Within this context the local CO, who was responsible for the irrigation command areas described by de Jong, proceeded to invent his own bethma. Being a government officer as well as a local farmer himself, he developed a concept of bethma apperently with an eye both to official political rhetoric and his local knowledge as a villager.

Among the main ingredients of bethma as conceived of by the CO, one finds rules stating that: 1) landless farmers should be included in the bethma redistribution of land, 2) all outsiders should be excluded, and 3) the bethma fields should be equally distributed among the participant households.

In view of the available sources on bethma as mentioned above there can be no doubt that the rules introduced by the CO corresponded with some of the main elements of popular understanding of the old bethma practice. Neither did they contradict other reported bethma structures. But, whatever the CO's, or his local advisors' motives for selecting this special combination of bethma rules, there is another characteristic about the CO's concept which gives away its interpreted character. It professes to apply to three social categories (landless, outsiders, households) which are mainly ideological and which in the reality of local irrigation contexts can barely be distinguished. Conveniently enough the CO bethma-rules do not bother at all with the actual local complexity of land tenure and production relations which cross-cuts, as we will see, the categories mentioned. The bethma-rules promulgated by the CO are therefore just abstract symbols; in a social sense they completely 'hang in the air', and they appear to be meant to do just that. By their existence at a level where they are not authoritatively, directly and exclusively identified with specific social positions, interests and relations, they form an umbrella, an adapted idiom, under which the dominant local powers can rally and interests configurations can adjust themselves. So, all along the line actors at different levels created their own bethma; not as much at a level of social structure but mainly at a level of normative communication, sanctioned by the alliance of traditionality and officialdom.

Reaching down a little further yet, it would be interesting also to know what actually happened to the insider/outsider criteria of the CO. In order to understand the local developments, it should be remembered first that the bethma policy implementation we are talking about took place in the context of government promotion of dry season non-rice crops, especially chilies. Since originally bethma seems only to have been associated with rice growing, contradictions arising between local perceptions of the 'real old' and the 'newly established' rules of bethma could be explained away by opposing the 'old rice-bethma' to the 'new chili-bethma'. This situation allowed for considerable leeway.

But bethma, in whatever form, involves a temporary staking-out of a restricted area which is to be provided with water while the remaining part of the irrigation scheme or command area is not. According to the most common conceptions of traditional bethma, the temporarily irrigated areas to be staked out should be situated at the top end of the schemes. These top end areas represent not only the potentially most water-rich but also the oldest part of the scheme, and seem as such to be associated with common property-like sentiments which may be the source of the historical bethma idea. However the

ideal situation in which every local farmer possessed a plot in the top end irrigation area of his village besides holding other plots elsewhere, does not currently exist - if it has ever existed at all. Under present conditions, therefore, staking-out a restricted bethma area necessarily entails an insider/outsider scenario that, in some form or other, cross-cuts the existing land tenure arrangements.

In the cases of chili-bethma described by de Jong, the area choosen was not at the top end. The reasons given for that seem convincing enough. In the one case top end water conditions were considered unfavourable to chilies, and in the other the rice-growing cycle in the top-end was still under way at the time the chilies should be planted. Anyhow, the choice of chili-bethma sites other than the, formally, appropriate sites, widened the leeway for rationalizing and legitimating actual choices under the bethma-idiom. It meant that the category of 'outsiders' who could lawfully be excluded from taking part in bethma acquired a measure of elasticity which, according to popular opinion, would have been absent if the appropriate area had be chosen.

On the other hand, the choice of chilies for bethma-cropping also posed its own constraints in this respect. For a number of reasons (high initial costs, differential access to the specific know how, knowledge on pests control, etc.) chili growing was not equally attractive to every local farmer. Many farmers, therefore, never bothered to assess their claims in the chili growing context. This was the case even while considering themselves 'insiders' and as such entitled to claim access to bethma production in the top end or elsewhere. As a consequence the acreages that were set aside for chili growing were more or less sufficient to accomodate the actual demand and even allowed for a good deal of selective discretion in actually applying the 'outsider' criteria or not. Some farmers (including the CO himself) who should have been considered outsiders if the concept was understood in terms of co-residence, were still allowed to take part in the chili-bethma. Other outsiders who for some reason were not welcome to the bethma-in-crowd were kept out. Keeping them out was mainly rationalized by reference to the rule on banning outsiders. This was natural enough since it was backed up by concepts of traditionality and endorsed by official bethma rules. Taking others in, on the other hand, was justified by reference to quite other criteria such as a person's special social and economic position, his correct conduct in certain political, kinship, land tenancy, and other social relations, or even his record as a well equipped and industrious farmer. In other words, in ordering access to bethma, the idiom of co-residence was liberally mixed with other idioms expressing socio-spatial nearness, thus providing a nicely balanced communicative resource for explaining cases of inclusion and exclusion.

The same happened to the CO-rules on the inclusion of the landless and per household equality of access. Local arrangements and perceptions provided their own versions of these concepts. In terms of the above criteria of co-residence for instance, the landless who were to be included in bethma should be co-villagers who owned no land in the scheme. In fact most of these so-called landless were also landowners or tenants in other schemes. The fragmentation of the plots the average household had at its disposal, called for careful planning and a strategic use of labour. This was achieved by reciprocal labour exchanges involving engaging relatives and tenants for the agricultural work in different schemes and in different villages. Besides blurring the inside/outside criteria, the actual organization of production relations thus put its own constraints on the other CO-rules too. The claim to access on grounds of landlessness began to be used for 'parking' bethma-plots with one's children or grandparents, often with no other goal than to acquire an asset which would be negotiated later for other interests. It was also used by virtual outsiders, who by means of lease-contracts became associated with the local mosque, which, as an inside institution could claim access.

In short, the account given by de Jong of the bethma introduction demonstrates how local arrangements, taking into account the land tenure structure, the power relations and the production system, came to grips with the new situation. The discursive frameworks of the CO-rules were appropriated by local interests. Their 'hanging in the air ...' allowed them to become new negotiable assets setting future contexts of interaction.

The complexity and selective employment of cognitive and normative communication that we glimpse here, can of course be seen in terms of legal pluralism. Different normative frameworks were used here in one and the same domain of local interaction: access to land. But to leave it at that would somehow mean missing the point. It seems worthwhile to look at the above situation from the slightly different angle I have suggested above.

Influenced by, and oriented to the bethma-concepts, as authorized by both the rhetoric of tradition and the authorities' pressure, local terms for explaining inclusion and exclusion regarding chili-bethma became characterized by abstractness. This allowed existing local repertoires for expressing economic interests in terms of socio-spatial nearness, to infiltrate and constitute current local versions of the state supported idiom. Plurality of normative frameworks as defined in relation to multiple socio-spatial contexts of interaction, here appears to be a less interesting feature than the insider/outsider idiom of bethma becoming an integrating discursive repertoire, incorporating a variety

of local normative frameworks, thereby collectively shaping the constraints and opportunities of the bethma-arena on its own ground.

The point that is argued here can be further illustrated and may acquire more comparative weight, if we take a look at comparable phenomena available in the otherwise rather different socio-political and cultural setting of irrigated agriculture on the Indonesian island of Bali.

Subak on Bali[6]

Anyone visiting the island of Bali is quickly convinced of the local existence of a very special and powerful organizational structure governing irrigated agriculture. The picturesque sights offered by the island's abundance of well planned and maintained rice-terraces with their intricate patterns of canals, ditches, dams and water division structures leaves little doubt that the *subak*, the famous traditional community irrigation corporations of Bali, are very much alive. This message is conveyed also by the local tourist brochures and the piles of pamphlets, papers, reports, and maps filling local bureaucrats' and policy-makers' cabinets. That the subak institutions form an essential part of Balinese cultural heritage, and as such are still the main regulative force in the paddy-fields, is a proposition that can not fail to be convincingly argued by any school-teacher or village-official as well as by the most backward local peasant.

It should be clear, though that in some important respects the subak on Bali is a quite different matter from bethma on Sri Lanka[7]. Contrary to representing a newly re-introduced semblance of a traditional institution, the subak has never been out of the hearts and minds of either Bali's farmer population or its administrators. Moreover, claiming to govern all aspects of irrigated agriculture, the Balinese subak represents a far more complex and comprehensive institutional framework than bethma. Not surprisingly the literature on subak is quite extensive, ranging from the first reports of Dutch seafarers in the 16th century to prestigious colonial works describing local adat law, and, finally, turning up again in contemporary reports on the problems of integrating the local irrigation corporations into the new technological and administrative structures accompanying government-induced irrigation management programs[8]. Still, anybody not satified by the usual recitals of the subak structural properties and the normative assumptions about the social significance of the famous laws of the subak, could search for empirical data on the actual significance of the subak institutions in the Balinese paddies. But they would soon be disappointed[9]. In this respect the comparison with bethma evidently does make sense. But that there are more similarities which are even

more interesting I will demonstrate by discussing below a real life irrigation situation in which we see some aspects of the Balinese subak at work. The specific irrigation sites I will focus upon are situated in the neighbourhood of Blahpane, a small village in central Bali's Gianyar district.

Though situated in central Bali, quite close to the main touristic route from the southern coast to the mountain ressorts of the Bangli District, the village of Blahpane is characterized by an atmosphere of remoteness, relative poverty and backwardness, which features it shares with many other inland Balinese villages. Originally a military outpost, guarding the northern border of the local fiefdom of Sidan against marauding bands from the mountain principality of Bangli, the habit of the lords of Sidan of switching alliances caused Blahpane to be claimed alternately by the dominant principalities of Gianyar in the west and Klungkung in the East. When colonial intervention in the beginning of this century finally suppressed the inter-principality petty-warfare and established Bangli, Klungkung and Gianyar as administrative Districts, we find the Blahpane area being administrated first by the District of Klunkung and later on being formally incorporated into the District of Gianyar.

The history and geography of Blahpane is reflected in its present village structure. Blahpane, its name expressing the equivalent of a broken rice-bowl, counts two residential hamlets of about 500 inhabitants each, partly separated from each other by a small north-south-running chasm. Socially and politically also Blahpane is split in two parts, one looking to the west where at a distance of a few miles the large village of Sidan forms the religious and political centre, and the other looking south to another centre the major village of Tulikup which formerly belonged to Klunkung. Administratively Blahpane is part of a territorial unit headed by the Gianyar village of Sidan, from which it is geographically separated however by a number of deep gorges. To the Sidan village administration, therefore, Blahpane has long been an out-of-the-way place that could only be reached on foot, or by driving south to Tulikup village first and from there taking a 5 mile bumpy dirt-track north, or by taking the tourist highway winding into the Bangli mountains and from there turning south again. Pinned against the Bangli border in the north, Blahpane is noticeably cut off from the bustling cultural and economic activity of the Gianyar region and is economically mainly oriented to the northern enemies of old. Bangli however, being a much poorer region than Gianyar, offers only limited economic opportunity and social relations with the Bangli villagers are often a bit strained. So, means of subsistence in Blahpane mainly revolve around its paddies and house-yards, producing rice and vegetables, coconuts, a few cloves, and the like.

The paddy production system of Blahpane, however, is not as neatly organized and regulated as one might expect after reading the classics on the Balinese subak-system. Plagued by both its geographical and administrative environment, by competing interests and lack of co-ordination, but yet at times also excelling in unaninimity and effort, irrigation in Blahpane has been a public issue for many decades. But let us take a look first through the eyes of the district administration of Gianyar.

What soon becomes clear is that the District level data on the Blahpane irrigation area tend to be far from complete and at some points even contradictory. But Blahpane is not unique in this respect. According to the the maps and registers of the Gianyar District irrigation offices, dating from 1987/1988, the irrigation area of Blahpane is partly administrated by a irrigation corporation called the subak Gelulung. The acreage of subak Gelulung is reckoned to be some 15 ha, and its leader is reported to be a man called Wayan Regig. Remarkably, his 'subak' would consist of just one sub-subak unit, *tempek*, registered under the name Blahpane. Another entry in the register records a tempek called Gelulung being part of a bigger irrigation scheme named subak Tulikup. The tempek Gelulung, covering 66 ha. and headed by a certain Wayan Sutapa, would belong to Tulikup instead of Sidan village territory. Other entries again, mentioning the Tulikup system, are silent on the 66 ha. Gelulung but mention the 15 ha. Gelulung as one of the Tulikup sub-subak units. Maps of the irrigation department indicate that the Tulikup/Gelulung system commands 2 minor (non-permanent) dams, which stand on a north-south running rivulet called Tukad Gelulung. But since these are registered as so-called non-Public Works units, information dries up at this point.

More, and rather different information is available in the office of the tax-collector for the part of the Gianyar District to which Blahpane belongs. According to the tax-collector, who by virtue of his profession has a more intimate knowledge of the local situation, subak Gelulung is a confederation of Gelulung and another subak called Tamanbali and covers a total of 47 hectares. The Tamanbali part, however, though covering 31 ha. on Gianyar territory, pays its landtax to the District of Bangli. The reason for this is that Tamanbali is in fact part of a large irrigation and temple complex, also called Tamanbali, which lies on the south-eastern corner of the Bangli District. Still the Gelulung/Tamanbali-minor confederation has its own permanent dam, called dam Gelulung, which was built by the Gianyar branch of Public Works in 1964 on the river Melanggit in Bangli territory.

Double-checking with the Sidan village authorities leads to contradictory statements and subsequent uncasiness. Gelulung is indeed the subak of Blahpane, but as it turns out, there is one Gelulung that is part of the Taman-

bali-complex, and another belonging to Tulikup, although both also belong to Sidan. Since it may seem strange that such different assessments of subak and the village territory may exist among the various levels of local government, it should be noted that this, at least in Bali, is not uncommon at all. It would be wrong, moreover, to see in it merely the signs of a failing bureaucratic hold and administrative inaccuracy. As I will discuss below, it signifies the complex intermediary roles a concept like subak plays in local interest management. Most certainly so with respect to an area like Blahpane, the irrigation units of which, as the tax-collector assures us, are doing rather badly, suffering as they are from water-shortages and both internal and external conflicts.

Approaching Blahpane, from the South, one first arrives at the hamlet of Blahpane Klod, the poorer and more backward part of the village. To ask to see the local subak leader sparks off heated discussion among the men who sit passing the afternoon in the shelter of the Klod hamlet community building. After one has been sent on a couple of wild-goose chases to alleged subak-heads, there grows a suspician that there is more behind this than meets the eye. Finally a very old man (who cannot have seen the paddy fields for many years) discloses to us that there exists no real subak in Blahpane. The area is just *natak tiis*, which means that its landowners are simply dependent on the drainage of the northern Tamanbali complex. Many of them therefore have become tenants in the subaks of the Tulikup area. As for Gelulung, that is just part of Tulikup.

As it was to turn out later, because the leadership, as well as the water rights of the territory, denounced as not belonging to Blahpane, had long since been a matter of dispute between the residents of Blaphane Klod and their northern Blaphane Kaja co-villagers, at the time nobody of the Klod hamlet wished to be presented as the subak-leader. All the more so since the actual context in which such a step should be taken had yet to be clarified. That was to become very clear when, some weeks later, a Klod resident suddenly stepped forward, undaunted by the prospect of worsening the already strained subak relations in the neighbourhood by declaring himself the local subak leader, or at least the subak co-leader. This, however, happened after his rival Kaja subak leader seemed to have convinced the researcher of the legitimacy of his speaking for the whole Blahpane irrigation area. The rival thus seemed to have succeeded in securing government aid to the benefit of Blahpane Kaja rather than Blahpane Klod.

Having moved on to the northern hamlet of Blahpane Kaja the matter of who was the local subak-headman seemed to present no problem whatsoever. Regig, a sturdy and strong willed Kaja farmer, was more than ready to boast of

his subak leadership, and his father's, who, himself being a Tamanbali farmer, had been the man who took the initiative to unite the Tamanbali and Gelulung systems in the early sixties. This union was intended to muster the manpower and the financial as well as the political support needed to realize an old ambition of the Tamanbali farmers of Blahpane Kaja: i.e. to become independent from the Main Tamanbali system in 'foreign' Bangli by building a new dam of their own on the river Melanggit. The story as it is told by Wayan Regig is confirmed and enthousiastically supported by many other Kaja farmers who are old enough to remember what happened at the time. In short it goes as follows.

Before 1964 the 30 ha. of paddy fields constituting the Blahpane Kaja northern and eastern sawah resources formed the tail end of the large Tamanbali irrigation complex in the District of Bangli. Being just the tail end, and given the bad irrigation management and the unfriendly attitudes of the Bangli farmers and subak authorities, lack of water was a recurrent problem. Reminiscenses of past eras of internecine warfare, involving the blocking off of water-supply and accusations of water-theft did not help much either. Although the Tamanbali sub-unit of Blahpane never failed to fulfill its ritual obligations to the Tamanbali head-system, they were in fact no more than a *natak tiis* unit, which means an irrigation unit that has no real subak or sub-subak-unit status, since it obtains its water only from the drains of other subaks. The situation was all the more tangled since the major part of the great-Tamanbali drainage-water was simply lost in the Melanggit canal, which, at about 3 miles to the northeast of Blahpane plunges into deep gorges only to become accessible again in the southern Klungkung District. So the Tamanbali farmers of Blahpane conceived of a plan to build a dam in the Melanggit stream at a spot precisely above a precipice at which the Melanggit water disappears into Klungkung territory. From that new dam, the location of which would not harm the great-Tamanbali interests whatsoever, the surplus water of Melanggit simply was to be retrieved and channeled by a system of tunnels and canals to the Blahpane area.

In order to muster political and administrative support, however, it was necessary to present the plans as being a Gianyar and not a Tamanbali/Bangli endeavour. Therefore the Tamanbali farmers of Blahpane contrived to form an alliance with a group of co-villagers, members of the northern part of the other Blahpane irrigation commmunity: the unit called Gelulung. The Gelulung territory, lying to the west and south of Blahpane, forms the northernmost part of the subak corporation Tulikup which is officially registered with the District of Gianyar. It draws its irrigation water from some traditional (semi-permanent) dams in a rivulet called Tukad Gelulung which, at least in its most

northern parts being fed mainly by Tamanbali drain-water, runs west of Blahpane village, parallel to the Melinggit drain in the east. As the story goes, many of the north Gelulung farmers, being dependent anyway on the Tamanbali drains, consented to formally split off from the southern Gelulung/Tulikup corporation and form an independent subak Gelulung which, in a confederation with their Tamanbali co-villagers set out to construct the new dam in Tukad Melinggit. Having thus secured the involvement of an officially existing Gianyar irrigation corporation, and presenting himself in the Gianyar District offices as the leader of this new Gelulung subak corporation, the Tamanbali leader succeeded finding government support for his plans. It was agreed that, as soon as the Gelulung/Tamanbali farmers had completed the necessary canal and tunnels connecting the chosen spot in the Tukad Melinggit with their paddies, the Gianyar department of Public Works would build the dam. The place was called Gelung/Tamanbali since, to give the new entity a new name was considered bad policy with regard to great-Tamanbali as well as Gelulung/Tulikup feelings. Blahpane Kaja old timers still remember the effort of constructing the new canal at their own expense, and guided only by local knowledge as an heroic performance.

Its total length being about 2 miles, the terrain conditions at some places allowed the canal to wind itself around the Melinggit banks. But at many other points they had to construct deep tunnels under Bangli territory, one of which extended to a distance of over 900 meters. On entering the Tamanbali area a ravine had to be crossed and another 1000 meters of tunnel had to be dug out before the canal was at the right surface level. After the canal was completed Gianyar Public Works started building the dam, but in fact never finished it properly. It is not clear whether in 1964, preluding the terrible local bouts of violence that were to accompany the 1965 political drama ending the Soekarno era, the Dam Gelulung, as it is called, became a political issue and the Gianyar workmen were scared away by the Bangli population, or just that their payments by Gianyar were stopped. Anyhow, they simply left the site before the project was finished. Eventually, the Blahpane farmers of Tamanbali had to take it on themselves to finish the dam and close the river bypass that was used during its construction.

But the new Dam Gelulung was ill-fated from the start. It remains a matter of debate whether the absence of a proper dam-temple, the building of which was never undertaken[10], might have had something to do with it. But, once the new Dam Gelulung was completed, it did not take long for new problems to emerge. They are the same problems which also presently deeply influence irrigation relations in the Blahpane area. The first is that the water supply of

the Gelulung/Tamanbali unit has remained unsufficient. The reasons for this are twofold. One: the stretches of the main-canal that are not tunnelled but follow the mountain-slopes, are regularly destroyed by land-slides. Maintenance of the canal therefore involves a lot of labour, and second: the 1,000 meter tunnel, south of the ravine, running under Tamanbali terrain which is still dependent on the great-Tamanbali drains, has at several places caved in. As a consequence there is currently a mood of wariness among the villagers with respect to taking part in subak work. There are also muted but unpleasant local rumours about whether the caving in was caused by errors of the villagers who took part in the construction of the tunnel or was actually brought about by sabotage.

Anyhow, the many requests Wayan Regig and his friends have filed during the past years with the Gianyar administration, asking for its support for an improvement and rehabilitation of the canal, have been turned down. The present Gianyar authorities' point of view as it is understood at the Blahpane local level would be that, since strictly speaking, the Tamanbali part of the area belongs to the Bangli-based great-subak of Tamanbali, it is up to the District of Bangli to provide support for the canal if such is considered necessary; even more so since the land tax of the Gianyar Tamanbali stretch was never collected by Gianyar, but has continued to be collected by the District of Bangli. Still, when in the context of an irrigation upgrading program for the Tulikup area, new water-division blocks were installed by government contractors from Gianyar, the new blocks, although unasked for, were also installed in the Gelulung/Tamanbali-minor territory, being as it is an important water-catchment area for downstream Tulikup. The main division block, however, placed on the unstable outlet of the canal, and not having the adapted construction of the former traditional block, instead of dividing the water properly, mainly flooded the adjacent plots, and after a while flowed downhill. Although the Tamanbali and some of the Gelulung members mastered this new problem by building a new (traditional) division structure themselves, other Gelulung farmers turned their backs on the problem and covertly began to undermine the confederation. They began by demanding a deputy leader for the Gelulung part. Once the deputy, a resident of Blahpane Klod, was appointed he began to pose as the real leader of subak Gelulung, i.e. not in Blahpane Kaja circles but in his own hamlet. He also associated himself more and more with the leadership of the southern Gelulung part of Tulikup.

What in fact can be observed happening now in Blahpane is that many of the northern Gelulung farmers are rallying under the dominant local version of the subak normative repertoire; i.e. the subak that is recognized as such by the

relevant authorities. Their loyalty is not so much with Wayan Regig any more as with his rival subak leaders from Blahpane Klod and Tulikup. It suits their interests now to refrain from taking part in Gelulung/Tamanbali subak activities, and even to 'steal' water from their fellow confederacy members in order to pass on the surplus to their friends in the main Gelulung basin. By this kind of strategy they apparently hope now to become seen as a Subak Gelulung that is not tainted any longer by the blind alley of the Tamanbali affiliation. Featuring as the subak corporation of Gelulung, perhaps also playing up their historical identity as part of the Tulikup Gelulung, they would be in a better position to apply for a new government dam in the Tukad Gelulung, which probably will come anyway, but which otherwise might be situated at a downstream location at a level too low for north Gelulung to profit from it.

The Tamanbali people, on the other hand, knowing that from Bangli they have nothing to expect anyway, are trying to curb the process of Gelulung/Tamanbali falling apart by staging activities that stress the unity of the confederation. The growing number of cases of misdemeanour by their Gelulung partners are not appreciated but still mostly left unpunished. Charges of lax management and failure to introduce effective cropping regulations are invariably answered by refering to the water-shortages and not to the internal conflicts. An apparently desperate effort has even been staged some time ago by a Tamanbali member who lent a plot of land to the corporation in order to found a Gelulung/Tamanbali subak temple, the symbol par excellence proving the subak's existence and unity as a public and religious corporation. It was all the more distressing, therefore, when after a short period the new temple had to be given up as a subak meeting-place because it was desecrated by the disputes at times flaring up between the Gelulung and Tamanbali members.

Conclusions

I would not deny that both the account on bethma as based on de Jong and the subak case of Blahpane are rather fragmentary and perhaps not really representative of the overall implementation of bethma in Sri Lanka or the average subak on Bali. The case of subak in Blahpane is anyway a rather exceptional one. Irrigation corporations on Bali do not generally have to cope with the special problems met by the Blahpane farmers. Still, what both cases have in common, and what makes them interesting as well as representative is that they very explicitly draw attention to the aspect of law in society which I have above tried to indicate by using the cannibalism/pluralism metaphor. They

let us see how law as an instrument of government policy as well as an instrument of local interest management is a janus-faced medium.

As K. and F. von Benda-Beckmann have argued in a recent study on what they call 'the multilocality of law' (K. & F. von Benda-Beckmann, 1991), it is important for getting a clearer understanding of the social significance of law to question the assumptions that go with saying that law (a law, or a normative framework) 'exists'. The existence of law, at the level of society's normative repertoires, should be analytically distinguished from its existence in social process. Legal repertoires, in a way, just 'hang in the air', as the von Benda-Beckmanns phrase it, as long as the 'when' and 'where' of their actually becoming a social factor is not concretized, be it in parlement, in the courtrooms, in administrative decision making, in farmer decisions on cropping patterns, or whatever. As also the bethma and subak examples demonstrate, on this down to earth level of existence, a law or a normative institution can 'exist' very differently, and can mean different things in different localities. In a sense, the subak of the Sidan village administration, or the subak of great-Tamanbali, or the subak of Gelulung are only the subak of the villager Wayan Regig in specific situations. In other words, plurality of law should not only be seen in terms of different normative systems pertaining to one domain of social life, but also in terms of the different levels and contexts of existence of one legal rule or one institution.

Still, this is not the point I really would want to make. It should be clear, after all, that the above accounts of bethma and subak are not so much about the diversity *of*, but about the relations *between* the different existences of institutional aggregates like bethma and subak; their janus-faced quality, which, in a sense, also gives them a cannibalistic aspect. As I have mentioned above (p. 90), there is a similarity between my argument in this respect, and what Fitzpatrick apparently had in mind when he made a case for his 'radical pluralism' (Fitzpatrick, 1983). I am not only or even mainly argueing that we should expand legal pluralism by adding a notion of mutual interaction between the various legal orders in society, or the recognition that each helps constitute the other. What the subak as well as the bethma cases draw attention to, is rather the necessity to go even further and subsume under notions of legal pluralism also to the phenomena of mutual constitution of the various local existences ('localities', in terms of the von Benda-Beckmans) of any legal repertoire *as such*.

In a sense the notion of plurality of localities is expressed in De Sousa Santos' concept of 'interlegality' (De Sousa Santos, 1987). Interlegality is coined by De Sousa Santos as the phenomenological counterpart of legal pluralism, and as such constituting the second key concept of a postmodern

conception of law. It is to be understood as the result of the interaction and intersection among legal spaces, which entails that, phenomenologically, one 'cannot properly speak of law and legality but rather of interlaw and interlegality'. Law, or socio-legal life, in his opinion, is 'constituted by different legal spaces (localities) operating simultaneously on different scales and from different interpretive standpoints'. In view of the emphasis which is put on legal pluralism, interlegality, mixing codes, and non-synchronism, in what De Sousa Santos calls the postmodern conception of law, law, if anything, would resemble a chameleon[11].

It is not the place here to extensively discuss and, in some respects, criticize De Sousa Santos' ideas about law in society. Part of this task has been recently taken on by others anyway (see: K. and F. von Benda-Beckmann, 1991). I only want to forward one remark, which is that a concept like interlegality would explain rather nicely the above cases on bethma and subak, if it were not for its perspective on the theme of law and variation rather than on the concrete social, political, and administrative significance of the phenomena discussed.

In the irrigation arenas of Sri Lanka and Bali interlegality and mutual constitution of law have resulted in the 'kingmaking' of traditional law. Out of the pool of resources traditional law has risen to be king here not because it 'exists' but because its vocabulary forms an authoritative medium for translating and presenting the various interests that constitute the arena to the various fora involved. As has been shown above, king subak and king bethma have many colours, which is the same as none. From the perspective of local actors, therefore, what would count is not so much the similarity of their irrigation law to a chameleon, which may intrigue the observer, but - to add another specimen to the metaphorical bestiary of legal anthropology - its qualities of 'stuffed goose'. Subak as well as bethma turn out to be trusty but empty forms, which on the one hand can be filled by various interests as ingredients, and on the other hand be consumed without neccessarily recognizing its actual contents. What counts most is that the agreeable *form is there*; but once the form is given, it also co-structures what can be put in and what can be taken out. In this sense the processes of accumulation of law, be it adat or state law or whatever, influence social organization and the choices actors make, in the contexts of irrigation in Bali and Sri Lanka as well as, I would dare to speculate, in most other law related interaction.

Notes

1) See Abel on the shortcomings of conventional sociology of law (Abel, 1980).
2) The data on *bethma* are based on a fieldwork conducted by Y. H. de Jong in 1989 with support a.o. of the department of Agrarian law. The data are more extensively discussed in: de Jong (1989), and Spiertz & de Jong (1991).
3) Leach argues that it would be highly improbable for farmers to share their land on a voluntary basis.
4) The 'law out of context' metaphor I have borrowed from the discussions on the phenomena of invention and transformation of customary law, must notably in the *Journal of African Law* (29), 1986.
5) As may be clear from the introductory remarks, the relative vagueness of the actual normative contents of the dominant model, neither the absence of clearly defined boundaries between state-, tradition-, and self-regulation, should be considered to be characteristic only of Sri Lakan bethma policy. As has, more or less implicitly, been argued by Fitzpatrick, and as will be shown in the report on subak on Bali which follows below, such vagueness may be seen as an element in the processes of mutual constitution and maintainance of state- and non-state law.
6) The data on the Balinese subak are based on my fieldwork conducted in 1988, sponsored by Wageningen Agricultural University.
7) See page 97.
8) To take a very small sample only, reports on subak range from Cornelis de Houtman, 1595-1597 (Rouffaer & IJzerman, eds. 1915) to Liefrinck (1969)[1886], Korn (1932), Grader (1960), Geertz (1967), Ngurah Bagus (1986), Sutawan (1986).
9) Only very little research has been done in this respect. For publications, see: Sutawan (1986), Pitana (1988), Spiertz (1989a, 1989b, 1991).
10) The reasons given for not having built a proper dam-temple vary from the difficulty of the terrain conditions, lack of fundings, fear of hurting Tamanbali feelings, up to rationalizations expressing that it needs not a temple to worship the Gods.
11) 'By constantly changing its colours according to certain biological rules, the chameleon is truly not an animal but rather a network of animals ...' (De Sousa Santos, 1987).

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PRIVATE INTEREST GOVERNMENT THROUGH CENTRAL SPOT MARKETS IN WEST AFRICAN FOOD TRADE

Abraham van Eldijk

Introduction

In Sierra Leone, commercial co-ordination of markets for local food products is concentrated in a limited number of market centers where wholesale traders link rural produce collection to distribution trade. Although only a part of the food trade actually goes through market centers with important wholesale functions, some of these markets have crucial reference functions for food trade in regional and interregional commodity markets.

Transaction conditions and prices emerging in prominent market centers are reflected in trade transactions outside these commercial centers, because trade conditions expressed in commodity markets in these centers constitute an open and authoritative reference resource of market intelligence for traders in other parts of the food marketing system. This central reference function is a consequence of the way commercial intelligence is concentrated in complex institutional systems - with a mixed public-private identity - that control and reproduce commercial transaction conditions within and between the different food trade channels.

It is not primarily the volume of trade that turns some of these market centers into pivotal spot markets. It is the character of the complex institutional structure of organized interests beyond the market, that turns them into dynamic business districts (Best, 1990), structured around encompassing (in terms of interest representation) (Olson, 1965) interaction fields (Swartz & Thoden van Velzen, 1968), in which competing and concerting commerce-related interests generate and negotiate commercial issues (Wright Mills, 1983, p. 15; Dahl, 1963) that integrate the political, social and economic dimensions of food marketing.

Complex, multi-dimensional organizational systems for commercial issue bargaining (Eldijk, 1987) can only be formed in market centers where political and administrative interests in food marketing (as perceived at the different levels of government) are organized in conjunction with organized private commercial interests. The importance of direct and dynamic institutional linkages between political, administrative and commercial interests gives markets in the main centers of government the best opportunities to become central commercial districts for food marketing. However, to become a central

referential spot market for commodity trade, strong interconnected commercial organizations should form the basis of the institutional infrastructure of a commercial district. Such a complex of commercial organisations should not only reflect organized interests in interregional wholesale trade, but also the interests of retailers at the end of the market channel. In market centers that are also important consumption centers, retail interests will co-influence transaction conditions in food marketing. Only in those market centers where interregional wholesale trade is linked to and influenced by organized retail interests, can interest bargaining over food marketing issues produce socio-political market conditions which constitute a spot market in which transaction conditions reflect encompassing interests in food marketing channels. Such organized spot markets can be identified as central systems of private interest government (Streeck & Schmitter, 1985) in local food trade.

This type of spot market can be defined as a restricted market domain constituting a concentrated stimulus-response center, functioning as an authoritative commercial reference resource for strategic assesment of (changing) transaction conditions in commodity markets.

To identify and analyze this type of spot market, one needs to study the complex institutional structures beyond commodity markets in major market centers. Within this paper it is not possible to present a detailed and integrated analysis of the political, social and economic dimension of institutional arrangements for commercial issue-bargaining beyond commodity markets in Sierra Leone.

This paper, however, will focus on one of the most crucial organizational characteristics of spot markets: concentrated market intelligence vested in interrelated trader organizations with an encompassing representation of commercial interests. After some general observations about trader organizations in prominent market centers, a number of such organizations are presented that are of special relevance for the formation and allocation of trade capital in local food commerce. The wide-angle perspective on local food marketing in Sierra Leone presented above, will I hope form a meaningful background for the assessment of the trader organizations presented in the next part of this paper.

Interlinked commercial finance schemes in semi-autonomous food trading systems

In large market centers, commercial practice and co-operation in trade is

decisively influenced by commercial associations. The most influential associations are initiated and organized by experienced local traders who are respected and feared by their colleagues and have well established contacts with traditional, religious, and government authorities at various administrative levels. The influence these associations have on trading practices and conditions in regional food trade is not just a consequence of the trade volume handled by these associations, but is primarily a consequence of the functions performed by these organizations in co-operation with official and semi-official government authorities with administrative or judicial powers to control (aspects of) local and regional trade. A large variety of co-ordinating and arbitrating functions, ranging from political interest lobbying at national level, to petty dispute settlement among local retailers, is vested in institutionalized public-private relations formed around trader associations. Most of these organizations are based on financial schemes varying from small-scale savings and credit associations to interlinked joint trade ventures with extensive capital resources. These schemes are interconnected by overlapping membership and commercial relations between participants of different organizations. As an organizational aggregate, these schemes form a co-ordinating core system of regional markets for trade capital. They are also the core of a semi-autonomous commercial field with self-regulative capacities (Moore, 1978).

In Sierra Leone most trader-organizations are involved in the accumulation and allocation of trade capital within or between produce branches in regional food trade. Some of these finance-schemes, like the mobile market bank, the ROSCA (rotating savings and credit associations) and the mutual credit fund, have been documented extensively in the literature. Detailed research on more trade-specific forms of co-operation, however, has been rare. To understand how traders adjust to a changing social, economic and political environment, it is important to have more detailed knowledge of the various institutional forms of commercial co-operation that co-ordinate reactions to changing circumstances. Although many trader-organizations concern themselves also with a number of issues such as control of supply, measuring and pricing techniques, the setting of quality standards, dispute settlement etc., here the focus is on financial issues. In particular, the organizational arrangements are discussed for the allocation of trade capital, co-ordinated within a limited number of organizations with high-contribution investment schemes.

Trade finance and commercial co-operation

In Sierra Leone almost every trader in local or regional food trade participates

in or has commercial relations with one or more trader-associations involved in financial co-operation. Although the objectives, functions and organizational structure of these associations vary considerably, a few major categories can be distinguished:

1. market banking: a safekeeping facility to satisfy illiquidity preferences of traders to enable them to withdraw trade capital from private expenditure and social obligations;

2. rotating schemes of the ROSCA type: savings and credit associations serving both illiquidity preferences and savings and credit needs of traders. They give small traders a periodic opportunity to buy large consignments of goods; popular with traders involved in rotating joint trade ventures and attractive to large traders for adjusting their capital needs and (il)liquidity preferences to seasonal changes;

3. mutual credit funds: based on recurring or non-recurring (initial) member contributions; some schemes can be fairly simple, operating according to highly standardized procedures, others are rather complicated using compound interest calculations;

4. rotating joint trade ventures: co-ordinated wholesale supply systems organized by traders in the same produce branch, operated on the basis of (negotiated) rotational buying schemes, which can be recognized and sanctioned by local authorities.

5. joint share-trading ventures or commodity pools: traders' combinations in specialized produce, based on a pre-arranged division of labour and a joint trade capital from unequal member contributions according to negotiated profit sharing arrangements;

6. produce banking schemes: non-specialized joint share-trading ventures in (speculative) wholesale buying and selling of non-perishable food. Important local and regional authorities might be given the opportunity to take capital/profit shares in these ventures. These joint trade ventures tend to become the foremost commercial investment schemes in regional food trading systems. The majority of members are influential and prosperous traders in the various produce branches.

Market banking

Market banking is the simplest form of safe-keeping and saving facility for local traders. It is organized by itinerant market bankers who collect individually fixed periodic (mostly daily) savings from participants. These schemes are highly flexible and are adjusted to the individual savings capacity of small market traders. At the beginning of each cycle (usually a month) participants have to state the amount they want to save periodically. Subscribers, however, are allowed to skip periodic contributions whenever trade is slack, making contributions impossible. Savings in market banking schemes can always be withdrawn whenever a subscriber needs cash. However, the organizers' reward, one periodic contribution in every cycle, is always left in the account to ensure that the organizer receives his/her reward for safe-keeping services.

Market banks are especially appreciated by female market retailers who want to withdraw their trade capital from financial claims made by lovers, husbands, children and other household members. Saving with a market banker is an easy and secure illiquidity strategy to prevent trade capital from being used for private consumption needs. To protect their trade capital, traders tend to leave as much money as possible in the market, either invested in goods or as contributions to commercial savings and/or investment schemes. These strategies also reduce the chance of being constantly harassed by family, friends and relatives with all kind of financial claims that cannot easily be denied.

Market bankers in Sierra Leone do not extend credit facilities, and participants value this restriction because it ensures that savings stay at their immediate disposal.

Financial relations between market-banks and other financial schemes are three-fold. Credit relations between retailers participating in market banking schemes and their supplying (sub)wholesalers form the most important indirect link between market banking schemes and other commercial finance schemes. Important direct linkages, based on overlapping membership exist between market banks and (low-contribution) ROSCA schemes. The organizers of market banking schemes represent a third link. Most organizers of market banks are wholesalers also participating in joint share trading ventures, high-contribution ROSCA'S or in produce banking schemes.

Rotational schemes of the ROSCA type

This type of financial co-operation, which has become a popular theme in the literature on informal finance (Geertz, 1962; Ardener, 1964; Bouman, 1977), also plays an important role in the organization and co-ordination of local food trade. Traders like to participate in ROSCA schemes for several reasons:
- The obligation of ROSCA members to contribute periodically to the scheme constitutes a socially acceptable (everyone being familiar with its procedures, savings discipline and sanctions) illiquidity argument to deny social claims on financial assistance that threaten the relative wealth associated with the possession of trade capital. This makes the ROSCA an important device to separate trade capital from private finance.
- Participation in ROSCA's gives traders the opportunity to increase trade capital periodically. Small traders involved in retail activities use this periodic increase in capital to engage in wholesale buying rather than purchasing relatively small quantities on credit from their customary wholesale contacts. Wholesale market traders use ROSCA funds to cover seasonal fluctuations in cash needs. The more prominent ROSCA's in local trade have high contribution levels and a select membership consisting of the more influential and successful brokers and wholesalers in the various produce branches.
- For big traders the ROSCA is an instrument to reallocate surplus liquidity within and between trade branches according to existing differences in time preferences for cash needs. The more prominent ROSCA's with overlapping membership integrate local markets for trade capital, and at the same time further social integration and co-operation, sharing intelligence between traders in different trade branches occupying similar trade positions.

The flexibility of ROSCA schemes makes it possible to adjust them to the needs of specific groups involved in trade. This flexibility relates to:
- contribution levels,
- periodicity of saving contribution and credit extension,
- the privileges and financial reward granted to the organizer,
- decision-making in the rotation of members in the cycle,
- the number of hands (standard capital contributions) granted to individual members through negotiations at the start of the ROSCA,
- different modes of registration (with traditional, religious or government authorities),
- norms and procedures for dispute settlement, which vary with the type of registration,
- mechanisms to reduce the risks of default (e.g., the organizer, co-members

or outsiders acting as guarantors; placing members with a weak financial position at the end of the cycle),
- sanctions on default,
- incorporation of mutual assistance arrangements such as the existence of a security fund or privileged allocation of funds to members in need,
- the possibility to change places in an already arranged rotation cycle,
- the nature of the contributions (in cash, in goods or in services),
- discretional powers of the organizer viz-a-viz sanctioning powers of registering authorities.

A special ROSCA type of traders' organization is the rotating capital joint venture. Unlike the routine in the common ROSCA, the individual member can only use the fund for commercial activities that are approved by the group. Group consent is deemed necessary to make sure that the joint trade capital is invested only in goods that promise a quick and secure turn-over so as not to impede the rotation schedule. This type of rotating capital association is mostly organized among young traders without individual wholesale connections, providing credit facilities. It is a form of self-help association that enables them to make a start in trade.

In some rotating capital joint ventures, the members also co-operate in the actual trade activities and establish collective customer relations with suppliers. In some branches it is not unusual for wholesale traders to stimulate, or even organize, rotating capital joint ventures for young starting traders as a method to extend their sales network. The rotational character of these schemes creates mutual dependency relations between participating retailers and generates internal social control. Through organized trust vested in such schemes, starting, non-credit-worthy retailers are turned into credit-worthy retail outlets.

Under conditions of inflation the ROSCA becomes unattractive as a financial saving-scheme. Inflation, however, does not affect schemes based on contributions in goods, such as certain rotating joint ventures organized among retailers linked to a specialized wholesaler. These schemes can be organized in such a way that the inflation risk is with the supplying wholesaler. Such schemes can be described as retail-pools based on a rotating 'goods on credit arrangement' between participating retailers and a supplying wholesaler.

When members gradually develop individual relations with wholesalers and acquire credit facilities on the basis of their trade performance or reputation, they will withdraw from these clubs to join other ones, organized among more experienced traders, like the rotating joint trade venture, the high-contribution

ROSCA, the joint share trading venture or the produce banking scheme. The organizations listed here represent a kind of promotion schedule from lower to higher grade trade associations. The lower grade schemes represent self-help organizations of small, starting traders, the high grade organisations are prestigious trade institutions only accessible to experienced 'big' traders with important exclusive contacts.

Mutual credit funds

These funds can be fairly simple funds established with non-recurrent initial contributions, for lending on to members in standard amounts. Interest payments are fixed, not expressed as a percentage of the loan, and deducted beforehand. In such simple schemes, borrowing periods are also standardized. The more complicated credit funds are based on recurrent member contributions. Loan amounts are not standardized and carry compound interest rates. Sophisticated systems for fund-sharing are used when the fund is dissolved.

In some cases fund sharing is based on a dual procedure. When the fund is dissolved, savings contributions are repaid first and the remaining capital is divided among the members according to the ratio of interest payments made by each individual member. Within such schemes interest payments constitute a forced savings element to increase the credit fund or to create a security fund for emergencies and covering default risks. Because of the complicated nature of the latter schemes, these are only found among urban, educated, non-Islamic (interest ban) traders.

Just as in all commercial schemes in which money is used as a standard value, the mutual credit fund is vulnerable under conditions of monetary instability. The relative strength of these schemes is a result of the fact that the interest rates of these schemes can be adjusted to changing inflation rates. However, when a moderate inflation turns into hyper-inflation, the schemes become unmanageable and are dissolved.

Rotating joint trade ventures

In regional market centers with important collection and distribution functions, and in major consumption centers, market traders in perishable produce regulate supply by organizing a rotation schedule for wholesale buying to guarantee a sufficient, regular supply and to prevent situations of over-supply. In some branches of food trade, interconnected rotating joint ventures consti-

tute strong and extended wholesale supply systems recognized and sanctioned by local authorities. In other branches, rotating joint ventures are relatively small schemes formed by local retailers. Such schemes can be dormant when a commodity is in short supply and traders are buying individually. Only when supply conditions favour collective buying will a scheme be activated. Dormant schemes, activated only occasionally at the top of a buying season, are often rather weak; the leader is usually not in a position to introduce and enforce by-laws to make members refrain from individual buying, selling or pricing. Often, members of such a dormant scheme are aware that it could be advantageous to co-operate on a more permanent basis, but do not trust each other sufficiently to establish a more permanent supply system. This lack of trust can be overcome when paticipants agree (consensus) to register their scheme with traditional authorities who will monitor and sanction the scheme against a fee (tax) based upon the value of standardized wholesale units. This traditional system, however, is gradually breaking down because increased competition among traders undermines consensual decision making, while the authority of traditional leaders is often eroded and not strong enough to persuade dissenters to save the system.

In some cases, rotating supply schemes can be transformed into an adhoc joint share-trading venture (see below), whenever partcipant traders want to buy large, cash on delivery consignments. These transformational schemes are mostly organized among female retailers and street hawkers in fresh food products. Members contribute whatever money they have available, with the leader of the group providing most of the capital. The profit sharing after selling is not related to contributions to the trade capital, but is shared equally because all participants are supposed to have the same trading role. This equality (in terms of profit sharing) type of adhoc joint share-trading venture has probably evolved from older organizational forms, which were developed in situations where wholesale buying on credit - on the basis of established 'customer' relations - was standard practice, and collective buying did not necessarily imply rotational buying/financing schemes or a joint trade capital.

Although rotating joint trade ventures are not primarily designed as financial schemes but as (wholesale) buying/supply-pools, these organisations have a decisive influence on trade finance. In some commodity branches, chains of credit, financing entire marketing channels, are upheld by controlled supply conditions and a stabilized price formation, realized and enforced by these rotating supply-pools.

In trade branches with less elaborated credit systems, rotating supply-pools

often comprise contribution schemes to finance wholesale buying from different suppliers/supply areas on a rotational basis. Within such schemes the division of consignments is tuned to financial contributions of participants to a specific buying transaction.

Rotating supply/buying schemes often function as market leaders at the retail level of local commodity markets. As leading representatives of retail interests these organizations can force wholesalers to inform retailers beforehand about changes in marketing strategies at wholesale level. Co-ordination between organized interests of retailers and wholesalers is based on strong, permanent relations (commercial and personal) between high-level trader organisations dominated by wholesale interests and rotating joint trade ventures organized among specialized retailers.

Joint share-trading ventures

In major market centers, trade partnerships may be formed at the beginning of buying seasons when produce supply increases. Specialized joint share-trading ventures are formed to increase trade capital for buying large consignments of produce, to speed up trade transactions and finally to strengthen trade positions in buying and selling. These joint share-trading ventures are usually formed around a very experienced and successful trader of good repute. Members of the organization all have specific roles. Some act as buying-agents, making contact with collecting traders or producers who arrive with consignments of produce in the main lorry parks or wholesale zones of urban and regional market centers. Other members are engaged in wholesale activities and negotiate transactions with sub-wholesalers and retailers. When a partnership is trading in perishable commodities, it is important that retailers and street hawkers also be involved in the partnership, because only they are in a position to sell quickly those parts of a consignment that are on the verge of getting spoiled beyond selling. Regardless of the agreed role differentiation within the partnership, members can be asked to assume one of the other roles whenever the organization is more involved in wholesale or retail activities than is normally the case.

In partnerships that are primarily engaged in wholesale activities, only a limited number of retailers and street hawkers can join. The wholesalers will regularly have to assist the retailers of the group whenever a large share of the produce bought has to be retailed quickly. In partnerships primarily involved in retail trade, only a few more experienced members will be responsible for wholesale buying. Only when consignments are too large to be handled by

member retailers will the partnership start wholesale or sub-wholesale selling to non-member retailers.

The initial capital of share-trading ventures is raised by contributions of the members. The members are not supposed to contribute equal amounts, but a standard is fixed for the smallest amount with which a member can participate in the association's capital. Over and above that, capital contributions must always be a multiple of the standard amount. These standard contributions are usually called "hands". In most organizations, the number of hands granted to individual members is decided in an initial membership meeting where the leader/initiator presents a proposal for the division of hands. This proposal is then discussed and all members are given the opportunity to suggest adjustments, to arrive at a compromise over the division of shares between the members. Although initially the capital needs of the organization are discussed, including the size and the number of shares, the most important discussion topic is the profit-sharing implications of the unequal division of hands.

Profit sharing takes place on the basis of the number of hands or shares in the organization. Negotiations in the initial meeting about the allotment of hands, basically concern the appreciation of the proposed labor division and the relative status positions of the members. The leader, established brokers (acting as buying agents) and wholesale sellers joining the partnership are granted relatively many hands in the trade capital of the organization. Young, inexperienced members, only active as market-retailers or street-hawkers, are granted a limited number of hands. When store-keepers or errand boys are included in the organization and do not have the means to contribute to the trade capital, the other members will decide to grant these less prosperous participants a few hands in the organization.

This practice of granting profit shares to members not contributing to the capital is characteristic for "sharing economies" without paid wage labor. The unequal allocation of profit-sharing hands is based on cultural concepts and social norms expressing the appreciation of labour/trade activities and status positions. The final consensus decision on the division of hands among members reflects the opinion of the members on an acceptable inequality in profit sharing. This decision can be changed only when the partnership is dissolved and a new scheme is negotiated. To prevent a small number of important traders from dominating a share-trading joint venture, most associations have a by-law specifying an upper limit for the number of hands individual members may have.

The fact that the number of hands constituting the share capital cannot easily be changed, does not imply that the joint trade capital cannot be

adjusted to changing financial needs during buying seasons. When the members want to increase the capital of the association, they will skip the periodic (mostly daily) sharing of transaction profits, to add these to the association's capital. At the end of a buying season the trade capital can be gradually divided again in the profit-sharing meetings, to adjust it to the diminished trade volume.

In the day-to-day activities of share-trading ventures the members know exactly what transaction profits are made, because all are working in and around the same trade area, and it is easy for them to consult each other whenever circumstances force a change in buying or selling policies. As far as profit-sharing is concerned, it is common practice that the leader always gets a small bonus on top of his or her regular share. This is a consequence of the process of profit sharing, in which payments of steadily diminishing amounts are made to each hand until a balance remains, too small to be divided among all hands. This balance represents the leader's bonus. This practice makes the leader interested in periodic profit-sharing, because only then is he or she in a position to obtain a bonus.

Because most share-trading ventures are temporal, there are special procedures for the final sharing of the joint trade capital when the association is dissolved. Most of the time, the capital will be larger than the sum of the initial members' contributions, because of occasional additions of profits to the society's capital. From the total amount of money available after the last transaction, the initial members' contributions will be deducted first, and the remaining sum will be divided equally over all profit-shares.

The interesting aspect of this type of joint share-trading venture is that status positions, trade roles, labor and capital contributions are taken into consideration when it comes to profit-sharing. Commercial joint ventures thus become mini-economies within the broader economic system. The rationality within such mini-economies is partly capitalistic (actual capital contributions as a yard-stick for profit sharing) and partly based on subsistence notions. The subsistence ideology is that all members are entitled to a minimal profit-share that enables them to make a living, whether they contributed to the capital or not.

Produce banking

Joint share-trading ventures are presented above as temporal partnerships

formed among specialized traders. The most important joint share-trading ventures, however, are non-specialized, wholesale partnerships in speculative investment in non-perishable produce. These schemes switch from one commodity to another when supply or sales conditions favor such a change. In this type of joint venture, it is an advantage when the members are active in different branches of trade as brokers and wholesalers. The diversity of trade experience and contacts represented by the members make it possible to shift investments from one branch to another. This has two advantages. First, trade capital can be invested more safely and profitably in different lines of trade, even though individual members are only well versed in one line of trade. Second, continuous investment in goods is a must for traders, given the pitfalls of a staggering inflation. Traders specialized in one commodity often face problems when they need to invest their capital in other commodities when the seasonal trade cycle in their branch of commerce is ending. The classic solution for this excess liquidity problem is to extend credit and start pre-harvest buying at village level. When, however, food scarcity, crop failures or hyper-inflation increase default risks at village level, traders have to look for other possibilities to invest excess liquidity. Especially in times of hyper-inflation when money looses its saving, wealth-storing function, traders become very keen on flexible investment schemes that can protect their trade capital from monetary erosion. Under conditions of inflation, commercial investment schemes such as produce banks gain importance at the expense of financial savings and credit schemes.

Traders in non-perishable commodities often prefer to invest in these kind of produce banking schemes to make speculative profits while storing goods and waiting for sales prices to go up. Trade joint ventures in non-perishable commodities are common among wealthy wholesalers able to contribute considerable sums to the capital of these schemes. In speculative joint ventures the emphasis is more on the capital contributions of the members, than on labour division and co-operation in the actual trade activities. In most produce banking schemes, the actual selling is done by the leader assisted by one or two young traders, who are granted a few hands (profit-shares) without having contributed to the capital.

In produce banking, the leader will suggest in what commodities to invest. Members, however, can propose other suggestions, and the final decision on the trade policy is to be reached by consensus. In periodic meetings, decisions are made on what kind of produce to buy, at what price, the moment to start selling, and finally the sales price for the commodities in stock. Whenever one or more members think the group is selling too early for too low a price, they are then entitled to buy from the association before commodities are offered to

non-member traders.

Produce banking schemes tend to become price leaders at wholesale level in non-perishable commodity-branches. The leading position of these schemes is based on the fact that respected and experienced wholesalers are members of the organization. The price policies of the organization are most of the time known to traders in a particular market center, whereas the organization will inform its potential buyers beforehand - through its members in the different lines of trade - about the time they will start selling and at what price. This practice is maintained because the association wants to give their potential buyers the opportunity to anticipate new wholesale prices. Not informing customers about a planned price increase is undiplomatic. Serious problems will arise from not informing buying customers about a decrease in price when the latter are forced to sell old consignments at a loss, when new, cheaper consignments enter the market.

These trade practices illustrate that produce banking schemes are in fact commercial consortia persuing collective goals through strategies which also reinforce commercial positions and the individual interests of participating traders. As a central commercial institution, these consortia generate, co-ordinate and reproduce transaction conditions in major centers for food marketing. Prominent individual traders, organized retailers, wholesale combinations and joint share-trading ventures are linked to these produce banking schemes through personal participation and/or established commercial relations.

Produce banking schemes are not only attractive investment opportunities for traders with excess liquidity, but also for local government officials, because these schemes show better returns then the savings accounts of the commercial banks. Therefore, under the present inflationary conditions, more salaried government personnel are becoming eager to participate in these ventures.

When the moment comes that non-traders (persons who do not represent commerce related interests) are allowed to participate in these produce banking schemes, the share capital company will make its appearance in regional food trading systems in Sierra Leone.

Where joint share-trading ventures and produce banking schemes are organized within regional trade systems, the relative importance of the integrative and co-ordinating functions of (high-contribution) ROSCA's organized among 'big traders' is reduced. In particular those produce banking schemes in which local and regional administrative and political authorities participate, often exercise more central co-ordination functions than joint share-trading ventures

or high-contribution trader ROSCA's.

The produce bank is a commercial institution with co-ordinative capacities that would make it well-placed in the center of dynamic business districts in industrialized countries. In Sierra Leone this superior institution is not an advanced success formula, but a defensive device to neutralize the disastrous effects of supreme monetary mismanagement resulting in hyper-inflation. The organizational potential of produce banks in commercial districts in Sierra Leone must, however, not give rise to false hopes. It can never do much to improve marketing efficiency in the distorted food market of a gate-keeper economy, open to a world market that is corrupted by the protectionist policies of major exporting countries, and a world market that is de-facto dissolved by misguided commercial opportunism.

The three pillars of commercial joint ventures: trade finance, organized trust and concentrated market intelligence.

The importance of financial (self-help) schemes for institutional co-ordination in regional food markets can hardly be overestimated. Trade capital is the uppermost scarcity factor and as such represents an important strategic orientation that directes and structures relations in commercial issue fields beyond commodity markets in major market centers. The scarcity of trade capital forges trade relations on the basis of savings, credit and investment arrangements which depend on organized trust.

The pivotal role of organized trust for trade finance is a major incentive for the formation of central authoritative commercial organizations. These have to secure the delicate financial balance in complex aggregates of trade relations through co-ordination and sanctioning of transaction conditions within and between food marketing channels.

The material presented in this paper suggests that under inflationary conditions, so-called produce banking schemes constitute apex organizations playing a central role as co-ordinating market leaders in Sierra Leone food trade. The co-ordination power of produce banking schemes in prominent food marktes is based upon the potential of such schemes to allocate and invest trade capital in speculative commercial ventures recommended by participating, specialized commodity traders who are often market leaders in local trade branches. The most influential produce banking schemes are those in which government-appointed or -recognized market authorities participate and that are also sponsored by constituency politicians, be it directly or indirectly through political

trader unions. Produce banking schemes can derive extra-ordinary powers from such political and administrative "participations", powers based on direct access to or even control over administrative and judicial sanctioning mechanisms and on political leverage to direct or "neutralize" government regulation. The commercial power of produce banks is much greater than their trade volume suggests, because they should be perceived as commercial consortia that also seek to further commercial positions of individual participants (which is proved by the buying and selling arrangements of these schemes). These participants represent personal linkages with other organizational structures in the market, hence reinforcing the market power resulting from the combined commercial investment scheme itself.

When market intelligence, sanctioning powers and political leverage vested in the complex organization structures of prominent market centers are appreciated in connection with each other, it is not surprising that commercial centers with such a co-ordinated institutional infrastructure can become crucial referential spot markets. With this institutional approach of spot markets as prominent referential stimulus-response systems, we can identify and analyze centers of private interest government in the national market for local food products in Sierra Leone.

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THE COMMONS IN PORTUGAL: A STORY OF STATIC REPRESENTATIONS AND DYNAMIC SOCIAL PROCESSES

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Introduction

In the past, there existed commonly owned and managed lands in many European countries. In most cases, these lands have disappeared as a result of a conscious policy carried out by the state which aimed at transforming feudal landholding into fully-fledged modern property[2)]. In this respect, Portugal was no exception. But unlike what happened elsewhere in Europe, here these lands *baldios* (sing. *baldio*) are reported to have survived. Many authors describe them as a part of a pre-capitalist, communalist social system, that has persisted in isolated mountainous regions such as Vila Real and Bragança in the north-east of the country. This image or 'representation' of the *baldios* has also dominated rural development policies and is strongly reflected in legal policy as well. However, recent analyses of historical processes and the contemporary situation suggest that the actual social practices behind these representations were quite different. One of the characteristics of the representations is their stability. In reality, however, the commons have changed. Their size has been considerably reduced, because of the privatization or nationalization of these lands. The uses to which these lands were put have changed as well. Animal husbandry for example, has diminished, whereas forestry has become important. The groups who used these lands have changed, too: apart from local farmers, today, state institutions like the forest service, mining companies, etc. are involved.

The representations of baldios can be said to be located in three different interrelated fields: the legal, the political, and the scientific. Apart from referring to each other, they also refer to society on the one hand as a tool in social struggle over the exploitation of these lands and on the other as hiding the social practices of actual management.

In this article an attempt is made to understand the paradoxical relationship between static representations and changing social practices by analyzing the social conflict over the utilization of the commons. The first three sections of the article will present a short review of the images of the commons in each of these fields. First, the legal development of the *baldios* will be situated in a historical perspective, starting in the early middle ages and proceeding up till our time. Of course, it will not be possible to make a thorough analysis of the history of the *baldios* over this period. Therefore, I have chosen to limit myself to three periods: the final

decades of the *Ancien Regime* (1869-1910), the first stable republican government, the *Estado Novo* (1926-1974)[3], which distinguishes itself by having a very elaborated policy towards the commons, and finally the period starting in 1974 with the Carnations' Revolution that continues up to the present (1991).

Like time, space is delimited, too. Most of the material discussed here refers to the North-eastern province of the country, Trás-os-Montes, which consists of the districts Vila Real and Bragança. In this region there still exist large tracts of commonly managed land. It will appear that within the legal system, the *baldios* have passed through a process of transformation. This transformation process at first sight appears to have come to full circle: from common ownership through privatization, nationalization and abolishment to a legal revival.

In the second section of the paper, attention is paid to the other fields of representation treated in this article: the political and the scientific. The contradictory transformation processes, abolition through privatization and nationalization on the one hand, and restoration on the other, are related to opposing political images of common land management. According to one, the commons are synonymous with backwardness and stagnation, whereas the other connects them to social transformation. Both political images, however, rest on a common scientific representation that can be summarized by the term "agrarian communalism". By mediating the opposing political images, this term can be twisted to support conflicting political practices and result in contradictory legal representations. Which of these representations prevails, depends on existing power relations.

Finally, the management practices in relation to the *baldios* are discussed. It will appear, that neither time nor the representations have left unchanged the way in which the *baldios* are exploited. The use to which the *baldios* are put today differs from the past. Nevertheless, even today the political representations follow the models developed in the past.

A historical overview: death, burial and miraculous resurrection of common property.

The communal use of land, e.g. for animal husbandry and the gathering of fire wood, is a long-standing tradition in Portugal. With respect to its origin, some authors stress the influence of the Germanic invasions of the fifth century (Velozo, 1953), some point to the existence of the concept of common property in Roman law (Soares, 1968), and others date it back to the customs of pre-Roman tribes living in what is now Portugal (Sampaio, 1923; Dias, 1953). One thing is certain, common property is ancient, and has taken various forms over time. The conquest of Portugal by the Christian kings against the Arabs between the ninth and

thirteenth century for instance, coincided with the creation of a feudal concept of property. Land was considered to be property of the Crown, which gave use and ownership rights to its faithful subjects: knights and religious orders, municipalities, but also to peasants or groups of peasants. The receivers of such a royal grant could in their turn donate rights to others if they wanted, creating a chain of contracts. The original source of these rights remained the Crown. In Portugal, unlike other European countries, the king was able to maintain his '*Uebereigentum*' (Sampaio, 1923, p. 51; Velozo, 1953, p. 24, p. 26; Silbert, 1981, pp. 85-84; Kahl 1983, p. 325).

The feudal context of the *Ancien Regime* allowed for three legal forms of commonly managed land. It could be owned commonly by those who managed it, it could be owned not by the community but by the Crown, by a knight, or by a religious order, and it could be owned by the municipality or *concelho*. The *concelho* was at that time the lowest rung of state administration. To these three types of ownership, correspond three names. In the first case, the commonly managed land was called *baldio*, in the second it was called *maninho* and in the third case it was called *bem do concelho*. In practice, the distinctions between these types of landownership were often blurred. First, the laws were much less clear on these points, than the classification suggests[4]. Second, if, for instance, the owner of a commonly managed piece of land had been forgotten, a *maninho* could turn into *baldio*. If, on the contrary, a member of the nobility established a claim on land that in fact was not his but the community's, the reverse process would take place, turning *baldio* into *maninho*. The latter process, facilitated by legal ambiguity, could even lead to privatization, if an individual used *baldio* land privately over a considerable period (Velozo, 1953; Soares, 1968; Rodrigues, 1987, p. 26; Gralheiro, 1990, p. 26).

Particularly from the second half of the nineteenth century, this process of privatization was stimulated by the state through legal measures. In 1869, a decree was promulgated which allowed the partitioning of *baldios* and their allocation as private property among commoners (Rodrigues, 1987, p.45). The fact that these lands were initially divided among all households of the community did not always imply that all were able to profit equally. Cutileiro (1971, pp. 15-21) describes the historical development of the *baldio* in the village of Vila Verde in the Alentejo. The two *baldios* of the village had been given to the inhabitants by the kings of the House of Bragança. Although the villagers were the rightful owners, the commons were managed by the municipality. In order to use the lands for agriculture or for grazing by cattle and mares, the inhabitants had to pay a certain payment in kind. Sheep grazing was free. In 1872, the commons were divided amongst the villagers according to the decree of 1869. After this division within about 40 years the large landowners were able to monopolize the former commons

because they could buy the allocations of their poorer fellow villagers who were unable to pay the rent. The example described by Cutileiro illustrates the working of the two processes mentioned above. First, it shows that the distinction between *baldio*, *maninho* and *bem do concelho* is easily blurred: although the commons were officially *baldio*, they were administered by the Municipality (Câmara) as if they were *bem do concelho*. Second, it illustrates the working of privatization: in this case, as in many others, the richer villagers were able to concentrate almost all the former commons in their hands.

Although already in the eighteenth century there was a law that demanded an inventory of the commons, we have to wait for the end of the nineteenth century for the first statistical data about land use in Portugal. According to Perry's Statistics of Portugal in 1875, there were around 4,029,500 hectares of *baldios*, some 45% of the country's territory (Perry, 1974, p. 282). About sixty years later, a new inventory showed that this area had decreased sharply. According to the 1939 inventory by the *Junta da Colonização Interna* only 407,544 hectares were still commonly managed land, a reduction of almost 90%[5]. In Trás-os-Montes, the decline is considerable too: from 57% to 12% of the province's area[6]. In Bragança, the reduction of the common lands is enormous: from 654,296 hectares to only 25,233 hectares in the same period. In this district, many baldios were divided in order to promote the production of wheat and olives (Taborda, 1932).

Up to the 1930's, this decline of the *baldios* can be largely explained by the process of privatization: the division of the lands amongst the commoners, or their usurpation by powerful elements in society. From the 1930's, however, the attack on common property takes new forms: internal colonization and afforestation. The idea of internal colonization was not new. In last decades of the nineteenth century, it had already been made a political issue by Oliveira Martins, at that time member of parliament for the city of Porto. In 1887 Martins proposed his law for Rural Development (*Fomento Rural*). In this proposal, he pointed to the fact that according to Perry's inventory 50% of the county's area was lying uncultivated, whereas on the one hand the country was dependent on food imports, and on the other many inhabitants of rural regions emigrated, looking for a living abroad. Bringing the land under cultivation and handing it over to families for tilling would be a perfect way to solve both problems at one stroke: increase national food production and reduce emigration by tying the people to the land (Silbert, 1981, pp. 249-251; Cabral, 1974, p. 55). In the nineteenth century, Martins' proposal remained dormant, but in 1936, the idea was taken-up again. The government created a special council, the so-called *Junta da Colonização Interna*, dedicated to making an inventory of the commonly owned lands that were laying uncultivated and at organizing the establishment of family farms on those lands that were suitable for agriculture (*Decreto-lei* 27207).

In 1939, the *Junta da Colonização Interna* (hereafter *JCI*) published the inventory I quoted above. It distinguished between four types of land. The first type was land that could not be taken from the population without causing serious damage to their farms. These lands were handed over to the *Juntas de Freguesia*, the parish councils, in order to be administered in a 'rational' way. They remained in common use. The second type was land that was unsuitable for agriculture. This land was handed over to the Forestry Service in order to be planted with trees. The third type was land that was considered suitable for agriculture. On this land, the *JCI* intended to establish colonies, groups of family farms managed by households from other regions of the country. If the area was too small for this aim, the land was to be divided amongst the inhabitants of the village to which it belonged in order to increase the vitality of the existing farms. Finally, the *JCI* identified land already forested or appropriate for afforestation (*JCI*, 1939; Estêvão, 1983, pp. 1162-1163, p. 1231 e.o.).

Internal colonization has not been a great success. Already in the 1940's, we can see a slackening in the activities of the *JCI*, which come to an end in 1965. By then, of the 79,452 hectares reserved provisionally by 1939, only 29,222 hectares had actually been divided, and 4,342 hectares colonized (*JCI*, 1939, p. 51; Estêvão, 1983, pp. 1239-1242).

While colonization declined as a policy, another possibility for the conversion of the *baldios* to more 'rational' uses, an option already present in the colonization project, gains importance: afforestation. Although planting trees has been seen as a viable policy since 1888, it is only in the 1940's that it is preferred over internal colonization. Ever since that time, it has dominated the scene (Estêvão, 1983, p. 1157, pp. 1172-1174). In 1970 the Forestry Service claimed it managed about 500,000 hectares of former *baldios* (Gralheiro, 1990, p. 73). The difference between this area and the 33,564 hectares used by *JCI* is a clear indication of the differential impact of internal colonization relative to afforestation. Common land to be afforested is put under the so-called partial forestry regime (*regime florestal parcial*), which means that it is considered to be property of a parish or an municipality, but is owned by the Forestry Service. It is considered as an investment made by the local authorities, their contribution to the national afforestation project valued according to the size of the land (10$/ha). The part of the revenues the Forestry Service pays them, is considered a compensation for that investment (*Regulamento* d.d. 24-12-1903; *Lei* 1971). In 1962 the government fixed a percentage to be payed (10%). In 1972 this is increased to 25% (Anonymus, 1974).

In legal terms, internal colonization and afforestation imply turning the commons into private or public property. Both processes are occurring at the same time. Internal colonization by the *JCI* leads to the division of the commons into land for individual households and land for municipalities. Afforestation by the

state's Forestry services means a shift in the balance between privatization and nationalization in favour of the latter. By 1966, the government considered the process of privatization and nationalization completed. In that year, the concept of common property was omitted from the Civil Code. All *baldios* which had not been divided and privatized, were considered the property of the parish or the municipality (Estêvão, 1983, p. 1257; Gralheiro, 1990, p. 58). At the end of the *Estado Novo*, legally the *baldios* had ceased to exist[7].

Up to 1974, this process has continued almost unchallenged. In that year, a bloodless, left-wing-inspired *coup d'etat* put an end to the autocratic corporatist regime that had governed the land since 1933: the *Estado Novo*. In 1974, Portugal entered a revolutionary period that lasted almost two years. In this period, many claims that had been suppressed by the dictatorship were rewarded (c.f. Santos 1990, pp. 31 e.o). One was returning the commons to the communities, a claim which as far as the nationalized *baldios* were concerned, was authorised by *Lei* 39/76, the so-called *Lei dos baldios* (law on the commons). According to this law, the population of a community can elect a committee charged with the management of the commons and with the distribution of the benefits. The state's services, like the forestry service, play only a secondary or advisory role. Benefits resulting from tree cuts are split between the state and the population. The state's share is presented as a compensation for investments in trees and labour, whereas the community's share is considered to be the returns on the fruit of its property. Therefore, the portions each party receives depend on the formal relation the committee holds with the state services and on the origin of the forest: spontaneous or planted by the forestry service[8]. The community receives minimally 60% of the revenues. *Lei* 40/76 regulates the transfer of privatized *baldios* to common ownership.

Summarizing the historical development sketched briefly above, we see that the legal forms of the commons has been changing dramatically. After the conquest of the country by the Portuguese kings, the commons are turned into feudal property. In modern times we see how common property is transformed into private and public property through privatization by division and colonization, and nationalization by afforestation. In 1966, the concept of common property is omitted from the Civil Code. In 1976, we see a revival of the concept of common property. After having been dead and buried for ten years, the *Lei dos baldios*, which intends to reverse the processes of the previous epoch, re-creates common property as a legal category.

The images of the commons in politics and social sciences

In the previous section, I have discussed the changes in the legal representation of the commons since feudalism. These changes were closely related to particular policies towards common property which were connected with and legitimized by specific political images of the commons and the agricultural and economic system of which they are a part. In a lecture presented in 1961[9], a technician of the Forest Service named Mendonça points to the fact that in Portugal the proportion of the national labour force working in agriculture is very high in comparison with other countries like the USA, Britain and France, whereas the productivity per head is much lower. This makes Portugal an agricultural society. "We cannot have any doubts. To an industrialized country corresponds a prosperous agriculture, to an agricultural country a poor and backward agriculture (Mendonça, 1961, p. 346, my own translation). Hence, to promote economic development, productivity in agriculture has to increase and the number of laborers has to decrease. Forestry will be one of the instruments to bring about this higher productivity of land, now under an "ineffective and egoistic" system of animal husbandry. "The reforestation will clash and collide with a very special community, almost impermeable to progress, accelerating its end, hastening an evident senile decay" (p. 351) and "in fact, in the medieval wall there appears a breach through which a ray of progress will penetrate, the vanguard of the benefits and advantages of modern society" (p. 356, my own translation).

Mendonça's lecture is a summary of the development programme of the Forestry Service during the *Estado Novo*. Both the colonization and the afforestation policies of that political system are related to a specific perception of the role of the commons in economic development. In the perspective of both programmes, the *baldios* are seen as an obsolete form of land tenure and exploitation, related to agricultural stagnation. Turning them into private property means that the land becomes a commodity that can be sold and bought on the market. This will propel agrarian development by enabling the best farmers with the highest productivity to buy land and expand, whereas the weakest are bought out and enter the industrial labour force. Turning the *baldios* into public property implies that their exploitation can be rationalized: the state plants trees on those lands which are unsuitable for agriculture, thereby maximizing the profit derived from these lands and guaranteeing the production of raw material (c.f. Hespanha, 1980).

The colonization and the afforestation programmes share the same view of common property. But they have different views of desired economic development in general. The proponents of internal colonization maintain that Portugal is essentially an agricultural country, the defenders of afforestation claim that Portugal should turn itself into an industrial nation (Estêvão, 1983). Mendonça's

lecture shows that the Forestry Service is on the side of the industrialists. Both agree that the commons have to be abolished, but differ about the best uses to which they can be put: agriculture or forestry.

The 1976 restoration of the commons is also related to a development programme directed at the socialization of the means of production. The commons are seen as a solid base for social transformation. This model also influenced the Land Reform in the Southern parts of the country, where cooperatives were established on former *latifundias* (c.f. Barros 1980). The common basis is clearly expressed in the preamble of *Lei* 39/76. Here, we can find an explicit reference to the Land Reform, to the desempowerment of the large landholders, and to the support of the small farmers and of democratic forms of grass-roots organization. To a certain extent, the communal land management committees can be understood as boards governing village cooperatives. An example of such a situation is given by Lourenço (1981). He describes the functioning of the committee in Montesinho near Bragança that acted as a livestock cooperative that manages pasture which has been improved by the Forest Service. In this sense, one can understand the *Lei dos Baldios* as a clear attempt to contribute to the process of social transformation[10].

The opposing political representations of the 'abolishers' (colonizers *and* foresters) and 'restorers' of the commons' role in social and economic development, are strangely enough based on a common anthropological image. According to this image, the *baldios* were a component of a general communalist culture. The common land was embedded in a set of communally owned or managed resources: the communal oven, the communal threshing place, mutual insurance, and the common herd or *vezeira*[11]. To a certain extent, even labour was a common resource[12]. Labour exchange between the households, for threshing, especially at harvest time, was a general practice. Further, the agricultural lands were open (celtic fields) and could be used for grazing after harvest (Peixote, 1974; Sampaio, 1923, pp. 31-34; Taborda, 1932, pp. 155 e.o.; Ribeiro, 1941, p. 417; Henriques, 1986). The management of these lands was essentially democratic. The villagers held meetings (*chamados*, *coutos*) where they elected office holders and, for example, - if necessary - decided to limit land use to ensure natural soil regeneration or allot plots for cultivation. The lands were used by the population of villages and parishes for grazing cattle, gathering heather for the stables, fuel, wood and stones for construction, and as a source of fruits and herbs. The lands formed an important component of the farming system, thus for instance the heather cut on the *baldios* together with the dung of the animals was used as fertilizer on their private lands (Peixote, 1974, pp. 392-393).

This perspective of the commons is closely related to a specific conceptualization of the communities that managed these lands. The anthropologists believed

that the villages were isolated from the wider society, maintaining only very limited relations with labour and commodity markets. This isolation made it possible for the commons to persist. Their internal structure was considered to be essentially egalitarian, based on solidarity and reciprocity rather than on power and exploitation. Martins saw them as a remnants of a previous age long gone in the rest of the world, allowing us to glimpse the youth of mankind and its primitive communism (Silbert, 1981, pp.226-227). Peixote (1974), Sampaio (1923) and Ribeiro (1941, 1987) stress their isolation as a reason for the persistance of a traditional, egalitarian social structure. Dias (1953), according to Silbert (1981, p. 278) "the best expert in Portuguese agrarian collectivism" describes Rio de Onor as a peaceful peasant community based on communal resources and mutual help relations. Polanah (1981), in his description of village life in Gerês, notes the existence of differences in property or welfare, but concludes that the solidarity between the people of the villages guarantees a strong cohesion. The main social differences are between the insiders and the outsiders. Not even migration is able to change the traditional authority and solidarity relations. Finally, many authors (Velozo, 1953; Baptista, 1978; Bennema, 1978; O'Neill, 1987), have pointed to the central role played by the commons in the traditional system of social security. The commons guaranteed to villagers with little or no land, access to pastures, to fuel and to dung, and sometimes even to the possibility of growing crops on land which was granted to them temporarily.

The 'abolishers' and 'restores' have the same scientific perception of communalism and of communities, but differ on other points. The Forest Service calls communalism 'egoistic' and 'inefficient'. It accuses the peasants of bad management and causing ecological degradation (Mendonça, 1961). Those who plead for restoration point to the values of traditional knowledge. Taborda (1934, p. 99) and Velozo (1953, p. 10) mention that the peasants on the commons take extra care of nitrogen fixing species like *tojo*[13]. Velozo (1953, p. 15) praises the communal herd as being the most effective kind of animal husbandry.

The common scientific representation of communalism apparently embraces two opposing valuations of common land management. The key-concept which makes this possible is tradition. On the one hand, it allows for connecting the commons with backwardness and need of modernization, and on the other for calling on traditional values and knowledge which not only have proven their ability to support generations of peasants in their struggle for subsistence, but also form an excellent base for true modernization: the transition to socialism. While the 'abolishers' see the *baldios* as a cause of stagnation, the 'restorer' believe that protecting or reestablishing primitive communism is conductive for socialist development, based on mutual solidarity, equality and basic democratic management of resources. Restoring the commons to the population would put an end

to proletarianization and the rural exodus and as well as rooting people in the rural regions, thus permitting a regionally more egalitarian development and stopping the haemorrhage of labour power leaving the country for Brazil, France and Germany (c.f. Baptista, 1978). In this argument, tradition does not have a negative meaning, expressing stagnation and backwardness and the lack of development, but a positive meaning, affirming important values. It is used to legitimize political claims.

The power of representation emerges clearly from comparing Peixote's and Dias' description of the management system of the *baldios* with the contents of the 1976 law. According to Peixote (1974) and Dias (1953) the villagers held meetings, where they elected a committee and decided on specific management arrangements. In the 1976 law this image is reproduced. Management is subject to a meeting of the commoners (the *compartes*) who are the joined owners of the *baldio*. This meeting elects a committee of five members responsible for daily management affairs, the *conselho directivo*. Thus this law, trying to incorporate customary law in the national legal system, forms a perfect mirror of the image produced by ethnographic studies to explain everyday life in *baldios* and communities.

However, this image, captured within the social sciences, nourished by political development projects and reflected in law, does not fully convey real practices. This difference will be elaborated in the following section.

Common land management: a look beneath the cloak

In the previous section, I referred to the presentation of the *baldios* as a part of a pre-capitalist, communalist social system, that has survived in isolated villages like those in the mountainous districts of Vila Real and Bragança of Trás-os-Montes. This was the image drawn by most anthropological and ethnographic research from the end of the last century up to the 1980s. Comparing this image with historical material suggests that it does not coincide with social reality. Historically, many communities in the North-eastern region maintained close relationships with the wider economic system. The main agricultural commodities were wine, silk, leather, wheat and cattle. Since the 18th century wine-growing for the export market has been very important in the Douro valley. In fact, its produce, port wine, is perhaps Portugal's most famous export article. Commercial wine-growing, however, has not been limited to this area. Almost everywhere one can find vines. In the past, one of the most 'isolated' regions, the border region of Vinhais in the district of Bragança, even exported to France. This only came to an ending in the 19th century because of the Phyloximera epidemic (Taborda,

1932; Sousa, 1983; Cepeda, 1988; Jacob, 1989).

In other parts in the district of Bragança, from the 15th to the 19th century the production of silk was important. In fact, at that time, the region was an international silk-producing centre exporting to other parts of the country and to the Americas. In the beginning, the silk cocoons were imported from abroad. The industry reached its height when in France, Spain and Italy the silkworms were killed because of an epidemic. Silkworms themselves were produced within Bragança. Until the first half of the 19th century, most silk was spun and woven in factories within the district. Only later, was this activity transferred to the cities near the coast (Taborda, 1932, pp. 173-185; Cepeda, 1988, pp. 110-114; Jacob, 1989, p. 168, 1990). Bennema (1978, p. 41) speaks in this case of a "process of de-industrialization of the country-side".

The wool industry (partly based on sheep kept on the commons) was organized on the principle of household labour. Jacob writes that in almost every hamlet people were spinning and weaving wool which was mainly traded within the region because of its poor quality (Jacob, 1989, p. 155; Jacob, 1990, p.102).

On the commodity side, the rural communities that were conceived of as isolated 'self-sufficient islands' (Jacob, 1989, p. 155) 'encircled by medieval walls' (Mendonça, 1961, p. 356), appear to have maintained strong commercial relationships with the wider economy. The same applies to labour. Small farmers with insufficient land for their subsistence were dependent on wage labour for their survival (Jacob, 1989, p. 149). Portela (1981, p. 222) writes: "In relation to the past, at least the past still alive in the memory of the people in the village, it also appears that agriculture was not the only means of subsistence". Non-agrarian activities he mentions are: smuggling, mining, working for the Forestry Service and for the ministry of Public Works, hunting and fishing.

These examples show that in the nineteenth century, the northeast of Portugal was closely connected to the surrounding market. For the commons, this connection could have contradictory effects. In some parts of the district of Bragança, for instance the Mirandela region, wheat production expanded rapidly because of price-increases resulting from state protectionism (Estêvão, 1983, p. 1166; Jacob, 1989, p. 166). Thus large parts of the commons that existed in this region were reclaimed for wheat and olive production, bringing about a reduction of cattle-rearing (Taborda, 1932, p. 153; Rodrigues, 1987, p. 93). In other parts of the northeast, however, cattle-rearing persisted or even expanded. Cattle was traded from mountain regions like Nogueira, Padrela, Barroso and Gerês in the districts of Bragança and Vila Real to other parts of the country (Taborda, 1932, p. 154; Jacob, 1989, p. 147). In these regions, the communal lands persisted (*JCI*, 1939, p. 51). According to Taborda (1932, p. 148, p. 153) and Jacob (1989, p. 147) these herds explain why these pastures remained communally owned. This suggests that

in this case market relations contributed to the persistence of communal land. So while in Mirandela the integration in the market led to a reduction of the commons, elsewhere, it contributed to their persistence. This implies that the commons should not be considered a remnant of a pre-capitalist society, but, as Cabral (1974, p. 30) does, as part and parcel of capitalist production. Pointing to the existence on the commons of large herds of capitalist cattle owners without land, he suggests that perhaps it should be considered as capitalist production in a non-capitalist guise[14].

The second aspect of the way the commons are presented concerns the internal structure of the communities which administered the *baldios*. Generally, these communities were thought to be based on mutual aid and solidarity. Social inequality, for instance resulting from economic differentiation, was considered to be slight, the power structure in the villages being essentially egalitarian and democratic. Dias (1953) mentions that there exists some inequality in Rio de Onor, for instance with respect to having access to the *baldios*, but he does not elaborate. Generally, he maintains the image of an egalitarian social structure, in which reciprocity prevails over exploitation. The image of the peasantry and village life produced by Dias and others is closely related to Romanticism, which, according to Silbert (1981), gave rise to the scientific study of rural communities in Europe: the peasant is conceived of as the Noble Savage. The first one to criticize this conception of the village community within Portuguese anthropology is O'Neill (1987). His conception of rural society is quite different: 'his' peasants are in no way better (or worse) than the rest of humanity. A nice juxtaposition of these images can be achieved by comparing Polanah's description of the population's attitude towards religion with that by O'Neill. Polanah (1981, pp. 11 e.o.) stresses the population's catholic faith and its obedience to the rules set by the church, e.g. monogamy. The villagers in O'Neill's study do not care very much about what happens in the church: "..during Easter period the priest must literally scold his flock in church in order to get more than a handful of villagers (particularly men) to confess and take at least one yearly communion.... Indeed, the priest constantly refers to villagers' materialistic religious vows to the saints as not only selfish but utterly 'pagan'" (1987, p. 343). And as to their monogamy, O'Neill (1985, 1987) points to the prevalence of bastardy and adultery.

O'Neill carried out his research in an 'isolated' community in the same region as Rio de Onor, the village studied by Dias in the early 1950's. In his study, he shows that within this community there are three clearly separated groups: the landless *jornaleiros*, the middle peasants or *lavradores*, and the class of land owners, the *proprietários*. According to O'Neill, in such a context of inequality, reciprocal relations like labour exchange have an exploitative impact. In the case of threshing, for example, labour exchange is done by labour rotation: a household

delivers workers to other households to do its threshing. In return, it receives members of these households that assist at its own threshing. But threshing the large harvest of a rich household takes much more time than that of small amount of rye of a poor. Therefore, the poor have to work longer for the rich than vice versa. "This is not a conscious exploitation of labour on the part of the wealthier households, but rather a form of inequality masked by an ideology of equality" (1987, p. 172).

Apparently, the presumption that the communities in which agrarian communalism prevails are egalitarian is incorrect. In fact, inequality is an important feature of a communal agrarian system. Common resources are not only used by the poor villagers, but also by the rich. As the latter in general dispose of more cattle, these are able to profit more from it than their poorer fellow villagers (Velozo, 1953, p. 13). This shows that private and common property in such a system cannot be analyzed separately but instead should be seen as parts of one, integrated system. They are linked. O'Neill (1987, pp. 107-109) provides us with an illuminating example of a possible effect of this linkage: a poorer villager acted as a shepherd of a flock owned joinedly by him and the richest women in the village. In the summer, the flock was fed mainly by letting them graze on the commons. During the winter, however, snowfall makes them inaccessible. Then they have to graze on private pastures situated at a lower altitude. In this case, these pastures were owned by the lady. When at certain moment, she decided to quit animal husbandry, she also forbade him to use the winter pastures for his part of their flock. As a result he had to abandon animal husbandry as well. As he could no longer use the private winter meadows, he also was unable to profit from the common summer pastures.

These examples show that the situation at the local level is rather complex. The communities that own *baldios* have not been what they were said to be: isolated and egalitarian, nor a traditional management and ownership structure, guaranteeing social security for the poor. They were a source of wealth for the rich, too, a means through which the poor could be exploited, and they were used as a means of production in a modern, market-oriented and perhaps even capitalist form of production, animal husbandry. The *baldios* thus played two apparently contradictory roles at the same time: on the one hand enforcing social and economic differences, and on the other hand hiding and softening them by offering a minimal protection to the poor. The one-sided representation that formed the base of state policies, hid this ambivalent character of the *baldios*.

Representations and social struggle

As we have seen, there exists no direct relationship between the images developed within the fields of science, politics and law, and social reality. The romantic portraits of rural communalism did not take into account inequality and hidden exploitation. The presentation of the baldios as components of a 'traditional', 'isolated' and 'backward' social-economic system did not pay attention to the extent to which these lands were integrated into the modern economy. The legal representations did not reflect social reality, either, as is clear from publications by ethnographers who did their fieldwork in the early 1970's (Fontes, 1977; Bennema, 1978). Neither internal colonization, nor afforestation, nor the 1966 Civil Code were able to put an end to communal land management. This difference between representations and the social practices they are said to reflect can be understood by analyzing the context within which they are developed. This context basically is a struggle over the use of scarce resources. In this struggle, first, the representations are instruments. They are used to legitimate, or hide a certain practice[15]. Representing the *baldios* as a component of an isolated, primitive communalist society served as a legitimation to abolish communal ownership of land, nationalize it, and impose forestry. Second, representations are the outcome of that struggle: they are (legal, scientific and political) statements produced by those in power and their opponents, and compromises made between struggling parties. The 1976 law for instance, not only re-creates the *baldios* as common property, but also allows for a continuation of forestry activities. It prohibits division of the *baldios* by the commoners and thus forms a legal obstacle against the fragmentation of forest property.

The relationship between representations and social struggle points to the need to clarify that struggle: which are the parties involved? What is the issue at stake? What are the arms and arguments used and by whom? How and where are the battles fought? In this section I will try to portray that struggle and show in what way it is connected to the representations discussed earlier. I will also try to show that the struggle did not leave the *baldios* unchanged. For the sake of brevity, this portrait has to be rather sketchy. I will simplify the analysis of that struggle by distinguishing only two levels and three oppositions: the national level, the local level, and the oppostions within and between these levels. These I will discuss for two periods: before and after 1976.

As Estêvão (1983) makes clear, before 1976, at the national level the struggle between the agrarian and industrial bourgeousie predominated. Both were in favour of the abolition of the commons. The agrarian bourgeoisie was interested in the expansion of the agricultural area and in harnessing the labour force in the rural areas. This group supported the programme of internal colonization. The

industrial bourgeoisie was interested in afforestation and opposed to the small scale colonization initially proposed by the *JCI*. Afforestation of the commons would increase the demand for fertilizer, stimulate the modernization of agriculture, create a pool of industrial labour by provoking a rural exodus, and guarantee the production of raw materials. The conflicting policy aims of colonization and afforestation, the conflicts between the state services responsible for the achievement of these aims are thus related to conflicting development models (agrarianism versus industrialism) and antagonistic interest groups.

Between the national and the local level, basically the conflict was about the use of scarce resources. The national bourgeoisies tried to have the commons used in such a way as to serve their particular aims, neglecting the interests of the local population. Traditional management of the commons is called 'egoistic' because its 'inefficiency' hinders the national economy profiting fully from the natural resources of the country (Mendonça, 1961). Afforestation created or enforced the opposition between the local and the national level by putting restraints on common land use by the local population. During the early stages of the afforestation process, the Forest Service prohibited goats and sheep in the areas under their control, because these would endanger the growth of the young trees. As a result, many peasants saw themselves robbed of their main source of income. As shepherds often had to pass through or near lands under forestry they were often fined because of animals that went astray and entered into the prohibited zones (Silva, 1973; Bennema, 1974; Baptista, 1978). Planting trees near the villages threatened life within these hamlets also, because it offered shelter to wolves, that occasionally began to enter inhabited areas (Costa, 1959). Furthermore, it formed an excellent fuel for forest fires which not only endangered crops and pastures, but also houses and people (Silva, 1973).

Finally, the *baldios* were also the object of a struggle within the parishes (c.f. Feijó, 1982). At this level, we can discern two broad types. The first concerns a struggle which is located at the level of the villages that make up a parish. The parties involved are the rich farmer and the poor peasant. The second concerns the parish itself. The parties involved in this type of conflict are villages, or villages and the parish.

With respect to the period before 1976, little information is accessible concering these conflicts. One case in point is the division of the *baldios* in Campeã by the JCI. Here, the division made in the early 1950's clearly benefited the richer families. If a family wanted to acquire part of the commons, it had to pay transfer taxes (*sisas*). Families which were unable to do so were dependent on the common lands which remained after the division, whereas the wealthier were able to expand their private property. Besides, it appeared that the most influential persons were able to obtain the best plots (Costa, 1959).

For the period after 1976, more information is available. The egalitarian conception of the community on which the 1976 *Lei dos baldios* is based obviously obscures inegalitarian forms of exploitation. I have already mentioned the village cooperative in Montesinho that manages the improved communal pasture. Nowadays, it hardly merits being called cooperative. In fact, it has been taken over by six persons, more or less constituting a single family. They prohibit the other villagers from making use of this pasture. Elsewhere, conflicts have arisen within the villages about the maintenance of the common land. Studying the impact of the 1976 law, Klein & Stok (1986) found that in a village in the Serra de Freitas large sections within the community oppose the maintenance of common land and wish it to be partitioned. The commons are mainly used by the big animal owners. Those who do not have (large) herds prefer to have it divided into private plots because then they will be able to expand greatly the land they own. The law, however, prohibits such a division, thereby protecting the rich.

There are also conflicts between villages in a single or several parishes about *baldios*. Some of these disputes already have a long history and involve disputes about (mixed) pasturing rights, borders and tresspassing, as is the case in the Serra de Gerês. Others are related to modern uses to which the *baldios* are put. Large parts no longer offer grazing to cattle and sheep, but are afforested. Villagers are well aware of the economic value of wood. In Ferral, also in Gerês, for instance, the *baldios* committees of the hamlets that compose the parish are trying to effect an orderly division of the *baldio* between the hamlets. This proposal has been put forward at this stage because the trees are still young. The revenues are still low so that the probability of serious conflicts is less.

Sometimes, *baldios* are a bone of contention between villages and the parish. In Bragado, a parish in the lower slopes of the Serra de Alvão, inhabitants are trying to create a *baldio* committee in order to get a hold on the rent paid by the miners to the parish council who exploit the granite in the *baldio*. They suspect that this rent is far from reasonable, and that the miners make a outrageous profit at the expense the parish. The acknowledgement of the committee by the Forestry Service has met unforseen obstacles, as a official refused to pass letters on to the central Forestry office in Vila Real and referred to decisions at higher levels within the Service that in reality had never been made. Cidadelhe de Aguiar is one of the villages that belongs to the parish Vila Pouca de Aguiar. In the village, the committee disposes of a constant flow of cash resulting from the leasing of resin concessions of about 2000 *contos*[16] *per annum* and of additional money from thinnings and final cuttings executed in the 700 hectares or so of pine forest every few years. The borders of the commons have been defined according to landmarks and documents dating from 1282, the year in which the village received its royal roll (*foral*). The committee has earmarked the money for infrastructural works:

the improvement of an irrigation system, the construction of bridges, repairing roads, etc. The releative importance of the *baldio* revenues for the village can be seen by comparing them with the money spent by the parish council of Vila Pouca de Aguiar in the surrounding villages in 1990: about 140 contos. In the same year, it received from the Forestry Service more than 1,000 contos from *baldios* of hamlets that belong to the parish and did not elect their *baldio* committees.

The number of common land management committees has decreased sharply. In the districts of Vila Real and Bragança, there have been 261 committees in the first years after the 1976 law came into effect (Rodrigues, 1987, p. 61), whereas in 1990 according to the Forest Service there were only 79. Nationally, the reduction is even more pronounced: from 637 to 132 (Duarte, 1990). Conflicts between small and big cattle rearers and between villages and the Forestry Service may be some of the causes of this decline.

Another factor that might be relevant is insecurity about the future legal situation. At the national level, actual legislation is not uncontested. In fact, until 1991, sixteen proposals have been discussed in parliament to abolish or amend the 1976 law (Rodrigues 1990:1). The various proposals share the idea that the *baldios* represent an obsolete concept of property that impedes development, and that the land has to be publicly or privately owned. Other arguments are the existence of 'parallel powers' (parish councils and *baldios* committees) and 'inconsistency in the forms of popular representation' (parliamentary and basic democracy) (Duarte 1990). The main advocates of changing the *Lei dos baldios* are the CDS (christian democrats) and the PSD, the social democratic party. The PSD is closely linked to the main paper pulp enterprises in Portugal, SOPORCEL and PORTUCEL. The political voice of the defenders is concentrated in the PRD ('Renovators'), PS (socialists) and PCP (communists). The communist party is closely connected to the regional secretariats of *baldios* committees in Vila Real, Coimbra and Viseu. These secretariats act as a kind of umbrella organization of *baldios* committees, helping them in their dealings with the government and with state services and trying to mobilize them in defence of the 1976 law.

The conflict between the PSD and the other parties in ideological terms is a conflict between right and left (with respect to the desired form of popular participation in politics). In economic terms, perhaps one can say that it is a continuation of the old conflict between industrialist and agriculturalist: the PSD defends the afforestation of Portugal and paper production as an important comparative advantage within the context of the EEC; the other parties (particularly the PCP) try to defend small scale agriculture using a more or less populist approach to the agrarian question.

In economic terms, the conflict about national legislation also reflects the old struggle between the national and the local level about the exploitation of a scarce

resource (land). In its latests legal proposal, *Projecto de Lei 532/V* for instance, the PSD makes the functioning of *baldios* committees dependent on the national government and district governors (Duarte, 1990). Apparently, this proposal is aimed at increasing the control of the national level over the management of the *baldios*.

The struggles carried out at and between the national and local levels have not left the *baldios* unchanged. The uses to which they are put today, differ from those of earlier days. Trees having replaced cattle, the shepherds of the past have become forest managers, dealing with investment rather than fodder problems. Apart from forestry, other modern forms of exploitation are becoming more important, e.g. the exploitation of granite mines. Representing the *baldios* simply as a traditional form of pastoralism, thus becomes increasingly inaccurate.

Conclusion

In Portugal the commons have come full circle: after being subjected to a process of privatization and nationalization which in the end led to their legal disappearance in 1966, they have been re-created in 1976. This development can be understood by the fact that images do not necessarily reflect the social practices they are said to represent. This relation is not direct, but indirect, mediated by the social struggles in which the representations are created.

We have seen that with respect to the *baldios* in Portugal three fields of representations can be distinguished: law, politics and social science. The representations developed within these fields do not exist independently from each other; they are interrelated. The legal transformation processes, abolition and restoration, followed from particular development policies: agricultural intensification and industrialization, and social transformation. Scientifically, both the proponents of the abolition of the commons and the defenders of its restoration were based on a common perception of the *baldios* as an element of pre-capitalist communalism.

One of the characteristics of the representations is their stability. Images developed in the nineteenth century have lasted up to the present. Martins in 1887 saw in the commons only uncultivated land, which needed to be put to economic use in order to tie the population to the land and increase food production. The *JCI* and the Forest Service in the 1930's and '40's painted a similar portrait of the *baldios*. The representations developed by ethnography show the same stability: abolishers and restorers of the commons base their argument scientifically on a shared image of the commons as a part of the primitive agrarian communalism that has been developed at the end of the 19th century. Only today this image has come under attack by research that exposes inequality and hidden exploitation

within apparently egalitarian communities.
The stability of the images can partly be explained by the fact that they are formulated and used within the national field. Here, they serve as legitimations for particular interventions at local level in order to subject it to a specific development programme. The miraculous resurrection of the *baldios* within the field of law has to be explained by a shift in the balance of power within the state: the Carnations' revolution of 1974 put at least temporarily an end to the rule of the bourgeoisie and allowed for popular demands that had until then been suppressed to be satisfied. One of these demands was the restoration of the *baldios* to the villagers.

The representations not only played their part in the social struggle at the national level, but also at the local level. The aims to which they were put differ according to who are able to wield them. They not only allowed wealthier and more powerful villagers to usurp the *baldios* for modernised agriculture and monopolize them under the cloak of equality, but also diverted money from the state and parish to villages for infrastructural work.

Although the images have roughly remained the same, the social practices they are said to represent have changed. The size of the commons has been reduced considerably, because of the privatization and nationalization of large parts these lands. The economic exploitation of the remaining *baldios* has changed as well. Animal husbandry, both for the market and for subsistence, has lost its pre-eminence. The capitalist cattle breeders and their enormous herds have virtually disappeared, just like the communal herds of the villages and their shepherds. Other forms of exploitation, particularly forestry, have become more important. In some cases, one might say that the shepherds of the past have turned themselves into the forestry entrepreneurs of today. The groups using these lands have changed, too: apart from local farmers, today state institutions like the forestry service, and private enterprises like mining companies, etc. are involved as well. These changes in social practices, however, still are conspicious by their absence in scientific, political and legal representations.

Notes

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2) In The Netherlands, for example, these were called *marken*. In this country, the amortization policy was started in the beginning of the nineteenth century, and completed about hundred years later (Buis, 1985).
3) Here I follow Rodrigues (1987). Although the strong man of the *Estado Novo*, Salazar, already assumed power in 1926, it is only after a referendum in 1933, that the regime officially assumes the denomination '*Estado Novo*'.
4) This division has been developed by Thomaz António da Vila Nova Portugal in 1790. In reality, neither earlier royal ordinances nor later legislation did discern very clearly between these categories, thus allowing (intentionally, as Velozo (1953, pp. 25-26) and Rodrigues (1987, p. 32 suggest) the process described below.
5) These figures should be read with care. In 1942, the JCI in a new inventory found another 126,489 hectares (Estêvao, 1983, p.1235). In 1970, the forestry service claimed it managed about 500,105 hectares former *baldio* (Gralheiro, 1990, p.73). See also: Baptista, 1978, pp.187-189. Reasons for variation are: differences in the definition of *baldio* (uncultivated or communally owned), inaccuracy in measurements, and inaccuracies in the data furnished by the *freguesias* and *câmaras*.
6) The JCI (1939) found 132,238 hectares of *baldio* in Bragança and Vila Real (total area 1,078,116), whereas Perry (p. 280) classifies 635,000 ha. as uncultivated on a total of 1,111,556 ha.
7) Gralheiro (1990, p. 58) mentions the point made by Soares (1967, p. 308) that the fact that former *baldios* though publicly owned were still subjected to traditional forms of utilization by groups of inhabitants, sets them apart from the 'ordinary' public land.
8) For extensive comments on this law see Rodrigues (1987) and Gralheiro (1990).
9) This lecture formed part of a series of conferences organised by the state's secretariat of agriculture to promote the second development plan, *II Plano do Fomento*.
10) Understanding the law as a part of a socialist strategy would coincide with Santos' (1979) recommendation to support normative systems that challenge undemocratic or non-socialist state legality, thus promoting a situation of 'dual power'. (See also Santos, 1990).
11) Almost everywhere, the communal herds have disappeared. Only the inhabitants of Fafiao, in the parish Cabril (Serra de Gerês), still maintain a *vezeiro*.
12) The fact that labour can be seen as a communal resource can be derived from O'Neill (1987, p.121): "Each household in reality has *insufficient* equipment, animal traction, and labour resources and cannot act entirely on its own. (...) The real productive units are constantly shifting labour teams and not the farmer's households".
13) Ribeiro (1987, p. 103) mentions the cultivation of *tojo* (*Ulex europaeus*) on enclosed plots.
14) The role of the market in the management appears from other examples as well. In Campeã, a parish in the Serra de Marão, "in the years of the thin cows" (1940's) people used cut heather (mainly *tojo*) from the commons and sold this in the city of Vila Real. Other commercial resources were charcoal and lime (see Costa, 1959). Anna Nobre (1987) found that in a village in the Serra de Alvao, after 1976, some peasants started commercial goat keeping on communal land. The distinction pre-capitalism and capitalist economy has theoretical implications which I will not deal with in this article.
15) Law can be used purposefully to obscure certain practices, for instance a state security act. In the spring of 1991, the Portuguese government has been trying to expand its possibilities on this field (Silva & Lopes, 1991; Lopes, 1991). Often, however, a law, like the 1966 Civil Code, hides a practice without being created to do so.
16) One *conto* is 1000 Portuguese escudos. At the time of writing a *conto* equalled about 13 Dutch Guilders.

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MANURE AS A LEGAL PROBLEM

W. Brussaard and H.M.J. Haerkens

Introduction

In recent years alarming reports have appeared regularly about serious contamination of soil and groundwater by nitrogen and about the large-scale depletion of forests due to ammonia. The most important cause of this pollution is a gigantic quantity of animal manure, produced by the livestock industry. In past decades, that industry has made great strides as a result of mechanization, economies of scale, intensified use of land, and especially by the bulk import of fodder through the harbor of Rotterdam. These developments have helped the livestock industry to make an important contribution to the Dutch economy, but have also resulted in a large surplus of manure. At present the annual production of animal manure in the Netherlands is more than ninety million tons. Livestock farmers have been spreading most of it on their own lands for years or it was spread in the immediate surroundings. This has often resulted in the sometimes extreme overdosing of minerals (nitrogen, phosphate, and potassium) and heavy metals (copper, cadmium, and zinc) found in the manure. This causes serious harm both to the agricultural sector and to the environment (Brussaard & Grossman, 1990): causing a decline in soil fertility, a decrease in quality of crops, health hazards for livestock, depreciating groundwater quality, deposits of potentially acidifying substances, and stench. The large surplus of manure does not exist only in the regions where the livestock industry is concentrated. It is a national problem because the environmental consequences affect the total surface of the Netherlands.

The main reason why manure has become such a problem in the Netherlands is that in the 1970s the government ignored the warnings sings for too long that things would turn out badly if nothing were done to the uninhibited growth of the Dutch livestock industry. To identify the problem a new word was introduced in Dutch politics: "manuring" (*vermesting*). Manuring is now considered one of the focal points of environmental policy. It is of concern of environmentalists, farmers, and the government (especially the Ministry of Environment and the Ministry of Agriculture), for very different reasons. In the 1980s the government enacted special legislation to redress the manure problem. Although the regulations involve many obligations for the livestock-farmers, environmentalists still have serious doubts about the effectiveness of the legislation. This poses questions about the practicability of regulating the

manure problem through legislation.

In this article, we consider some aspects of the impact of legislation. We start with a description of the legal measures that have been taken up till now to combat the manure problem. The present legislation is based on a phased implementation until the year 2000 and will be strengthened because of the disappointing results of the government evaluation of the first phase. To gain an understanding of the way the government tries to reach specific environmental objectives, such as the elimination of manuring, we deal with the government policy on nature, environment, and agriculture. We find that a public cooperation and acceptance is fundamental for government policy and consider this strategy to be closely linked to post-war developments in the welfare state. This raises the question of a new approach to the manure problem corresponding to the changed role of government, meeting the wishes of the environmentalists and sensitive to the needs of the farmers. We conclude that expectations about the power of legal instruments to solve the manuring problem should not be too high.

First legislation on manure (Nuisance Act and Interim Act)

In a relatively short time, the manure problem has engendered an entirely new system of legislation and regulation. The nuisance caused by storage of manure has long been subject to environmental legislation. The Nuisance Act (*Hinderwet*) requires a permit for establishments where waste products (including manure) are stored, processed or destroyed[1]. Since 1967 livestock farms with permanent manure storage have also been required to obtain a permit (Brussaard & Grossman, 1990). The Nuisance Act is still important because it also officially stipulates the conditions for storing manure[2]. It also regulates the nuisance to the surroundings caused by the storage, and the protection of the environment.

By the beginning of the 1980's however, the manure problem in the Netherlands had become so great that in order to tackle it there was a need for specific legislation, in addition to the Nuisance Act. For this purpose, a bill for a new Fertilizer Act (*Meststoffenwet*)[3] was introduced in Parliament in 1984. Together with the previously introduced bill for a Soil Protection Act (*Wet Bodembescherming*)[4] the Fertilizer Act was supposed to offer possibilities for controlling these problems (Brussaard & Grossman, 1990). Before the definitive enactment of these laws, problems with manure had become so serious that in 1984 Parliament decided to impose a temporary freeze on the establishment and expansion of pig and poultry farming through the Interim Act on Limiting

Pig and Poultry Farms (*Interimwet beperking varkens- en pluimveehouderijen*)[5]. This law, which was accepted by Parliament in a remarkably short time, prohibited the establishment of new pig and poultry farms throughout the Netherlands. Furthermore, expansion of existing farms was also forbidden in areas with a large concentration of such farms. Outside these areas of concentration, existing pig and poultry farms were allowed to expand only to a limited extent. The validity of the Interim law was restricted to two years, after which the manure problems were to be redressed by definitive legal regulation (Brussaard & Grossman, 1990) through the Fertilizer Act and the Soil Protection Act. As will be shown on page 155, however, the Interim Act did not succeed in freezing the pig and poultry business.

The current system of Dutch manure regulation and policy

The manure legislation of 1987 is based on two laws. The Soil Protection Act[6] applies, among other things, to the use of animal manure. The Fertilizer Act[7] regulates trade in fertilizers, removal of surplus manure, and the production of animal manure. Government decrees and ministerial regulations have been elaborated on the basis of these two Acts. For the time being, this legislation applies to manure produced by cattle, pigs, chickens and turkeys because these animal types produced by far the largest part of the total animal manure in the Netherlands (Brussaard & Grossman, 1990)[8]. In connection with this legislation the "Manure Action Program" (*Mest Actie Programma*) was published. In this Program, three technical solutions are formulated to resolve the problem of the excess manure. In the first place, as there is a close relation between the feed put into an animal and the manure that comes out, measures must be taken to control the formulation of animal fodder. Thus, for instance, the application of a less 'mineral-spoiling' feed system and the use of fodder with a lower quantity of minerals are promoted. Secondly, the distribution of manure to arable farms and horticulture must be expanded. This can be done by improving the quality of the manure, so that it contains no disease germs or weeds, and by an adjustment of the infrastructure. The third solution is, in the long term, the processing of the manure into a product fit for export. The initiative for this third action should be taken by the livestock industry.

The Manure Action Program explains why the realisation of the manure policy is to take place in three increasingly comprehensive phases (1978-1990 / 1991-1994 / 1995-2000). Implementation of final standards in the short term would cause serious problems for the livestock industry; the quantity of manure that final standards would define as excessive is far too great to handle until

distribution and processing plants have been established. Therefore the standards in the first phase have been formulated in such a way that in the first phase there can be excessive manure per farm but there is no *national* manure surplus. A cattle farm that produces a manure surplus can deliver its manure to regions where the livestock industry is less intensified. In connection with this policy, the Manure Bank (*Mestbank*) has been set up to help transfer excess manure. It is charged with facilitating trade in excess manure and is obliged to accept quantities of excess manure offered by manure producers.

The first problem for the legislators was to find a standard for measuring the amount of manure. They defined it in terms of the phosphate found in the manure, as phosphate is one of the polluting substances. Thus the minister had to establish the quantity of phosphate that the average animal produces per year in its manure. This was done, on the basis of research, for each of the four types of animals just mentioned and for each category within those four types (Brussaard & Grossman, 1990). In this system of legislation phosphate standards are related to areas of agricultural land.

As there is a close relation between the feed put into an animal and the manure that comes out, it is possible to influence the phosphate level of the manure through the composition of the fodder. To encourage the production of environmentally sound manure, at the beginning of 1990 the regulation was amended in such a way that lower standards are valid when phosphorous-poor fodder is used[9].

Production limits and surplus levy

With respect to the production of animal manure, the maximum quantity of manure (expressed in kilograms of phosphate) that can be produced on a farm is directly related to the amount of agricultural land belonging to that farm. An elaborate and detailed system of regulations governs manure production. The main regulation is that manure production up to 125 kilograms of phosphate per hectare per year is free. Above this limit expansion of the farm and new establishments are forbidden (Brussaard & Grossman, 1990). In connection with this rule, manure producers were obliged to hand over the data about the initial situation at the time the Fertilizer Act came into force (the number of animals on the farm, the quantity of their manure production, and the area of agricultural land belonging to the farm). Owners of farms that produced more manure than 125 kilogram of phosphate per hectare at the beginning of 1987 are allowed to continue at this level of production, but they must pay a surplus levy. This financial instrument should reduce surplus-production. The levy is graduated and depends on the amount of surplus manure. The amount of

money that is raised by this levy is used for the financing of the Manure Bank.

Phosphate-standards for application

A government decree based on the Soil Protection Ac.[10] establishes standards for the maximum quantities of manure (expressed in kilograms of phosphate) that may be applied on the agricultural land per hectare per year. Because the extent to which phosphate is absorbed from the soil can differ according to the crop, a distinction has been made between grassland, fodder crop land (i.e., land on which corn is cultivated), and arable land[11]. The decree allows fewer phosphates to be applied on phosphate-saturated ground and more on ground with little phosphate. To avoid problems for the livestock industry the application standards will be implemented in phases. For the first and the second phases the government has already established the standards, for the third and final phase (1995 - 2000) the standards will be re-established according to further developments. Together with the production limits, these phosphate-standards for the application of the manure are an attempt to decrease manure production in the Netherlands.

Manure bookkeeping

In connection with legal rules regarding the production limits, manure and surplus levy producers are obliged to submit data about the production, storage, application, and trade of animal manure. Not only producers of animal manure, but also traders and managers of storage-places, are obliged to keep manure bookkeeping up-to-date, because the sale of animal manure must always be accompanied by proofs of delivery which have to be sent to the Manure Bank[12]. The present bookkeeping is only concerned with the phosphate-problem but in 1994 the mineral registration system (*MARSsysteem*[13]) which registrates phosphates, nitrogen and potassium will be introduced. This is expected to stimulate the use of mineral-poor fodder (see *Structuurnota Landbouw*, p.73).

Transfer regulations

The efficient transport of surplus manure is also regulated by the Fertilizer Act: transfers of manure production to another farm business or to another location are restricted[14]. The present-day regulation makes it difficult to amalgamate and divide farms, so that further investments and developments in farms are also difficult. That is the reason why a new Transfer Law is now

being debated in Parliament.

Provisions about manure spreading

The use of animal manure in fall and winter carries extra risks of nitrogen and phosphate leaching and run-off to ground water or surface water, because during these periods the crops take up little or no nitrogen (Brussaard & Grossman, 1990). Therefore, the manure legislation also has provisions about manure spreading during those periods. For example, at the moment it is forbidden to spread animal manure on grassland in October and November, and on snow-covered ground also from January 1 through February 15. For these rules too, implementation will be phased.

Covering obligation

In connection with the evaporation of ammonia that may occur when manure is applied, the regulation also contains a provision about covering the spread manure with soil. At the moment farmers have to incorporate the manure into the soil within 48 hours.

Transition to the second phase

At the time of the parliamentary debate on the Fertilizer Act at the beginning of 1986, the Ministers of Agriculture and of Environment had promised that the efficacy of the manure legislation and policy would be evaluated during the first two years of the first phase. This evaluation could be used for possible readjustments of the policy before or at the time it entered the second phase. The Evaluation Report was published in 1990 (*Evaluatienota 1990*) and as a result the Minister of Agriculture annonced new measures (*Notitie mestbeleid tweede fase*). The significance of the evaluation is limited because it covers only the years 1987 and 1988, and the elaboration of the manure legislation by governmental decrees took place only in the course of 1987. Besides the information about the effects of the legislation is still restricted. Especially difficult to measure are the effects on the environment because the consequences of manure application will only become visible in the long term, and a national monitoring-program for the upper ground-water level does not exist. Therefore the Evaluation Report does not give detailed conclusions, but it contains some fifty points, of which the following are the most important.

Animal numbers

The Evaluation Report provides insights about the development in animal numbers. It is remarkable that from 1984 onwards, when the Interim Act was meant to freeze the establishment and expansion of pig and poultry farms, the number of pigs and chickens nonetheless increased by some 8 percent a year. After the beginning of 1987, when the new manure legislation came into force, a decrease of 3 to 4 percent per year was registered. According to the report, this decrease was in part due to bad market conditions for pig and poultry farming. Concerning the other two types of animals that came under the manure legislation in 1987, the trend for turkeys shows the same picture of increase till 1987 and decrease thereafter; for cattle there has been a continuous decrease since 1984, when the Superlevy[15] was introduced (*Evaluatie nota 1990*, p. 27). At the same time, however, the report shows a considerable increase of animals of types that did not come under the terms of the law: sheep, goats, ducks, rabbits, furbearing animals (i.e. minks and foxes) and horses. Of these, the number of sheep, goats and rabbits has risen sharply. Sheep especially produce phosphates (*Evaluatie nota 1990*, p. 29). In light of this development, the Minister decided to bring ducks, rabbits and fur-bearing animals under the force of the law in the second phase. For horses, goats and sheep another system of regulation will be introduced, so that for these animals maximum numbers per hectare will be stipulated (*Notitie Mestbeleid tweede fase*, nr 3, p. 8).

Manure production and application

The evaluation shows that manure-production at national level has been decreasing since 1985, both in the overall quantity and in the amount of phosphate. At the same time, the manure surplus has increased at the level of the individual farm business because of the introduction of the phosphate standards in 1987; the same will happen in 1991 when the new standards are effective (*Evaluatie nota 1990*, p. 26-28).

As to the situation of the phosphate-saturated grounds, research has indicated that in the areas where the livestock industry is concentrated (the eastern and southern parts of the Netherlands), 270,000 hectares are saturated, which means 60 % of all agricultural land, much more than expected. If all these areas were to fall under the strict rules for phosphate-saturated grounds, there would be a considerable extra manure surplus at the level of the farm business (*Evaluatie nota 1990*, p. 12). Therefore the Minister decided to apply the rules for phosphate-saturated areas to only 60,000 to 80,000 hectares in

1991/1992. These are the areas where the risk of phosphate leaching is greatest.

In the second phase, the standards for manure application on fodder crop land will be made stricter more rapidly, and the prohibition on spreading manure will be extended to at least five months. The Minister also announced a change of the production limits. Starting from 1995, a livestock farmer will not be allowed to produce more manure than he can spread on his own land in accordance with application rules and deliver to others like farmers, traders, utilizers of arable land and horticulture and manure processing industries. The deliveries must be substantiated by specific documents and supply contracts.

These rules force farmers to build more storage facilities, and the distribution of manure to areas with a shortage of manure must be stimulated. Moreover more attention will be paid to investments in processing facilities of animal manure and the export of the products. As noted above, the Minister considers this to be a responsibility of the livestock industry, but the response has been slow. A capacity of six million tons of manure processing at the end of 1994 will be necessary. To finance this processing industry a new levy on manure production will be introduced (*Notitie mestbeleid tweede fase*, nr. 3, p. 13-14).

Acceptance of the policy

To ascertain farmers's attitude about manure regulation, the Minister refers to research on the acceptance of the manure policy by the Dutch livestock farmer. According to this research report (Katteler & van den Tillaart, 1989), 74% of the farmers support the premises of the manure policy. About the different components of the manure legislation, there is greater diversity of opinion. Farmers support these components in the following percentages:

- phosphate standards (first phase) 83%
- incorporation into soil 76%
- manure bookkeeping 73%
- spreading manure 66%
- expansion prohibition 58%
- surplus levy 52%
- transfer of manure production 34%

Half of the livestock farmers (52%) accept the premises of the manure policy as well as the elaboration in regulations. One out of every eight farmers rejects policy and regulations totally. Among young farmers (younger than 40 years) there is more acceptance than among older ones.

On certain questions there was much diversity between the different groups of farmers. For instance, 64% of the cattle farmers think it is fair that they have to pay a levy on excess manure, 45% of the pig-farmers think so, and only 24% of the poultry farmers. The same diversity appears on whether the prohibition of expansion and new establishments is justified: 70% of the cattle farmers, 50% of the pig farmers, and 45% of the poultry farmers agree. The answer to this question also shows a regional diversity: 54% of the farmers in the concentration area think these prohibitions to be fair; in the areas without a manure surplus the support is 78%. With respect to the measures in the second phase, the perspectives are less optimistic: 64% think the mineral registration system does not make sense, about 50% do not accept the new application standards and 30% fear serious continuity problems of their livestock farm.

Government policy on nature, environment and agriculture

Manure policy is also part of the general government policy on environment, nature-conservation and agriculture. With respect to these policy-domains, three important government reports were published in 1989 and 1990, which intend to construct a broad and coherent environmental policy[16] containing specific objectives and strategies: the National Environmental Policy Plan (*Nationaal Milieubeleidsplan, NMP*) later on followed by a complementary report NMP Plus, the Nature Policy Plan (*Natuur Beleidsplan, NBP*), and the Agricultural Structure Memorandum (*Structuurnota Landbouw, SL*).

The main object of these policy reports is "sustainable development"[17], a concept adopted from the Brundtland Rapport (published in 1987), which means a development that provides for the needs of the present generation but does not endanger the possibility of supplies for future generations.

National Environment Policy Plan

In the NMP (*Nationaal Milieu Beleidsplan*) the environmental pollution is analysed as a problem that emerges from the way quantities of materials are used without regard to the quality of future production, consumption and of life in general. This issue can be discerned at various levels from the global warming effect right down to the manuring problem discussed here.

The general solution to these problems in one generation (by the year 2010) is to be attempted by decreasing the use of energy, closing substances cycles (product life-cycle management, *integraal ketenbeheer*), and adopting a more

quality-minded approach to resources. For this purpose, the government is explicitly making an appeal to the different target groups of environment policy, such as the industrial complex, traffic and transport, farmers and consumers. The clause in the constitution (art 21 Dutch Constitution) that obliges the government to keep the environment liveable is interpreted as complementing the public's responsibility (NMP, 1989, p. 123). Environmental policy cannot become reality by regulations and legislation alone; it can only succeed by cooperation and in consultation with the target groups (NMP 1989, p. 188). A proper mix of instruments like regulation, financial incentives, education, good example, and contracts (*convenanten*) should start the process of change towards sustainable development (NMP plus, 1990, p. 79). The appeal to the target groups must result in their "internalising" (*verinnerlijking*), their responsibility for the implementation of environmental policy and their willingness to translate the general goals into their specific and private concerns.

With respect to the manure problem, the target of the NMP is that by the year 2000 the balance between the use of manure and its absorbtion from the soil is restored. The emission of phosphate and nitrogen should be reduced by 70-90 % and ammonia by 30% (NMP, 1989, p. 137-139). Measures to be taken are, for instance, the expansion of the processing industry, distribution facilities for manure and the introduction of a mineral registration system (*MARS-systeem*) for phosphates, nitrogen, and potassium. But if the results of these measures should turn out to be disappointing, over the long term perhaps volume measures (a decrease in number of animals) might be considered (NMP, 1989, p. 193).

Nature Policy Plan

The NBP (*Natuur Beleidsplan*) is called a strategic project to reach the "sustainable conservation, recovery and development of nature and landscape values" (NBP, 1990, p. 33). The NBP starts with an inquiry into the current situation in the different parts of Holland and depicts the perpectives and possibilities for further nature conservation, ending with in the introduction of an "ecological structure", a chain of natural reserves all over Holland supported by physical planning. Similar to the NMP, the NBP is strongly committed to cooperation with the target groups, like (environment-minded) farmers. They are invited to contribute to conservation of nature and landscape values and to stop harmful practices. (NBP, 1990, p. 10). To stimulate this "wise use", the government is endeavouring to broaden the societal basis (*het maatschappelijk draagvlak*) of policy support and to strengthen the peoples' consciousness about nature and environment by education and financial incentives (NBP, 1990, pp. 110-115).

The agricultural Information Service should be renewed especially for farmers so that knowledge is also spread about the way to fit concern for nature into the management of the farm (NBP, 1990, p. 182).
With respect to manuring, the NBP contains, in addition to the general environmental standards formulated in the NMP, a specific area policy meant for so called "phosphate-saturated grounds" (fields that have been surcharged with phosphates or that need to be handled with special care to protect the environment). In these areas special manuring standards will be in force, and under specified circumstances the government will be prepared to buy these fields (NBP, 1990, p. 126).

Agricultural Structure Memorandum

According to the SL (*Structuurnota Landbouw*) two developments are necessary in order to obtain a "competitive, safe and sustainable agriculture": first, a more market-oriented approach to agribusiness and second, a greater conformity to general environmental requirements as formulated in the NMP (SL 1990, p. 63) in order to prevent production processes from affecting natural resources irreversibly. Both objectives demand the introduction and establishment of so called "sustainable management" (*duurzame bedrijfssytemen*), that can deal with both economic and environmental requirements. This new type of management must be achieved within ten years. This means that in this period a large-scale reduction of the emissions of chemical insecticides and herbicides, phosphates, nitrogen and ammonia must take place. In the SL the manure problem is treated from both the angle of the animal and the vegetable sectors of the agribusiness and includes both organic and artificial fertilizers (SL, 1990, p. 70). Therefore an overall policy, built on the *Notitie Mestbeleid Tweede Fase* (see page 163) is presented; this policy pays attention to the related problems of the overflow of phosphate, nitrogen and ammonia (e.g. the mineral registration system). The SL prescribes a less intensive use of the land by proclaiming a standard for the maximum number of animals grazing on one hectare. The intensive livestock industry will be forced to combat the manure problem by the development of direct recycling of the manure, as well as through storage, transport and processing (SL, 1990, p. 74). Education, information and research will be used to implement this policy, and there is optimism that "sustainable management" will work. The government presumes that farmers are prepared to invest in these new management systems as long as they have good economic prospectives (SL, 1990, p. 143).

The impact of government regulation

The manure problem and the relevant legislation illustrate a more general problem of modern (technical) western society, namely the question to what extent law can be used as a steering instrument, a tool for social change.
Since the beginning of the 1970s, when the environment became an explicit point of government concern, a totally new set of laws has been developed on the basis of which the government has entered an important new area of authorithy. Along with the Nuisance Act, these new Acts are intended to protect the air, the soil and the water against pollution and damage by dangerous materials. The new Fertilizer Act and the ministerial decrees about the application of animal manure based on the Soil Protection Act of 1987 are also part of this system of environmental legislation. This increase in legislation assumes that the government is able to guide social developments by legislation and seems to increase the "steering capacity" of the state (the possibility of the government to influence social processes in a desired direction), because the social actors are forced to behave in an particular way and alternatives for actions are diminished (Derksen, Drupsteen & Witteveen, 1989). This trend is closely linked to the post-war development of the welfare state. Thanks to progressive government concern, societal advance and a general level of welfare for all have been achieved. This has increased citizens' expectations from the state (Bovens & Witteveen, 1985).

The economic recession in the beginning of the 1980s, however, forced cuts in expenditures and curtailed the development of the welfare state. The momentum of welfare provision, the growing and (more often) disappointed expectations of the people, the increasing complexity of social problems, the growing conflicts of interests, the progression of technology, artificial intelligence and information, and the increasing emancipation of the people, all these and other things led to a reconsideration of the role and the organisation of the state (Tjeenk-Willink, 1984). Serious doubts have been raised about whether laws should be seen as instruments for "social engineering" (de Beus & van Doorn, 1984). It has been noticed that the increase in legal rules does not necessarily mean that the ability to carry through policy also increases. This is certainly true when it comes to environment policy (Derksen, Drupsteen & Witteveen, 1989). The limits of the government's "steering capacity" have become apparant.

As a reaction, the government's aspirations have become less ambitious and (in theory at least) steps have been taken to "withdraw" (De Ru, 1987). In this situation the government does not strive to act unilaterally, but shows an inclination to cooperate with social institutions and organisations that are too

influential to overlook and, unfortunately for the government's objectives, able to frustrate all government policies. Thus attention in the discussions has shifted from the state as actor with "steering capacity" to that of creating opportunities in which other bodies participate (Bovens & Witteveen, 1985).

This changed role of the government can been found in the policy project reports about nature, environment and agriculture - NMP (plus), NBP and SL, mentioned above. The government is trying to develop other instruments besides legislation, to implement its policy: these include arrangements with target groups and financial incentives (see NMP-plus, 1990, p. 79). The explicit involvement of target-groups to bring about sustainable development, the promotion of sustainable management, the emphasis on education, information and research, can all be seen as phenomena in the quest for "non-legal government influence" (steering from a distance). The government hopes to find the proper "mix of instruments", appealing to both the government and the public and suitable for the task. Government objectives are not to be achieved by force, but by the conviction of the various social actors ("internalising")[18].

Evaluation

As is shown above, so far the legal measures that have been taken to combat the manure problem have not proved very successful.

As we have seen, the legislation system of 1987 is applied to the manure produced by cattle, pigs, chickens and turkeys. Three years later, however, the Minister of Agriculture announced to extend the force of the law to ducks, rabbits, and fur-bearing animals as well because of the increase of the number of these animals (*Notitie mestbeleid tweede fase*, nr. 3, p. 8). The legislation is effectively an invitation for the breeding of manure-producing animals that were not brought under the law, so it is neccessary to readjust the system. There really seems to be persistent problem of legal loopholes. One wonders if the government did not deliberately leave open these chances of escape, with the deleterious consequences mentioned here.

Thus, although the present manure legislation can be seen as an attempt to reduce the manure production in the Netherlands, the strategy used does not really effect the desired reduction. Farmers previously producing manure intensely, after 1987 can continue to do so, all they have to do is to pay the (rather low) surplus levy. Moreover, one can always start new establishments, provided that the production limit (125 kilogram of phosphate per hectare per year) is not exceeded. As we stated above, these flexible regulations will disappear in 1995 when new legislation will limit the production of manure to a

quantity that can be spread on the land belonging to the farm or delivered to others. It is quite difficult to assess the consequences of this new system, especially whether it will reduce the production of manure. It might cause serious restrictions to production, but not prevent production up to and even above the maximum limit when new sales potentials have been found. In such a case, export would be the solution of environmental problems!

Another point is the phased implementation of the standards. Of course environmentalists have objections to postponing the final ones. They fear the expansion of manuring in the country as a whole, especially because the starting point of the legislation (see page 161: production limits) is the freezing of the 1986 situation, when there was already overproduction from a environmental point of view. The research on the acceptance of the manure policy (Katteler & van den Tillaart, 1989), however, shows that farmers also have objections against phased implementation. Farmers' acceptance of the second phase of the legislation is not very promising. Livestock farmers are worried about their future and are consequently not very willing to invest in processing and storage facilities. This actually shows the "circular" complexity of the problem and points up the legislator's dilemmas between economics and environment, agriculture and nature. While the government is hoping for technical solutions and tries to 'buy time', farmers use this time to save expenditures for storage facilities and processing industries, and environmentalists loose confidence in both the farmers and the government.

The inquiry into the phosphate-saturated grounds, makes this dilemma even greater. Even though at least 270,000 hectares are saturated, the Minister decided to apply the strict phosphate standards for these grounds to an area of no more than some 70,000 hectares. Of course this policy is incomprehensible for the conservationists, but from the perpective of the government broader application would produce such a massive increase of the 'surplus' manure, that it could not possibly be eliminated or processed by current facilities. Now that private initiatives to build manure storage facilities, a distribution system, and a manure-processing industry have lagged far behind the expectations of the government, the government seems to have abandoned its own objectives.

Another approach to the problem?

As we have described above, so far the legal measures that have been taken to combat the manure problem have not proved very succesful. The livestock industry has become a considerable economic force. Because the government

ignored the problem of the manuring in the 1970s, whatever 'mix of instruments' is chosen, the measures that the government must now take will be the more drastic because so much time has passed. Moreover, it is unlikely that the farmers will be prepared to give up their acquired position.

In this section we consider two other approaches to the manure problem, the Danish system of permits and volume measures, which mean an reduction of production and production capacity. This approach has been announced as an ultimate remedy in the NMP (see page 167) in connection with the mineral registration system (MARSsystem).

Regulation by permits

In Denmark, also a country with a manure problem, the legislative body has chosen a system of strict rules with the possibility of exemptions granted by local authorities. Besides clear standards about the minimal distances between stables and farms on the one hand and vulnerable objects (like water abstraction plants, food industries and watercourses) on the other hand, there are detailed design orders for farms, stables and manure storage facilities. Furthermore, there are strict regulations about the application of manure in the soil, expressed in livestock-units per hectare per year, and about the minimal manure storage capacity. For all these cases the local council may grant an exemption when the requirements cannot be fulfilled and the environt is harmed. Farmers who produce more manure than can be spread on land belonging to the (leased) farm, need to make a written agreement to ensure that excess manure quantities can be sold to other properties, to processing industries, or to biogas plants. The local council may lay down detailed requirements for the working of such agreements. The local authorities must also be informed of new establishment, expansion and in general changes on the farm. Control and supervision is also in the hands of the local council.

The local council in Denmark has very far-reaching powers; would that be the best solution in the Netherlands too ? In the Netherlands, regulation by permit implies an individual examination of the case in the light of comparable situations. The Dutch primary production sector is composed of a very large number (estimated at more than 90,000) of small livestock enterprises operating in a relatively autonomous way without much cooperation. It is likely that the large number of permit applicants would prevent the individual examination and hence the approval of permits. Here the problem of equal treatment in equal situations arises. Moreover, what would be the just criteria to grant or to refuse a permit? The number and types of animals, the amount of the manure surplus, the style of production, agreements about sale, processing and export

of manure, or something else?

On paper at least, a permit system is a very strict one. Everyone who has a permit has a right to act in accordance with the conditions, and without this permit certain activities are forbidden. In practice, however, a system based on paper permits inevitably spawns a bureaucracy and still may not be able to prevent people from breaking the rules. The large number of Dutch livestock farms makes implement and control especially difficult. Besides, in the Netherlands local authorities of the rural communities are often closely linked to agrarian interests. That makes it difficult for local authorities to take unpopular steps and act impartially.

Volume measures

Many environmentalists are agitating for volume-measures over the short term. This seems to be a simple solution because when the animal population is decreased, the quantity of animal manure will decrease too. On this however, a controverse exists between the Ministry of Agriculture and the Ministry of Environment. Volume measures pose many problems. In the first place what is the proper standard for reduction? Who is going to pay the bill? Here again, as in the permit system, the problem of equality arises. Is the reduction standard proportional to farm size or a flat rate for each? Will it be applied regardless of the magnitude of the livestock business, of geography, topography, soil composition and the style of production?

To develop volume measures, a completely new system of legal rules will have to be set up because the present legislation is inappropriate. The research on the acceptance of a restrictive manure policy, however, gives little cause for optimism (Katteler & van den Tillaart, 1989). As we have shown above, the issue of acceptance, of conviction and toleration of the measures, will be one of the important pillars for enlisting the supports of the target-groups that issues from the government's policy programs on nature, environment and agriculture. Volume measures, desirable though they are in the view of environmentalists, will inevitably cause tensions between the legislators and the target groups. The autonomy of Dutch farmers is not very likely to stomach subjection to regulations though necessary.

Considering the structure and the size of the livestock industry attention must be paid to the implement and control of this legislation because farmers will be forced to do something they are presumably not eager to do. Therefore, many questions still have to be answered about the feasibility of volume measures and how to prevent farmers from breaking the new rules. In addition, as volume measures would be a new phenomenon, there are risks of loopholes in

the law, unforeseen and unexpected side effects, and inequalities due to individual evasion of regulations. Conflicts of interests connected with the manure problem are likely to increase when the legal standards become more restrictive. The distinct pleas from the social actors involved (farmers, the livestock industry, environmental protectors, policemen as controllers) with respect to economic development of the livestock industry, protection of nature and environment, legal security (*rechtszekerheid*), and efficiency of the government rules, are obviously not going to culminate in consensus.

Conclusion

In this article we considered manure as a legal problem. We showed that the current manure legislation is based on a government policy of freezing the 1986 situation, in the hope that within some years a final (technical) solution, such as an economically strong manure processing industry, will be found.

Notwithstanding a general withdrawal of government from direct regulation in past decade, this is not the case for environmental problems, especially the manuring problem. In the eyes of the government, the environmental problem is too serious, and perhaps the public too uninformed, to stand aloof. We showed that until now manure legislation has not been very successful. We found that the difficulty in solving the manure problem (see page 162-165) seems to be a result of both the complexity of the problem and of the limits to government intervention (see page 164-165).

It is unclear how far new legislation can resolve the problem. A permit system and volume measures, two options that have not been part of the regulations up till now, were discussed. We acknowlegded both the complexity of the manure problem and the impacts of government intervention. Besides, as we showed earlier, the structure and the size of the Dutch livestock industry is likely to become an obstacle for restrictive government policies, in spite of the government's attempts to create a social basis of policy support and a proper mix of legal and non-legal instruments to solve the problems.

The manure problem reflects a permanent strain between necessity and possibility, between policy and morality, between efficacy and public equality. Taking into account the complexity of the problem and aspects of implementation, maintenance and controlability, we conclude that the expectations of a solution of the manuring problem by legal instruments should not be too high.

Notes

1) Hinderwet, Stb.1952, 274, reprinted in Schuurman & Jordens 1988, p. 30.
2) Hinderbesluit, 30 januari 1953, Stb.1953, 36.
3) Tweede Kamer, vergaderjaar, 1983-1984, 18271, nrs 1-3.
4) Tweede Kamer, vergaderjaar 1980-1981, 16529, nrs 1-3.
5) Interimwet beperking varkens en pluimveehouderijen, wet van 10 januari 1985, Stb. 1, reprinted in Schuurmans & Jordens 1986: 78 S.
6) Wet Bodembescherming (Stb.1986, 374), reprinted in Schuurman & Jordens 1986, 147 - VIb.
7) Meststoffenwet (Stb.1986, 592) reprinted in Schuurman & Jordens 1987, 191.
8) Regeling aanwijzing diersoorten en hun mestproduktie (Stcrt. 1986, 246), reprinted in Schuurman & Jordens 1987, 191, pp. 84-98.
9) Amendment to Regeling aanwijzing diersoorten en hun mestproductie (Stcrt. 1989, 253).
10) Besluit gebruik dierlijke meststoffen (Stb.1987, 114), reprinted in Schuurman & Jordens 1987, 191, pp. 159-166.
11) See Besluit gebruik dierlijke meststoffen d.d. 21 december 1989 (Stbl. 1990, 99): arts 2 and 3.
12) Meststoffenwet art 6; Registratiebesluit dierlijke meststoffen (Stb. 1986, 625), reprinted in Schuurman & Jordens 1987, 191, pp. 100-109, and Besluit Mestbank en Mestboekhouding (Stb.1987, 170) reprinted in Schuurman & Jordens 1987, 191, pp. 111-122.
13) Mineralen Aanvoer en Registratie Systeem.
14) Verplaatsingsbesluit Meststoffenwet (Stb. 1987, 171), reprinted in Schuurman & Jordens 1987, 191, pp. 125-135.
15) The Superlevy is a very high levy based on the milk-quota system that is introduced by the European Community in 1984 to discourage the extreme production of milk.
16) On the question whether the government succeeded, see N. Nelissen, *Nationaal Milieubeleidsplan en Natuurbeleidsplan: een twee-eenheid?, Milieu en Recht*, 1989/7-8.
17) In the NMP the main purpose is called "the maintenance of the carrying capacity of the environment on behalf of a sustainable development". The target of the NBP says "sustainable conservation, recovery and development of natural and landscape values". And the SL contains the aim of a "competitive, safe and sustainable agriculture".
18) In this context the attention is drawn to the necessity of so- called consequences analyses by management science. See C.B.F. Kuijpers and P. Glasbergen in *Bestuurswetenschappen* 1987, nr.1 en P. Glasbergen and C. Dieperink in *Milieu en Recht* 1989/7-8.

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NATURE AND LANDSCAPE CONSERVATION AS A BRANCH OF AGRICULTURAL INDUSTRY; A SECOND LIFE FOR THE DUTCH LAND LEASE ACT?

H.C.A. Walda

Introduction

Deeper understanding of the place of agricultural enterprise in rural areas, as well as agricultures increasing productivity due to technological progress, are leading to a reconceptualization of agriculture. From the mid sixties, there has been an increasing awareness that unlike traditional agriculture, modern agriculture, constitutes a threat to the preservation of nature and landscape. Policymakers are currently developing concepts that intend to re-establish a balance between agricultural enterprise and preservation together with the restoration of nature reserves and scenic areas. As a result of both public policy and private initiative, a kind of development has been initiated that attempts to use areas regarded as especially valuable, in a way that neutralises the effects of modern agriculture. The opinion that agriculture must once again perform an essential role in the preservation of certain cultivated landscapes is gradually gaining recognition. Involving farmers in the management of these areas has two consequences. On the one hand it is a method of attaining management objectives in the areas in question by using the farmers' know-how; on the other hand it can generate income in agriculture. After all, it is becoming more and more evident that what we should understand by agriculture includes the management of rural areas. In the past, their management was a natural consequence of agricultural production. Nowadays it is necessary to make explicit commitments on this subject, and even to offer financial compensation.

At present, there are two systems of rural management. In areas determined in the *Relatienota*[1)] (Policy Document on Agriculture and Nature Conservation), farmers can enter into a management agreement. A management agreement is a contract between a farmer and the government that lays down the terms to be observed by the farmer. It specifies the farmer's obligations in the interest of nature and landscape conservation and the compensation that will be paid by the government. For these legal provisions it is irrelevant whether the contracting proprietor is owner or lessee of the land. This paid nature-management increasingly constitutes a second branch of agriculture. For example, in *Relatienota* areas the income drawn from management agreements

compensates for the declining profits of dairy farming caused by the introduction of the super levy[2]. Because this provision entails great government expense, it is restricted to areas where nature is most threatened.

In the second system of rural management, nature protection organisations strive to acquire land in order to offset exploitation. The aim of these organisations is conservation and, where appropriate, the development of natural and scenic beauty on the terrains purchased. Basically, there are two ways to achieve the desired management. Firstly, nature protection organisations can manage the terrains themselves. The problem with this is that private management is very expensive. Consequently, it is often preferable to involve farmers in nature management. When farmers are called in, nature protection organisations are faced with the difficulty that the Land Lease Act does not include an explicit reference to nature management as a component of agricultural management. At the time the Land Lease Act became operative, traditional agricultural production was adopted as the main option. The implicit effects of traditional agricultural production on nature and landscape were not taken into consideration. As a result of this, introducing nature management clauses in farming lease contracts is problematic. The aims of the Land Lease Act are bipartite: it protects the economically weaker lessee against the economically dominant lessor, and it protects the general interests of agriculture. To guarantee these aims land lease contracts need approval by an administrative body: the *Grondkamer* (Land Control Board). Because the protection of nature and landscape is not an aim of the Land Lease Act and clauses focusing on that item will easily be in conflict with the protection of the lessee and with the protection of the general interests of agriculture, the Land Control Board suspends nature management clauses in most cases. The Land Lease Act rule ordering the examination of the lease contracts in the matter of excessive clauses, is intended to guard against "*Kennelijke excessen*"[3] (apparent excesses). Although management clauses are not intended to frustrate agricultural activity but rather to regulate it, and although management goals, in accordance with advancing social development, are increasingly a matter of public interest, Land Control Boards must nevertheless adhere to the definition of agriculture as laid down in the Land Lease Act.

This definition does not include management with the purpose to conserve or restore natural resources and landscape. As things are, nature conservation organisations select candidate lessees who are willing to produce in a way that is in accordance with their aims. As a result of this, lessee and lessor concur on the desired nature management. However, this has no bearing on the examination by the Land Control Boards, not even when a lessee's only possibility for profitable exploitation is by accepting management conditions in

exchange for an allowance or a reduction in rent. At present, Dutch parliament is discussing a bill to revise the Land Lease Act to make it possible in certain cases to introduce nature management obligations in the lease contract.

The present paper outlines the existing possibilities to introduce management clauses in the land lease contract. Furthermore, the proposition to revise the Land Lease Act will be discussed. Before this, a short summary will be given of agricultural development in the past decades, and of policy initiatives resulting from an increasing awareness of the value of environment, nature and landscape. Finally I will draw some conclusions.

The development of agriculture in The Netherlands

Before the introduction of fertilizers at the end of the nineteenth century, farmers produced manure by grazing sheep on the moors during the day, and gathering the manure at night by rounding up the sheep in the stable. When fertilizers became available, the moors were no longer needed for the production of manure, and, like the greater part of the waste land, they were converted into farming land in the long run. After the Second World War, economic activity expanded dramatically. Because especially in the fifties and the sixties the public's real income grew rapidly, agriculture was confronted with increasing costs of labour. As a result of this, it became necessary to develop labour-saving and productivity increasing techniques to keep pace with the income development outside agriculture. The movement towards increasing labour productivity has led to considerable mechanization since the fifties. The parcels to be cultivated were adapted to the use of more and larger machines. These adaptations consisted not only of enlarging and land consolidation, but also of drainage of wetlands. In cattle farming especially, complete farms were moved to regions characterized by their "openness". Concurrently with the mechanization, the use of the land intensified, especially throuhg the increased use of non-factor inputs such as fertilizers, concentrates and pesticides. The growing capital-intensivity of agricultural industry and the availability of non-factor inputs led to a marked specialisation and, consequently, to expansion. The separation of arable farming, cattle farming and horticulture led to an increase in the amount of animals on every farm, to a growth of the average land size, and to an extension of the surface area of every farm.

Land development, called *ruilverkaveling*, laid down in a new *Ruilverkavelingswet*[4] of 1954[5], intended to meet the demands that modern agriculture makes by reinforcing the structure of the farm. This was also intended to reduce the income deficits of the farmers, and the competitive position on the

international market was to be improved. Clause 2 of the law stipulates that land consolidation is meant to promote the interests of horticulture, silviculture, arable farming and cattle farming. At present, regional concentration is taking place: entire regions and even districts are concentrating on a single branch of farming. Although this process is well under way, a number of concentrated areas can be pointed to. The best-known example is probably the complex of greenhouses in the Westland (the Glass City). In addition to this, intensive pig farming is gradually being concentrated on the sandy soils of Brabant, in the Gelderse Vallei, and in the Achterhoek.. Dairy production mainly takes place in Friesland and in the rivers area. Labour-intensive branches of farming or branches with relatively low profits per hectare, such as pomology and arable farming, are losing ground.

All these developments were encouraged by the agricultural policy of the EC. Ever since the EC was founded, agriculture has been its most important area of policy. The system of intervention prices has continually guaranteed producers of the sale of their production against relatively high minimum prices. Although the intervention prices were primarily intended to stabilize the markets, they are also a means of guaranteeing a reasonable standard of living for the farming population. To prevent small-scale farmers having their standard of living greatly undermined, the controlled prices were fixed at such a level that exploitaton possibilities are just barely profitable in regions of lower productivity.

As a result of these technological developments and favourable rules, combined with a policy aimed at the emancipation of the rural population, a very successful development has taken place from a socio-economic point of view. That this development has its drawbacks, especially for environment, nature and landscape, has gradually become more apparent during the last decades. In the next paragraph, the external effects of modern agriculture on the area of nature and landscape will be dealt with.

The development of the awareness of the value of environment, nature and landscape

Small-scale agriculture and horticulture, as practised in the Netherlands until around the beginning of the sixties, is not considered harmful to nature and landscape. On the contrary; of the total surface area of cultivated land in the Netherlands of approximally 2,000,000 hectares, 700,000[6] hectare is regarded as a lovely and valuable cultivated landscape, and this is in large part the result of agricultural activities in the past. The abovementioned development towards

mechanized and intensified agriculture and the decrease of fully cultivated land has allowed the farmers to become less dependent for the management of their farms on specific environmental factors that had previously determined the use of the land and gave the area its unique character. Modern cultivating and building techniques have not only led to an impoverishment of nature and landscape, but also to an attack on the quality of soil, water and air. Agriculture as a form of land utilization can perform a number of functions simultaneously. Until the beginning of the sixties, there was a complementarity of, among other things the production function, the ecological function and the cultural function. In the last decades these functions have more and more come to compete with each other. The introduction of fertilizer has not only caused moors and waste lands to be converted in agricultural or silvicultural areas, it has also transformed poor meadows into intensively utilized meadows with an abundance of food. In the first decades of the 20th century this led to enormous ecological diversity. Later, this diversity gradually decreased because of displacement: ecosystems with shortage of food, such as moors and bluegrass grounds made way for ecosystems with abundance of food or were marginalized. This process was reinforced by the use of other non-factor inputs such as concentrates and pesticides. Mechanization and the consequential enlargement of the average parcel resulted in the gradual disappearance of specific landscape characteristics: ditches were filled in, wooded banks were cleared away and consolidation became more straightforward. Lowering of the groundwater level led to a decrease in ecological diversity. There have always been intensively manured plots, and dry plots are not new either, but next to these there were also many lightly manured grounds or grounds that were defertilized, as well as moist and very moist plots. These days, virtually the entire area is heavily manured and deeply drained. This has caused a high degree of standardization and levelling out in the degree of fertilization, the degree of moisture, the intensity of pasturing, plot size and shape and the fotography of the landscape. Among others the increasing use of chemical pesticides caused a spectacular decline in the stock of birds of prey in the sixties.

Government policy

Simultaneously with the development of modern agriculture the call for peace and free spaces in the countryside increased. Next to this, an increasing interest in the developments in the rural area arose, and there was a growing awareness that razing the historical cultural heritage had to be halted. This was laid down for the first time in the *Oriënteringsnota*[7] (the first part of the

Third Policy Document on Physical Planning: the Orientation Report) . This document formulates the aim of government policy as follows: to protect nature reserves and scenic areas and to develop the landscape in such a way that its flora and fauna are safeguarded, as are its cultural-historical meaning, its natural quality and its visual attraction. As a starting point a balance was chosen between the various actvities that take place within the rural area or are served by it. Although the contribution of agricultural development to the destruction of the historically man-made landscape is hardly in doubt, it is assumed that specific agricultural management is a priority for the preservation of what remains of it. For this purpose, the Orientation Report introduces the model of separation or interrelation of functions. Separation is used when the functions cannot be reconciled, and interrelation is used when the various functions can be intermeshed in a balanced relation[8].

To operationalise the separation-interrelation model, the rural area is divided into areas with either agriculture or nature as their main function, and areas where agriculture, nature, and other functions go together. The *Relatie-nota* contains the general starting-points for the policy for areas that are of special natural interest[9]. The Report proposes, among other things, an arrangement enabling farmers to enter into management agreements with the government on a voluntary basis. The agreements are supposed to make it possible to continue agriculture in depressed areas in such a manner that local natural and landscape values are kept intact. The maintenance of certain specific natural and landscape elements and the inclusion of or concentration on nature and landscape in the management of the farm, is properly rewarded. This arrangement was adopted as the *Beschikking beheersovereenkomsten 1977* (decree on management Agreements 1977). This decree was adapted in 1983 and has now been superseded by the *Regeling beheersovereenkomsten* 1988[10][11]. The Relatienota policy is executed in stages. In the first stage, approx. 100,000 hectare were selected. The introduction of the second stage, another 100,000 hectares, has been announced in the *Natuurbeleidsplan*[12] (Nature Policy Plan), and is now in force.

In the first half of the sixties a discussion was also initiated on the replacement of the *Ruilverkavelingswet* by a new regulation which, unlike the *Ruilverkavelingswet*, would include, besides the interests of agriculture, horti-culture and silviculture, the improvement of the rural area in terms of nature and landscape, infrastructure, outdoor recreation and cultural history. The *Landinrichtingswet*[13] (Land Development Act) came into operation in 1985. The law provides four different forms of land development, two of which are *herinrichting* (redevelopment) and *ruilverkaveling*[14] (reparcellation). Areas suitable for redevelopment are those which perform, or will have to perform,

apart from an agricultural function, also a considerable non-agricultural function. Those areas which mainly perform, or will have to perform, an agricultural, and few non-agricultural functions, will be taken into account for reparcellation. This new instrument, which extends its objective beyond mere redistribution, offers better possibilities to react to the developments that present themselves or are required in the rural areas.

Management obligations in the land lease contract

In those areas not selected within the framework of the aforementioned *Relatienota*-policy, owners can protect the environment either by taking the initiative themselves or by leasing terrains where the lessee is obliged to manage the land in a way conducive to this objectives. In the private sector, especially where nature conservation organizations manage the terrains stipulations aimed at the protection of nature and landscape are included in lease contracts. For the proper pursuit of their aims, these organizations depend on the Land Control Board's assessment of the secundary restrictions agreed on at the execution of the Land Lease Act. In this respect problems may arise out of the Land Control Boards' ability to reject certain restrictions as excessive, even when lessor and lessee register no objections to them. For a clear understanding of this issue, the system of the Land Lease Act will be discussed. But first, a few figures will be given to illustrate the significance of the Land Lease Act.

Landlease

Of the land in agricultural use, approximately 61 % is owned by the farmer, 3 % is held in longleases, and less than 1 % in usufruct[15]. The remaining 35 % of the land is leased. The importance of landlease is greater than is suggested by these numbers, because of the total number of farms (approximately 130,000), approximately 54 % is entirely or partially leased. So the majority of the farmers are lessees.

This lease is a contract exclusively created for agriculture: *pacht* (agricultural lease) is only possible when the land is used for agricultural purposes. A consequence of the Land Lease Act system is that if a piece of land is given in use for agricultural purposes, no legal arrangements other than according to the Land Lease Act are allowed. Agricultural lease is a personal right. The acreage under agricultural lease is declining: in 1970, 48 % of the land in agricultural use was leased.

Agricultural lease act

Landlease is regulated by the 1958 Agricultural Lease Act[16]. The Agricultural Lease Act aims at the protection of the weaker position of the lessee and the protection of the general interests of agriculture. To achieve these aims, the Land Lease Act has a mixed private and public law character. The public law aspect is evident in the involvement of the state in the agricultural lease contract. These contracts must be approved by an administrative body: the *Grondkamer* (Land Control Board). There is one in each of the twelve provinces in the Netherlands. Decisions of the Land Control Boards can be brought to appeal to the *Centrale Grondkamer* (Central Land Control Board). The Land Control Boards examine, among other things, whether the contracted rent is in accordance with the maximum rent allowed as decreed by the Act[17] and whether the other obligations of the lessee laid down in the agreement are considered excessive. The Land Control Board can approve, change or nullify the lease contract. A modification of the contract may concern the rent or other obligations of the lessee. Nullification is only allowed when there are no possibilities of changing the contract in such a way that it is in accordance with the law. Especially with regard to the present issue, investigation of the lessee's other obligations is important. A lease contract will not be approved when it creates obligations for the lessee that are considered excessive[18]. It does not matter whether lessee and lessor have reached an agreement on this or not. The law stipulates that excessive conditions be abolished. Exactly what is excessive, is left to the Land Control Boards. Because Land Control Boards are administrative bodies with a great deal of autonomy, it is possible for the Land Control Board in one province to approve a lease contract which would be rejected in another. If both lessor and lessee are satisfied with the approval of the Land Control Board neither will go into appeal. So a certain amount of legal inequality is possible depending on the province where the leased land is situated.

Land Control Boards must be distinguished from the law courts. Agricultural lease law has its own law courts in two institutions: the *pachtkamers* (tenancy tribunals), one in every cantonal court, and one instance for appeal: *gerechtshof* (the tenancy tribunal of the Court of Appeal) at Arnhem.

The legal definition of the agricultural lease contract is every contract in any form and under any name in which one party accepts to provide the other party, in return for a compensation, the use of land or a farm, for agricultural purposes. It follows from the Land Lease Act and from jurisprudence that by "all agricultural activities" is meant those that lead to agricultural production in the traditional sense[19].

A lease of a farm has a legal duration of twelve years; a lease of land without farm buidings has a legal duration of six years. A six-year extension follows de jure, unless one of the contracting parties informs the other within a certain period before the termination of the contract, that it does not want the extension. In case of a non-renewal notice, the lessee can request the tenancy tribunal to extend the contract anyway. The tenancy tribunal decides on the request in accordance with the principles of equity, provided that the Agricultural Lease Act makes no exception. The Act makes the following exceptions: refusal of renewal is obligatory when (i) the lessee has seriously neglected his obligations, (ii) the lessor wants to use the leased object for purposes other than agriculture in accordance with the common interest, (iii) the lessor or his spouse wants to use the leased object personally for an agricultural purpose. However, the latter case is again decided according to equity principles when refusal of renewal would seriously endanger the social position of the lessee, and personal use is not of overriding importance for the lessor, or those who derive their rights from him. When the interest of both lessee and lessor are deemed to be of equal importance, extension is refused. It is possible to enter into a short-term lease contract, but for this special permission of the Land Control Board is required. If the Land Control Board has approved a term of one year or less, the contract cannot be extended. In all other cases it is obvious that a lease contract has in fact a minimum duration of the active life of the lessee.

If the lessor wants to sell the leased object, he must first offer it to the lessee. If both parties cannot agree on a price, the lessor can ask the Land Control Board to value the object of the lease. The Land Control Board must base its valuation on the leased status of the object. As a result of the rather low maximum rents prescribed by the government, and the far-reaching protection of the lessee, the value of an object in leased condition is about 55 % of its value in non-leased condition.

In short, the Land Lease Act closely controls a lease contract. The authority of the Land Control Boards can thoroughly interfere with the parties' intentions. The definition of lease makes it almost impossible to give land for agricultural use on the basis of personal right without calling it lease.

Excessive conditions

For the first time in 1964, the Central Land Control Board laid down conditions in an enactment with which a management clause could be justified[20]: management conditions are required in the general interest of nature protection and scenic interest, and they must be taken into account at the agreement

on the rent[21]. Later enactments show that the lessee must remain free to choose the way in which he wants to manage his farm.

From the beginning of the eighties onwards there has been an increase in the amount of lease contracts that contain clauses protecting nature and scenery. Often, these contracts contain a clause that offers the possibility of compensating the lessee if he is unreasonably restricted in the use of the leased object. In the majority of the cases, the Land Control Boards take a lenient position[22]. This leaves some uncertainty about whether the restricted use of the rented land as a result of the special conditions is taken into account at the fixing of the rent. A possible cause for this incertainty is that it is generally very difficult to determine whether and to what extent a management condition has negative economic consequences for the lessee. Mostly, other circumstances can be pointed to that influence the rent, such as the groundwater level or land distribution.

The most far-reaching condition that has been approved[23] is undoubtedly the obligation of ecological management, as described in the standards for ecological agriculture of the Central Ekomerk Foundation (SEC) at Hattem[24]. The inclusion of this condition is not accompanied by a reduction in the maximum rent allowed. It is remarkable that this condition caused the introduction of certain obligations into the lease contract already stipulated. Part of the standards for ecological agriculture is the brand holder's (SEC) right to make additional conditions for each farm[25]. Surprisingly, these standards interfere with the independent attendance of the farm by the lessee. Only the Guelders Land Control Board has been confronted with this condition so far. Because it was approved by that regional board the opinion of the Central Land Control Board was not required.

Because management conditions for leasing are a conditio sine qua non for nature preservation organizations, these organizations have begun to requesting approval for one-year leases in such cases where it was obvious beforehand that the desired conditions would not be accepted. The intention is that the lessee carries out the desired management in spite of the fact that it is not included in the lease contract, on pain of loosing the lease the following year. In practice this always works, because there is an increasing willingness from the side of the lessee to accept restrictions that are determined entirely voluntarily. It is, however, in the interest of the abovementioned organizations to lease on a long-term basis with a view to the continuity of the desired management. Continuity is not assured with lease contracts of one year at a time.

Taking obstructions to agricultural management into account at the determination of the maximum rent allowed has in the meantime led to a number of requests by lessees to the Land Control Board to lower the rent if

exploitation is prejudiced because the land leased is located in or near a natural reserve. In none of these cases the Land Control Board lowered the rent[26].

Nature management; a branch of agricultural industry?

Policy plans

In recently published policy documents, showing the policy intentions of the various departments of the Central Government, attempts are made to add weight to the interests of nature and the environment. Hesitantly, aims are being formulated that tend toward greater involvement of farmers in nature conservation, connecting this policy more and more to agricultural income.

The *Nationaal Milieubeleidsplan*[27] (National Environmental Policy Plan) concludes that compensation for the use of the environment is usually lacking, which must therefore be introduced for the sake of environmental protection. Efforts must be made to improve the management of farms, to achieve ecologically sound production. Agriculture is expected to develop "incentives" that motivate the farmers' initiative in solving environmental problems.

The *Natuurbeleidsplan*[28] (Nature Conservation Policy Plan), introducing ecological determinants, points at possibilities in certain rural sectors to pursue a policy aimed at the interrelation of nature and landscape with agricultural management. Extensivaton of agricultural land utilization offers perspectives for nature and landscape. For the preservation and management of crucial areas, attention is not only being paid to the use of certain instruments in the area of environmental planning, but also to financial aid for the management of nature reserves, forests and rural estates, and for landscape maintenance. Such notions as "linking along", "public-private cooperation" and "nature sponsoring" are attempts to broaden the basis of nature and landscape policy. It is recognized that nature management and landscape maintenance contribute to the income formation of farmers. It is appreciated that while placing special value on nature and landscape, agriculture in agrarian man-made landscapes must have sufficient economic potential.

In the *Structuurnota Landbouw*[29] (Memorandum on the Future Structure of Agriculture) it is assumed that there is a possibility for nature and landscape management to be coordinated with agricultural management and for investments aimed at the preservation of natural values to be extended. After all, agriculture and horticulture are, apart from users of the rural area, also the main managers of "green" spaces. In some cases agriculture and nature

will be interrelated on the plots themselves, to preserve certain ecosystems, especially those which require a certain amount and a certain type of human cultivation, i.e. human influence, like poor grass lands and pasture areas of ornothological interest. In such situations there is a choice between management entirely by professional conservationists or making a place for the farmers in such a program.

The production of nature ?

The above-mentioned quotations show that there are various concepts to connect the interests of nature and landscape preservation to the interests of farmers. The conservation of soil fertility, clean water and unpolluted air are indisputably immediate agricultural interests. It goes without saying that the agricultural producer must pay at least a part of the costs of such care; after all, the preservation of his means of production and raw produce is at stake. Moreover, a healthy environment and the preservation of nature and the landscape are public interests. It is obvious that the farmer must not be charged with the costs that must be made to achieve this aim but exceed those of straightforward stewardship, for this is an interest which reaches beyond that of the sector in question. More generally, it is accepted that the farmers in particular must perform a role in nature management. Although there is no mention of nature as a product of agricultural activity, it is obvious that financial incentives are sought to protect nature and landscape preservation. Furthermore, preservation involves a saving in costs, according to an investigation[30] in *Relatienota*-areas proving that management conducted by farmers in a system of adapted management is financially more attractive than management by nature preservation organizations or by the government itself.

Lease managements agreements

To take advantage of the move towards the notion of paying for nature management, an amendment to the Land Lease Act is in preparation which intends to eliminate a number of the impediments to the connection of agriculture and nature management resulting from the Land Lease Act, as described in chapter 4. On June 30th 1988 a bill was put forward in the Parliament, which is still in discussion, proposing an amendment to, among other things, the Land Lease Act[31]. This amendment to the Land Lease Act must make it possible to involve farmers, via a lease, with the management of areas vulnerable from the viewpoint of nature and landscape protection. It is also intended to

improve the possibilities of involving farmers in the management of nature reserves, according to the explanatory memorandum[32]. The aim of the management is to create the possibility of inclusion of such conditions in the lease contract in a way that they can no longer be called excessive, provided that they comply with the requirements. Those conditions can be included in lease contracts if the leased land is classified as one of the two types of area introduced in the amendment: *gevoelige gebieden* (vulnerable areas) and *reservaten* (nature reserves). In vulnerable areas it is possible to continue agriculture, in nature reserves agriculture is placed second to nature conservation.

Vulnerable areas

In this context, the following conditions must be met[33]:

1. the lease contract must concern a farm or land situated in a *(vulnerable) area* assigned by the minister at the request of the owner;
2. the obligations must be essential for the preservation or development of the values located on the land that are important from the point of view of natural beauty or on account of their scientific significance;
3. the obligations must be in harmony with agricultural management, and
4. in the lease contract, an allowance must be agreed on for the fulfilling of the obligations.

It is up to the owner to request the minister to assign a vulnerable area. The minister designates a certain area, having approched an authority appointed through a general administrative measure. The designation is announced in the *Staatscourant*.

The Land Control Boards are assigned an important role: in lease contracts in vulnerable areas, the Land Control Board will have to continue deeming as excessive not only those obligations which are not in harmony with the agricultural management, but also those which are not essential for the preservation or development of land with intrinsic natural beauty or scientific value. As a result of the conditions that must be met, the latter evaluation presupposes completely new expertise for the Land Control Boards.

Nature reserves

The conditions for these are:

1. the lease contract, concerning a farm or land, must refer to plots acquired by private nature preservation organizations managing territory, assigned by the government or by Royal decree, and be situated in a *nature reserve*;

2. the obligations must be connected with the preservation or development of the values located on the land that are important from the point of view of natural beauty or on account of their scientific value;
3. the obligations must be aimed at the organization and management of nature and landscape preservation, and
4. an allowance for fulfilling of obligations must be agreed on in the lease.

These conditions form a part of a 3rd paragraph which is to be included in chapter II of the Land Lease Act: Special terms with reference to leases within nature reserves.

Nature reserves are areas where the ownership of agricultural land is acquired by the government or by appointed nature preservation organizations managing terrain, in which the management is primarily aimed at the preservation i.e. the development of nature and landscape, according to the definition of the *Relatienota*.

If these conditions are satisfied, an adapted lease system will come into force. This departs from existing lease law, in that the standard extension rules, as well as the rules referring to the subrogation and election of a joint lessee, and clauses which regulate the consequences of the decease of lessee or lessor, do not apply. They are replaced by the possibility for parties to reject the extension by notifying the opposite party that they do not want the extension, or do not want it under the same conditions. The Land Control Board can revise the clauses of the contract if this is advisable for the preservation or development of the existing natural values.

Allowance

With regard to vulnerable areas as well as nature reserves, the obligations of preservation or development of natural values do not qualify as excessive. However in that case an allowance is necessary because without an allowance those obligations are considered as excessive. For determining the highest permissible allowance, further rules will be announced by a general administrative measure. However, the compensation cannot exceed the rent, as included in a lease contract approved by the Land Control Board. The reason for this is that an allowance which exceeds the rent will result in a negative rent. A negative rent does not allow for reciprocation, and thereby no longer complies with the definition of a lease contract as laid down in clause 1 of the Land Lease Act. For those cases where it is impossible to manage a farm without granting an allowance equal to or higher than the agreed rent, the explanatory memorandum refers to other agreements, such as the loan contract

for the land in question or a contract on the carrying out of services.

Conclusion

Dutch agriculture has reached a turning-point. At present, the emphasis is being placed on those functions of the rural area which have received little or no attention before. In the past, in traditional agriculture, the farmers managed nature. Management was an automatic consequence of production. The cost price of agricultural products included an allowance for nature management, without anybody being aware of this. Technological developments has changed production methods and nature management, which was previously incidental to agriculture, now disappeared altogether. Moreover, the prices of agricultural production have been determined centrally by the EC. This price regulation pays no attention to the "managerial element". The emancipation of nature management, and its evaluation as public good and as a duty of the government, is accompanied by new problems. Although policy documents show recognition of the necessity to develop a methodology to reconnect nature preservation with agriculture, a price for the production of nature as a new phenomenon is reduced to mere price-fixing. There will be no restoration of traditional agriculture insofar as the price for nature management is not discounted in the determination of the price of agricultural production, but a separate allowance is granted by the government or, if lands are rented by the farmers to nature protection organizations, for the costs of such management. This proves that a definition of agriculture which includes the management of the rural area is not chosen as a starting-point. This is the context in which the discussed amendment for the Land Lease Act must be seen. Because nature management is explicitly not defined as belonging to the agricultural actions, conditions in the lease contract aimed at nature management still are considered excessive when they form an impediment to agricultural activity.

The government presents a solution which removes the barriers to management conditions in lease contracts if certain strict stipulations are fulfilled, taking as a starting-point that (paid) nature management is only marginally possible.

The application of practice of important guarantees for the lessee on nature reserves is accordingly justified by pointing to the objective of the new rules: " to stimulate farmers to take up the management of a number of hectares apart from their own farm". This is not a question of restricting the existing management, but of a farmer in a nature reserve leasing a few extra hectares. " ... the allowance the farmer gets for adapted management he execu-

tes on extra ground, which did not belong to his farm before, (will) be of negligable influence on the income position of the farmer in question."[34] This argumentation ignores the fact that the disposal of extra parcels, apart from the management obligations, can be of great importance for the exploitation of the farm despite of nature managements obligations, and therefore protection of the lessee is necessary. These extra parcels could be parcels forming a connecting strip or parcels used for extensive grazing of cattle, etc. Furthermore, the *Meststoffenwet* (Fertilizer Act) links changes in the surface area belonging to the farm with regard to the allowed manure production[35]. The same can be valid for the Super Levy Decree with regard to the milk quota[36].

In the system proposed by the government, nature management conditions in the lease contract are not considered as *"buitensporig"* (excessive) providing the lessee in return to that obligations recieves an allowance. In the opinion of the government the maximum level of a nature management allowance must be limited to an amount that is just below the rent. This is because where the allowance is equal to the rent or even higher, the contract is no longer under Land Lease Act legislation. According to the Land Lease Act a rent is essential. If there is no obligation in a contract for the "lessee" to pay a rent, then legally there can be no land lease contract. As a result the lessee is not protected by the Land Lease Act. The lack of protection which the Land Lease Act offers in such cases is justified by the statement "that the use of grounds in reserves and vulnerable areas, especially those with operation restrictions, is generally not of overriding importance in agricultural management". That the use of these grounds can certainly be of overriding importance has just been pointed out. Regarding the governments argument, in my opinion yet another comment can be made. Maximizing the management compensation to the rent level, with reference to claims on lessee protection, leads to a reduction in continuity of agriculture as nature management plays a more substantial part in overall management. As soon as the benefits of nature management rise above the costs of land use, the lessee's usual guarantees are eliminated because the Land Lease Act is no longer valid. In my opinion two calculations must be made in order to judge whether there exists a land lease contract or not. In the first calculation an estimation must be made of the real costs of operation restrictions and management activities, including labour costs, write-off's of material, etc., as a result of the nature management obligations agreed upon. Only where the management allowance exceeds the real costs of those restrictions and acitivities must another calculation be made: that part of the allowance that exceeds the costs has to be deducted fron the rent. Only if the surplus part of the nature management allowance is equal to or higher than

the rent is the Land Lease Act nullified. Thus a negative rent is unlikely. When management conditions are no longer considered excessive, the Land Lease Act will only be an obstacle to the farmer if no adjustment is made for foregone productive land use.

The possibility now offered by the legislator to provisionally stop regarding management conditions as excessive, is only a partial solution. The starting-point for the proposed regulation is not to threat nature management as full agricultural management, but as an inconvenient though necessary curtailment of the farmers' freedom of exploitation. The management allowance is a compensation for the enforced restriction, and not a reward for the enhancement of nature and landscape.

The lessee's freedom of decision to practise management as a second branch of work is greatly restricted in the proposed system. In "vulnerable areas" assignment by the minister is required, whereas the criteria for this assignment are not clear. The condition that the management should be in agreement with the agricultural management is investigated by the Land Control Board, rendering the lessee's opinion irrelevant. Because the allowance may not be equal to or higher than the rent, only a relatively small management effort is possible. If both parties agree on a higher allowance nevertheless, the contract is no longer under Land Lease Act legislation. As a consequence, the lessee is no longer assured of the continuity of the land use and the lessor risks the interruption of a management program already started. For reserves, the above holds in an even greater extent. Because the aim of the management should be to direct structure and management towards preservation of nature and landscape, only those lessees are considered whose farms do not also include a considerable second branch of activity. Even when the allowance does not equal or exceed the rent, an adapted lease regime is valid, with the result that the protection of the lessees is severely affected, which seriously endangers continuity.

Another effect of the proposed regulation can be that Land Control Boards stop accepting management conditions altogether apart from vulnerable areas and reserves. The consequence will be that the prevailing practice of management according to conditions in standard lease contracts uncompensated by an allowance will be abandoned. This could cause a marked rise in costs for nature preservation organizations managing terrains.

As a result of the above incentives for farmers to manage their farms in a way that meets with the societal demands concerning nature conservation and landscape restoration, vary according to whetter the farmer is owner or lessee of the land. Because the definition in the Land Lease Act does not include nature preservation; the lessee is obliged in his contractual relationship with

the lessor to cultivate the leased land in accordance with the Land Lease Act. Although the above-mentioned amendment to the Land Lease Act extends the possibilities of performing nature management on farming land, a lessee cannot choose far reaching nature management because he therewith takes the risk that important guarantees he enjoys as a lessee expire.

The legislator made an explicit choice not to define the concept of agriculture in the Land Lease Act in a way that links up with its original meaning in traditional agriculture. As a result of this policy, a full integration of agriculture and nature preservation in leased land is impossible.

Notes

1) Nota betreffende de relatie tussen landbouw en natuur- en landschapsbehoud. Tweede Kamer, zitting 1974-1975, 13 285, nrs. 1-2 (1975) (hereinafter Relatienota).
2) See van Eck (1989), for effects of management conditions on farms.
3) See Memorie van Toelichting Ontwerp Wet 1937, p. 3.
See further Court Arnhem, August 7th, 1940, P. 1941, 279. Cf. Tenancy Tribunal Winschoten, March 17th, 1939, P. 1940, 62, total reversal of the onus of proof in the favour of the lessor as regards the fulfilment of obligations of the agreement; excessive obligation. Tenancy Tribunal Amersfoort, March 30th, 1939, P. 1940, 66: the condition that the lessee may not prosecute a third party disturbing him in his use with acts of violence, without the consent of the lessor; excessive obligation.
4) Act of November 3rd, 1954, Stb 510, as amended and supplemented.
5) In 1924 the first land consolidation act became effective: the *Ruilverkavelingswet* 1924. The second land consolidation act became effective in 1938: the *Ruilverkavelingswet* 1938. The 1954 Law was the third law in thirty years.
6) Tweede Kamer, zitting 1983-1984, 14 392, no. 46.
7) Tweede Kamer, Zitting 1973-1974, 12 757 nr. 2.
8) In organized agriculture circles, interrelation policy is considered largely a failure. For more on this subject, see, amongst others, Wolff (1990).
9) A distinction is made between management areas and reserve areas. In management areas, agriculture and nature can go together permanently. In reserve areas nature protection comes first. Attempts are made to purchase the farmlands. In anticipation of this, in management areas as well as reserveareas, management agreements can be concluded.
10) Management agreements usually have a currency of six years. The management agreed upon can differ per hectare and per area. It may include the maintenance of natural obstacles, buffer management on grass lands and farmlands, the upkeep of landscape characteristics, etc. The management allowances can run to approx. f 1,500.00 per hectare a year.
11) Regeling Beheersovereenkomsten 1988, Ministerie van Landbouw en Visserij, nr. J. 7433, 1988 Stcrt. 149, amended afterwards, on December 23rd, 1988, no. J. 88/13309, Stcrt. 1988, no. 252
12) Tweede Kamer, Zitting 1989-1990, 121 149, nrs. 2-3.
13) 1985 Stb. 299, reprinted in Schuurman & Jordens 101 (1985).
14) The two other types of land development are *aanpassingsinrichting* (land readaptation) and *ruilverkaveling bij overeenkomst* (land consolidation by agreement). Land adaptation is intended to remove obstacles which arise as a result of the construction of an infrastructural facility, such as a road, a railway, or a canal. Land consolidation by agreement is an agreement between all the owners concerned on the redistribution of their land to improve

the land distribution in a small area.

15) Source: CBS, Landbouwcijfers (The Netherlands Central Bureau for Statistics, Agricultural Figures), 1989.

16) *Pachtwet*, stb. 1958 no. 37.

17) The highest permissible prices have been mentioned in the *Pachtnormenbesluit* 1977 (Lease Norms Order), September 29th, 1977, Stb. 545, as amended afterwards. The maximum lease value per hectare per year has been fixed per type of soil and amounts to f 540,00 maximally for sea clay grounds. In addition to this, a surcharge or deduction can be used for outcrop, soil hydrology and land distribution.

18) Clause 5, section 1, sub b, Land Lease Act.

19) Clause 1, section 1, sub b, Land Lease Act indicates what should be understood by agriculture: arable farming; grassland farming; cattle breeding; poultry farming; horticulture including pomology, and the growing of trees, flowers, and bulbs; the cultivation of wicker and reed, and every other branch of cultivation of the soil except silviculture.

20) In 1976, a condition is considered excessive if the lessee suffers any measurable hindrance from it (Central Land Control Board 1976, P 3276). Further conditions considered excessive are: the obligation to keep so many cattle on the leased ground that excessive grazing as well as topdressing is prevented (Central Land Control Board 1978); the obligation to refrain from removing the mown flowering off the pasture (Land Control Board Guelders & Overijssel, 1976), and the obligation to leave the mown grass in the orchard (Land Control Board Guelders & Overijssel, 1976). Considered not excessive are not using semi-liquid manure not coming from the farm of the lessee without permission of the lessor (Central Land Control Board, 1978). The lessor is also authorized to prohibit the use of certain pesticides for the entire leased ground or part of it in the interest of flora and fauna (Central Land Control Board, 1978). See Geuze, 1981, p. 340 ff, for an elaborate survey of the conditions approved or abolished by the land control boards and the Central Land Control Board in the seventies.

21) Central Land Control Board 1964, P 2536.

22) Among other things, contracts were approved that contained the following conditions: the lessee shall lend all assistance to the preservation of the bird population in the area; mowing may not occur between sundown and sunrise; the lessee shall mow the grass crop from the centre (Land Control Board Guelders, September 20th, 1984, no. 938/1984). The lessee is not permitted to roll or pull the grassland between March 20th and July 1st; eggs may not be collected during the entire year; to protect the bird and predator population, loose dogs may not be brought along on the leased ground (Land Control Board Guelders, April 2nd, 1987).

23) Land Control Board Guelders, April 6, 1989, no. 1988-5925-OW.

24) This foundation is the brand holder of the registered "EKO"-hallmark.

25) The CEF norms for the keeping of milk cows include the following conditions:
- Dairy cows must be grazed minimally 120 days a year;
- The use and presence of chemical/synthetical crop protectives herbicides, disinfectants, growth regulators (auxins), and cosmetics on the farm is prohibited unless mentioned on the list of permitted means;
- The use and presence of chemical/synhetical manure, manure enriched with fertilizer, and polluted manure on the farmis prohibited unless mentioned on the list of permitted manures;
- The distribution of organic manure over the land is prohibited in the period between November 1st and March 1st;
- The feeding rations must for at least 2/3 consist of food produced according to an ecological method approved by the brandholder;
- The average ration of concentrates per animal per year is determined by the brand holder;
- Rut induction/synchronization and the administration of preparations for this purpose to

the cattle is prohibited.

26) Central Land Control Board, January 25th, 1985, GP 10,268.
27) Tweede Kamer, Zitting 1988-1989, 21 137 nrs 1-2.
28) Tweede Kamer, Zitting 1988-1989, 21 149, nrs 2-3.
29) The *Strucuurnota Landbouw* is presented to the parliament on 3 june 1990
30) Costs and benefits of reserve management and management agreements in a number of pasture bird areas. Beintema, A.J., and P.J. Rijk. The Hague/ Arnhem, Landbouw Economisch Instituut/Rijksinstituut voot Natuurbeheer, 1988. Lei-publication 2.185 /RIN-report 88-61.
31) Tweede Kamer, Zitting 1987-1988, 20 617, nrs. 1-2.
32) Tweede Kamer, Zitting 1987-1988, 20 617, nr. 3.
33) The 10th section to be added to clause 5 of the Land Lease Act.
34) Explanatory Memorandum, p. 17.
35) In the *Meststoffenwet*, 1987, Stb. 598, a reduction of manure production rights of 125 kilos of phosphate per hectare is connected to the reduction of the surface area belonging to the farm.
36) By virtue of the Super Levy Decree, the milk quotum is connected to the surface area belonging to the farm in use for milk production. A decrease in surface area can lead to a proportional decrease in the milk quota.

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A CROOKED BALANCE

Agricultural production and nature conservation: an Indonesian and a Dutch area compared

Viviane W.M.M. Ampt-Riksen and John W. van de Ven

Introduction

Throughout the world tensions have grown over the last century between agricultural production and nature conservation. Such tensions are partly caused by the ongoing conversion of wild lands into arable lands and partly by the effects of agricultural intensification. In general, agricultural policy concentrates on expanding agricultural production because of food needs and business profit all over the world. This has meant that the amount of land left to nature world-wide has diminished considerably. This process continues.

It is now acknowledged that agricultural food production, a basic condition for human existence, threatens another basic condition: nature. Therefore for the last two decades agricultural policy has been gradually changing. Although still dominated by economic factors, limitations on agricultural production have been set in order to conserve the environment and nature and landscape values. Nature conservation has become an integral part of almost every government policy, and as such, it influences life in many farming communities. Conservation policies, which concentrate on the protection and preservation of nature (flora and fauna) by protecting the habitats of species, have been intensified in the last decades.

Being engaged in research on the relationship between agricultural production and nature conservation in two very different areas in the world, Kerinci in Indonesia and Winterwijk in the Netherlands[1], we have asked ourselves whether, besides the obvious differences, there would be any similarities in this relationship. Therefore, we have made an exploratory comparison of nature conservation legislation, its effects on nature and agriculture and embedding in social life, of these regions.

In Kerinci, expanding agriculture encroaches on the tropical forest, but national policy is committed to protecting it. This affects agricultural development. In Winterswijk, agricultural development has also reduced the amount of natural areas of forest and hedgerows. Here also nature conservation is a part of national policy. A change in agricultural production therefore is necessary to conserve, restore and develop nature values and values of the landscape[2] in agricultural areas.

In Kerinci, as an indirect result of the activities of the International Union for Conservation of Nature and Natural Resources (IUCN)[3], a National Park was allotted, and Winterswijk was allotted a National Landscape Park.

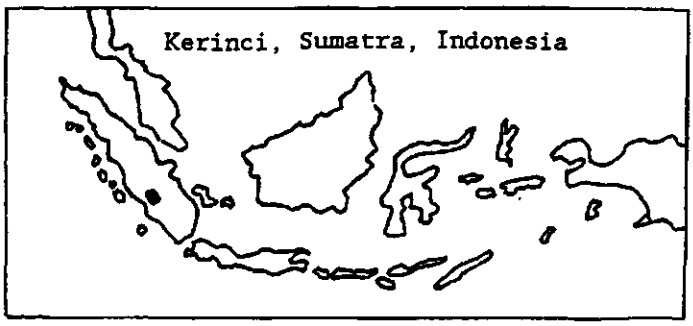
In this contribution, we describe and compare farming and nature conservation in these two areas according to four criteria. The first deals with non-biotic factors that partly condition the interdependence of agriculture and nature: geo-physical circumstances dominating agricultural development more in Winterswijk than they do in Kerinci. The second concerns the history of land occupation and land use. In both areas, socio-economic history to a great extent structures the current relationship between agriculture and nature conservation. The third and fourth concern the development of national and local policies and legislation. Nature conservation and agriculture took different courses in Winterswijk and Kerinci. They are the result of long-term historical processes. In this context it is interesting to note that once, for decades, both areas were part of the same (colonial) state.

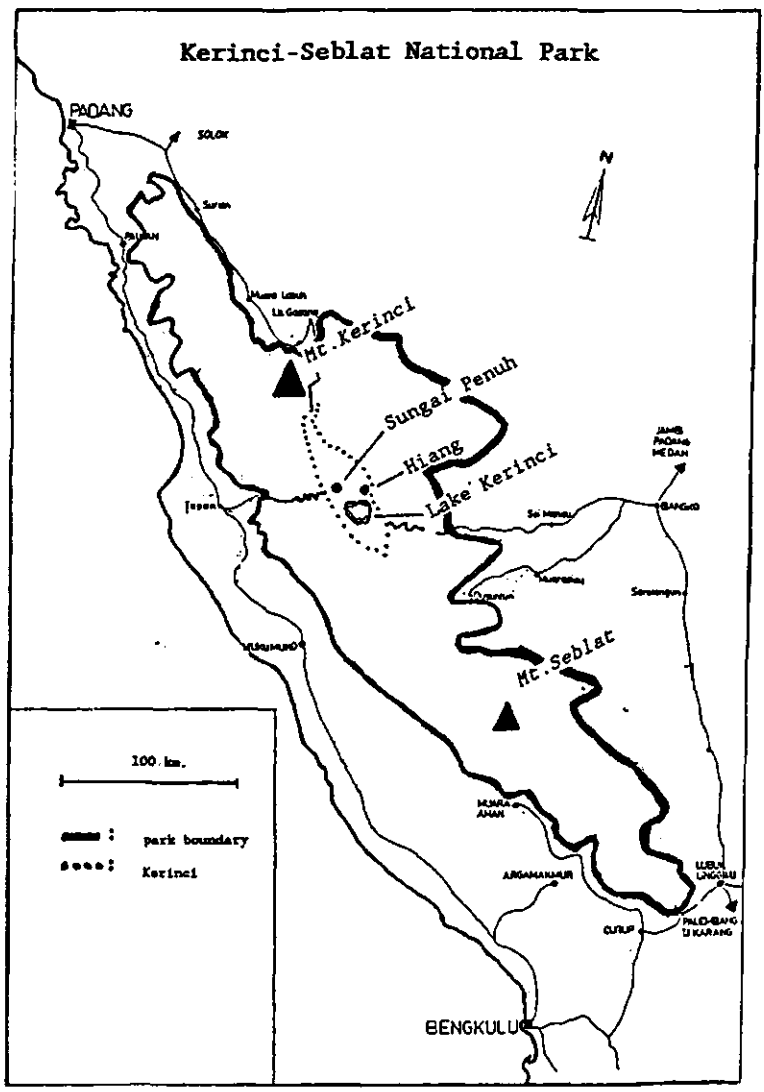
Kerinci

The valley of Kerinci is a densely populated agrarian enclave in the mountains of west-central Sumatra (see figure 1). The valley, in fact a table-land at 800 meters above sea level, is about 70 kms long and 10 kms wide. Nowadays some 300,000 people live in the 276 villages and hamlets that make up the district (*kabupaten*) of Kerinci[4]. The majority of the people are Kerincinese (*orang Kincai*), an ethnic group that has farmed the area for centuries. Nine out of every ten families in Kerinci depend for their livelihood on agriculture (Kerinci Dalam Angka (KDA), 1988: table 43). Agriculture occupies forty percent of the district area and consists of rice farming in the valley and specialized and mixed tree-crop farming in the hills. Crude cinnamon (cassia vera) is the most important cash-crop. The other sixty percent of the district area consists of mountains, covered with tropical forests, that encircle the valley.

Recently these forests have become a vital central part of the National Park Kerinci-Seblat[5]. The target of the park is the consolidation of the flora and fauna on its extended territory of 1.5 million hectares. Kerinci, as the biggest agrarian enclave, right in the middle of the park, is of major concern to the park management. In spite of old and new legislation and sometimes coercive policing, the people of the valley continue to gather forest products such as timber and still clear forests for farmland[6]. At the moment new monitoring wildlife and forest programmes, pilot afforestation and community develop-ment projects are being promoted, to get the people of Kerinci

Figure 1: Kerinci in Indonesia





involved in nature conservation and to improve the management of the park territory[7]. Without doubt these programmes will result in better control of the natural resources. But because the motivation behind the conversions of the forests is subsistence need and business profit, it is also without doubt that pursuing the above projects alone will not in the long run prove sufficient to stop the forest encroachments. When one further takes into account the number of farmers involved, the extension of the area concerned, and the local agrarian history in which forest conversions have been common, it will be evident that whatever Kerinci forest conversation policy is pursued, this will only be effective when local farming communities (partly) support the conservation of natural resources in their own interest. And, in general, in their own interests means in the interests of agriculture.

This raises two questions. Firstly, which interests between nature and agriculture can be traded off locally ? (See, for instance Siebert (1989), who argues that selective and licensed gathering of rattan in Kerinci should be allowed in exchange for monitoring and planting in local forests by the population.) And secondly, which bodies and normative systems of local socio-legal control are fit to act as counterparts in the management of natural resources? This contribution is focused on the last question. More specifically we want to know whether traditional law and its offices and procedures, can provide for notions and social structures that support conservation policies from outside, and whether and how contemporary forest encroachments are legitimized in traditional law. It will be argued that in general Kerinci traditional law in principle provides for local control of natural resources, but that its executive capacities of control differ considerably per community. It is exactly because of this differentiation in control that we think that any classification of natural resources in Kerinci should also include an analysis of the actual and historical ways local forest management is and has been executed. Such knowledge would greatly benefit a policy that wants to mobilize the contemporary and future users of the forests as co-executives of nature preservation. This is by no means a plea for conserving or revitalising relics of traditional socio-legal control. The aim has to be the tracking down of viable local counterparts of whatever nature. The question of whether traditional institutions of land use can or cannot fulfil a backbone function in local resource management can only be answered by doing research in the locales where traditional law is operating: that is in the villages. In this contribution, the contemporary law of land tenure of one particular community is described against the background of general developments in agriculture and accompanying forest encroachments in Kerinci.

Following the four topics of comparison of the introduction, the relations

between watershed management, agriculture and forests conservation in the valley are first briefly sketched. Secondly, the interdependence between agricultural specialisations and traditional law are described for Kerinci in general and for one community in particular. The third section deals with the history of nature conservation legislation in Kerinci. Finally some comments are made on government policy with regard to nature conservation and agriculture in Kerinci.

Geo-physical conditions and watershed management in Kerinci

The valley of Kerinci is jammed in between the west and the east range of the Barisan mountains. Near the second degree of latitude, all rivers between the two mountain ranges pour their water into the valley of Kerinci. The waters all meet in Lake Kerinci in southern Kerinci. Out of the lake flows the Merangin river that transports the water easterly to the Jambi lowlands.

The drainage function of the valley makes watershed management problematic and floodings endemic[8]. The colonial Dutch government, effectively operating in the area between 1902 and 1943, and the Indonesian government, both improved water management by digging canals and building dams. In the inner valley and along the riverbanks at the edge of the valley where rice production takes place, the farmers are dependent on reliable watershed management. A steady supply and drainage of water in this area is necessary to manage the irrigation of the rice fields (*sawah*). Out of the valley, on the hill slopes, farmers operate tree-crop orchards (*kebun*) on former forest lands. The expansion of the commercial tree-crop zone around the inner valley started in colonial times and accelerated in the 1970's. The erosion effects of the expansion had a strongly negative influence on the already problematic watershed management of the valley. In colonial times there was a concern for land degradation and erosion (Van Aken, 1915, pp. 17-18), but in the late 1950's it became evident that due to deforestation the main problem was no longer drainage but the uncontrolled supply of water from the mountain rivers (see Verstappen, 1957). The linkage between geo-physical conditions, up hill erosion and valley rice farming is well understood by farmers. This makes rice farming and up hill forest conservation speculative allies. Improved watershed management in exchange for forest conservation, however, will only be a possible de facto policy option in those regions where the same farming families control *sawah* as well as up hill *kebun* and forests. This is still the case in only certain regions, mainly in the central valley. In other regions, mainly the North and the South of the valley, farming units do not control the different

production zones. Here they are split according to the different cultivation zones[9].

Farming and control of farmlands in Kerinci

In the three or four centuries before colonial rule, migrants from the Padang and Jambi regions founded villages at the edge of the Kerinci valley. These people and their offspring irrigated swamps to grow rice, gathered forest products and opened orchards in the surrounding forests. Settlements and split-off villages defended and controlled their own territories. Internal organization was based on descent and kinship. Village heads controlled life and the exploitation of natural resources. The right to till the soil was restricted to village members only. By the time the Dutch entered the valley in the beginning of this century the legal concept of village territory (*ulayat*) fully demarcated villages and the users of natural resources from each other (Van Aken, 1915, pp. 23-24; Morison, 1940, pp. 75-77). Village territories consisted of arable lands as well as forests.

Today one still finds throughout the valley this archetype of Kerinci farming and resource allocation, that is the cultivation of rice and tree crops and the gathering of forest products by families on their own village territory, albeit now of a monetized variety. In this 3-zone model, the rice zone, orchard zone and forest zone are proportionally exploited according to market prices and family circumstances. However, the 3-zone model is no longer the main and only way families and villages organize production. Agrarian specialisation broke this down.

The first specialisations took off between 1910 and 1930, after colonial export promotion and the modernisation of marketing facilities (Van Aken, 1915, pp. 17-22). At first rice export had priority. At the end of the 1920's, it became clear, however, that the "the fantastic surplus [of rice] proved to be mythical" (Schrieke, 1955, p. 100). This changed the emphasis of agrarian policy to the cultivation and export of tree crops. By the 1930's, coffee, rubber, cinnamon and tobacco cultivation were established in Kerinci and orchards were expanding in the hills. Especially in the North and South of the valley the tree-crop cultivation resulted in a change in ownership and exploitation rights. *Kebun* (orchards) became the subject of investments, transfers, and more elaborate concepts of private property (Watson, 1981, p. 247,317,18). Village residence and ownership of orchards started to diverge, and disputes about the boundaries of village territories increased (Schrieke, 1955, p. 100).

Because of the Japanese occupation, the struggle for Indonesian

independence, and participation in the Sumatran separation movement in the 1950's (Watson, 1981, p. 25), between 1940-1960 farmers returned to subsistence production. After the recovery of the economy in the 1960's, a second wave of specialisation in tree crops took place in the 1970's. This accelerated the expansion of *kebun* around the valley, especially in the hinterland of those villages that had already experienced tree-crop production in colonial days. Here local farmers could rapidly extend their *kebun* and specialize on tree crops because of their past experience and the legal infrastructure existing in those villages. The former internal community restrictions on the alienation of *kebun* in colonial times had given way to the concept of transferable individual property, that was no longer embedded in family property and control as a mere use right. Also the external community restrictions on the buying and selling of *kebun* between residents and outsiders had gradually disappeared in favour of a more or less 'free' land market. The latter proved to be of importance to people from outside the tree-crop belt, who could now move in rapidly when investments seemed promising. At the present time, for instance, many civil servants, traders and shopkeepers of the district capital, own *kebun* in the tree-crop belt. The latter, in general, do not operate their *kebun* personally, but make use of share-cropping arrangements. The share croppers originate mainly from outside the valley, but also poor Kerinci farmers are attracted by the employment opportunities. The tree-crop area, in North and South Kerinci, now extends deeply into the contemporary national park territories.

Traditional local community control of these territories and its users is weak, as the classical community/territory relationship has been eroded in the last decades because of the inflow of relative strangers and outside capital. Many farming families and villages in this region have abandoned the old 3-zone model of farming. Rice farming -a condition for subsistence- has become scarce in the tree-crop belt. Share croppers, small farmers and investors almost exclusively rely on the cultivation of coffee and cinnamon. Rice farmers in the old settlements of the tree-crop belt no longer control their upland hinterlands. In other areas and villages in Kerinci, the speed of forest encroachments has been relatively slow when compared with the North and South. One of those villages is Hiang. In Hiang, the history of forest conversions is also bound up with the local history of the agrarian economy and its legal institutions. But here, as in other villages, the outcome has been less negative, viewed from a nature conservation perspective.

Farming in Hiang[10] is based on the traditional 3-zone model of exploitation by nuclear and extended families. Rice is cultivated in the central valley and along the banks of the river Sangkir. Tree crops are grown in the

hills, and in the adjoining forests timber, among other forest products, are irregularly gathered. Until the 1980's, both *sawah* and *kebun* areas slowly expanded. Only after 1983, did the more or less equal exploitation of the different zones change strongly in favour of rice cultivation. In that year, after the construction of two dams on the river Sangkir and the construction of canals, the local agrarian extension office executed its pilot rice intensification programme for Kerinci in this area. All Hiang farmers now cultivate the fast growing rice varieties that doubled the yearly harvest. This recent specialisation in rice farming, almost exclusively directed family labour and money to the rice zone. Only infrequently are new *kebun* now opened. In fact, at the moment, about half of the more distant *kebun* are temporarily not in use. As was already the case in the tree-crop belt, agrarian specialisation in Hiang is now breaking down the traditional community/territory unity. But since in Hiang this process is concentrated in the rice sector, it changed local agrarian law only modestly in practice. In the first place, restrictions on the alienation of *sawah* in traditional law have been abandoned. This created a land market in rice fields, open for people inside and outside the village. However, in practice, most *sawah* parcels cannot change hands. Only a very small number of *sawah* are owned as individual property (traditional law) or registered as private property (Indonesian law). The bulk are locked up in a traditional system of inheritance. In Hiang and in Kerinci this system is called *bergilir-ganti*, which can be translated as 'rotational time-sharing'. In a nutshell, firstly, it means that individual use rights of the heirs to an estate are not tied to particular plots. Plots rotate every year to level out the difference in yields through time. Secondly, it means that when there are more heirs than plots - which is the rule- parcels of *sawah* are not further fragmented, but the time to use the plots is fragmented in annual time shares: one turn every 2 years, or every 5 years, etcetera, depending on the number of plots and heirs. Transfer of time shares is allowed, but is bound to pre-emption rights of the other members of the time-sharing group. Every individual farmer is allowed to hire out, or exploit his or her turn to a particular *sawah* in a share-cropping arrangement. As a result the opening up of the Hiang *sawah* market mainly had internal village effects.

But whatever statistical practice is the rule in the rice area of Hiang at the moment, the specialisation broke away from the traditional concept that only Hiang families are allowed to cultivate Hiang rice fields. This contrasts with developments in the Hiang *kebun* or tree-crop zone.

In the *kebun* area of Hiang, traditional law rules. The right to clear parcels of forest to lay out new tree-crop orchards on the territory of Hiang (in fact there are 3 territories, since Hiang consists of 3 communities) is restricted to

Hiang residents only. Eighty ha. of forest still stand on village territory in in front of the national park border. Only first-generation *kebun* in Hiang are regarded as individual property. When forest is cleared and trees are planted, both the land and the trees are considered the property of the planter. When *kebun* are inherited, they become the property of the heirs -all children- and yields will be shared. The right to plant new trees, however, is allocated to only one of the children. This means that after several years of re-use and work, the trees and their yields come into the hands of one of the children of the second generation. This exclusive right to individually exploit *kebun*, however, is limited to use only. Ownership of the land on which the trees grow, remains with the family of heirs. Alienation of the land is only possible with the consent of the other heirs. However, selling *kebun* with the agreement of all heirs, is a legal option which is de facto hypothetical, as other villagers can still easily open new *kebun* in the forests. Selling to people from outside the village is prohibited, and in any case pressures from outside investors to buy *kebun* are non-existent. When outsiders want to buy *kebun* they want to invest in steady cinnamon production for which the socio-legal conditions are best in the cinnamon-belt of North and South Kerinci. Even the economic elite of Hiang now prefers to buy cinnamon gardens in other regions, which they operate in a share-cropping system or with temporary labourers. Because of this lack of internal and external pressures, the traditional restrictions on alienation of *kebun* in Hiang continue to operate and as a result one finds only Hiang people in Hiang *kebun*; a practice fully in accordance with traditional village law.

Management of the Hiang tree-crop/forest area is executed by functionaries, whose offices are also institutionalized in traditional law. A board of office holders is responsible for the 'wise use' of the village territory. One functionary is especially charged with the control and allocation of natural resources. This office holder (the *petinggi adat*), for instance, controls the allocation of rights to clear forests for new *kebun*, the rights to gather stones in the river, and the rights to the selected logging of trees in the forests.

In Hiang certainly, and possibly in those other Kerinci villages that continue to operate in 3 zones on one territory, socio-economic and socio-legal conditions seem favourable to a local nature conservation policy associated with the institutions, procedures and offices of traditional law. The option to trade off further irrigation in Hiang or new irrigation in other villages for cooperation in forest conservation seems realistic in the 3-zone villages. And traditional law in those villages probably still offers points of departure for a cooperative management of resources on village territories.

Law and nature conservation in Kerinci

Although the Kerinci-Seblat National Park is new, forest protection in Kerinci certainly is not. Two legal categories of protection have been of importance in the history of Kerinci: The allocation by the government of 'nature reserves,' and 'protected forests'. The first category is directly linked with former nature conservation policy proper, while the second allocation was intended to protect watershed management in the valley. Both allocations stem from colonial times. The first Dutch East Indies ordinance on nature conservation was published in 1916 (Stb. van N.I. No. 278). The goal of this act was to establish a series of nature reserves (*natuurmonumenten*) throughout the archipelago, located on state domains. On these territories every kind of human intervention was prohibited. In 1932, this ordinance was replaced by the Nature and Wildlife Reserves ordinance (*Natuurmonumenten- en wildreservatenordonnantie*, Stb. van N.I. No. 17). The new ordinance united former ordinances on wildlife protection and hunting and separated nature reserves from the new category of wildlife reserves. By 1940, about 120 Nature and Wildlife reserves had been designated with a total area of about 2 million Ha. (Coomans de Ruiter, 1948/49, p. 142). In 1941 (Stb. van N.I. No. 167), a last revision of the 1916/1932 ordinance was made. Because of the Second World War and the War of Indonesian Independence the 1941 ordinance never came into operation. But nowadays, retrospectively, it is often used as the legal point of juncture between the history of Indonesian legislation on nature conservation and colonial legislation.

As a result of the above legislation, Mount Kerinci was designated a Nature Reserve in 1929 (Stb. van N.I. No. 474). Also in 1929, all other forests surrounding the valley became subject to protected management by the provincial forestry department and were denominated Protected Forests (*boschreserves*). In short, this meant that human interventions became restricted to the licensed gathering of certain forest products and selective hunting. To secure the agrarian expansion of the commercial tree-crop production in Kerinci at that time, however, the bounderies of the protected forests were projected to a distance of 3 to 5 kms behind the villages. Herewith, an intermediate ring of forests between agriculture and the protected forests was reserved for the benefit of the villagers (and colonial revenues). Thus, already by about 1930 the valley of Kerinci, at least on paper and in government intention, was enclosed by nature reserves and protected forests.

Indonesian legislation did not substantially change the legal status of the nature reserves and protected forests in Kerinci. Only recently have all forests become subject to new national legislation on the management of natural

resources and the environment[11]. These acts are to enable better management of nature, integrated into broad land-use plans for large regions. For Kerinci this means that under the umbrella of the National Park, parts of the protected forests will get more specific functions[12] and the agricultural use of the valley will become subject to zonation[13]. Contemporary regulations, however, are still mainly based on the 1967 Forest Act. This act, in turn, followed in the tracks of earlier colonial legislation. In the act, all forests are divided into two main categories: Forest that grows on private property (*hutan milik*) and forest that does not. Forest of the last category is conceptualized as state forest (*hutan negara*). In Kerinci all forests are state forests, which according to earlier colonial divisions are divided into *hutan lindung* (protected forest) and *cagar alam* (nature reserve). The people of Hiang for instance have to deal with protected forest.

Clearly, the early allocation of legal status to the Kerinci forests in government law did not stop the forest encroachments. The real impact of this formal protection, however, is more difficult to judge. On the one hand it may have slowed down the rate of forest conversions. In Hiang, for instance, farmers are very well acquainted with the concept of *hutan lindung* and the prohibitions of its use. On the other hand, because the borders of the protected forest are now more or less de facto also recognized as the boundary of village territory, the legal status may have increased illegal gathering and logging. As those forest territories, ideologically and in practice, are no longer regarded as belonging to the village, villagers do not feel responsible for the management of their natural resources. From a nature conservation perspective, the problem here is that people apparently too readily regard forests as an open resource when their protected status is not enforced. This is exactly what happened in Kerinci before the foundation of the National Park.

Government policy in Kerinci

Government policy on nature conservation and on agriculture in the valley, already share a long history. Colonial policy was primarily directed at the expansion of commercial tree-crop production, but at the same time it was realized that because of watershed management, for both the benefit of the valley and rice farming, protection of the forests was a necessity. The result was an ambiguous policy that promoted tree-crop production as well as the conservation of forests. By placing the borders of the protected forests behind the villages, the valley, which was then reserved for agricultural use was separated from nature by an intermediate forest zone. Today, this zone has

almost everywhere disappeared. Characteristic for this early colonial intervention in nature in the valley was its focus on agriculture, with the exception being the nature reserve of Mount Kerinci, which was based on the premises of nature conservation. Between 1942 and 1970 one hardly could speak of a government policy on nature conservation or agriculture in Kerinci. Only at the end of the 1970's, as in other regions of Indonesia, did the government become actively involved in the agrarian production of the valley. This resulted, for instance, in the Hiang rice-intensification programme. The foundation of the Kerinci-Seblat National Park in 1983, marked the beginning of a new era of government policy on nature conservation in the area. As yet it is too early to judge how both policies are interrelated. But as future zonation of the valley forms part the development plan of the park, separation as well as interweaving of the interests of agriculture and nature will probably be pursued. One might only hope that for the sake of nature conservation, natural resource management in the valley will not only rely on strict separation, but will also be founded on a policy that interweaves the interests of agriculture and nature. At least in some of the Kerinci villages, economic and traditional socio-legal conditions seems favourable for concluding agreements on the management of local natural resources.

Winterswijk, The Netherlands

Winterswijk can be described as an area with its own special character. It is situated in the most eastern part of the Achterhoek, a region in the mid-east of the Netherlands, bounded by the German border. The size of the area is about 12 kms long and 12 kms wide and approximately 28,000 inhabitants live there. The whole area makes up one municipal territory. The village of Winterswijk with its nine surrounding hamlets is situated in the middle of the rural area. Farms are scattered all over the rural area. The hamlets come under the municipality of Winterswijk.

About ten percent of the rural area is covered by forests and nature areas (see figure 2). The main characteristics of this area are the richness of trees, the many differences of topography and the traditional farms that are to be seen all over the area. The area of Winterswijk is also known for its valuable brook systems and the plantation following the course of these brooks. Eighty percent of the area is used for agricultural production, mainly animal husbandry. The farmland is used mainly for pastures and the arable land for maize (cattle fodder). The increase of animal husbandry has been considerable

in the last decade (S.A.B., 1987).

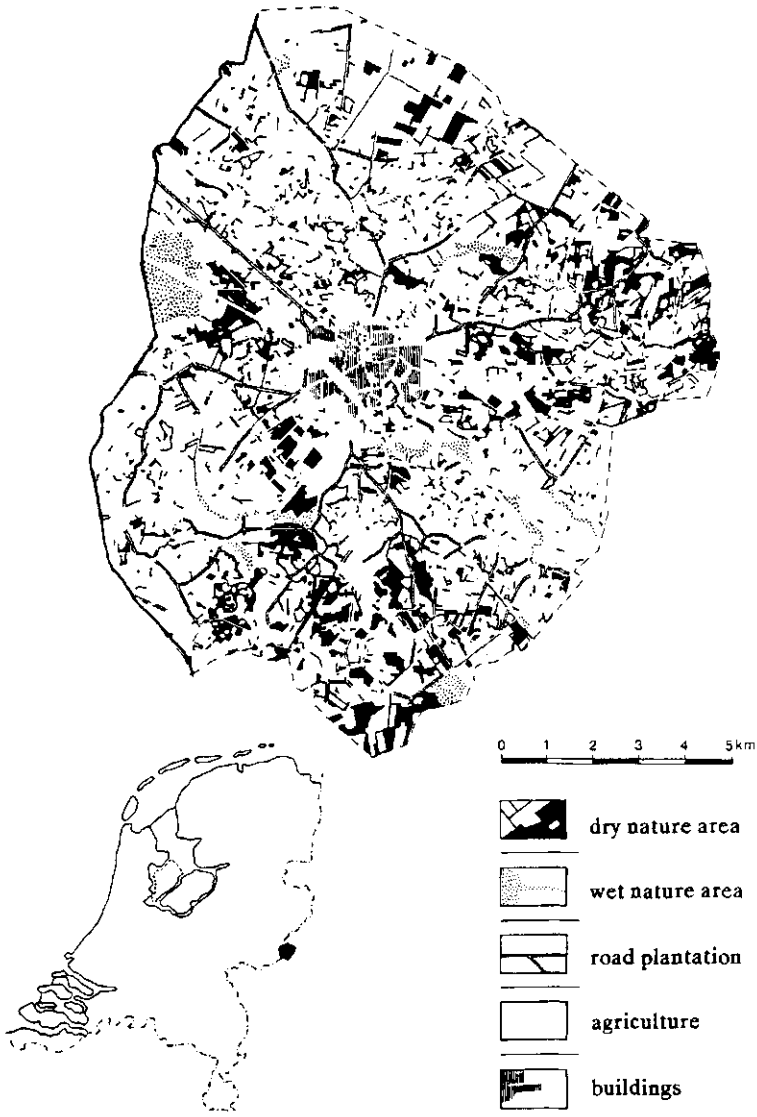
Geo-physical conditions and watershed management in Winterswijk

The first main agricultural settlements in the area of Winterswijk were founded in the Middle-Ages. The geological situation and the high water level made it possible to use only the higher lying ground for agriculture. Therefore, only small parts of waste land were brought under cultivation, each big enough for one farm. The parcels were surrounded by hedgerows to keep the cattle away from the farm. The landscape therefore took on a very enclosed character: of scenic landscape (*coulissenlandschap*) (Bijhouwer, 1977). The farmlands were used intensively. The fertilization of the farmland was accomplished by using heather-sods taken from the waste land. This added a spherical shape and steep edges to the farmlands. To achieve such a system of fertilization a certain balance between farm and waste land was essential. For each hectare of arable land, 6 to 7 hectares of heather land was needed (Van den Brand, 1981). The invention and increasing use of barbed wire (dating from 1880) made the hedgerows redundant; they lost their function and therefore many of them gradually disappeared. The invention of artificial fertilizer at the end of the nineteenth century made the essential proportion between farmland and waste land redundant. Moreover, it made it possible to bring the waste land under cultivation.

Social circumstances at first slowed down this development, but in the 20th century a change from waste land into arable land took place. This changed the relation between farmland and nature areas. Nature areas and forests, excluding wood cultivation areas, have nowadays become enclaves in farmland.

Since the second half of this century optimal agricultural production and intensification has taken place. In order to realize this, adjustments which benefitted agriculture took place on a large scale. Parcels were enlarged and adjusted to the use of agricultural machinery. Hedgerows, shrubberies, bushes and pools, which had an important function in the ecological infrastructure, disappeared in order to straighten, join and enlarge parcels. The elements which did not disappear, however, have lost their function for agricultural farm management and their maintenance has therefore been neglected and such elements have diminished.

Figure 2: Winterswijk, in the Netherlands



(source: Kerkstra, Vrijlandt; Het landschap van de zandgebieden)

To reduce the water nuisance to agriculture, large parts of the brook systems were canalized. The watershed management in Winterswijk is based on two brook systems, the Groenlose Slinge in the north and the Boven Slinge in the south. The water nuisance and inundation of fields and villages was mainly caused by the increase of drainage necessary for bringing the land under cultivation. Therefore, during the 1950's and 1960's water boards decided to canalize the brooks (de Jong, 1982). Local and national protests about this issue increased from the end of the 1960's (Van den Brand, 1981) and led to an informal agreement about which zones would be canalized and which would not.

In other parts, the drainage of farmland and lowering of ground water tables also took place in order to reduce the water nuisance. A large part of the agricultural land needed better drainage. This water nuisance, especially in the south-eastern part of Winterswijk, is mainly caused by loamy soil near to the surface. The high ground water table, however, enables only a relatively extensive agricultural use of the land. This moist situation and extensive use creates the possibility for high nature values. Draining the land, however, leads to hydration of crops in summer and a loss in nature values.

Farming and control of farmlands in Winterswijk

For several centuries until the beginning of this century, the area of Winterswijk was ruled by a reasonable small group of wealthy farmers: the *Scholten*. They had great influence on the local peasants, who were mainly their tenants. This power was based on large landownership, especially in the southern and north-eastern part of the area. During the first half of the nineteenth century the power of the *Scholten* reached its highest point. The distribution of common grounds which took place at that time was controlled by the *Scholten*, and they divided most of such grounds amongst themselves (Van den Brand, 1981). It had significant consequences for the tenants whose chances of having their own farm was thus minimized. They were bound to an archaic production structure which involved rent paid *in natura* and services, etc. This system considerably reduced the tenant's possibilities for agricultural modernisation (Alders, 1979; Wildenbeest, 1984). The *Scholten*, who adored hunting and beautiful surroundings, were thus very conservative where the modernisation of agriculture was concerned. Examples of how the Scholten retarded modernisation can be seen in the preservation of the existing landscape patterns, the introduction of new landscape elements such as carriage drives and in the reduction of possible farmland by the partial af-

forestation of waste land (Wildenbeest, 1984). They prevented an agricultural development towards uniformity in agriculture and an increase in scale of the landscape, unlike what happened in other areas in the Netherlands.

But in the meantime, the *Scholten* also became isolated by their conservative attitude. They maintained their eccentric lifestyle and conspicuous consumption pattern and they cherished their forests. Slowly, however, the growing isolation between the conservative countryside and the modern town of Winterswijk and changes in the inheritance system in the Netherlands led to the destruction of their power (Alders, 1979; Wildenbeest, 1985).

The *Scholten* had been able to delay the cultivation of waste land on a large scale until circa 1930. The main onset of this process was partly due to grants allocated by national government, but by that time the national agricultural boom had nearly finished. So the profound changes that took place on the sandy soil areas elsewhere, after the agricultural crisis between 1877 and 1895, started too late for Winterswijk to take advantage of it.

At the beginning of the 20th century the average size of farm in Winterswijk was less than 5 hectares. The growing local population put an extra strain on the already bad situation of the tenants and emigration took place. After the Second World War the number of farms diminished. The poor way of allocating and accessibility of arable land and the modest watershed management caused sons to have little interest in taking over the farm. A relatively high number of farms ceased to exist. With cultivation growing, the average size increased from 8 hectares in 1960 (Kooy, 1966) to 12 hectares in 1980 (Wildenbeest, 1984). But many farms are still too small for dairy-cattle farming to be a paying concern.

The retarded modernisation and cultivation of the area came also too late to fit into the 'programs' of land consolidation (*ruilverkaveling*). Not until the 1970's was *ruilverkaveling* considered for the western part of Winterswijk. Although in some ways nature values were taken into account, the main goal of this *ruilverkaveling* was to achieve the optimal division of plots and watershed management for agricultural production. After long preparations and planning the *ruilverkaveling* plans are now being executed.

Government policy in Winterswijk

During the first half of the 20th century nature and landscape conservationists discovered Winterswijk to be a valuable area and pleaded for its protection. In comparison to other areas in the Netherlands, various species of plants and animals which have become rare still live in Winterswijk. Compared in general

to other areas, Winterswijk still has very valuable landscapes. The meandering brooks are the habitat of rare species of plants and animals and they represent, therefore, high natural value and value of the landscape. One may say this is the implicit outcome of the *Scholtens'* influence.

Gradually the national government has become aware of the severe effects on nature of the enormous agricultural development it has itself stimulated for years. It took the national government until the 1970's to present a nature conservation and landscape conservation policy related to agricultural development. This nature conservation policy was presented in the so called Three Green Reports (*Drie groene nota's*)[14] which indicated the need for a separation and interweaving of natural and agricultural areas. The reports established a policy framework to coordinate the conflicting interests of nature and agriculture. A number of intended measures were proclaimed: to create a system of management and maintenance agreements, a system to allocate National Parks and a system to allocate National Landscape Parks. The latter two were the result of a process put into action by the IUCN[15]. In 1967, the International Committee for National Parks of IUCN drew up a list of all national parks and comparable nature reserves. This list was meant to be an incentive for countries to create their own system of national parks where nature and landscape could be protected. As a result of this, in 1971, the Netherlands produced its first national policy memorandum in which it outlined its policy on the institutionalisation of national parks and national landscape parks[16]. The Achterhoek was presented as one of the potential national landscape parks. Further details on this policy were given in various further national policy memoranda.

A national landscape park has been described as follows: "a rather large area (10,000 hectares) in which nature areas, waters and/or forests are situated as well as agricultural areas and settlements; areas which are important because of their variety in nature values, features of cultural and historic value and aesthetic value and which clearly cohere ecologically, culturally and historically; the whole area can be characterized by its tranquillity and its stability" (Ministerie van Volkshuisvesting en Ruimtelijke Ordening, 1973)[17]. The policy aims for these national landscape parks is to preserve them and to develop the specific and differentiated characteristics into a coherent area, taking note of the social, culture and economic interests of the local people living and working there.

In 1975 the area of Winterswijk and four other areas in the Netherlands were allocated as experimental national landscape parks. Anticipating the official allocation of a total of 20 national landscape parks, five areas were appointed as an experiment in order to be able to form a sound judgement on

whether national landscape parks were realizable. A legal procedure to allocate national landscape parks, however, has never been put through. The experimental allocation was given by national government, but the provincial governments were ordered to execute the policy. Winterswijk is said to have been selected because of its unique landscape and high nature values. This allocation could also solve the problems already noted in the area (see Interdepartmental Commission on National Parks and National Landscape Parks, 1975). First, the relation between the development of agriculture, watershed management and nature and landscape management. Second, the extension of intensive livestock production with its disastrous influence on nature values which fortunately has so far been minor in this area. To execute the policy in Winterswijk an integrated committee was set up of representatives from the national, provincial and local governments, from the waterboards, and from agricultural and nature conservation organisations and united landowners.

The allocation created commotion among the local population and especially among the farmers, who dreaded its presumed conservative influence on agricultural development (Wildenbeest, 1984). They feared their agricultural investments would have poor prospects because of the expected adjustments and limitations on agriculture in preserving nature and landscape. In their view, agricultural development would come to a standstill and they would hold the national government responsible.

Plans were made by both the agricultural organisations concerned as well as by the nature conservation organisations. They accentuated the contradiction between agricultural and nature conservation interests. Attempts to solve this problem were finally killed off by the violent resistance of the farmers. Nearly ten years after the allocation of the area as an experimental landscape park, it was withdrawn by national government.

Law and nature conservation in Winterswijk

At the beginning of this century the preservation of real estate got into difficulties because of the deteriorating financial situation of the owners and inheritance problems. In 1928, the Estate Act (*Natuurschoonwet 1928*, (Stb. 1928, 63)) was put into operation. This act provides tax incentives for real estate owners to preserve and maintain their estate as a whole, along with its extant nature value. Destruction of this value means a loss of these tax concessions. In Winterswijk a relatively large number (66) of estates are classified as coming under this Act. The contribution of this act has been and still is an important stimulant not to remove the hedgerows and forests,

etcetera, particularly in view of the fact that other legal nature conservation instruments were not realized until the 1970's.

These other instruments were developed according to the Three Green Reports[18] which cover the management and maintenance agreements and allocation concerning landscape elements. It gives farmers the possibility to conclude agreements on a voluntary basis on managing certain agricultural areas in a particular way and on maintaining allocated landscape elements in order to preserve nature values and values of the landscape. The agreements lay out the farmer's obligations, e.g. the measures which must be taken or refrained from in the interest of nature and landscape preservation. It also specifies the farmer's compensation for doing so.

In 1981 according to the Decree on the Allocation of Landscape Elements, pools and hedgerows, were in particularly indicated in the area of Winterswijk[19], and thus maintenance agreements could be drawn up. In general these maintenance agreements have only very little impact on farm management.

In 1984, a management plan was drawn up for the western part of Winterswijk and areas were allocated, so that management agreements could be drawn up according to the Decree on Management Agreements. There are in general two kinds of areas: management areas and reservation areas. In reservation areas farm management is severely restricted. Such areas are supposed to be sold to the government or to nature conservation organizations, but until that happens it is possible to conclude the same kind of management agreements as in management areas. In 1990, this plan was revised and a new management plan was also drawn up for the eastern area. Farmers were individually approached and asked to participate.

The main goals in management areas are to preserve what to the farmers are natural disadvantages (such as not lowering the ground water level), to buffer agricultural and nature areas and landscape elements (including the brooks in the eastern part), to maintain, restore and enhance landscape elements and to maintain and develop botanic values. To serve these different goals several kinds of agreements are drawn up with varying impacts on agricultural management.

The possibility of concluding maintenance and management agreements in the Winterswijk area was related to the allocation of experimental national landscape parks. Although the allocation fell through the possibility of management and maintenance agreements still exists.

Although many farmers in Winterswijk own both arable and forest land, their main interests are in the area of agricultural development. In general, a farmer considers nature values and values of the landscape as a by-product of

agriculture. Individual farm management contributes to a farmers readiness to conclude an agreement. Factors such as poor consolidation of plots, high ground water levels, poor soil structure, the size of the farms, etc. influences a farmer's willingness. But also social factors are involved. (Un)certainty about the continuity of the farm can be dominant but so can a farmer's social position in his agricultural social surroundings. Therefore an individual approach to understanding farmer's responses is necessary (Volker 1984, 1990). So far, management agreements have been concluded with farmers of 34% of the management area (1200 ha) after an active programme by national government to promote their policy on this. This percentage is about the Dutch average. But most of the time agreements were concluded with only little impact on farm management.

Apart from national legislation, local-level legislation has an influence on the relation between nature conservation and agricultural production, which in this case is illustrated by taking the local land-use plan.

According to Dutch law (Physical Planning Act, Stb. 1962, 286) a land-use plan is mandatory for all local government. It describes the use of land in the area covered by the plan (i.e. the rural area) and it is directly binding on the citizen as well as on government. The plan indicates the appropriate designation for the land according to local policy. It is forbidden to change the use of land contrary to its stated designation. Building and construction permits must be refused by local government if they conflict with the land-use plan. Because of its possible interfering nature anyone can lodge objections with the local government before the land-use plan is laid down by the town council. The plan must also have the provincial government's approval. Those who lodge objections with the local government can appeal further to the provincial government and later to the Crown if they do not agree with the provincial government's decision[20].

In Winterswijk, due to the distinction between agriculture and nature conservation, the process of drawing up the land-use plan has been very difficult. It is now nearly finished but the preparations by the local government of Winterswijk have been going on since 1969 (Buro Voogt, 1974). Drawing up a Preparatory Document (*Voorbereidingsbesluit*) is the first step in this procedure. The legal consequence of this drawn out procedure is that the local government can defer applications for building or construction permits until the final land-use plan is put into force. However, farmers are well represented in the local council which has a great influence on the process and the contents of the land-use plan.

Winterswijk town council laid down its land-use plan in 1975. Two years later the Provincial Government gave their partial approval. They had

considerable doubts, however, about its concern for the interests of nature and landscape and they pressed the local government to make a new plan. The possibility to appeal to the Crown was used and the Crown annulled the plan completely only in 1985. The main criticism concerned the plan's insufficient protection of nature values and values of the landscape and its lack of description of those values. Agricultural interests were, on the other hand, too well served. No limits were put on intensive livestock production which could cause severe damage to the many nature areas situated nearby.

In the meantime, in 1981, the local authorities decided to start a new procedure for drawing up the land-use plan. But by this time *ruilverkaveling* (the consolidation of plots by exchanging territory where necessary) had been instituted in the western area of Winterswijk. This meant that the land-use plan had now to cover two different areas: *ruilverkaveling* area and the eastern area (see S.A.B. Advisors on physical planning, 1987, 1989).

Finally, after a long and complex process, the legal procedure for the approval of the two new land-use plans is almost finished (see S.A.B. Advisors on physical planning, 1987, 1989). In the new plans, nature, landscape, and agricultural interests have been taken care of. For certain activities which can be harmful to nature values and landscape values, a permit is mandatory. The map accompanying the land-use plan indicates where a permit is needed for activities such as cutting down trees and forests, for afforestation in open areas, for removing earth from sites and for leveling the steep edges of farmlands. It also indicates areas requiring a permit for drainage activities. Normal maintenance activities are excluded from this demand. The land-use plan also provides zones for protecting archaeological values and valuable brook courses. The zone provision is meant to protect the most natural brooks and in particular their banks. A zone amounts to 15 meters on each side of the brook and should be planted. To construct draining facilities, to cut down woods, to remove earth from sites and to construct quays in these zones is only allowed in conjunction with a permit. Agricultural interests are served by guaranteeing the possibility of normal agricultural development. This does not include intensive livestock production, however, and limits have been imposed concerning the size of these kind of farms. Where these rules have been contravened, the local government is authorized to restore the original situation by law-enforcement.

Because its existence is only recent, it is not clear yet what kind of effect the land-use plan will have on nature conservation in Winterswijk. First, millions of guilders have been spent by the local government in Winterswijk to create these recent land-use plans, but there is hardly any capacity to check whether the rules are observed in the area itself. Second, in the past, local

authorities did not always react very adequately to contraventions of the *Voorbereidingsbesluit*. An adequate reaction is necessary to create the credibility needed if citizens are to keep to the rules. Third, research in other areas with the same kind of problems caused by the distinction between agriculture and nature conservation has shown that a rather great number of contraventions of the land-use plan take place (Van Schaik and Wingens, 1986). These few remarks show that one should not be too optimistic.

Conclusions

When the areas of Kerinci in Indonesia and Winterswijk in the Netherlands are compared according to the four criteria chosen (non biotic factors, local history and landuse patterns, local and national policy and legislation), the following can be concluded:

(1) It is evident that the physical-geographical morphology of each area to a large extent determines the interdependence of nature and agriculture.

In mountainous Kerinci the natural areas that encircle the valley prove to be of major importance to the watershed management of the valley. Control of the water supply is necessary for rice farming and to prevent the lower valley from flooding. It is to be expected that in the future when rice intensification programmes are extended, the dependence of the rice belt on reliable water supplies will increase. With respect to watershed management, rice farming and forest conservation have mutual interests. On the other hand, tree-crop production and forest conservation compete for the same natural resources.

In Winterswijk, which is low-lying and flat, agriculture at first strongly depended on natural resources. Farmlands and waste-lands were exploited in proportions that benefitted agriculture as well as nature. Artificial fertilisation ended this more or less symbiotic relation and gave rise to land consolidation and farm management which has an unfavourable influence on nature and the natural values of the landscape. Due to the physical-geographical conditions, watershed management in Kerinci at least makes rice farming and nature conservation early allies. In Winterswijk, however, watershed management destroyed natural values to the benefit of modern agriculture.

(2) In both areas, some of the current patterns of land use by the socio-economic units of control are more negative for nature conservation than others.

In Winterswijk, the *Scholten*, who for a long time dominated the region,

have, in retrospect, fulfilled a curious role in the history of nature conservation. On the one hand, their conservatism has meant that the remnants of their estates are nowadays the most valuable territories of nature conservation. On the other, it also led to their social downfall which set free a social class of farmers who developed an ethos of independence which nowadays is strongly opposed to nature-oriented government interventions. It is only recently that there has been any interest amongst the farmers to conclude management agreements, and only provided that these do not interfere too much with farm management.

In Kerinci, the relation between agriculture and nature differs according to local particularities. In villages like Hiang where the rice zone, the mixed tree-crop zone and the forest zone still are exploited by the same families, the natural values have been preserved the best, and a farmer acceptance of nature oriented interventions are the highest. Because of the mixed farming economy, nature conservation may also be of interest for these communities. In those regions where families fully depend on the exploitation of the tree-crop zone, or on the gathering of forest products, nature conservation can only be successful when alternative means of subsistence are made available and outside capital investments are redirected.

(3) In both Kerinci and in Winterswijk government policy stimulated agrarian development and nature conservation, and with it a contradictory relationship between agriculture and nature.

In Winterswijk the government encouraged the development of animal husbandry and executed land consolidation. In Kerinci commercial tree-crop production and rice intensification programmes were respectively launched by the Dutch colonial and the Indonesian government. But nature conservation policies were also outlined by these same governments. It is interesting, however, to observe that the timing of this duality in policy was different. In Kerinci, agricultural development and nature conservation programmes both started under Dutch colonial rule at the beginning of the century. This contrasts with the situation in the Netherlands where the government gave earlier tax concessions to encourage estate owners, but a nature conservation policy relating to agricultural production was only outlined in the 1970's. In Kerinci, the colonial policy concentrated on the separation of agriculture and the natural habitat, physically buffering the two by a forest zone for local use. The contemporary policy of the National Park is still based on such a separation but as a result of intended zonation, the interests of agriculture and nature will be interwoven in certain zones. In Winterswijk, so far policy has also had this mixed character of separation and interweaving. The management

and maintenance agreements concluded in this respect are most eye-catching. Designed to harmonize the interests of nature and agriculture, these agreements are of a special character, because they are based on the individual preferences of farmers.

(4) In Kerinci as well as in Winterswijk, the relation between agriculture and nature has been structured by local law. In Kerinci, both traditional and government law structure legal relations in the villages. Ownership, use and transfer of farmlands and forests by individuals and families, and the management of village territories have all been the classical realm of traditional law. Traditional law, however, does not hold a monopoly in the villages any more. From colonial times onwards government law made its entrée in the valley. At the moment both systems operate in the villages and farmers act and legitimize their behaviour in terms of both systems. As in former days, however, contemporary nature conservation policy is exclusively set in government law. This denies the fact that in the communities of Kerinci - in spite of the valley-wide forest encroachments- local resource management, at least in principle, is institutionalized and executed in traditional law. This reflects local 'policies' on resource management and to neglect or overrule traditional resource management, is simply missing opportunities for cooperation. On the other hand, a non-selective mobilization of traditional law is no panacea for nature conservation problems. Because, as has been argued, the status and control of procedures, institutions, offices and concepts of traditional law, at village level, differ considerably. That is why in a number of villages in Kerinci -probably in all 3-zone communities- partnership in local resource management could depart from traditional law. In other villages, local cooperation will have to be commenced using other lines of social organization.

In Winterswijk, frictions between the government and the farmers over nature conservation are not conceptualized in mutually recognized, different systems of law. Local interests relating to both agriculture and nature conservation are democratically represented in local councils even though political relations in the local council influence local policy. For decades farmers have constituted the majority on the local council of Winterswijk. This political situation has had a profound influence on the process of drawing up the local land-use plan. But as policies and decrees of local councils in general operate within and in agreement with the Dutch legal system, deviations from national and provincial policies and legislation cannot be that severe. In addition, Dutch legislation also provides some legal protection for citizens in case of disputed legal interventions by the government.

The biggest difficulty in comparing the legal situation of both areas, in general, lies in the fact that in Indonesia we are dealing with a more pluralistic legal system than the legal system of the Netherlands.

In Kerinci this pluralistic situation gives people a choice and they will use the system which they feel expect to be more favourable in pursuing their goals. Contradictions of interest are easily formulated in terms of different systems of law. In the Dutch situation, however, choices are also present. Within a more uniform system, different packages of legislation exist with various -often contradictory- goals and perspectives. People can use these differences as a resource for their own benefit. in both cases by 'pluralistic' behaviour personal interests level out national goals of legislation.

But is a uniform system not a better guarantee for the prevention and solution of nature conservation problems? Winterswijk shows that by definition this is not the case, for the withdrawal of the allocation of the National Landscape Park, was not the outcome of a legal struggle, but was forced by the extra-legal actions of the farmers. It may be questioned whether the outcome would have been as favourable for the farmers if the regular legal procedures had been followed.

Notes

1) The research in Kerinci, Indonesia was done by J.W. van de Ven as a part of his PhD research on 'Social security and land law in Kerinci, Sumatra'. The research in Winterswijk, the Netherlands was done by V.W.M.M. Ampt-Riksen as a part of her PhD research on 'Dutch legislation and management practice concerning landscape conservation and landscape development'.
2) By nature values and values of the landscape we mean those values which are attached to nature areas or landscapes by governments. The attached value is based on extant kinds of species and landscapes and their rarity. It is an indication of the necessity to preserve, maintain or restore nature areas or to maintain or enhance landscape elements.
3) The IUCN organization, founded in 1948, includes about 500 governments and NGO's and networks of experts in over 100 countries in the world.
4) In 1915, 60,000 people lived in Kerinci (van Aken 1915:68). The population figures for 1971, 1980 and 1988 are respectively 107,000, 240,000 and 280,000 (KDA, 1988: table 34 and 40).
5) At the IUCN (International Union for Conservation of Nature and Natural Resources) Bali conference in 1982, the government of Indonesia founded Taman Nasional Kerinci Seblat (Min. of Agriculture Letter No.736/mentan/x/1982).
6) At the moment it is estimated that some 6,000 families in Kerinci farm a total of 11,000 ha. of former forests inside the national park. That is 5 % of the protected forest area of the district (TNKS 1987).
7) Since the middle of 1990, a WWF field office (WWF Indonesia project no.3941) in Sungai Penuh, the district capital of Kerinci, is assisting in the establishing of the national park.
8) In 1988, for instance, 24 floodings were registered in Kerinci: 158 buildings, 4 bridges and 710 ha. of rice fields were destroyed (Kerinci Dalam Angka, 1988: tables 122 and 123).

9) Because it is not the rule for rice farming and tree-crop cultivation to be controlled by the same families and villages, one also has to be very cautious about the idea that intensification of rice farming as a matter of course will result in a reduction of forest encroachments for tree-crop cultivation.
10) The section on Hiang is based on an analysis of data to be published later. The author stayed from March 1990 until January 1991 in the village.
11) See: *Undang-undang Pokok Pengelolaan Lingkungan Hidup* 1982 (Environmental Basic Management Act).
Undang-undang tentang Konservasi Sumber Daya Alam Hayati dan Ekosistemnya 1990 (Conservation of Natural Resources and Eco-Systems Act).
12) At the moment, plans to lay out areas for nature tourism are the most developed in the North of the valley (see: Site Plan *kawasan wisata Gunung Tujuh dan Gunung Kerinci, Departemen Kehutanan* 1989).
13) The main target of zonation will be the establishment of buffer zones between the forests and the agrarian valley. Where exactly the buffers will be located -in the *kebun* area or the forests- and how they will be managed is so far unclear. But whatever political compromise is reached, it will have a major impact on life in Kerinci.
14) Report concerning the relation between nature and landscape conservation: the so called Relation Report (*Relatienota*). Report of advice of the Interdepartmental Commitee on National Parks and National Landscape Parks: part I, National Parks and part II, Interim Advice on National Landscape parks.
15) See note 3.
16) *Nota inzake een systeem van nationale parken en nationale landschapsparken in Nederland*; Ministerie van Welzijn, Volksgezondheid en Cultuurbeheer, 1971.
17) *Oriënteringsnota*: first part of the Third Report on Physical Planning.
18) The legal instruments related to the Relation Report (*Relatienota-instrumentarium*); i.e. Decree on Management Agreements (*Beschikking Beheersovereenkomsten* (Stcrt. 1977, 104), Decree on Maintenance Agreements Landscape Elements (*Beschikking Onderhoud Landschapselementen* (Stcrt 1977, 182) and Decree on the Allocation Landscape Elements (*Beschikking Aanwijzing Landschapselementen* (Stcrt. 1981, 20). See also Walda in this volume.
19) The landscape elements concerned are coppices, belts, plantation on steep edges of farmlands, road-side plantation, pools and forest and nature areas smaller than 1 hectare.
20) For more information on Land-Use Plans and Physical Planning in the Netherlands in general, see Grossman & Brussaard, 1988.

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PRIVATE POCKETS AND PUBLIC POLICIES
Rethinking the concept of corruption[1)]

Jos Mooij

Introduction

After having won the struggle for independence, most post-colonial nations opted for a strongly government-directed path of development. The assumption clearly was that economic and social development could be steered by planned intervention, carried out by a public body that was mandated (in reality or according to its own ideology) by the general public. In many of the new states an enormous expansion of the government bureaucracy took place, and huge investments and efforts were made to stimulate planned development in various fields such as agricultural production, trade, industry and social welfare. Laws and policies became an important instrument in the hands of these new governments in their attempts to guide this development.

Now, three to five decades later, it is clear that this huge government development initiative is far from easy to carry through. One of the difficulties encountered in this process is widespread corruption within the government bureaucracies themselves. I went through the 7 issues of one week's edition of the Indian newspaper to which I subscribe, and I found various articles on four current cases of misappropriation of public funds (related to eduction, rural development, housing, and the supreme court), a number of short references to corrupt practices, and 3 reports on parliamentary discussions in which the opposition parties impeached the present government claiming that "the administration had totally collapsed", "corruption is at every level of administrative hierarchy", and "sensitive posts had been occupied by men under a cloud and corruption continued to be rampant in the bureaucracy" (Deccan Herald, 10-16 March 1991). This not only tells us that India has a free press, and that the nation was heading for new elections, but also that misappropriation of public funds and other forms of corruption is indeed a serious problem. I am afraid that India is not a particular case in this respect. In many other Asian, African or Latin American countries things do not seem very different, although the press might report it less freely.

This observation of widespread corruption raises many questions about the possibility of planned development and the actual relevance of laws and policies. It is obvious that there have been many cases in history where development of one economic sector or the whole society have greatly bene-

fitted from extensive government efforts and investments. However, it is also clear that in some other cases these government expenditures are partly misused, and that the main interests in an extensive and expanding government expenditure rest primarily with the bureaucrats and politicians themselves. Relevant questions, then, are under which conditions does corruption usually develop? Which types of bureaucracies are liable to be corrupt? And which types of social relations enhance or reduce the chances of corruption emerging within the state?

Despite their relevance, these questions have received only little attention in development sociology. There has been surprisingly little research carried out that was explicitly about corruption. The most interesting theoretical work on corruption still dates from the 1960s and 1970s. This is not to suggest that after the 1970s nobody has bothered anymore about the subject; also in the 1980s some new books and readers have appeared. These recent publications, however, have not succeeded in triggering a new theoretical debate on the issue. They are incidental and scattered publications, and their main point of reference remains the 1960s-1970s literature, of which the most important contributions are collected in Heidenheimer (1970, and reprinted several times afterwards). Apart from the limited and scattered nature of the publications about corruption, it is surprising how little impact these studies have had on theorists writing on related subjects. Most theorists who have written on the nature of the state in post-colonial countries do not make any reference to studies of corruption. For instance the often cited and reprinted articles of Alavi (1972) and Saul (1983) on South Asian and East African states, although dealing with the bureaucracy's private use of the economic infrastructure and means of repression, do not refer to any literature about corruption. Also the body of literature concerned with public administration has developed as a separate body of theory, without much linkage to either the literature on corruption or the theoretical debate about the nature of the state.

One of the reasons for the lack of explicit interest in corruption undoubtedly is the fact that research about corruption is very difficult. Due to their very nature corrupt activities are kept secret. People involved in corrupt practices will not be very willing to talk about them. They have an interest in hiding these activities[2]. The best researcher therefore would be someone who joins the game for a certain period. Very few researchers, however, like that idea. Furthermore, the whole institutional organization of academic work probably trammels corruption research. As long as the continuity of research is dependent upon finances channeled through the state bureaucracy and government permission is required, it is hardly surprising that critical investigations of this bureaucracy remain exceptional.

Corruption is a tricky subject. For Westerners interested in Third World bureaucracies, it is easy to fall into various pitfalls of ethnocentrism, which is another reason to leave the whole subject alone. The easy way out, of course, is to express the view that corruption is everywhere and, hence, that there is no special reason to focus on so-called Third World countries[3]. In my view this position is not particularly helpful. I think that in some countries corruption is much more widespread than in others, and also that there are different forms of corruption related to different histories and different social relations. The idea that widespread corruption in some African or Asian countries would be the result of specific processes of colonization and decolonization seems to me quite plausible, and in any case much more interesting that the idea that it is as bad everywhere.

The main objective of this paper is to rethink the concept and practice of corruption. I think this is a necessary exercise for everybody studying bureaucracies in which corruption is prevalent and concerned with questions about the possibilities and conditions of government-directed types of development. The term 'corruption' is frequently used by officials themselves, critics, journalists and others. So, one cannot do without a critical evaluation of this concept. The rethinking in this paper involves a discussion of the most important literature on the subject[4]. This leads to a firm critique of the concept of corruption as it is usually employed. The main point of the critique is that corruption is often conceived of as deviant behaviour on the part of the corrupt individual. What I want to do in the last part of this paper is to drop this 'individual deviation' conception, and to look at corruption as a more structural phenomenon, that is, to regard it in terms of regime characteristics. In this way I hope to make a start with linking the literature on corruption to the theoretical debate on the nature of the state, and to suggest some possibly interesting paths for further research.

What is corruption?

Before embarking on the discussion of the literature, it may be useful to say something about different types of corruption, and what they have in common. I will not develop a definition of the term 'corruption'. In the course of this paper I will argue that it is impossible anyway to give a universal definition of the term. Heidenheimer (1970), discussing present-day forms of corruption, distinguishes between administrative corruption and electoral corruption. The latter term is rather clear and unambiguous: it refers to some illegal practices in order to win votes. Direct blackmail, threat or fake elections are usually not regarded as corruption. Corruption thus refers to situations where elections

have been more or less free, and where politicians attempt to win individual voters in a way that is not allowed according to government law. Administrative corruption is a somewhat diffuser concept as it may take several forms. Most authors writing about corruption restrict the concept to bribery: civil servants accepting money from clients in order to further their client's case. Sometimes bribery means that the civil servant refrains from activities that are part of his duty (e.g. close inspection) or indulges in activities he is not supposed to. Often bribes are meant to speed up services the bureaucrat has to perform anyway or to give a preferential treatment to the paying client. Both parties are more or less equal. Both have the opportunity to be involved in these kind of practices or to stay away from them. This is different with extortion. Here the administrator is the powerful party able to impose his will on the other. According to some, this must be considered as coercion or blackmail rather than corruption. A third form of administrative corruption is misappropriation of public resources. Money, food, cement or other commodities may be appropriated and/or sold. To me, it seems important not to restrict one's attention to either of these different forms. They often appear together and, as I will argue later, are causally related in some instances[5].

Another distinction sometimes made is between corruption, patronage and nepotism. These terms usually refer to similar practices, but based on different types of relationships. Like most authors, I use the term corruption to refer both to activities where only a transaction of money is involved, and to activities where family, patron-client or other social relations are involved.

What all these diverse forms of corruption have in common is some form of misuse of public property, public office or mandatory power. A corrupt official uses his official position as a resource to pursue goals for which this position was not meant officially. Therefore, what happens in corruption is that something very fundamental is violated, namely the claim that the government is a public body working on behalf of the people. This claim is a fundamental one, because a large part of the legitimacy of modern states rests upon this claim. Corruption thus means that the legitimacy of the government and administration are at stake. This fact makes charges of reputed corruption such a powerful critique of a government, especially by opposition parties during election campaigns[6].

Apart from public positions and authority, which are used as resources to pursue other goals, also various sorts of government laws and regulations are used as resources in corrupt practices. Especially the laws and regulations concerning punishment, sanctioning or granting (for instance of licenses) can be used as a powerful means to extract money. Even within the most honest bureaucracy it is difficult to completely standardize the implementation and

enforcement of these rules. In corrupt bureaucracies there is a lot of scope for differential sanctioning, and therefore for extracting bribes. The following example of rickshaw pullers, or human horses, in Calcutta may clarify this point (based on Lapierre, 1986; Netocny, 1990). One particular type of harassments the rickshaw pullers in this Indian metropolis have to endure time and again is maltreatment by the police. This maltreatment can occur for several reasons. The carriages sometimes do not possess proper lights. The pullers may choose a certain route which actually is forbidden for rickshaws, or they may operate without a licence. If the pullers are caught, they usually pay some graft-money to the police to get their licence back or just to continue their route. Lapierre describes for example that

> "in theory the renewal (of a licence) cost twelve pice (a little less than one penny) The price had not changed since 1911. In practice, however, it was said that a puller would have to pay about thirty rupees in baksheesh [bribe] to the police officials to procure the precious document. When their protector [the general secretary of the Rickshaw Workers Union] was not there, the sum could well be three times higher" (1986, p.191).

In the example the police are able to extort the Calcutta rickshaw pullers because these pullers have broken government rules in one way or another. Legally these pullers find themselves in a weak position. The policemen on the other hand are in a strong position. Their power to punish offending rickshaw pullers is backed by the law. However, the way they use this power as described in the example, is not officially authorized. The police in this example uses rickshaw transport legislation and general traffic regulations as resources at their personal disposal. They use them as a means to extract money[7].

Summarizing the main introductory points hitherto, I have argued that what is at stake in all forms of corruption is a violation of the claim that the government works in the public interest as specified in a set of official policy statements and laws concerning public administration. Corruption means that people holding public offices use this position as a resource to pursue other goals. The instruments of a government to rule, funds as well as laws, are appropriated and used as resources in corrupt practices.

Corruption: Main points in the literature

Most of the discussion about corruption can be reviewed under two different headings. Firstly, what are the functions and effects of corruption? Does it contribute positively or negatively to usually shared values such as economic growth or increased equity? And secondly, what are the causes of corruption?

How can it be explained? It is surprising that a third subject, what can be done about corruption, is only a sideline in most work. Klitgaard (1988) is one of the few books explicitly about how to overcome corruption. In most literature this policy-relevant question is only tangentially touched on.

Corruption: positive or negative?

The debate about the positive and negative aspects of corruption has been triggered by one of the early writings about corruption in developing societies, Wraith and Simpkins (1963). These authors take a rather moralist stand: Corruption in Africa is serious and bad, and should be abolished. Their study, a comparison of British history with the African situation, in the hope that African and other developing nations will benefit from the British experience to do away with corruption, is based on two main assumptions. (1) Corruption is regarded as an individual aberration motivated by avarice, and therefore a moral failure on the part of the corrupt individuals. Wraith and Simpkins expect that spread of education and further growth of professionalism will cure these moral shortcomings. (2) Corruption is regarded as incompatible with, and detrimental to economic development.

This last point has been criticized by several authors (e.g. Bayley, 1966; Leff, 1970; Tilman, 1970), who aim to show that "corruption serves in part at least a beneficial function in developing societies" (Bayley, 1966, p.719). Corruption would improve the allocative efficiency of the government, it would humanize the workings of an impersonal bureaucracy, it would promote economic growth when high-level functionaries re-invest their spoils in the local economy, and it would increase political stability by granting favours to some demanding groups. As expected, these positive interpretations of corruption in turn are widely disputed. Alam (1988) argues that the assertion that bribery would increase allocative efficiency is not true, as the market for government services has no open access. Theobald (1990) stresses that spoils usually are not reinvested in the local economy, and Myrdal (1968) is convinced that political instability rather than stability results from corruption. In general most authors reach the conclusion that corruption is detrimental to economic and social development (e.g. Atalas, 1973; Johnston, 1989; Klitgaard, 1988; Leys, 1970; Nye, 1967; Wade, 1985).

Although these latter authors share a negative interpretation of corruption with Wraith and Simpkins, they are less moralist in their approach. Rather than assuming a priori that corruption is bad and should disappear, they reach their conclusion after some investigation of the pro's and con's of corruption. In this investigation some authors are mainly concerned with its effects on

economic development, while others are more bothered with matters of equity and the possibilities for democratic control. What most of these authors, however, do share with Wraith and Simpkins, is a rather unproblematic conception of corruption. Apart from one rare exception, they regard corruption as an *individual* activity. Their investigation, then, is concerned with the effects of the sum total of all these individual aberrations upon the government bureaucracy. They regard corruption as an external factor that has effects on the way the government bureaucracy functions. Although some of them acknowledge that corruption is generated itself by certain societal characteristics, such as strong loyalties to family, caste or ethnic communities (e.g. Myrdal, 1968), these factors are located outside the government. In other words, corruption is regarded in terms of individuals, whose loyalties are not with the government but rest elsewhere. Corruption is not regarded in a more systematic way, in terms of regime characteristics.

Causes of corruption

A second question dominating the literature of corruption is concerned with the causes of corruption. Broadly speaking two approaches can be distinguished. Economists have developed a kind of marginal utility theory of corruption (e.g. Klitgaard, 1988; Niskanen, 1975; Rose-Ackermann, 1978). Klitgaard and Rose-Ackermann base themselves upon the so-called principal-agent model. On the one hand, there is the principal or superior who formulates a set of preferences for action. On the other hand, there is the agent, acting on behalf of the principal. While the principal would like the agent always to fulfill the principal's objectives, monitoring is costly, and therefore agents have generally some freedom to pursue their own private interests and to betray the principal's interests. In other words, they may be corrupt. What makes this an economic model is the proposition that the agent will act corruptly when his likely net benefits from doing so outweigh the likely net costs. When the principal knows the agent is corrupt, he will consider taking steps to reduce corruption. An optimal level of corruption is found when the total sum of the costs of corruption and the costs of efforts to reduce it, are as small as possible. (Klitgaard, 1988, pp.22-27; Rose-Ackermann, 1978, p.6).

Although some individual corrupt behaviour may be explained in this way, this model is not very helpful to understand corruption as a widespread social phenomenon. Like the literature reviewed earlier, the model takes the individual as its starting point, and conceives of corruption as an individual act to pursue personal benefits. It regards individuals primarily as economic agents. No attention is paid to a characterization of the social relation between the

principal and the agent. It is assumed that the principal and the agent have conflicting interests, but what these interests are, and why they should conflict are not explained.

A second approach to the causes of corruption is by contextualizing it in historical, political, economic or social processes. Contextualizing corruption immediately implies that the concept itself is problematized. Especially historical approaches, such as Brasz (1970) van Klaveren (1970), Swart (1970) and Wertheim (1964), have clearly shown that what is regarded as corruption may vary greatly in different societies. According to these authors the meaning of the term 'corruption' has shifted a great deal during the last centuries. One of the most important elements in this process has been the introduction of a Weberian bureaucracy, or at least the introduction of the ideology of a Weberian type of bureaucracy with its civil codes and administrative law, prescribing tasks and duties of public officials. According to Wertheim the current definition of corruption ("officials who infringe the principle of keeping their public and private concerns and accounts strictly separate") cannot serve as a universal sociological concept.

> "For it presupposes a social structure in which the separation between these two kinds of account-keeping has either been carried through in actual fact, or else has been generally accepted by society as a criterion for proper conduct on the part of the civil servants. Only then can the acceptance, or demanding, of gifts as a precondition for the bestowal of favours be regarded as a 'corruption' of the prevailing standards of morality" (Wertheim, 1964, p.106).

According to Wertheim, this principle of separation between public and private revenues did not exist as a matter of principle before the time of Napoleon. In the so-called patrimonial-bureaucratic states the local lords levied taxes on behalf of their own court. These local lords did not have to render accounts of their income or expenditure to anybody. As long as they fulfilled their tributary obligations to the prince and showed no signs of rebelliousness, these local lords were free to dispose of the assets they collected as they wished (1964, p.109). In this situation abuse of public office did not exist as it does now. However, accusations of corruption were possible in case anyone enriched himself too much, aroused the envy and hostility of his overlords, or threatened the central power (see also van Klaveren, 1970). With the introduction of (the ideology of) a Weberian bureaucracy and the corresponding legal framework, the meaning of the term 'corruption' shifted towards the practice of blurring the boundaries between public and private affairs[8].

Another major point the 'contextualizing approach' draws attention to, is

the relation of corruption to political and economic processes. Gould (1980) and Graft-Johnson (1975) are very interesting in this respect. Gould's work on corruption in Zaire is an explicit attempt to relate corruption to capitalism, underdevelopment and class formation. He distinguishes three phases in Zairian political history: the colonial period, the first five years following independence in 1960, and the period after 1965. Each of these periods is characterized by different class relations and different forms of corruption. In the first phase, corruption was rather limited, according to Gould. In the second phase corruption became an important means of facilitating accumulation processes. In this way the national bourgeoisie succeeded in consolidating its economic base. After 1965 the bureaucracy grew substantially. In this last phase the state became an instrument in the hands of a national bourgeoisie still in search for an ever more solid economic base (p. 7).

Decolonization is also a central element of Graft-Johnson's account of corruption in Ghana. In this interpretation corruption has flourished after independence due to the expansion of government functions and administrative apparatuses, and due to the introduction of a new system of public administration in which politicians occupied a central role. New officers had to be recruited for all the new posts. This was done partly through the old civil service system, and partly through political patronage which now became possible. Conflicts of interests developed between civil servants and politicians. According to Graft-Johnson, most politicians were less educated and less experienced in the art of administration than most bureaucrats. They were, however, more powerful. In the attempt to consolidate themselves all means were legitimate and, hence, corruption became widespread.

Both Gould and Graft-Johnson give some indications of why corruption is particularly prevalent in Third World countries. This, in their line of reasoning, is to a large extent caused by the social formation at the time of independence, the sudden importance of elected politicians and the rapid expansion of the state bureaucracy after independence.

This interpretation of widespread corruption in some Third World countries differs substantially from another quite popular opinion that corruption in the Third World is caused by the fact that many officials are strongly tied to their caste, kin or ethnic group, and therefore unable to let their public duties prevail over their private ones (e.g. Myrdal, 1968). Where Myrdal locates the origins of corruption in social relations outside the state, authors like Gould and Graft-Johnson explicitly link corruption to the prevailing political system.

A critique of the concept 'corruption'

Some points of critique of the conceptualization and study of corruption have been briefly mentioned above already. I have argued that some authors understand corruption mainly in an individualistic manner. Others, by contextualizing corruption in social, political or economic processes, succeed in relating the phenomenon of corruption to structural features of society. However, what remains is that corruption is primarily regarded as *rule-breaking* behaviour. At the present time this rule is implied in the Weberian model of bureaucracies. This model is the yardstick for 'measuring' corruption. Corruption may be widespread, and it may have political-economic or social causes. Still, it is regarded as a deviation. To my knowledge Theobald (1990) is the only author who more or less reverses the perspective. He argues that the western Weberian state is in fact a special situation, and the outcome of a particular conjuncture. According to Theobald

> "(...) our conception of the modern state with its 'clean' administration is the product of a particular period in the development of western capitalism. This was a period of enormous economic expansion (...) technological advance (...) Bretton Woods (...) managed capitalism founded upon Keynesian economics (...) mass employment backed by a public commitment to full employment and welfare. In short the consolidation of a form of social democracy in which the state, in fulfilling a range of civic obligations, became as public a piece of property as it had ever been (1990, p.165)[9].

In fact, the suggestion of this statement is that there is no special reason to regard corruption as the deviation and the Weberian state as the proper model. We might as well reverse the perspective, and regard corrupt bureaucracies as normal and the Weberian state as a deviation from this normality[10]. Or we might permit ourselves to think that there may be several models all describing specific elements of real bureaucracies.

Corruption and normative pluralism

The most interesting attempt to describe corruption in this way, thus not only as norm deviation, but also as an institutionalized practice itself structured by certain rules and norms, is made by Wade (1982, 1985). Wade describes the institutionalization of corruption in the irrigation department in a South Indian state. Different forms of corruption can be observed in this case. Field staff members of the irrigation scheme ask water users for (extra) money in exchange for water. Illegal sales of public resources, especially cement, take place on a large scale. Job transfers to desirable posts are often facilitated by

money transfers to the responsible officers or politicians. Politicians distribute short term material inducements in exchange for electoral support. These different forms of corruption, according to Wade, are not independent, but form part of the same system. Money collected from clients is not a mere individual property. There are systematic procedures for sharing these collections at each rank and with higher ranks. One of the main mechanisms of this sharing is that prices are paid for transfers to desirable jobs. Although job transfer is officially a matter of the bureaucracy itself, -superior officers two ranks higher officially authorize transfers- in reality politicians are active in influencing transfers. Money thus flows from clients of the bureaucracy via field staff and other lower officials to higher officials and politicians, and ultimately some of it is used in election campaigns. There are certain rules according to which these corrupt practices take place. When people do not behave according to these rules, for example when they are reluctant to collect revenue or when they are not willing to share their benefits with their superiors, they may be punished. What may happen for instance is that a few years before promotion is due, the dissident suddenly starts getting a number of very adverse Confidential Reports (Wade, 1985, pp.483-4).

What this example shows is that in cases like this it makes no sense to conceive of corruption as an individual act of filling one's own pockets. As Wade describes corruption may be an institutionalized practice, with its own rules, norms, relations of hierarchy and redistribution of collected spoils. This system is known by the participants, and its norms are at least partially shared. In other words, the so-called 'private interests' that would prevail over public ones in corrupt practices, should not be regarded as individual interests. They may be shared. In fact this means that there may be (at least) two different sets of norms, rules of conduct or laws governing behaviour of bureaucrats and politicians. On the one hand their behaviour may be based upon official government law prescribing one conduct and forbidding another. On the other hand, their behaviour may be based upon the rules of conduct as developed within corrupt bureaucracies: rules concerning the collection and distribution of bribes, rules concerning job transfers etc. Corruption may thus be usefully described in terms of normative pluralism: different sets of rules exist within the same social field, government institutions.

As Wade's example shows, the two sets of rules are not independent. Corrupt field staff in the Irrigation Department need their authority as government officials: otherwise they cannot go on with their corrupt practices. However, which normative system is more important and dominates the other one, is an empirical question. It may be that the Weberian model is the dominant one, and corruption the exception. It may also be that the rules

regulating corrup-tion are dominant, and that the Weberian model has lost its significance, except as an ideology that can be used to defend positions of power and authority[11].

This critical discussion can be concluded by formulating the following five points concerning the conception of corruption and possible directions for future research. Firstly, in many cases it seems not very fruitful to define corruption as an individual practice. Although in some cases corruption is an incidental act of filling one's own pockets, it is also often part of an institutionalized practice. It is embedded in certain social relations and structured by certain rules. Secondly, it is therefore inadequate to regard corruption as only rule-*breaking* behaviour. Of course, all corrupt practices are acts of deviation. The point, however, is that for an understanding of corruption it is not only necessary to know the rules that are broken, but also the rules replacing the broken ones. In other words, it is necessary to develop an alternative post-Weberian description of how the government institutions at issue work. Thirdly, in such analysis, which has real behaviour as its starting point rather than a normative and therefore hypothetical model, it is possible to pose a series of questions regarding the Weberian model itself. These questions relate to the social construction of this model, how it has become the dominant yardstick, and what its function is in actual practice (see also Abel, 1980; Nelken, 1981). Fourthly, the different normative orders within government institutions are not independent of one another. Rules and social positions derived from the official structure, function as a major resource in corrupt practices. The official Weberian model of the bureaucracy, thus, cannot be simply disregarded or replaced. Corruption means that there are different, interdependent sets of norms, rules and social relations. Fifthly, probably normative pluralism exists in almost all government bureaucracies, not just in corrupt ones. There are always gentlemen's agreements, remarks that are consciously left out of the minutes, important informal discussions in corridors or during lunchtime. To describe this phenomenon Wassenberg (1987) distinguishes the 'recorded order' from the 'un-recorded order'.

Corruption and the study of regime types

To move away from the individualistic and 'deviation conception' of corruption, it is necessary to understand corruption in relation to regime characteristics. The question to be addressed is: how can we characterize corruption, apart from norm-deviation? What does it mean in terms of regime characteristics? To answer this question it is necessary to have some idea of how to

analyse regime characteristics in the first place. For that I use Jessop's concept of state form or regime type: the institutional ensemble of forms of political representation, forms of internal organization and forms of economic intervention. According to Jessop "different state forms and regime types can be distinguished in terms of the differential articulation of political representation, internal organization and state intervention" (Jessop, 1982, p.228).

These three elements can be used as three points of entry in an alternative description of corruption. They provide for three different angles from which corrupt practices can be understood. All corrupt practices can be described equally in terms of political representation, internal state organization, and economic intervention. So the examples used under the different headings are arbitrary. Placed under a different heading different aspects would be highlighted.

Corruption as a form of political representation

The term 'political representation' refers to the way people have access to, and participate in state politics and state administration. Corruption, indeed, can be conceived of as a specific way of acquiring access and influence: through payments. This point is very forcefully put forward by Scott (1969) who regards corruption primarily as a transaction "in which one party exchanges wealth -or trades on more durable assets such as kinship ties- for a measure of influence over the authoritative decisions of government" (p. 321). Corruption, thus regarded, forms an alternative to pressure-group politics or official participation in corporatist bodies or advisory boards. One might hypothesize, as Scott does, that different types of political representation are relevant in different stages of political and administrative processes. While pressure-group politics and advisory boards are especially relevant before legislation has been passed, corruption is more evident at the enforcement stage of laws and policies. This may explain why corruption has seldom been treated as an alternative means of political representation, which in fact it is, as the following example shows.

Crow (1989, pp.220-221) describes some practices developing around open market sales, one particular element of Bangladesh food policy. In times of scarcity and high food prices the Bangladesh government allocates large quantities of foodgrain to private traders, in order to increase supply and reduce prices. However, these traders according to those interviewed by Crow, will either store this foodgrain till prices are higher and a larger profit can be made, or transport it to a large city "where the sale of a large quantity may have a less significant effect". Transport of this grain is forbidden. Nonetheless, it happens, the traders bribe the police they meet on their way to the city. In

this way the food traders pay for influence over implementation of this particular policy.

As is obvious, this form of political representation can only be used by the rich or otherwise powerful people. Only these wealthy people possess some assets to exchange. One may expect that this form of representation develops particularly in cases where political power and economic wealth are in different hands. When these rest in the same hands bribery is unnecessary.

Corruption and the internal organization of the state

When regarding corruption as a form of internal organization of the state, it becomes obvious that corruption can be regarded as the introduction of market mechanisms within the government. Wade's description of corruption in a South Indian irrigation department clearly illustrates this point. Wade describes the market for public office: government officials pay money for job transfers to desirable posts. Transfer prices vary greatly between posts and departments. Because each post, according to Wade, has a fairly constant revenue-raising potential, a kind of normal price tends to emerge around each post. When, however, the amount of money spent through a post changes, the transfer price may change accordingly. An example Wade (1985, p.478) mentions concerns a UNICEF-funded drinking water programme. The price of posts which disbursed the money and supervised the quality of work escalated immediately. An other element affecting transfer prices is the importance of the legislation that the department is responsible for enforcing. For example, "much more can be earned in the Revenue Department during a land reform scare than when no one is worried about land reform laws" (1985:478). Competition for jobs takes place not on the basis of professional competence, but on the basis of money.

Also Tilman (1970), writing about the distribution of services rather than posts, relates corruption to the introduction of market mechanisms.

> "Corruption involves a shift from a mandatory pricing model to a free-market model. The centralized allocative mechanism, which is the ideal of modern bureaucracy, may break down in the face of serious disequilibrium between supply and demand. Clients may decide that it is worthwhile to risk the known sanctions and pay the higher costs in order to be assured of receiving the desired benefits. When this happens, bureaucracy ceases to be patterned after the mandatory market and takes on characteristics of the free market" (1970, p.62).

Although some authors like Tilman have stressed the positive aspects of this

development, such as the maintenance of an equilibrium between the limited supply and the excess demand for government services and posts, I personally see nothing particularly desirable about this situation. The positive interpretation is based on the presumption that allocation along lines of payment is preferable to allocation along lines of equal treatment or officially recognized rights (Szeftel, 1983). Furthermore, as most markets, the market opened up by corruption is not an open or free market, as advocates suggest. Among other things, the illegal and therefore secret character of corruption will put severe limits to the openness of this market (Alam, 1988).

Corruption as a form of economic intervention by the state

Regarded from an economic angle, corruption is a special type of surplus-appropriation or -redistribution. In the political economic analyses of Gould for instance (1980) and Szeftel (1983), this feature of corruption is obvious. Szeftel describes corruption in Zambia, which he characterizes as a 'spoils system', stressing its systematic character. According to him, corruption is one of the ways "in which public wealth and influence are appropriated and accumulated by individuals with access to public office or to public officers" (p.163). One of the examples he gives concerns a scandal around the African Farming Improvement Fund. This fund was established in 1958 in order to improve farming and marketing conditions. The farmers themselves financed this fund through levies on marketed surpluses. The fund was supposed to provide the infrastructure and loan assistance necessary for farmers to expand and, perhaps become commercial farmers. At the end of the 1960s a huge amount of corruption had developed. According to the report of the commission investigating the scandal, the

> "outstanding feature (...) was that loans were made without any inquiry as to how far arrangements had been made for the purchase of the properties concerned, without any inquiry as to whether the persons concerned were African farmers, whether they were farming in the province concerned or whether the farms they purchased where in the province concerned ... nowhere was the money advanced secured ... Most of the loans were made to persons who were members of the Board [of the fund] or who held positions in Government or Public Service" (Doyle Report, quoted by Szeftel, 1983, p.175).

What is clear is that corruption in this case is a form of surplus appropriation on the part of the people representing or having other forms of access to the state. The farmers for whom the loans were intended and, moreover, whose contributions had formed the fund in the first place, were excluded, while persons in public positions benefitted from the fund. The Zambian spoils

system, hence, can be understood in terms of class formation. According to Szeftel, access to public office enables entry into the (petit) bourgeoisie, or at least functions as a means of accumulation. What Wade's example of the irrigation bureaucracy in South India shows is that corruption may not only involve surplus appropriation, but also redistribution of this surplus within the bureaucracy.

Conclusion

Most of what is written above supports the claim that often corruption is not very desirable, to say the least. Corruption means that the government itself is not a trustworthy body, even with regard to its own policies, self-made laws and plans. It is likely that corruption increases social inequality, as only the have's (of money or public posts) are able to set the scene of corrupt practices. In most cases corruption will decrease government efficiency. When job appointments take place on the basis of payment, professional competence becomes less important. Also the graft-money-seeking behaviour of corrupt government officials is likely to undermine government efficiency. Due to its secret nature and restricted access, corrupt practices cannot be controlled by the public at large, and hence run counter to democratic principles.

That corruption deranges planned intervention and interferes with a proper implementation of laws and policies is important to remember when thinking about possible ways to do away with it. In order to put a halt to corruption measures such as stricter codes of conduct, watch dog committees, checking and double-checking the activities of government departments are often proposed. These proposals are based upon a flawed idea of the function of laws and policies in a corrupt society. As I have argued, corruption means that positions of authority and government laws and regulations are used as resources in corrupt practices. So, also the stricter codes of conduct can be used as resources by corrupt officials whose task it is to enforce these rules. There is no reason to have much faith in watchdog committees and other inspecting bodies. In many countries it is the police that is most notorious for its corruption.

Other types of measures are necessary to reduce corruption, which would involve social sanctions rather than legal sanctions. Without being able to elaborate fully, this means that in any case measures are required which change the relationship between the bureaucracy and the public, as well as the internal relations within the corrupt bureaucracy. More openness to the public about the services provided and the rules along which this takes place, an

expansion of the ways in which the public can participate in government processes, an expansion of the possibilities for lower officials to criticize their superior supervisors, are among the changes that need to take place. Fortunately most government bureaucracies are not undifferentiated homogeneous blocs. Hence a fight against corruption means looking for ways to strenghten the position of the officials who can still be regarded as supporters of the official rules and democratic principles.

One thing that becomes very clear in a discussion about corruption is the weakness of the concept of 'planned development'. Corruption is an extreme example that shows the impossibility of planned development. It shows that government administration is a social process (often even a social struggle), rather than a planned process. Hence, planned development is a fiction. The idea of planned development is based on the assumption that the main actors, the government officials, all behave in line with the official laws and policies. Corruption shows that there is no *a priori* reason why this should be the case. Government officials may have their own purposes, their own objectives. Rather than strictly following the official rules and regulations, they may use their position of authority and the official government rules to pursue goals other than the official ones. New norms and rules of conduct may develop within government bureaucracies, which may differ substantially from the official civil service code. In such situations it is hard to predict the effects of laws, policies and plans. Very much depends on the government officials who have to work with them and the characteristics of the government institutions involved.

What can academics do? Three suggestions can be made to further the study of corruption. Firstly, as I have argued, it seems important to regard corruption not only as individual deviant behaviour, but also to look at it in a more constructive way: what is corruption, what happens in corrupt practices, what are their systematic features, and which rules guide corrupt practices? Corruption not only implies that rules are broken. It often also involves adhering to new norms or rules. It is important to understand these.

Secondly, it would be illuminating to link the study of corruption to the more general theoretical literature on the state. In the above description of corruption in terms of state/regime characteristics, many issues are touched that are widely debated within this body of literature. For instance, there has been an extensive debate about the presumed instrumentalist character of the state and its relative autonomy (see e.g. Alavi, 1972; Block, 1980; Miliband, 1970, 1973; Moore, 1980; Poulantzas, 1969, 1976; Wood, 1980). Widespread corruption gives some credibility to the instrumentalist position, although

requires further investigation. Another debate is about class formation in post-colonial regimes: is it justifiable to speak of the development of a political or bureaucratic class, or is state access a means for the capitalist class to strengthen its economic basis? (See e.g. Saul, 1983, Shivji, 1973; Byres, 1988; Rudolph and Rudolph, 1987). Szeftel takes the position that corruption helps the (petty) capitalist class to develop. Wade suggests that there is indeed something as a political class. In both these articles the authors' positions remain at the level of assumptions: the issue is not seriously addressed. Related to this debate on class formation is the literature on the rentier state (see e.g. Boone, 1990; Krueger, 1974; Toye, 1988). In my opinion, the analysis of corruption would undoubtedly gain in rigour if it were linked to these theoretical debates.

Thirdly, the need for comparative research should be stressed. The above framework of different elements of regime types could be of much use. Comparing different regime types on the basis of these criteria, would probably show that labelling some practices as corrupt and others as remaining within the law, is often quite arbitrary: looking at the actual behaviour it may become clear that these regime types have a lot in common. For example, officially sanctioned privatization of government bodies is also a form of turning public offices into private businesses. It shares types of corruption with the apparently contrary tendency of reorganizing public bodies along market lines, that is introducing competition between government institutions, and making them financially self-supporting, as for instance UNICEF proposed with regard to the health sector in African countries (Kanji, 1989). Both mean that allocation of offices through payments are introduced, and that public bodies have to raise part of their own financial requirements. Their effects may have similar drawbacks. Comparative research will highlight these issues. It will also address the questions of why some practices are corrupt while other very similar practices remain within the legal framework, what difference this makes, and why in some situations corruption has developed while in other situations other non-corrupt forms of dealing with similar issues have developed. We need a better understanding of these issues in order to create governments that are more trustworthy and committed to the people who need for their support.

Notes

1) I have profited a lot form the comments on earlier drafts, made by Marina Endeveld, Barbara Harris, Kees Jansen, Peter Mollinga, M.V. Nadkarni, the participants of the research meetings organized by Franz and Keebet von Benda-Beckmann, and various authors of this book.

2) Brasz (1970) even suggested to regard secrecy as part of the definition of corruption.

3) For lack of a better alternative, I still use the ethnocentric concepts 'Third World', 'developing countries' and 'developed countries'.
4) In this paper I focus especially on African and Asian countries. This is not to suggest that corruption only occurs in these two continents. For the moment I myself am more interested in developing countries than in developed countries, so I concentrated on this literature. It happened to be that most of this literature is about Africa and Asia. Very little is written about corruption in Latin America.
5) Sometimes the concept of corruption is also used to denote activities in private businesses. Mostly however, as in this paper, corruption refers to behaviour of people holding public offices. It may well be that this is an unwarranted restriction. The lack of interest for the private sector by students of corruption suggests that the private sector is more or less OK, and that the public sector is the main troublemaker. I think this suggestion is very misleading: there may be as many malpractices in private business as there are in public offices. An important difference between the two is that public institutions are easier accessible, that much information is public, while private businesses have a more closed character. It is therefore simply easier to know about malpractices in public offices. Whether this justifies the lack of interest in private business is another matter.
6) By making this accusation, the opposition is able not to criticize the whole political order, of which they themselves are part as well. The perception of wrongdoing individuals enables them to reconcile their critique of the real world with a promise that within this political order things could be much better (see also Johnston, 1989: 24).
7) One may wonder whether in some cases laws and regulations from the beginning have the function of creating law-breaking behaviour, and thereby possibilities for corruption. This was suggested to me by one trader-informant in South India. This person argued that the main reason that the Kerala government was interested to formulate a market regulation Act was that they expected that big traders opposed to implementation of this body of law would be willing to pay high bribes. With regard to Calcutta rickshaw pullers, Lapierre and Netocny do not give any details concerning reasons behind the creation of rules by the government. They do, however, both suggest that the law concerning rickshaw transport is unworkable and that it is unavoidable that a huge amount of offences occur. This makes the law an even more powerful resource in the hands of the corrupt officials.
8) This position that the term 'corruption' may have different meanings in different societies, is not a relativist or subjectivist position, as Brasz (1970) suggests. What is meant with the term 'corruption' in a specific society is to a large extent shared by all its members. This meaning depends on intersubjectively created norms of decent behaviour, known and applied (often unconsciously) by most members of this society. That individual A may regard corruption as very useful, and B as something that should be punished severely does not really matter. Both refer to the same intersubjectively created phenomenon of corruption. (See Sayer (1984) for a discussion of the difference between 'meaning in' and 'meaning of'.)
9) And, according to Theobald, it is quite possible that the heyday of this relatively clean bureaucracy is over, and that the current trend of privatization could well increase corruption in Western government bureaucracies.
10) The use of the term 'normal' is not meant in a legitimizing sense. I am quite convinced that more often than not corruption is, as the moralists claim, bad and should be abolished. 'Normal' here is meant in a descriptive sense: common.
11) Two additional remarks should be made here. Firstly, the term 'normative, or legal pluralism' is sometimes conceived in a rather positive way. It is associated with tolerance, opposition against a centralizing power, or increased possibilities for subordinate groups to organize their own lives. In the case of corruption this positive connotation is unjustified. This type of normative pluralism within the state is more likely to benefit the have's than the have-not's (see also Vel in this volume about the social inequality implied in a situation of legal pluralism in Indonesia). Secondly, although it can be maintained that different sets of norms and rules are distinguishable in corrupt bureaucracies, not all definitions of normative

pluralism fit these bureaucracies (for critical discussions and comprehensive reviews of the concept of normative/legal pluralism, see Griffith, 1986; Merry, 1988; Moore, 1973). It all depends on the criteria used to distinguish different sets of rules or bodies of laws. One extreme position is to argue that normative pluralism means that there are different bodies of laws with a different social basis and a different source of legitimacy (as for example is the case with state law and church law). If this definition is used, a corrupt bureaucracy cannot be described in terms of normative pluralism. The other extreme position is to argue that normative pluralism exists whenever there are semi-autonomous social fields generating norms semi-autonomously from other normative systems. This certainly is the case in corrupt bureaucracies. The irrigation bureaucracy as described by Wade, can be described as a social field generating its own norms semi- independently from the official government rules. I do not want to go into the pro's and con's of the various definitions of legal pluralism. To me it seems useful to employ the term to describe corrupt bureaucracies since it emphasizes the institutionalized character of corruption, that there are rules according to which corruption takes place. For an understanding of corruption it is necessary to acknowledge this rule-structured character. Otherwise one can never say more that there is a gap between official laws an the (unstructured) corrupt real world.

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THE STRUGGLE FOR COOPERATIVES[1)]

Otto Hospes

Introduction

The history of so-called cooperatives in developing countries is a litany of broken promises. National governments of developing countries have long assured rural populations as well as international funding agencies that to introduce cooperatives with their rules and procedures, is to emancipate the so-called backward and unorganized rural population, to bring prosperity to its member-producers, to increase the production of food and cash crops, to guarantee national food security and to induce national economic development. Although the exact package of promises varies from nation to nation and from development plan to development plan, all packages have in general been of a grand or grandiose quality.

However, those institutions called cooperatives did not function as they were supposed to function and were not what they were supposed to be according to the ideals, policies and even 'theories' of their different supporters. The United Nations Research Institute for Social Development concluded that, "... rural cooperatives have seldom achieved the development goals set for them by economic and social planners. This has been most clearly evident when the goals have included structural changes" (UNRISD, 1975, p. 10). In his FAO report Dülfer (1976) says that "for some time now critical voices from the spheres of project implementation and empirical research have been making themselves increasingly heard. They point out numerous failures or at any rate examples of lack of success either in individual projects or in entire cooperative programmes" (p. 1). According to Baviskar and Attwood (1984), "...the performance of cooperatives in most countries has been spotty and mostly discouraging" (p. 85).

From reassurance to reassessment of cooperatives.

Different conclusions have been drawn by the different actors involved in 'the cooperative debate'. Three main types of arguments against cooperatives can be distinguished.

First, many of these actors now question the intrinsic or absolute value of the cooperative as a tool to combat rural poverty in developing countries. In their World Bank paper Lele and Christiansen (1989) citing Hanak and Loft

(1987) for example, recommended that Nordic donors drastically review their assumptions on the role of cooperatives in development: "unless Nordic donors openly begin to reassess the blanket assumption that cooperatives are a good thing everywhere, there are dangers that future promotion will again turn to areas where cooperatives do not stand a chance of success" (p. 19). Abbott (1989), former chief of the Marketing and Credit Service of the FAO, also emphasizes the relative value of cooperatives and suggests that, "Cooperatives are needed as a competing channel, not as a monopoly" (p. 19). Even the staunchest adherents of cooperatives like a top official of the International Cooperative Alliance now admit, "It is becoming apparent, whether cooperative supporters wish to realise it or not, that cooperatives are not always the best or most appropriate development tool" (Thordarson, 1988, p. 46). The so-called cooperative has lost its privileged status as a development instrument to the benefit of small rural producers.

Second, many participants in the discussion on the role of the cooperative in development have concluded that so-called cooperatives in developing countries are not 'genuine' cooperatives but 'pseudo-cooperatives' (Verhagen, 1988) or 'gov-operatives' (Van Dooren, 1978). It is now accepted wisdom among the wide range of international development agencies that many cooperatives in developing countries are far from being member-controlled institutions and - analytically and practically speaking - qualify better as a government-controlled institution. "If member participation and democracy are among the basic cooperative values, they are noticeable by their absence in much of the developing world" (Thordarson, 1988, p. 42). The so-called cooperative has lost its reputation as a 'self-help association'. This has focussed attention on what precisely are the essential features or 'basic values' of the cooperative (Watkins, 1985; Marcus, 1988) so as to make a better distinction between false and genuine cooperatives. The strong and now widespread conviction that, "The relationship between cooperatives and government remains, with little doubt, the single greatest obstacle to the success of cooperative development efforts in the South..." (Thordarson, 1988, p. 49) explains the increasingly heard policy rhetoric on the need for "de-officialisation" (ibid) or "appropriate roles for government in promoting the cooperative movement" (United Nations, 1987). It is more or less assumed that it is possible and necessary to transform those organisations called cooperatives by international development agencies and national governments into organisations which are much closer to a pre-defined set of cooperative ideals and principles.

The third conclusion is an extreme version of the second. It elaborates the conclusion that the concept of the cooperative is misleading and no guarantee of 'self-help' and 'self-regulation'. The central idea is not to transform so-called

cooperatives into 'genuine' cooperatives but to break with the concept of 'the cooperative' altogether in favour of alternative concepts like 'self-help association' and 'self-help promoting institution' (Verhagen, 1988). However, attempts to define 'self-help' and to solve the paradox of 'self-help promotion' will demonstrate that this break is not that fundamental. The essential features of 'self-help associations' and 'cooperatives' are both hard to define and to use as analytical tools such as to distinguish these organisations from other types of organisations. In the international network of so-called Non-Governmental Organisations (NGOs) organized parallel to governmental aid agencies which partly finance them (Hospes, 1988), the idea of promoting these alternative concepts is rather popular. Those who promote this idea, however, run the risk of immediate disqualification as participants in the development policy discussion on 'the cooperative'. Persistent believers in the concept of the cooperative (e.g. 'single issue' bodies as the International Cooperative Alliance) feel uneasy about these ideas. However, broadly-based international development agencies which change policy discourse from time to time and 'play on' a range of development instruments will have less scruples in welcoming these people to the 'cooperative debate' (cf. Seminar on the Donor Support to the Promotion of Rural Cooperatives in Developing Countries organized by the World Bank, 1990).

Cooperatives do not speak for themselves.

This article is about the struggle for cooperatives. I want to review the promotion, evaluation as well as the discouragement of those institutions in developing countries which are called cooperatives by national governments and international development agencies. Different assumptions, ideas and views on the essence of cooperatives as well as conflicting interests of the parties involved in cooperatives have assured a lively debate and a fierce struggle for cooperatives. This debate and struggle suggest that cooperatives are best viewed as social-normative constructs as well as swords which fit many hands. This argues for the development of legal pluralistic and political-economic approaches to cooperatives.

Two main themes function as entry points to describe the struggle. The first concerns the poorly understood Western European and colonial histories of early so-called cooperative movements. The second main theme is the Babylonian confusion over the essence and evaluation of cooperatives which arose when cooperatives proved unable to create heaven on earth in developing countries. Both themes are related: one-sided historical interpretation of the significance of cooperatives in Western Europe and their areas of overseas

influence has contributed to confusion about the essence and evaluation of cooperatives in developing countries. A more comprehensive understanding of these histories as cases of farmers' technical-economic and political-economic interest articulation however, will not yield the essence and appropriate evaluation of 'the cooperative'. It will rather emphasize historically specific roles of cooperatives facing particular circumstances and the disregarded significance of governments and unions in both Western Europe and its colonies in supporting the interests of farmers.

In the first section of this article, I reconstruct the misleading picture of the potential of the cooperative based on its success in Western European history. My first argument is that the history of the first Western European cooperative movements has placed excessive weight on farmers with their back to the wall as a result of poor socio-economic conditions in general and exploitative traders in particular. My second argument is that the 'self-help promotion' efforts of national governments during the rise and consolidation of cooperative movements in Western Europe have been poorly articulated in the debate on the role of the cooperative in developing countries.

In the second section, I draw lessons from histories of cooperatives in colonized economies. For pragmatic reasons I concentrate on cases from British East Africa. A first lesson is that cooperatives were not immediately set up on a nation-wide basis but rather emerged in particular cash crop-producing areas as marketing bodies (see Van Dooren, 1978; Vincent, 1988; Cranenburgh, 1990). Secondly, the rise of these cooperatives pre-dated national cooperative law (see Vincent, 1988; Cranenburgh, 1990). A third lesson is that introduction of co-operatives in East African colonies increased the awareness of farmers and their leaders of colonial conditions and provided an opportunity to openly discuss the tasks and responsibilities of the colonial ruler (ibid).

The third section is about the post-colonial history and debate of so-called cooperatives in the developing countries, as they are now called. This history begins with the formation of the alliance between Third World national governments and international development agencies to promote cooperatives. Lively debates start when the cooperatives supported by these national governments and development agencies evolved as the anti-climax of a wider historical development of cooperatives, which began in Western Europe and spread to the colonies. I address three main themes: the first concerns the essence and 'proper' evaluation of so-called cooperatives. What are the essential features of a cooperative and how do we evaluate cooperatives in different contexts? The use of local-traditional forms and concepts of cooperation for cooperative development strategies is the second theme. Baviskar and Attwood (1988) regret in this connection that, "Most cooperatives are planned without

any real knowledge of how, and under what circumstances, village people do cooperate informally with each other" (p. 10). The third theme is the relationship between cooperatives and governments. Central questions concern 'appropriate roles' of governments in cooperative promotion and the nature and possiblities of turning government-controlled cooperatives into member-controlled institutions ('de-officialisation of cooperatives').

When the first Western European cooperative movements emerged.

The Industrial Revolution which took place in the first half of nineteenth century England was a specific combination of technological progress and social underdevelopment. In this historical context, consumer cooperatives were started as an attempt of small industrial producers and industrial labourers to relieve their social distress and to provide an attractive alternative to the truck system which meant that employees were more or less forced to buy basic consumption goods of their employers. However, the breakthrough of the consumer cooperative movement took place after wages and salaries had gone up considerably. It was not so much the first pains of the Industrial Revolution but rather the economic gains which followed which guaranteed the continuity of the cooperative as an organization to defend consumer interests in England.

The grain crisis in Western Europe at the end of the nineteenth century (1877-1895), a result of the enormous supply of cheap North American wheat, provided the seeds of a European-wide wave of agricultural cooperative movements. Farmers faced financial difficulties and were almost forced to work together to market agricultural produce so as to minimize costs. However, the Western European farm cooperative movement had just experienced an organizational take-off when the world grain crisis subsided at the turn of the century and a period of new economic growth began. Farmers were in need of a marketing instrument which could efficiently handle the enormous expansion of the flows of modern agricultural inputs and agricultural produce (Stuijvenberg, 1977). This marketing instrument had to be organizationally complementary to the family farm as the unit of agricultural production. The cooperative was their answer and evolved as a technical-economic extension of the family farm.

Input suppliers and output dealers were catalysts of the movement. Under poor socio-economic conditions, but even more so when economic conditions improved, agricultural traders were a thorn in the farmers' flesh. Sharp increases in traders' profits with the enormous expansion of trade was hard to accept and further motivated farmers to start cooperatives (Stuijvenberg, 1977).

The history of the first Western European cooperative movements has been associated too much with farmers in dire straits as a result of poor socio-economic conditions in general and exploitative traders in particular. Cooperatives have been too easily considered as just an expression and answer to crises. The less recognized historical significance of cooperatives in Western Europe is their role *after* situations of crisis: these cooperatives proved not so much an instrument to combat rural poverty but rather a product of recovery and growth. Small farmers joined cooperatives to claim their share of the new economic welfare which otherwise might have ended up in the hands of traders and large farmers.

The first cooperatives of Western Europe were the initiative of small industrial producers and industrial labourers (in England) and farmers and their leaders of local agricultural communities (in the Netherlands, Germany, Ireland and Denmark) in response to poor economic conditions and exploitation of input suppliers. As expression of mutual material interests of labourers or small farmers, these cooperatives support definition of 'the cooperative' as a timeless, invariable and universal phenomenon. However, the *specific* features of the historical-economic circumstances which forced and enabled labourers and farmers to cooperate cannot be emphasized too much.

The need for more emphasis on the circumstances specific to the rise and consolidation of cooperatives in Western Europe also applies to the general political situation. There is a broad consensus that at the turn of the century Western European liberal governments were not involved in formation of cooperatives which started as a 'self-help movement'. The common conclusion that governments played no role or at most a minor one, disregards the active indirect role of Western European liberal governments vis-a-vis agriculture in general and cooperatives in particular. These governments enabled cooperatives to increase and stabilize their market shares of agricultural produce and to become one of the most distinctive features of Western European agricultural systems in the twentieth century. The most profound but least recognized step of Western European governments in stimulating cooperative development however, has not so much been the supply of a whole array of support services (in the fields of law, tax and quality control of agricultural inputs and produce) but the (re)construction of the organisational infrastructure of the agricultural sector: government stimulated farmers to organize themselves better in cooperatives as well as unions and to form representative national bodies to defend their interests and to discuss agricultural policies. These incentives contributed to the development of an enormous diversity of cooperatives and unions which in turn reflected different product-specific interests and socio-cultural backgrounds of the farming population. Cooperatives primarily

defended the technical-economic interests of farmers whereas farmer unions concentrated on their political-economic interests (see Smith, 1961; Diepenbeek, 1988). The technical services and legal instruments of governmental bodies created near-optimal conditions for cooperatives as farmer service centres. Representatives of unions were given opportunities to inform national agricultural policy makers about the points of view of the farming population.

Cooperatives in colonized economies.

The success of the cooperative movements of Western Europe inspired national governments to implement their ideas on cooperatives in their colonies. The first step of the Dutch in promoting cooperatives overseas was to officially declare the Dutch Law on Cooperative Societies as the official cooperative law in the East Indies in 1915. The British conceived credit cooperatives as appropriate instruments to combat rural indebtness in Indian (cf. Robert, 1983). Indigenous farmers in British East Africa were stimulated to organize themselves in marketing cooperatives (see e.g. Van Dooren, 1978). The significance of the ideas and practices of the colonial ruler with respect to rural institution-building cannot be underestimated as these ideas and practices have resulted in legal-organizational structures which condition the development of government-supported cooperatives in the post-colonial era. Vincent (1988) states that, "many of the legal and governmental structures within which cooperatives in Uganda function today, were framed within the colonial period" (p. 189).

This section draws some conclusions from the histories of cooperatives established in East Africa under British colonial rule. These cooperatives were the common effort of indigenous traders and the colonial government. Indigenous agricultural produce traders successfully used cooperatives to increase their own market shares by breaking the monopolies of Asian traders (Van Dooren, 1978, p. 40). In Tanzania, according to Cranenburgh (1990), "The cooperatives' early success was not due to their superior efficiency compared to private traders, but to their political appeal: they were instrumental in wresting economic control away from immigrants and toward Africans" (p. 125).

The very first forms of farmer cooperation organized by agricultural traders pre-dated national cooperative law making. When cooperatives proved attractive in facilitating cash crop marketing, colonial governments intensified their efforts to construct a legal-administrative framework to give cooperatives a central - if not monopolistic - position in the marketing of cash crops (for

Tanzania, see Cranenburgh, 1990, p. 126-127). "Cotton which made up less than 10 percent of Uganda's exports in 1906-7 [...] accounted for over 90 percent of its total exports twenty years later. At that point, as the indigenous cooperative movement began to spread eastwards to Teso, government policy makers advocated the establishment of a cooperative system under government control throughout the whole country" (Vincent, 1988, p. 190). The government control of Teso District was particularly important as it had "the highest average per capital production in the protectorate" (ibid, p. 199).

Cooperatives were not immediately set up on a nation-wide basis (as happened in the post-colonial era) but rather emerged in particular cash crop producing areas. For Tanzania Cranenburgh (1990) notes that, "The expansion of the movement was limited, however to the cash crop producing areas of Kilimanjaro and Bukoba, Sukumaland and the south" (p. 127). Cooperatives were not used to market food crops, as they were supposed to in the post-colonial era (see Lele and Christiansen, 1989, p. 18).

In public rhetoric the role of cooperatives was acclaimed as an expression of proper British government administration which enabled local people to acquire leadership capacities. "The fundamental principle of the [cooperative] system is identical to that of 'Indirect Rule' - which could be better named 'Cooperative Rule' - the essential aim of both being to teach personal responsibilities and initiative ... Not the least attractive feature of this movement is that no other system offers better prospects of producing leaders from among the people" (Lugard, quoted in Coulson, 1982, p. 98, and Cranenburgh, 1990, p. 126). The British colonizer wished to 'educate' the colonized how to manage and cooperate according to a modern western formula. One of the less intended consequences of these educational efforts however, was that cooperatives increased farmers' awareness of the tasks and responsibilities of the colonial ruler. Cranenburgh (1990) says that in Tanzania, "The multiplication of cooperative societies and unions ... during the 1950s gained a great social and political significance. Indeed, the cooperative movement became the most important institutional forum for the representation of African interests vis-a-vis the colonial government" (p. 128). In her detailed historical account of the cooperative movement in Teso District of Uganda, Vincent (1988) states that, "It was in the context of African nationalism that the cooperative movement got off the ground in Teso" (p. 195). Vincent however, emphasizes that seizure of state power has neither been the central demand of the cooperative movement nor the first wish of up-coming nationalist leaders involved in cooperatives. "It may be suggested, then, that the cooperative movement in Teso developed as only one phase of a reform commodity movement which had its earliest expression in the 1920s [...]. A reform commodity movement, according

to Jeffrey Paige (1975: 70), is a typical form of political expression in a smallholding agricultural system such as that of Teso. It is concerned with the control of marketing in agricultural commodities. It demands neither the redistribution of property nor the seizure of state power" (Vincent, 1988, p. 201). The development of Ugandan cooperatives cannot be seen in isolation from the growth of the Uganda African Farmers Union. This Union was founded in 1948 by Ignatius Musazi who is described as 'Uganda's first modern national leader' (Engholm, quoted in Vincent, 1988, p. 195). "Registered under the Business Names Ordinance as a partnership of twenty persons, its objective was to act as commission agents for the sale of cotton, coffee and other produce. Since its main purpose was to pressure the government into fixing higher prices for cotton, its growth was rapid" (ibid, p. 194).

The post-colonial history of cooperatives in Uganda and many other Third World countries painfully demonstrates that the combined mobilization of cooperatives and unions vis-a-vis national rulers has been a rather unique feature of cooperative development in the late pre-independence era.

Post-colonial history and debate of cooperatives.

Although cooperatives were a foreign formula, independence did not end cooperative development in the new nations but instead ushered in an enormous growth of new cooperative movements as 'the third way' (differing from the capitalist and socialist models) to organize and develop rural economies. The new leaders praised the nation-wide tradition of mutual help and described cooperatives as its modern expression. They promised that cooperatives would effectively combat rural poverty, acting as a counterweight to defend and secure the interest of farmers against exploitative traders who were regarded a main obstacle to economic growth (see Bouman, 1981). Cooperatives became integral parts of rural development programs and were given a privileged status in the new economic constitution as key instruments of economic and social development. Ministries of Cooperatives were established to implement cooperative policies and programs.

Decolonization did not put an end to foreign support to cooperative development in the South. The post-war and post-colonial boom of international development agencies further guaranteed the continued promotion of cooperatives as an appropriate tool to combat rural poverty. As members of these international development agencies, former colonial states were able to contribute indirectly to cooperative movements in developing countries.

Ministeries of Foreign Aid or Development Cooperation were established to include bilateral support to cooperatives in developing countries.

With the financial support of international development agencies of western countries, Third World national governments could spend a great deal of capital planning and implementating cooperative projects. However, enormous financial support to these cooperative projects and ambitious development objectives set by national governments sharply contrasted with their generally disappointing results. The dramatic report of the United Nations Research Institute for Social Development (1975) on the role of cooperatives as agents of change in developing countries was the beginning of a period of confusion and disagreement on the essence and 'proper' evaluation of cooperatives among large international development agencies such as the United Nations, Food and Agriculture Organization and World Bank on the one hand and cooperative interest bodies such a as the International Cooperative Alliance, Committee for the Promotion of Cooperatives and World Council of Credit Unions on the other.

The 'essence' of cooperatives and their evaluation.

UNRISD's extensive research in the period 1968-70 of 40 individual cooperatives and related institutions in thirteen countries in Africa, Latin-America and Asia was based on the view that, "Among the ideals associated with the cooperative movement has been the aim that class distinctions among members should be eliminated or at least greatly reduced and that the cooperative should promote egalitarianism with regard to the means of production (access to equipment and credit, water supply, in some cases size of holdings, etc.) and with regard to income and benefits" (UNRISD, 1975, p. 6). The Research Institute concluded that their sample provided not much cause for optimism on the role of cooperatives as 'agents of change':

> "A general conclusion of the study is that cooperatives introduced into rural communities characterized by significant inequalities of wealth, power and status are not likely to be very effective in bringing about fundamental social change in favour of the more disadvantaged groups. Those in a more advantageous position will tend to take advantage of the cooperative. Instead of changing the local structure, the cooperative is more likely to be absorbed by it and may reinforce and deepen existing inequalities by yielding benefits to a limited group. If the poorer members of the cooperative do not benefit from the cooperative services or if the poorer members of the community at large do not belong to the cooperative, then the effect of the cooperative in relieving rural mass poverty will be minimal" (ibid, p. 7).

The International Cooperative Alliance, one of the largest post-colonial guardians of cooperative business and ideology, tried very hard to refute

UNRISD's findings. First, it presented a methodological critique and questioned the tendency of UNRISD to generalize across levels and across different types of cooperatives. The ICA warned against "generalization from some rural cooperatives to other rural cooperatives, from rural cooperatives to urban cooperatives and from one type of cooperative, e.g. credit cooperatives, to other types of cooperatives, dealing with production, marketing, transportation, etc." (ibid, p. 25). Besides, the ICA complained that "the cases studied were not all genuine cooperatives..." (ibid, p. 25). So, even ICA knows some (many) cooperatives are bogus, even if officially chartered as cooperatives. Secondly, the ICA presented a substantive critique and opposed the view of UNRISD on the role of cooperatives in development. According to the ICA, cooperatives should not be primarily burdened with the task of reducing socio-economic inequality in rural societies. This creates wrong or unreasonably high expectations and easily results in negative evaluations of cooperatives. The ICA suggested that, "It would be more correct to say that it is a major purpose of cooperatives to provide small and medium-sized producers with better access to the means of production and productive techniques. Viewed in this light most of the cases studied showed some progress" (ibid, p. 26). The ICA further mentioned that UNRISD had confused 'equality' with 'equity'. According to the ICA, "Cooperative principles are primarily concerned with equity and not a blanket equalitarianism. The difference is that equity implies rewards commensurate with contributions" (ibid, p. 27). Not surprisingly, the ICA was convinced that from this point of view the overall results of cooperatives in developing countries were not as disappointing as claimed by UNRISD.

From the perspective of UNRISD the concept of cooperatives as 'agents of change' referred to an instrument that brings benefits to the masses of poorer inhabitants in developing countries. However, UNRISD underestimated the complexities of social stratification at local level and inadequately conceptualized cooperatives as *part* of the social context. The ICA had a more modest agent of change in mind and refused to consider distribution of benefits of cooperatives as part of the larger problem of social inequality. Still, it is very useful (even in an economic sense) to think about how social inequality of society at large affects the possibilities of cooperatives to start and to serve the economic interests of their members. Baviskar and Attwood (1988) addressed the problems of cooperative action in stratified societies and asked whether cooperatives contribute toward equalization of opportunity. They conclude that "cooperation, whether formal or informal, whether based on grass-roots initiative or state planning, is not likely to change the indigenous social structure very far, especially not where the economy is stagnating and oppor-

tunities for innovation are absent. However, inequality, at least moderate inequality, is not necessarily an obstacle to cooperation" (p. 5).

A better understanding of the dynamism of cooperatives in different social contexts implies an understanding or consensus of the essential features of 'the cooperative'. A seemingly minor methodological criticism by the ICA of the UNRISD research was that not all studied cases were genuine cooperatives. However, this is not a mere methodological critique but rather a substantive one. It suggests that the ICA clearly understood the difference between 'real' and 'false' cooperatives and that the working definition used by UNRISD was inappropriate. The selection of case studies by UNRISD did not follow a predefined set of substantive features defining 'the cooperative' but rather a loose approach. UNRISD simply selected those institutions called 'cooperative' as case studies and studied a wide range of different 'cooperatives' with varing degrees of involvement by governmental agencies, peasant syndicates, rural syndicates, Catholic Church authorities, Protestant missions, national cooperative organizations, development projects, cooperative unions and the local farming population (UNRISD, 1975, p. 59-64). This diversity of 'cooperative' institutions provides another strong argument against general statements (like those of UNRISD in its final report) on the effectiveness of 'cooperatives' on whatever grounds. At the same time this diversity complicates attempts to define more or less abstract features, principles or values of 'the cooperative' and to make distinctions in diverse concrete situations between 'real' and 'false' cooperatives.

Top officials of the ICA hold the view that their cooperative principles differ only slightly from those of the famous Rochdale cooperative (Marcus, 1988) which started in 1844 and is regarded the first 'real' Western European cooperative (see e.g. Van Dooren, 1978, p. 13). However, during the 23rd ICA Congress in 1966 it was decided to speak of 'democratic control' as one of the six main cooperative principles instead of the classical Rochdale formula of 'one man, one vote'. The Rochdale principles of 'goods sold at regular retail prices, business conducted on a cash basis and the number of shares which one man might own are limited' (Filley, 1922, p. 21-22) were also discarded. The new principles were 'open and free membership, internal and external extension and cooperation between cooperatives at national and international levels' (later known as 'movement to movement assistance': see Thordarson, 1988, p. 51ff). The Rochdale principle of 'earnings divided in proportion to patronage' is probably the best conserved, since it still is one of the top six ICA cooperative principles.

These seemingly subtle redefinitions force officials of the ICA to cite 'Basic Values' as the supposedly common and constant normative base of changing

'Cooperative Principles'. 'Basic Values' are characterized as "self-help values, mutual help values, non-profit interest values, democratic values, voluntary effort values, universal values, education values and purposeful values" (Watkins, 1986; Marcus, 1988; Book, 1988). The recognition by the ICA that the problems and situations faced by the Rochdale Pioneers differ greatly from those of current cooperatives (Marcus, 1988) basically explains ICA's increased emphasis of abstract-normative values underlying cooperative principles. These vaguer notions of the essence of the cooperative make it very hard to take the self-confident words of the president of the ICA very seriously when he states that: "We know what makes a cooperative and whom it should serve ..." (Marcus, 1988, p. 5).

However, the words of the president gain significance when he continues that, "... our principles do not explain how it should operate when changes are taking place in the surrounding socio-economic field" (ibid). Whether intended or unintended, the president introduces a central dilemma of the evaluation of cooperatives. How do (changing) socio-economic circumstances affect the essence of cooperatives? When do so-called 'cooperatives' which adapt themselves to changing circumstances turn into non-cooperatives? How does the essence of cooperatives materialize under different circumstances? Do all these institutions qualify as 'cooperative'? How have these questions been approached? The case of Apthorpe and Gasper (1979) is probably the most instructive. They were invited to an international consultation in 1977 to present a brief critique of cooperatives and their pertinence, or lack of it, for the rural poor. However, their critique passed "without mention in the proceedings published in the following year" which is "perhaps, some indication of the sensitivity of criticism that students of public policies can encounter" (p. 35-36).

Apthorpe and Gasper (1979) distinguish two pairs of evaluative approaches of cooperatives: 'immanent-transcendent and essentialist-instrumentalist'. They consider these four types neither "mutually exclusive or a comprehensive catalogue of approaches in evaluation nor consensually applied in particular cases" (p. 4) but as "the leading elements in some overall approaches found in the evaluative discussion of cooperatives and other organizations" (ibid). An immanent evaluation is an 'internal approach' which "takes as its criteria those used within the policy/institution itself" (ibid). In a transcendent evaluation an 'external approach' is used. This approach takes "its criteria independently of the policy evaluated, without any necessary overriding reference to the policy's self-conception or implied criteria" (ibid). The weakness of the immanent evaluation is two-fold: first, it seems to ignore that many conflicting official and unoffical criteria and objectives might be used within the policy/institution itself. "In the case of cooperatives, goals have generally been set by govern-

ments but at times the government's 'hidden objectives' may be as strong as - or even stronger than - the stated objectives. This makes investigations of the fulfilment of only stated goals rather obscure" (Holmén, 1990, p. 9). Secondly, it is very hard to determine whether the criteria and objectives used 'within' the policy/institution itself have an 'internal' or 'external' origin. "With cooperatives it is often the case that their goals and roles have been determined by external actors, usually the state and international aid agencies, and then they have been superimposed on local societies" (ibid). The weakness of the immanent approach thus provides a critique of the distinction between an 'immanent' and 'transcendent' evaluation.

An 'essentialist approach' can "sometimes be seen as an extreme form of an immanent approach. There is a particular commitment concerning the matter being evaluated [...]. Its essential and true form must be distinguished, free from distortions which disguise its potential, its true nature. It should be assessed only in the light of its own avowed, true and distinctive objectives. Usually the commitment is a positive one; the true nature posited is good" (ibid, p. 7). Apthorpe and Gasper, placing all four types of evaluative approaches on a continuum, characterize an 'instrumentalist approach' as an extreme form of 'transcendent evaluation (ibid, p. 8)'. This approach

> "treats particular activities and measures simply as means toward some more general ends; ends without reference to features of particular means. For example, in considering the promotion of a particular type of programme or institution, an instrumentalist approach would, roughly speaking, first consider 'whether' rather than 'how'... This detachment from particular means leads to a willingness to entertain considerations about, and to be open to, the adoption of a variety of means, and different means in different cases, according to circumstances. That is, it tends very much to situationalism in assessment and prescription" (ibid, p. 6).

The weakness of an instrumentalist approach is two-fold: first, it assumes that we all have a common frame of reference when discussing the possibilities of cooperatives. It simply considers 'the cooperative' as one type of instrument. Among international development agencies an instrumentalist approach easily results in 'joy riding' with concepts (like 'cooperatives', 'self-help associations' and 'NGOs'). Second, the instrumentalist approach gives the false appearance of 'objectivism'. It ignores different expectations and interpretations of cooperatives as well as differences of opinion with regard to the 'essence of development' as a goal of cooperatives. "With instrumentalism it can be the goals rather than the means to attain them which tend to be seen as not requiring much defence or even close examination" (Holmén, 1990, p. 7). This also implies that the difference between the essentialist and instrumentalist approach resembles the false distinction between 'normative' and 'objective' approa-

ches. The instrumentalist approach is a many-sided but normative approach. It is based on vague notions about 'development' and implicit ideas about the suitability of different 'instruments' as means towards the ultimate aim of 'development'.

Apthorpe and Gasper reviewed four large studies and conclude that three of them use an immanent-essentialist approach and one is instrumentalist[2]. The immanent-essentialist as well as transcendent approaches offer few possibilities to analyze how (changing) circumstances affect the essence of cooperatives. The instrumentalist approach does take different and changing circumstances into consideration but denies the normative dimension of (evaluation of) cooperatives. Another approach or combination of approaches is needed to go beyond the limitations of these four types of evaluative approaches.

I believe the opposite of an essentialist approach is not an instrumentalist approach but rather the combination of a 'legal pluralist' and 'legal anthropological' approach. This combination is not an evaluative tool but rather an analytical perspective. A legal pluralist perspective distinguishes a plurality of 'essences' or normative complexes instead of one 'essence' or standard (see F. von Benda-Beckmann, 1983a; Griffiths, 1986). From a legal anthropological perspective these 'essences' are considered social-normative constructs which means that in human interaction these 'essences' are being created, changed and mixed (for a case study see: K. von Benda-Beckmann, 1987). The enormous diversity of human interaction again explains plurality of norms, ideas, definitions, expectations and assumptions.

From a legal pluralist perspective it is impossible to speak of the essence, the material features, or the development objectives of the cooperative. Rather one should speak different natures and conflicting objectives of so-called cooperatives. Thordarson (1988), ICA Development and Associate Director says that, "While they may all look alike on the surface and all call themselves cooperatives, they have evolved from very different sources and carry out fundamentally different functions" (p. 46). However, his distinction of three different kinds of cooperatives is not very impressive as he admits himself:

> "There is little but the name in common between the large agricultural cooperatives which process and market sugar in India, coffee in Kenya, and ground nuts in Senegal; multipurpose cooperatives formed at the initiative of government departments to provide credit and inputs to farmers; and the grass roots cooperatives which have grown at the initiative of local members in order to provide the poor with improved services and bargaining power. A distinction among these three fundamentally different kinds of cooperatives is not always clear. In some countries single purpose consumer cooperatives function as grass roots institutions (Antigua), while in others they are part of a state system to distribute essential commodities (India)" (p. 47).

Therefore, he safely concludes that, "Nevertheless, any analysis of the success or failure of cooperatives as a development tool must take into consideration the different nature of cooperatives and the different goals which they seek to accomplish" (ibid).

A legal anthropological perspective however, emphasizes that it is not cooperatives that seek goals but different bureaucrats as well as farmers and traders who differently define the nature and objectives of cooperatives in which they are to some degree involved. 'Cooperative principles' cannot explain how the cooperative "should operate when changes are taking place in the surrounding socio-economic field" (Marcus, 1988). These principles do not speak for themselves (see F. von Benda-Beckmann, 1983b). It is rather human beings as part of changing socio-economic fields who try to put their flag on top of the 'mountain' of different principles, features and objectives of cooperatives. This shifts the issue of the debate from the essential features of the cooperative towards the struggle of different interest groups to further public and private goals with the help of 'cooperatives' as social-normative constructs.

Cooperatives and other forms of cooperation.

> "While the efforts of most of these groups [new forms of grass roots organizations based on cooperative patterns] are only to be encouraged, it would be a sad day for the cooperative movement if its own theory and practices were being better and more effectively applied by groups which felt the need to disassociate themselves from the formal cooperative sector. [...] If cooperative organisations do not place a greater importance on this kind of policy research [on indigenous or tribal forms of cooperative behaviour] and search for innovative approaches [based on this research], there is a considerable danger that other forms of 'self-help organizations' may replace cooperatives as a favoured instrument of grass-roots development" (Thordarson, 1988, p. 43, 60).

This quotation from a top official of the International Cooperative Alliance illustrates claims of the ideal of organized cooperation for the 'formal cooperative sector'. Thordarson refuses to award 'the title of cooperative' to cooperative organizations which behave like the cooperative movement should according to its own theory. The idea that 'other forms of self-help organizations' could be 'real' cooperatives does not even occur to him. He believes that the 'formal cooperative sector' must be protected. The approval of this ICA official to explore 'other forms of self-help organizations' can thus be interpreted as an attempt to both incorporate these other forms and improve the formal cooperative sector.

Ideas and research proposals like those of Thordarson are not unknown among national governments of developing countries: the histories of cooperatives as part of rural development programs in Indonesia (Bowen, 1986) and Tanzania (Cranenburgh, 1990) are full of political abuse and distortion of

traditional local concepts and even suggest that national policy makers might have very well understood the magic charm of traditional local concepts of cooperation to further their 'cooperative policies'.

The highest rank which might be awarded to 'other forms of self-help organizations' with the permission of adherents of 'the cooperative ideal' is 'the pre-cooperative' (Munckner, 1981; United Nations, 1983). This concept implicitly recognizes the existence of 'other forms of self-help organizations' but fails to recognize their diversity. Even worse, it conceives of these 'other forms' as a primitive form of cooperative organization which however, might evolve into 'the cooperative' as the final stage of legal-organizational development. The disappointing record of those organizations called cooperatives in developing countries and confusion over their nature and objectives provide sufficient reason not to simply consider 'the cooperative' as the ultimate concept or form of cooperation but instead as an alternative concept which has been given different functions and meanings in different places and times. The same argument also applies to the concept of 'self help association' as a substitute for 'pseudo-cooperatives' (Verhagen, 1987). Large international development agencies might welcome and use such an alternative concept to raise funds and to (falsely) guarantee their efficient use. The still virginal concept then evolves as a new title for an old litany.

Many colonial and post-colonial governments assumed that the social norms underlying 'traditional forms of cooperation' would be a fertile base for the smooth introduction of 'modern cooperatives'. Dore (1971) concluded that this assumption is based on a romanticized view on the nature of traditional communities. Besides, "even if traditional communities are solidary and egalitarian it is difficult for them to take on the formal institutions of modern cooperatives, such as rational auditing and control over managers, without destroying the very bonds of solidarity and mutual trust which are supposed to be .their advantage" (Dore, 1971, p. 60). There are two 'practices' which provide completely different perspectives on the use of 'traditional' concepts of cooperation for 'modern' cooperative development strategies. First, those few national cooperative planners in developing countries who have read Dore's conclusions might have decided to put more emphasis on 'cooperative education and training' and the careful re-construction of traditional local concepts. With respect to the role of education, these planners still enjoy the support of international development agencies: "Education in cooperation has to be undertaken in the formative years of children, if they are to acquire a sound understanding of the principles of cooperation and democratic self-management" (United Nations, 1987, p. 11). Secondly, "new forms of grass roots organizations based on cooperative patterns" (Thordarson, 1988) evolve as

'modern' expressions of so-called traditional local organization. This development refutes assumptions on the static character of traditional societies, the lack of organizational capacities of their members and the idea of 'the cooperative' as the ultimate modern form of organization. An interesting dimension in this connection is that there is a need for these 'new forms' to loosen their relationship with those (modern) cooperatives which are more or less regulated by government agencies (see Thordarson, 1988, p. 43).

Cooperatives and governments

There is broad agreement among scholars and international development agencies about the problematic role of national governments in promoting 'cooperatives' in developing countries (see e.g. Van Dooren, 1978; Baviskar and Attwood, 1988; Cranenburgh, 1990). "In accepting public aid, cooperatives have often become dependent on governments, which, in not a few countries, have used this leverage to gain control over these organizations. To the extent this happens, it serves to undermine the democratic and autonomous nature of the cooperative organization" (United Nations, 1987). In this section some results of the debate of international development agencies on the ideal and actual relationship between cooperatives and governments have been analyzed. These results suggest that the debate has at least four shortcomings.

First, it is misleading to talk about the relationship between governments and cooperatives. The central question of the United Nations seminar (1987) on "The Role of Government in Promoting the Cooperative Movement" in which representatives from Ministeries of Cooperatives of two dozen Third World countries participated, provides a nice illustration: "How to reconcile government support for cooperatives without compromising member interests and the self-reliant character of cooperatives, is a challenge to both government officials and cooperatives alike" (United Nations, 1987). This definition of the problem confuses the ideal and actual relationship between governments and cooperatives. Ideally, government officials and cooperatives are two separate entities. However, in many developing countries it is hard to determine where the tasks and responsibilities of goverments end and those of 'cooperatives' begin (for Indonesia, see Schott, 1985). Diepenbeek (1990) holds that cooperatives in many developing countries have evolved as 'internal economic organisations' (p. 16). This implies that the question of cooperative organisation is an internal affair of centrally planned economies (ibid, p. 2) or part of public administration.

A second shortcoming is that policy recommendations for changing relationships between governments and cooperatives are extremely vague. In his

article[3] called "From Stockholm to Stockholm: The Lessons of Three Decades of Cooperative Development", Thordarson (1988) considers 'de-officialisation of cooperatives' as one of the priorities for the future of the cooperative movement in developing countries. This ICA leader seems very much aware of the interwoven goals of cooperatives and government when he describes 'de-officialisation' as "the transformation of government-controlled cooperatives into a more member-controlled form" (p. 48). However, it is not very clear what is meant by 'de-officialisation'. Thordarson only refers to the need for "increased autonomy" of cooperatives to be realized on the basis of a "partnership" of governments and cooperatives which, however, suggests that the false distinction between governments and cooperatives has not been understood. Van Dooren (1978) describes 'de-officialisation' as the government promotion of autonomy of cooperatives. He mentions "education and training of members and chosen managers of cooperatives on the one hand and transfer of state authority and programs to central organizations of cooperatives on the other, as the best steps towards cooperative autonomy and democratization" (p. 45, own translation). According to Van Dooren (1978) 'de-officialisation' implies that "the state should take action to transform cooperatives which have been established by the government into independent, democratic self-help cooperatives" (p. 45, own translation[4]). He is convinced that 'the state' should take the initiative to 'de-officialize' cooperatives because "experience has shown that expectations for the automatic transformation of 'state cooperatives' into real democratic self-help cooperatives have nowhere been fulfilled" (ibid, p. 45, own translation). However, these recommendations ignore the interests of national governments in promoting and controlling cooperatives, which leads to the next shortcoming of the international debate on cooperatives and goverments.

A third shortcoming is that policy recommendations on the appropriate roles of governments in promoting cooperatives fail to view governments as part of the problem. One of the main fiscal policies of national governments in developing countries is maximizing the difference between national consumer prices and export prices of food crops. A large difference enables these governments to finance their budgets and to make investments in industry and infrastructure. At the same time low domestic agricultural prices support the national government in a political sense: low national consumer prices are effective tools to win and sustain political support from urban populations. Cooperatives are extremely useful tools to implement this policy and minimize its social costs. Anti-farmer price policies might lead to rural unrest[5]. However, this reveals the 'multi-purpose' character of cooperatives. Propaganda on the role of cooperatives in 'nation building' disguises economic and admini-

strative control. A cooperative administration with the common three-tier structure (national, provincial and local) enables governments to monitor and control marketing of agricultural produce and farmers' organizational initiatives. Distribution of privileges related to cooperatives does the rest: new leadership, cheap credit, trade monopolies and monopsonies buy off agricultural price discrimination and stifle rural unrest. These government objectives are rarely spelled out in official publications on the role of governments in promoting cooperatives. In the United Nations report (1987) on the "Role of Government in Promoting Cooperative Movement" for instance, the strong involvement of national governments in cooperatives is regretted but merely taken as an occasion to emphasize (again) and distinguish five 'appropriate' roles that governments can usefully play in promoting cooperative development: "effective legislation for governing the establishment and operations of cooperatives, granting financial and concessional benefits, general promotion of the cooperative movement, support to cooperative education and training programs and regulatory control to ensure that the officers and members of cooperatives discharge their responsibility in conformity with legal practice" (p. 5-14). High expectations are fostered with regard to the 'appropriate legal framework' which is "necessary to prevent abuses which plague the cooperative movement in many countries or to remedy those which arise" (ibid, p. 6).

But given the implicit but decisive objectives of national governments in promoting cooperatives, it is doubtful whether the legal, financial and educational services of governments described in the report guarantees less government control. An idealized view of the record of governments in promoting cooperatives feeds unrealistic notions on 'appropriate roles' of governments in promoting cooperatives:

> "It is widely acknowledged that government has played an important role in encouraging the formation and strengthening the operation of cooperative organizations in many developing countries as well as developing countries. This observation remains particularly valid in developing countries where poor people, if left without assistance from the state, would have meager prospects for organizing cooperatives and running them efficiently" (United Nations, 1987, p. 4).

This observation also underestimates the damage done by national governments to cooperatives as 'self-help organizations'. It does not take into account that millions of rural people in Third World countries now associate institutions which are 'cooperatives', at least according to government officials and international development agencies, with government intervention, gifts and control.

A fourth shortcoming is that no implications are drawn from the significant rise of cooperative organizations which prefer not to be government sponsored or registered.

> "Many small cooperatives may find it convenient not to be registered, hoping thus to remain unknown to national authorities. This applies, for instance, to cooperatives set up in some countries by trade unions. A significant recent development is the emergence of a more experimental approach to the problems of organizing popular participation. This has created a 'grey area' involving organizations which, though clearly not cooperatives, have common objectives with cooperatives. [...] There are also considerable numbers of associations which, although they have certain characteristics of cooperatives, do not meet all the requirements for formal registration as cooperatives. This is perhaps one of the most significant developments in recent years" (United Nations, 1983, p. 107).

Conclusion

In many developing countries government support of so-called cooperatives has been a kiss of death for small rural producers: cooperatives have been institutional components of low domestic agricultural price policies of national governments. The monoculture of institution building by national governments promoting cooperatives as the privileged development tool has eroded small rural producers' possibilities to protest government price policies. Therefore, better articulation of responsibilities and interests of governments and farmers involved in cooperatives is needed to transform cooperatives from rural tax systems to enterprises serving the material needs of farmer-members. However, this is not a mere technical affair which requires more training or extension. The conclusion to draw is that most of the debate about the nature of cooperatives is irrelevant, because it fails to deal with the motives for and realities of the capture of cooperatives by governments.

Insights on conflicting interests of governments and farmers raise discussion on the need and possibilities for political-economic interest articulation by farmers *vis-a-vis* governments. In this discussion the transformation of government-controlled cooperatives into a more member-controlled institution is a political and economic problem. Its central question is whether national governments will accept the farmers' articulation of their interests in union-like organizations functioning parallel to cooperatives or in apex[6] cooperatives. This seemingly passive act of acceptance might be one of the most decisive steps of governments in promoting cooperative movements to benefit small rural producers. This does not imply a reduction of responsibilities of governments with respect to cooperatives but rather a stronger commitment to stimulate farmers to articulate their own interests.

The histories of cooperatives in Western Europe and in colonized economies provide interesting lessons, being case studies of rural political-economic and technical-economic interest articulation. These histories also shed light on policies and publications which emphasize the relative value of cooperatives as a development tool. These histories do not suggest that the disappointing results of cooperatives in developing countries are a reason to select another development tool or concept to replace the cooperative as the favoured formula, but rather emphasize the complementary role of cooperatives and unions in articulating farmer interests vis-a-vis national governments.

A divorce of the post-colonial marriage between Third World governments and international donor agencies in promoting cooperatives is an important pre-condition for substantial change in the nature of many cooperative movements in developing countries. Without the approval and financial support of international agencies, these governments are less able to continue their 'promotion' of cooperatives. Holmén (1990), who tries to "determine the conditions under which cooperatives can be suitable institutions for enhancement of development" (p. 6) in Africa, even believes that, "Termination of development aid and of external support to praetorian[7] states might seem cruel in the short perspective. In the longer run, however, it would most likely force governments to reduce (albeit reluctantly) their direct interference in local and regional economic life" (ibid, p. 76). However, this drastic termination would throw the baby out with the bathwater. International donor agencies might require national governments to be on speaking terms with NGOs like, for instance, farmer unions. Finance then becomes related - or even subordinated - to attempts to build a rural organizational infrastructure as an arena for farmers to articulate their different interests.

It is very tempting for international funding agencies to claim the ideal of organized cooperation for so-called 'self help associations' now that government-supported cooperatives have failed to serve farmer interests in many developing countries. Some of these agencies seek collaboration with NGOs (see e.g. Newiger, 1984, p. 99-100) as 'self help promotion institutions' and new partners in promoting grass-roots development. From a legal pluralist perspective these attempts might be qualified and analyzed as 'formula shopping'[8] and not of much interest to small rural producers in developing countries. A more pragmatic and political-economic approach deserves much more attention among international policy makers. This approach takes the wider question of political-economic and technical-economic interest articulation of farmer populations as its starting point.

Notes

1) The author is grateful for the constructive comments of Franz von Benda-Beckmann, Frits Bouman, Niek Koning, J.D. von Pischke and Jacqueline Vel on earlier drafts of this paper.
2) Immanent-essentialist: a) the 1968-70 UNRISD-studies b) the 1977 survey study called "A Review from withing the Cooperative Movement" which served as a background study for c) the 1977 Loughborough Consultation organized by the ICA. Instrumentalist: a) the 1977 survey study called "Cooperatives and the Poor: A Comparative Perspective" which also served as a background study for the Loughborough Consultation (Gasper and Aphtorpe, 1979, p.9-16).
3) This article was presented at the Seminar on the Donor Support to the Promotion of Rural Cooperatives in Developing Countries, organized by the World Bank in January 1990, held in Washington D.C.
4) In his publication Dooren (1978) uses the term "state" and "government" as synonyms.
5) One of the four main questions of the farmers of Teso District of Uganda under British Rule was: "(1) what was the relationship between the world price of cotton and the prices paid to growers.... While the first question was common to farmers throughout Uganda ... (Vincent, 1988, p. 199)".
6) Apex cooperatives are secondary or tertiary cooperatives which represent village cooperatives (primary cooperatives) or secondary cooperatives at the national level.
7) Holmen (1990, p.57) mentions that, "Praetorian societies are defined by "their lack of community and effective political institutions" (Huntington S, 1968), ... by their absence of agreed procedures, ... the fragility of institutions, ... [and] the lack of widespread sentiment of their legitimacy" (Finer SE, quoted from Naur M, 1986, p.151).
8) This is analogue to concepts used by two legal antropologists: K. von Benda-Beckmann (1984) speaks of 'forum shopping' with regard to Minangkabau people who approach different courts to win disputes. Spiertz (1986) suggests the concept of 'idiom shopping' to characterize the strategic use of local normative complexes by villagers involved in a funeral ceremony on Bali.

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ENVIRONMENTAL POLICY IN THE NETHERLANDS AND IN THE EUROPEAN COMMUNITY, A CONCEPTUAL APPROACH

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Introduction

Since the beginning of the 1970's environmental policy has gathered momentum in all western industrialized countries. Within two decades the policy field has been broadly accepted, new institutions have been established and often considerable amounts of environmental policy measures have been enacted. Similar processes took place in international organizations. In this article we want to have a closer look at developments in environmental policy in the Netherlands and in the European Community (EC), the organization which most determines the international context of environmental policy in West European countries. It is not our purpose to describe or evaluate regulations at the national or the Community level. Our goal is to reconstruct underlying processes of environmental policy's institutionalization. By doing so, we hope to be able to gain a better insight in some important problems in present-day environmental policy making in the Netherlands and in the Community.

The starting-point of our analysis is a preliminary version of a part of the conceptual framework developed for the investigation of Dutch environmental policy. Relevant elements of it will be presented in the next section. At this moment only a limited amount of empirical data is available. In this article we will therefore restrict ourselves to an analysis on a rather theoretical level. In the third section we will describe the evolution of environmental policy both in the Netherlands and in the EC in terms of our analytical framework. Though the interrelations between public and private actors can not be ignored of course, particularly not in the context of Dutch environmental policy development, the emphasis will be on the conceptualization and organization of environmental policy by public actors. Accordingly, the outcomes of the present investigation will concern mainly the role of the public actors involved in the institutionalization of environmental policy in the Netherlands and the EC. In the context of this article it is not possible to make a full, systematic comparison between the two political systems. We will rather venture to look at processes at the Community level from a different angle, which may obscure some areas but reveal new ones. In the fourth section we will focus on specific problems of integration of different sectors within the environmental policy

field and with other policy fields. In the final section, we will evaluate our approach, that may be characterized as loosely comparative, and present some conclusions.

Theoretical framework

In this section we will develop a theoretical framework to analyze environmental policy in the Netherlands and the European Community. Central notions in this theoretical framework are the processes of institutionalization and societalization.

Institutionalization

In this article the process of institutionalization for environmental policy is elaborated. In his study on public welfare work, Peper defined the process of institutionalization as the development of a pattern of social activities and means related to a particular problem, purpose or value (Peper, 1973, p. 51). The existence of a certain problem, the possibility of communication and the presence of societal support are, in the opinion of Peper, necessary conditions for institutionalization to come about. With these considerations in mind we can interpret *why* the process of institutionalization in environmental policy has occurred, and analyze *how* social activities are institutionalized. When studying the institutionalization of environmental policy in the Netherlands and the EC we have to deal with the following questions: what is the character of the institutionalization process and from which strategic and ideological background is the institutionalization of governmental care for the environment being pursued? To answer these questions the concepts of stabilization and structuration, introduced by Peper as central notions of institutionalization, can be helpful. Structuration, according to Peper, refers to the construction of order in social space: activities can be attuned to each other so that they become more or less predictable. The notion 'construction of order' however has a taint of determinism. Therefore we use structuration rather in the sense of structuration theory. Structuration here refers to the dynamic process whereby, through social interactions, structures are produced and reproduced (cf. Giddens, 1979, p. 129). The process of stabilization refers to the social time-dimension of the process of institutionalization, or, in other words, to the development of certain rules in order to maintain a pattern of activities.

Institutionalization has been one of the long-standing themes in sociology, especially during the sixties and the seventies. In general, institutionalization

was described as a process of preservation and coagulation of social activities. But according to the structuration theory of Giddens, structure neither fully determines the activities of actors, nor have actors total freedom to act as they want. With the notion of 'duality of structure' Giddens alerts us to the fact that "the structural properties of social systems are both medium and outcome of the practices they recursively organize" (Giddens, 1984, p.25). Structure in other words regulates the behaviour of individual actors, but at the same time it is produced and reproduced in interactions.

Institutionalization we now define as the process by which on the one hand structures are formed in interaction while at the other hand attempts are made to preserve these structures. The establishment of order starts from certain ideologies used by public and private actors which, in confrontation with existing domination and legitimation structures, lead to new structures. In our case this results in a delimitation of the environment as a policy field from 'older', existing policy fields, with respect to organization as well as content of the policy. The second aspect of the process of institutionalization, stabilization or the maintenance and enlarging of the established order, is a process of power in which environment as a policy field tries to establish its own place within overall governmental policy and at the same time attempts to obtain societal support and legitimacy for the 'new' policy from private actors.

In summary, the process of institutionalization contains the following elements:

(1) the forming of social institutions and an independent policy structure (structuration),
(2) the maintenance of the established order (stabilization).

In general the processes of stabilization and structuration are established through the interactions of public and private actors. The interactions between public and private actors in the context of a particular problem lead to routine practices. In this article, however, we concentrate on the role public actors play. However, this does not mean that the formation of environmental policy has been entirely initiated by public actors. Especially in the first stages of Dutch environmental policy, but continuing to the present, the environmental movement is playing an important role in putting environmental issues on the political agenda. In the context of this article it is not possible to deal with this matter. We therefore concentrate on the building up of the environmental policy field by public actors and restrict ourselves to looking at the way interactions between different public actors lead to a process of institutionalization of environmental policy both in an organizational sense and regarding the content. The central questions are how environmental policy is delimited from other policy fields (structuration) and how this 'new' policy

subsequently functions within the context of other policy fields (stabilization).

Societalization

In Dutch social sciences, the concept of 'vermaatschappelijking' refers to the interplay of state and society. Following Kraemer (1966)[1], lacking a more elegant alternative, we will translate 'vermaatschappelijking' here with the word 'societalization'. In Dutch policy-making societalization in this sense is not a new phenomenon. Dutch history shows different kinds of interweaving of state and society ever since 1900 (cf. Romein, 1967), known for instance as (neo-) corporatism and compartmentalization ('verzuiling', cf. Lijphart, 1988).

In this article we concentrate on those aspects of societalization that are directly relevant to environmental policy. A good way to identify the specific characteristics of societalization in environmental policy is to contrast it with older processes of mutual encroachment by state and society. The most important difference between the forms of societalization mentioned above and the process of societalization in environmental policy is the role the government plays. In comparison with compartmentalization and (neo) corporatism, the process of societalization in environmental policy is initiated by the central government with the purpose of improving the effectiveness of policy measures. In the older forms of societalization, frequent interactions between the elites of public and private actors are principally based on mutuality and interdependence. Another difference is the relatively low level of institutionalization of negotiation and deliberation circuits in environmental policy as compared with other forms of societalization[2].

Societalization in the case of environmental policy can thus be seen as a new version of the phenomenon. Instead of a process in which both private and public actors participate in the process of policy making, it is rather a strategy of central government to make public policy more effective and efficient. In this particular form of societalization, inspired by discussions about the crisis in the Dutch welfare state since the late seventies, governmental organizations attempt to draw private actors into the policy making process in order to overcome certain shortcomings in governmental policy. We will come back to this point later.

Societalization as a strategy of state policy has played an important role in Dutch environmental policy in the last decade. In this sense it is, however, a quite typical Dutch phenomenon. It is obvious that the conditions for similar strategies or processes do not exist in the EC, because of its supranational character. To be sure, there are many formal and informal contacts between the EC Commission and the Council on the one hand and private actors on

the other hand, e.g. in the Economic and Social Council or by way of lobby. In addition, and especially in recent years, the Commission actively tries to reach 'the European citizen' by information campaigns such as the European Year of the Environment (1987). The decision-making process itself, however, is determined almost entirely by the Community institutions and the governments of the Member States. Private actors are not being drawn directly into this process. Consequently, the interrelations between public and private actors have not been worked out at the Community level in a way comparable to the societalization strategy developed by the Dutch Ministry of Housing, Physical Planning and Environment during the eighties.

Bearing in mind the specific character of societalization in the context of Dutch environmental policy making, in the following we will focus on the institutionalization of environmental policy in the Netherlands and in the EC.

Institutionalization

In this section we will investigate processes of institutionalization in environmental policy in the Netherlands and in the EC. We will do this by tracing the broad lines of development of Dutch and EC environmental policies from their origins. It will appear that problems with respect to the integration of the various parts of environmental policy and with other policy fields occur in the institutionalization process both in the Netherlands and in the Community. In the next section this specific set of problems and the different policy reactions to it will be analyzed in more detail.

The Netherlands

Already in the period from 1500-1900 densely populated towns in the Netherlands were confronted with various environmental problems, among which surface water pollution seems to have been the most serious (Diederiks & Jeurgens, 1989, p. 203). Until the middle of the nineteenth century, if measures were taken against environmental problems, these were undertaken by local authorities, in accordance with dominant ideas about state intervention in those days (cf. Van Zon, 1986, p. 252). Only when sanitary conditions in some areas grew very bad, national measures were introduced. An example is the Nuisance Act of 1875, the first environmental law in the Netherlands.

Despite the societal support to prevent or to reduce environmental problems during this period one cannot speak, however, of the institutionalization of care for the environment in the form of a central environmental hygiene policy. The

most important reasons for this are: the marginal role the central government plays until the nineteenth century, the local scale of environmental problems and the fact that environmental problems were mainly defined in terms of public health and the fight against poverty. Steps were taken within this framework (Querido, 1965; Verdoorn, 1965; Juffermans, 1983; Van Zon, 1986; De Swaan, 1988), and the improvement of public health at the end of the nineteenth century gave a picture of an apparent solution of environmental problems.

Not until the 1960's we can speak of central governmental care for the environment. The main catalysts were: the growing range and seriousness of environmental problems after World War II, the fact that causes and effects of environmental problems were not longer only on a local scale but also on a continental and even global level and increasing doubts about the consequences of continuing economic growth arose in industrialized countries. In a relatively short time a broad social awareness of environmental issues developed. In this political and socio-economic climate, regulation by the central government was now considered the best way to tackle the problem. This led to the start of a process of institutionalization of environmental policy at national level in the late sixties. In 1971 a new Ministry of Public Health and Environmental Hygiene was set up. On the one hand it was based on the traditional link between public health and the environment, but on the other hand it can be regarded as one of the first expressions of the growing importance and independence of environmental issues in policy and a broader perception (not only connected with public health) of environmental problems in Dutch policy.

One of the first documents prepared by the new ministry was the Emergency Memorandum on Environmental Hygiene (1972)[3]. Apart from a first attempt to analyze and reconsider the interrelations between economic growth, social and cultural factors and ecological problems, the document focused on thirteen separate, short time priorities. Important features were the emphasis on the abatement of already existing, often urgent environmental problems and the institutional organization, based on the four main 'sectors' or 'compartments' of the environment: water, soil, air and organisms.

It is interesting to note that the main concepts of environmental policy in the eighties, such as coordinating human activities with the environment, the ecological approach and the 'two-track policy', are already mentioned in the Emergency Memorandum. Despite this broader perspective, however, the accent in the first phase of Dutch environmental policy is on the development of the organizational structure of environmental policy and a system of regulation along sectoral lines (structuration). This resulted on the one hand in

discussions on which organizational structure could tackle environmental problems best (one environmental department or environment in the department of either public health or physical planning) and on the other hand in a great variety of sectoral legislation to overcome the most severe environmental problems.

An important question is why concepts such as the ecological approach do not until the eighties become part of Dutch environmental policy. This may be explained by the fact that a new domain of governmental care, like the environmental policy field in the seventies, has to deal with a double problem (See Verkruisen, 1977, p. 8). On the one hand, solutions had to be found for severe environmental problems. As mentioned above, this led to institutionalization along sectoral lines. On the other hand the process of institutionalization was hampered and slowed down, firstly because of the shortcomings of sectoral environmental policy and legislation itself, and secondly because of the lack of consensus about the position of environmental policy in relation to other policy fields. Let us consider these two factors in more detail.

The drawbacks of the sectoral approach to environmental problems first manifested themselves in the existence of separate, often slightly different regulations for air pollution, water pollution, handling of chemical waste, etc. In order to harmonize and, as far as possible, to combine the various procedures, the General Environment Provision Act was adopted in 1979. Though partially succesful in this respect, the law could not conceal another serious bottle-neck, also to some extent linked to the sectoral character of the institutionalization of environmental policy so far: the problem of enforcing environmental legislation[4].

The second factor slowing down the process of institutionalization was environmental policy's continuous search for a place in relation to other policy fields, and the laborious fitting-in of environmental perspectives into other policies. This phenomenon may be dubbed as environmental policy's 'struggle for independence'. During the period 1971-1982 central issues in this struggle were: the position of the Ministry of Public Health and Environmental Hygiene, inter-departmental allocation of tasks and coordination and integration of different aspects of environmental policy.

In summary, we consider the period between 1971 and 1982 as the first phase in the institutionalization of environmental policy in the Netherlands. This period can be characterized by the process of structuration. It is the period when there is a demarcation of environmental policy in relation to other policy fields (the 'struggle for independence'). As we shall see, only when the position of environmental policy has been more or less defined, stabilization

can occur. Stabilization is the process by which the established structure is maintained and defended and the content of environmental policy can expand.

The start of the stabilization phase can be pin-pointed at the beginning of the eighties, when the Christian-Liberal coalition cabinet of Prime-minister Lubbers came into office. One of the first decisions during the formation of this coalition was the merging of environment and physical planning in the newly established Ministry of Housing, Physical Planning and Environment (HPPE). This merging put an end to the discussions about the relations between environment on the one hand and public health and physical planning on the other[5]. Moreover, attempts were made to solve the problems remaining from the 'struggle for independence' during the seventies. Soon the outline of environmental management[6] was set up, containing firstly a shift from traditional environmental hygiene towards coordinating human activities with ecological considerations and secondly the integration of different aspects of the environment and the elaboration of a planning structure. In the years from 1984 until today 'environmental management' was the keyword in the further organization and development of Dutch environmental policy.

The new ideas on environmental policy making were worked out in the Integrated Environmental Policy Plan (PIM; 'Plan Integratie Milieubeheer', 1983[7]). The PIM was presented as a final contribution to the discussion on coordination and integration in environmental policy. The central element in the definition of integration as formulated in the Integrated Environmental Policy Plan is to tackle coherent environmental problems in an integrated way. Internal integration is then defined as the accomplishment of coherence and consistency between aspects of environmental policy as pursued by departments with environmental tasks, while external integration is defined as achieving coherence and consistency between environmental policy and other areas of governmental policy. However, the way integration was defined and subdivided in internal and external integration (PIM, 1983, p. 6), clearly showed the still marginal position of environmental policy in relation to other policy fields (cf. below). This subdivision into 'internal' and 'external' aspects, is also apparent in the First Memorandum on Environmental Planning ('Meer dan de som der delen', 1984[8]). In this memorandum an indicative and open mode of planning[9] is introduced, designed to stimulate the involvement of other public and private actors in the process of planning. The new system of planning[10] did not, however, prevent other departments with environmental tasks from keeping their own planning structures. A real integration of the planning process did not occur. The definitions of integration and planning make clear that structuration is even in the beginning of the eighties an internal process of 'building-up', initiated by the Directorate General of the

Environment of the Ministry of Housing, Physical Planning and Environment.

In the Indicative Multi-year Programme-Environment (IMP-E) 1986-1990 (issued in 1985)[11] the content of the 'new' environmental policy was worked out. It included: (1) the formulation of an 'effect-' and 'source-oriented' policy ('two-track policy'), (2) the stimulation of a sense of responsibility for the environment by economic policy makers, resulting in practices guided by common aims, and (3) a strategy of 'internalization' ('verinnerlijking'), according to which different target-groups of the policy have to become conscious of the environmental consequences of their activities (IMP-E 1985-1990, 1985, p. 5).

The 'effect-oriented' policy line takes the perspective of the environment and is based on five (later eight) themes[12] as well as a regional strategy for the management of specific areas. The 'source-oriented' policy approaches environmental problems from the angle of human activities. Different target-groups and relevant product categories are identified. In addressing these 'target groups', 'internalization' and the encouragement of responsibility for the environment are central objectives. The policy of target-groups and internalization and the regional approach can be seen as policy categories in which the societalization of environmental policy is given concrete form (see also below).

The publication of the National Environmental Policy Plan (NEPP, 1989[13]; followed in 1990 by a revised version, the so-called NEPP-plus[14]) constitutes the latest and, for the time being, final step in the establishment of the new planning system. In its conceptualization of environmental problems it proceeds one step further than the previous IMP's. The main objective of environmental policy is considered to be the introduction of controlled feedback mechanisms to counterbalance the transfer in time and space of environmental problems. This should be done by way of: (1) closing substance cycles, i.e. minimizing losses of energy and material in the conversion of raw material to product and waste, (2) conservation of energy, and (3) improvement of the quality of production processes and products in order to prolong the utilization of materials. (NEPP, 1989, p. 82ff.). Particularly in this part of its analysis the NEPP was strongly inspired by the concept of sustainable development, introduced in the Brundtland report (WCED, 1987). Thanks to the concept of sustainable development every department can endorse the analysis of the environmental problems in the NEPP. There is however a discrepancy between on the one hand goals and premises and on the other hand concrete measures. During the eighties goals and premises of environmental policy have become broader and broader so that other departments with environmental tasks can underwrite the general lines of

environmental policy. Problems rise, however, when concrete measures are required. An example are the measures to tackle the acidification problem in the NEPP. Despite the agreement on the middle-range goals, the disputes on the implementation of concrete measures have the character of a struggle for competence.

In summary: the institutionalization in Dutch environmental policy consists of two elements. First the process of structuration characterized by a process of delimitation of environmental policy from other policy-fields. The structuration of environmental policy resulted in a structure in which the formation, implementation and enforcement of environmental policy is in the hands of different departments, all dealing with different environmental tasks. This 'fragmented institutionalization' constitutes the first step in institutionalizing Dutch environmental policy. The second element is stabilization. This process can occur only when the position of environmental policy is more or less defined in relation to other policy fields. In the period after 1982, when the organizational structure of environmental policy is more or less clear, one can speak of stabilization with regard to the content of environmental policy, along the lines of environmental management. But because of the fragmented institutionalization, the State's changing role in the eighties and the problems of environmental legislation, stabilization leads to a specific development of the content of environmental policy in the eighties. Below we will discuss problems of centralization and internal and external integration in more detail.

The European Community

In October 1972 the European Council (the Community's Heads of State or Government), after preparatory work by the Commission, decided to launch an Environment Action Programme. It was adopted on 22 November 1973[15] and covered the period 1973-1976. The programme included both basic principles and objectives of Community environmental policy and proposals for specific actions to be undertaken in the near future, such as the formulation and (where necessary) harmonization of quality objectives and emission standards together with the establishment of research programmes. A new Directorate-General for Environment, Consumer Protection and Nuclear Safety (DG XI) was set up and the first environmental Directives were adopted by the Council, for example in the fields of water pollution, dangerous substances and waste. Work along these lines was continued in the period covered by the Second Action Programme (1977-1981)[16].

In the second section the concepts of structuration and stabilization have

been introduced to describe the process of institutionalization. These concepts can throw light on the emergence of environmental policy in the EC. On the basis of Peper's analysis (see section above), we will, however, also first briefly discuss the specific conditions for this process to come about in the Community.

Though in the late sixties national environmental policies were developed in several European states, for example in the Netherlands, at the same time the view was still widely held that activities of the European Community in the field of the environment should be limited to avoiding trade barriers. The environment was given somewhat grudging recognition. The international climate with respect to environmental issues changed rapidly, however, and in the course of 1971 and 1972, under the influence of, among other things, the 1972 Stockholm Conference on the Human Environment and the report to the Club of Rome (Meadows, 1972), the Commission, the European Parliament and the six Member States[17], gradually recognized and accepted the protection and improvement of the quality of the environment as an appropriate Community goal for its own sake (cf. Bungarten, 1978, p. 128-147).

The environmental issue thus entered into the existing political and legal structure of the EC. The effects of this seem to have been twofold. On the one hand the availability of an already functioning international policy machinery has probably facilitated the development of a broad range of activities in the environmental field in Western Europe in a relatively short time, at least when compared to other forms of international cooperation. On the other hand, the development of environmental policy within the particular geographical scope of the Community has to some extent predetermined processes, problems and results of environmental cooperation in Europe in general. From an environmental point of view -regarding for example dispersion patterns of pollution in the atmosphere and in rivers and seas- the composition of the EC is a mere coincidence. Consequently, the EC has often been involved in environmental problems that did not really 'fit' into its territory. This can be seen most clearly in the role the Community played in the framework of international agreements, for example the Rhine-Convention (cf. Lammers, 1984; Jessurun d'Oliveira, 1987) or the Paris Convention on Marine Pollution from Land-based Sources (cf. Saetevik, 1987). Because of several internal constraints, mostly of political or juridical character, this role has not always been one of stimulation or leadership.

Essential for the emergence of policies in the framework of the EC is the political support of the Member States. This support is, of course, in turn dependent on the national political and societal context. As has been indicated before, the awareness of the problem and the recognition of the overall goal of

environmental policy in the Community were present among the Member States in the years around 1972. Agreement was absent however when it came to determine the concrete actions to be undertaken by the Community. In particular France combatted the competence of the Community in many specific fields with pointing out the lack of a clear Treaty basis for a common environmental policy (Bungarten, 1978, p. 148-150). As a result, the First Environmental Action Programme was adopted not as a Council Resolution, but only as a 'Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council', thus emphasizing that the Programme included actions to be carried out either by the Community or by the Member States or by both of them together. This was the first manifestation of a continuous struggle about the distribution of competences between the Member States and the Community. In fact even in the Fourth Action Programme, adopted in 1987, this mixed character was preserved, though it had been proposed by the Commission as a Council Resolution[18].

In general it can be said that the support of Member States for Community action in the field of the environment existed as long as these actions did not interfere with their own political priorities or economic interests. A case in point is air pollution. Despite the fact that the First Action Programme and, more clearly, a 1975 Resolution on Energy and Environment[19] had stated the general intention to undertake action against air pollution caused by the energy sector, a proposal presented in 1975 for restricting the sulphur content of heavy fuel oils used in power stations[20] had to be withdrawn by the Commission (Johnson & Corcelle, 1989, p. 123). Except for a Directive of rather limited importance on the sulphur content of gasoil[21], it was not until the beginning of the eighties, after recovery from the oil crisis, that the Community was able to start control of atmospheric pollution by energy conversion in a substantial way[22].

More examples could be given of this discrepancy between the Member States' support for the general goals of EC environmental policy and their reluctance in specific cases. This can be considered one of the reasons for the uneven development of the various parts of the policy field and, accordingly, the patchy pattern of institutionalization in EC environmental policy. Around certain issues a great deal of political activity developed, sometimes resulting in a more or less coherent policy at the Community level, substituting national policies in the field in question. The 'clean car' issue, including the introduction of unleaded petrol, constitutes a recent example. Around other issues, however, also clearly affecting the functioning of the common market and already subject to regulation in several Member States, similar

developments have not taken place. One can think of the regulation of the sale and use of pesticides. Up to now the Commission has only been able to state its intentions to propose measures on this matter[23]. Here, institutionalization at the Community level has yet to begin.

In the Netherlands the founding of a new department, the development of a sectoral environmental planning system and the enactment of a more or less comprehensive set of sectoral legislation took place largely in the seventies. From the beginning of the eighties problems mainly concerned the consequences of the fragmented character of this first wave of institutionalization: the lack of coherence between parts of the policy field and between environmental policy and other policy fields. EC environmental policy, however, is still limited to certain parts of the policy field. One could say that the initial phase of structuration - the forming of specific environmental policy structures - has not yet been concluded at the Community level.

Notwithstanding all this, by piecemeal policy development, environmental protection gradually gained the status of a policy field in its own right in the Community[24]. The Single European Act, brought into force in 1987, formally affirmed the Community's responsibility and its authority to act in the area of the environment[25]. Consequently, parallel to the continuing process of 'conquering' new parts of the policy field, a stabilization of the institutions and policy structures already established began. Just as in the Netherlands this implied, among other things, the need for more adequate conceptions of the interconnectedness of different sectors of environmental policy (internal integration) and the relationship with other policy fields (external integration).

Problems of integration

In the preceding section it has been shown that the development of environmental policy has led to a fragmented institutionalization in the Dutch case and to a patchy pattern of institutionalization in the EC. Both in the Netherlands and in the Community this course of events has caused a lack of coherence and consistency within the environmental policy field. As a result, two kinds of integration problems were perceived. Firstly there were integration problems within the environmental policy field, because different departments with environmental tasks had to coordinate their activities. Secondly, problems of integration occured between environmental policy and policy fields having environmental repercussions. Both in the Netherlands and in the EC attempts have been made to integrate environmental considerations into such fields.

Efforts to solve these problems have been crucial in the more recent phases in the development of environmental policy in the Netherlands and in the EC. In the first subsection we will discuss the Dutch government's reaction to problems of integration. These problems are mainly caused by 'fragmented' institutionalization. Activities to solve these problems are on the one hand structured by the outcome of the fragmented institutionalization and on the other hand influenced by political discussions about state intervention and the weakness of environmental legislation. In this context we will return to the concept of societalization once again. In the second subsection problems of integration in EC environmental policy will be investigated. Although internal and external integration problems can also be found in the EC, efforts to solve these problems have a distinct character because of the supranational status of the Community. The accent is on an integration of environment into economic policy structures.

The processes of institutionalization and in the Dutch case of societalization resulted in different kinds of environmental professionalism in the departments concerned, while at the same time general ideas about the relations between state and society brought about different strategies of state intervention. In other words the state is not one subject, but, depending on the situation, public actors deploy different aspects of a policy theory. We define a policy theory as a framework by which the complex reality (of policy makers) is reduced to manageable concepts, both in order to delimitate a given policy field from other policy fields and as a framework for defining policy problems and measures to be taken. Policy theories are, in other words, the structural properties of a social system, which are formed and used in interaction by public actors. In environmental policy, policy theories consist of the following elements: environment concepts, i.e. reconstructions of the 'environmental reality', and intervention concepts, i.e. reconstructions of the intervention context. These notions are developed and discussed extensively elsewhere (Van Tatenhove, forthcoming). Later on we will sketch broadly how the processes of institutionalization and societalization have led to several different accents in environmental policies with a potentially negative influence on the fulfilment of the current integration objectives.

Reactions on problems of integration in Dutch environmental policy

In the eighties, after the place of environmental policy had been more or less defined, an impressive policy structure was built up according to the environmental management concept (see above) However, this did not mean that all problems were solved. Five departments still dealt explicitly with

environmental tasks (the Ministry of Housing, Physical Planning and Environment (HPPE), the Ministry of Agriculture, Nature Management and Fisheries, the Ministry of Transport and Public Works, the Ministry of Economic Affairs and the Ministry of Foreign Affairs), and problems of integration still existed. Besides that, the implementation and enforcement of environmental legislation remained a bottle-neck and it was recognized that the further degradation of the environment had in no way been arrested. In this section we will discuss the efforts to solve this set of problems.

Also during the eighties the idea that governments could blueprint societal developments gradually disappeared. The belief in planning and detailed regulations first came under scientific attack. This led to a political discussion, inspired substantially by the coalition headed by Prime Minister Lubbers, about the scope and the level of detail and complexity of government regulation. The environmental policy field, with its huge number of relatively uncoordinated regulations was selected as the first test case for the subsequent deregulation[26]. Nevertheless, efforts to deregulate had little direct effect on the implementation of environmental policy (cf. Nispen & Van der Tak, 1984; Menninga & Smit, 1984). Indirectly, though, the ideology of the state devolution gave rise to a new way of thinking about relationships between public and private actors and intervention strategies in terms of deliberation, negotiation and cooperation.

The philosophy connected with the deregulation strategy, problems of policy effectiveness and 'internal' and 'external' integration resulted in closer interaction between state and society in the environmental policy field. The Ministry of HPPE began efforts to approach its 'target-groups', such as various economic sectors, more directly. This is what we call the process of societalization: central government making public policy more effective and efficient through the strategy of 'internalization', a 'target-group approach' and 'integrated region-oriented policy'.

In the IMP-Environment 1985-1989[27] the 'strategy of internalization' was introduced in order to achieve a better enforcement of environmental legislation, particularly in trade and industry. In the later IMP's-Environment and the NEPP it evolved into a strategy to encourage responsibility within target-groups[28] and administrative bodies for the environmental consequences of their activities. According to the IMP-E 1986-1990 economic policy sectors must formulate a 'source-oriented policy' for their target-groups. This is only possible when economic policy sectors internalize environmental goals and premises and create conditions for behavioral changes within their own organisation. At the same time all individual members of the various target-groups have to develop a sense of responsibility for the environment.

Internalization is in the NEPP considered as of "almost overriding importance to structural changes in production and consumption processes because these environmental aspects need to be considered at an early stage in designing and making decisions about these processes" (NEPP, 1989, p. 188). The way internalization should be attained has nonetheless remained largely unclear. One of the reasons is the multi-interpretative character of the concept. Governments as well as target-groups use different definitions of internalization (cf. Nelissen,1988). Public information and the formulation of environmental objectives in close cooperation with target-groups should play a major role but these strategies have only been described in general terms. More recently efforts have been made to stimulate environmental concern within the organization of individual firms.

'Region-oriented policy' was first introduced as a sectoral, 'effect-oriented policy' (IMP-E 1985-1989). In the NEPP (1989) the new concept of 'integrated region-oriented policy' was developed. The word 'integrated' refers to the integration of environmental and physical planning in a certain region. Two aspects of 'integrated region-oriented policy' are relevant here. Firstly, the concept can be regarded as the result of the changed relations between state and society. Although the initiative is in the hands of public actors, actual policy measures are developed together with private actors. In this process cooperation, negotiation and deliberation play a major role. Secondly, the 'integrated region-oriented approach' can be seen as a way to overcome the problems connected with internal and external integration. One of the main goals is to integrate different policy fields involved in regional development.

'Internalization' and 'region-oriented environmental policy' may thus be conceptualized as new strategies to overcome certain problems in environmental policy making, especially the integration of aspects of environmental policies as pursued by different departments with environmental tasks (internal integration), the difficulties in achieving coherence and consistency between environmental and other government policies (external integration) and, strongly connected to these questions, the problem how to implement policy measures.

Reactions on problems of integration in EC environmental policy

As we have seen the themes of 'internal' and 'external' integration have played an important role in the institutionalization of Dutch environmental policy. The same themes - the interconnectedness of environmental sectors or media and the relations between environmental policy and other policy fields - can also be found in the Community, albeit in different forms.

In the Netherlands the first phase of structuration was more or less completed in the beginning of the eighties. In the same period the EC was still in the process of establishing its competence in the field of the environment on a fairly ad hoc basis, with an emphasis on water pollution. Institutionalization had not yet proceeded so far as to show the drawbacks of a sectoral approach in policy practice. Moreover, such drawbacks would manifest themselves more clearly in the implementation of EC Directives at national level. Consequently, the theme of integration within the environmental policy field was dealt with in the Third[29] and also the Fourth Environmental Action Programme in comparatively general and theoretical terms when placed alongside the Dutch 1983 and 1984 Memoranda. The necessity of avoiding a mere transfer of pollution from one sector to another was stressed and a discussion about the economical efficiency of the sectoral approach was proposed in careful wording. A first attempt to implement a so-called multi-media approach was made in the 1987 Directive on asbestos[30]. The recent reorganization of DG XI, by which the old sectoral set-up was transformed into an organization based on the division between 'sources' and 'effects', may also be a reflection of a more integrated approach to interconnected environmental problems.

With respect to the 'external' aspect of integration -integration of environmental policy in other policy fields- policy in the Community differs from national policy. EC environmental policy started almost as an annexe to economic, particularly competition policy. Only gradually did the policy field gain a degree of independence, but a close relationship with the economic goals of the Community always remained. There was nothing new, therefore, in the Single European Act again stressing the interconnectedness of the environment on the one hand and the internal market on the other. There was one important change, however. The situation in the seventies could be described as the full integration of free trade requirements in environmental policy, whereas the Single European Act prescribes just the reverse, the integration of environmental considerations in all other fields of Community policy (Art. 130 R(2)). Consequently, measures to establish the internal market that are related to the environment have to be based on "a high level of protection" (Art. 100 A(3)). Ambitious, but very generally formulated plans for this integration are presented in the Fourth Environmental Action Programme. It is interesting that these plans emphasize, among other things, the responsibility of private actors. As a way to stimulate this responsibility the Commission intends to collaborate with industry in drawing up guiding principles and codes of conduct. Since the opportunities for the Commission to implement such a policy are very limited, however, it would be too much to expect this intention to be on the same footing as the inculcation of

responsibility in the Netherlands (see also below).

For policy fields other than the internal market, however, integration of environmental considerations seems to be less obvious. Here, as in most cases in the Netherlands, a 'new' aspect has to be included in already fully developed policy fields, often against established interests. A clear example in the EC (as well as in the Netherlands) is agriculture. Up to now the efforts made by the Commission to integrate environmental requirements in agricultural policy have resulted mainly in plans and programmes[31]. The first concrete measure was proposed in December 1988, concerning the pollution of surface waters by nitrate from diffuse sources[32]. We will return to the case of agriculture in the next section.

The contextuality of environmental policy

As a result of the processes of institutionalization and societalization it is only on a very abstract level possible to speak about *the* environmental policy. Environmental policy is a 'skeleton' existing of intended goals, premises and measures. This 'skeleton', however, acquires 'flesh and blood' in concrete social contexts, through interactions between public and private actors. In this article we concentrate on the roles of public actors. Broodly speaking, public actors in concrete social contexts use policy theories consisting of environmental and intervention concepts. It is not possible to elaborate this theoretical framework within the scope of this article. Therefore we will just give a general analysis of the different conceptualizations of the environment and types of intervention used in Dutch and EC environmental policy.

Traditionally public health aspects dominated Dutch public policy in the field of the environment. In the seventies public health and quality of life issues remained on the agenda, but the accent shifted to socio-economic aspects of environmental problems. Inspired by the 'Limits to growth' report (Meadows, 1972) and 'spaceship earth' philosophies the idea of economic zero-growth entered the public debate. In the eighties another shift took place to new themes, such as accomodating human activities to environmental constraints, social-spatial aspects of environmental problems and sustainable economic growth. The latter, derived from the Brundtland report (WCED, 1987), can be regarded as a new interpretation of broad ecosystem theories, favouring economic growth as a necessary condition for developing ecologically sound production and consumption modes.

This broad and much simplified historical outline should not, however, be seen as a sequence of different environmental perceptions. It rather constitutes a growing body of available interpretations of environmental problems. The

combination of concepts of the environment actually applied by policy makers in a certain situation largely depends on the specific characteristics of the context. Relevant factors are, for example: the public and private actors involved, the kind and seriousness of the environmental problems and the degree of institutional integration between the policy fields concerned. Current research by the authors clearly shows this phenomenon in the case of Dutch environmental policy.

In the EC, conditions for the application of environment concepts are different. As a logical consequence of the principally economic orientation of the Community, EC environmental policy has been developed largely in the frontier zone between environmental problems and industry and trade, as has been pointed out above. Therefore, harmonization of product norms and emission requirements has from the outset played an important role in the Community's environmental policy. Besides, though naturally no tradition in this field existed in the EC as it did in the Netherlands, concern for public health aspects is apparent in some Directives focussing on the quality of the human environment[33]. Particularly since the end of the seventies, the scope has been slightly extended by the introduction of some Directives directly relating to the use of physical space and the protection of ecological values[34]. Moreover, the Fourth Environmental Action Programme puts some emphasis on the protection of nature and sensitive areas. It may be safely maintained, however, that environmental problems are still being reconstructed in the Community mainly in terms of the effects of economic activities. The relative neglect of other aspects may be considered another partial explanation of the patchy institutionalization of environmental policy at the Community level (see also above).

Along this line we can try to go one step further. Regarding again the basically economic bearing of the EC, one can suppose the activities of the Community in other policy fields to be determined mainly by economic considerations as well. This applies for example not only to energy or communication policy, but also to agricultural policy. As a consequence, common agricultural policy has been chiefly concerned with product prices and farmer incomes, and not so much with the physical impact and the spatial distribution of different types of land use. Environmental problems in the agricultural sector are, however, related precisely to these aspects. Bearing this in mind, the integration of environmental considerations in agricultural policy is not just a matter of including some additional, in some cases costly measures in the existing body of Community legislation in the field. It rather requires the redefinition of the entire policy field in terms of physical and spatial relationships. Some elements for such a redefinition have been given in the

Commission's Communication on Environment and Agriculture of 1988 and, notably, in the European Parliament's 1986 Resolution on the same subject[35]. The full development and integration of social-spatial aspects of the environment in EC policy can, however, be expected to give rise to many complications, not only at the philosophical level, but also, for example, with respect to the distribution of competences between Member States and the Community in such important fields as physical planning. Together with the point made before, concerning the support of Member States for the transfer of competences, this short analysis justifies some doubts about the feasibility of a real integration of environmental requirements in other major areas of Community policy such as agriculture.

The second set of concepts lying at the basis of policy theories handled by policy-makers refers to different interpretations of the context of intervention. Intervention concepts are explorations of features of the social context, perceived to be relevant by policy makers and aimed at selecting appropriate policy instruments to deal with a given problem. In this field there is a significant difference between the Netherlands and the EC, connected with the ways private actors participate in policy making and implementation.

In the EC the intervention context is strongly determined by the supranational character of the organization. Therefore, the range of possible reconstructions of this context is more limited than a national situation. For instance the main legal instrument of the Community, the Directive, is directed only to the Member States and has to be implemented by the national governments before it applies to private actors[36]. Non-state actors can only be approached in an informal way, but many industrial sectors and social groups are not sufficiently organized at the Community level to make this practicable. Consequently, the lion's share of the actions taken by the Community in the field of the environment consists of Directives. They usually contain concrete requirements to be fulfilled by public or private actors, and must therefore be regarded as either specific or general intervention. Nevertheless, as far as the legal and political position of the Community allows, there seems to be a tendency to include more interactive strategies in the policy mix. One can think of the Committees, consisting of representatives of the Member States, encouraged by some Directives to adapt the requirements to technical and scientific progress, as a first step. Committees of this kind could also play a role in working out concrete requirements for specific sectors in the framework of the 1984 Directive on air pollution caused by industrial plants[37]. These Committees can in principle be helpful for the Commission to keep in touch with new developments 'in the field', though still mainly through government officials. More important from a conceptual point of view

is the Commission's intention, briefly mentioned above, to draw up guiding principles and codes of conduct in direct collaboration with industry. It will be interesting to see if this strategy will succeed in practice. It would herald a new orientation in EC environmental policy, clearly relating to the Dutch inculcation of social responsibility. As indicated before, however, the large distance between 'Brussels' and actors in society, as well as the limited availability of personnel and expertise within in the Commission, cannot be regarded as optimal conditions for substantial departures from the well-established concept of direct intervention, practised so far in the form of EC Directives.

In Dutch environmental policy a broader range of intervention concepts is applied. In general, one can say that Dutch environmental policy evolved from intervention to combinations of intervention, interaction and transaction (based on Baaijens, 1988, and Snellen, 1987). In the early seventies efforts were made to overcome the most severe environmental problems with a great variety of sectoral legislation. The deterioration of the environment, perceived primarily in terms of public health risks, was considered such a threat to human society, that governmental intervention gained broad legitimacy. The choice of direct intervention was not hard because of the belief in the government's capacity to guide societal developments. As sketched above this belief in governmental planning was weakened in the eighties. Efforts to overcome inefficacy in sectoral legislation and 'fragmented' institutionalization led to the societalization of environmental policy and new forms of intervention, such as different forms of financial regulation and social regulation like the 'strategy of internalization'. This shift did not, however, result in the (partial) 'withdrawal' of the state predicted by some 'deregulationists'. The main change was rather that the government tried to intervene in a more subtle manner. Examples are the strategy of planned interaction in integrated region-oriented policy and various forms of public-private partnership (transaction), for example by way of covenants, introduced in Dutch environmental policy from the mid-eighties.

In this section the idea of environmental policy's being context-bound, that is environmental problems and intervention strategies being widely considered as dependent on the policy context, has been applied to overall developments in Dutch and EC policy. It may be worth pointing out two further potential applications of this notion. In the first place it could be useful for the investigation of concrete decision making in national and EC environmental policy. For instance in the case of the Community, apart from clashes of economic or other interests represented by the Member States, the existence of different reconstructions of environmental problems and intervention contexts in different Member States inevitably play a role in political processes[38].

Secondly, this kind of analysis could be helpful in understanding the implementation of EC Directives in national policy systems. Here again, it is possible that underlying conceptualizations of either the issue at stake or the way to tackle it do not always fit together, causing problems of implementation[39]. Clearly, both applications would require detailed studies of environmental policies both at the Community level and in the Member States. We will not attempt such analyses here.

Conclusions and evaluation

In the foregoing we have described processes of institutionalization in terms of structuration and stabilization. It was concluded that the phase of structuration in Dutch environmental policy, roughly extending from the beginning of the seventies to the beginning of the eighties, resulted in a 'fragmented institutionalization' of the environmental policy field. This means that different environmental tasks were performed by several different departments. In the EC lack of sufficient political support for concrete measures and problems of competence between the Member States and the Community (partly explained by the basically economic character of the EC) led to considerable parts of the environmental policy field not being covered at all. The specific processes of institutionalization in both political systems, particularly in the Netherlands combined with changing views on the role of the state in society, brought about the need for a better coordination and integration within environmental policy itself and with other policy fields. In the Netherlands efforts to overcome problems of internal and external integration, for instance by introducing the strategy of internalization and integrated region-oriented policies, have been key elements in the stabilization of the newly established policy field during the eighties. In the EC the establishment of policy structures still continued in these years, but at the same time efforts were made to deal with problems connected with the sectoral organization of the policy field (the internal aspect) and to accomplish a better integration of environmental considerations into other fields of Community activity (the external aspect). It was argued, however, that attempts to effect both kinds of integration are strongly affected by the existence of different notions of environmental problems and intervention strategies in different parts of national states, respectively the Community apparatus.

Our approach in this article has been to analyze broad developments and tendencies in environmental policy in two political systems. We have done this by applying a conceptual framework, originally developed for the Dutch

context, both to the Netherlands and the EC. Because we did not first undertake a systematic analysis of conditions under which our concepts would be applicable, our approach on the one hand led to some rather obvious results, for instance the conclusion that processes of societalization in the Community could never play a role as important as in the Netherlands. On the other hand, in our opinion the idea of 'fragmented' institutionalization has shed some light on problems of 'internal' and 'external' integration of environmental policy, particularly in the Netherlands. The notion of different mixes of environment and intervention concepts, appeared to be useful to analyze and explain factors impeding the integration of environmental and other policy fields. It turned out that especially in the Community, as a consequence of its character as a supranational, still principally economic organization, opportunities to broaden current conceptualizations of environmental problems and modes of intervention must be considered rather limited. This will probably constitute a serious obstacle to a full integration of environmental considerations into other policy fields in the EC.

Notes

1) In 1966 Kraemer introduced the concept of societalization of state. In his view the Societal State is a community wherein the State is societalized, "not only in the 'empirical' sense of being the crystallization point of the maximized interests of a fully emancipated Society, but also in the 'moral' sense that, through it, all citizens assume responsibility for one another" (Kraemer,1966:148). With the concept of the Societal State Kraemer seeks to give expression, "not only to the fact of the close interrelatedness of State and Society nowadays, but also to our conviction that this interrelatedness results from a development which may be characterized better as a 'societalization' of the State than as a 'statification' of Society" (Kraemer, 1966, p. 15).
2) The societalization of environmental policy shows some similarities with the democratic statist policy model, as developed by De Wolff (1984). Particularly the initiating, coordinating and generally leading role of public actors in the interaction process is obvious both in the democratic statist policy model and in contemporary Dutch environmental policy making.
3) Urgentienota Milieuhugiëne, Ministerie van Volksgezondheid en Milieuhygiëne, Tweede Kamer 1971-1972, 11906, nrs. 1-2.
4) The central government became painfully aware of these shortcomings when, at 14 september 1983, the report of the Commission Hellinga on the so-called Uniser-scandal was published. Uniser was a private waste disposal enterprise, that illegally dumped chemical waste and resold polluted oil.
5) The Ministerial Commission of Interdepartmental Allocation of Tasks and Coordination (MCIATC) gives two possible solutions for the existing allocation of tasks in the seventies. Firstly uniting the environmental tasks of environmental Hygiene and physical planning and secondly transporting environmental tasks from other ministries to the Ministry of Public Health and Environmental Hygiene (Rapport van de Ministeriële Commissie Interdepartementale Taakverdeling en Coördinatie, Tweede Kamer, zitting 1977, 14649, nrs 1-2, p. 29). This discussion had it's roots in the sixties. Also the Commission

Interdepartemental Allocation of Tasks and Coordination gave in 1971 a few possibilities for the allocation of environmental tasks (1971, p. 38).

6) The concept of environmental management was initiated by the Minister of Environment, P. Winsemius; cf. Winsemius, 1986. The central goal in the environmental management approach is the awakening of everybody's own responsibility for the environment. In order to attain this goal attention is paid both to the organizational structure of environmental policy and to the development of policy measures to stimulate private and public actors' responsibility.
7) Ministerie van VROM (1983), Plan Integratie Milieubeleid. Deregulering van overheidsregelingen. Tweede Kamer, zitting 1982-1983, 17931, nr. 6.
8) Ministerie van VROM (1984), Meer dan de som der delen. Eerste nota over de planning van het milieubeleid, Tweede Kamer, zitting 1983-1984, 18292, nrs. 1-2.
9) On the one hand a plan is an investment for decisions and actions in the future (internal function of planning), on the other hand the function of a plan is to provide clarity for other governments, firms or citizens about what they can expect from the planning government.
10) In 1984 the system of sectoral Indicative Multi-year Programmes (IMP's) was replaced by one integrated IMP-Environment (IMP-E), covering a four year planning period and updated annually. In 1989 it was succeeded, as announced in the 1984 Memorandum, by the first National Environmental Policy Plan (NEPP).
11) Tweede Kamer, zitting 1985-1986, 19204, nrs. 1-2.
12) The five themes introduced in the IMP-E 1986-1990 were: acidification, eutrophication, diffusion of substances, disposal of waste and disturbance. In the NEPP (1989) climate change, dehydration, and squandering were added.
13) Tweede Kamer, vergaderjaar 1988-1989, 21137, nrs. 1-2.
14) Tweede Kamer, vergaderjaar 1989-1990, 21137, nr. 20-21.
15) Official Journal of the European Communities (OJ), C 112, 20.12.1973.
16) OJ, C 139, 13.6.1977; good accounts of the development of the environmental policy field in the EC can be found in: Bungarten, 1978; Klatte, 1983; Koppen, 1988; Johnson & Corcelle, 1989; these publications have also been used as a basis for the present subsection.
17) The UK, Ireland and Denmark became Members of the EC only in 1973, but already before their formal accession consultations took place with the applicant countries (including, at that time, Norway).
18) Proposal: OJ, C 70, 18.3.1987; text adopted by the Council: OJ, C 328, 3.12.1987.
19) OJ, C 168, 25.7.1975.
20) OJ, C 54, 8.3.1976.
21) Directive 75/716/EEC, OJ, L 307, 27.11.1975.
22) The first important step was made by the adoption of Directive 80/779/EEC on air quality standards for sulphur dioxide and suspended particulates, OJ, L 229, 30.8.1980.
23) Cf. the Communication on 'The perspectives of the Common Agricultural Policy', Commission of the European Communities, Brussels, 1985 (Document COM(85)333final); and the Communication on Environment and Agriculture, 1988 (Document COM(88)338final).
24) The adoption of about 100 environmental Directives between 1972 and 1987 and a sequence of judgements of the Court of Justice, acknowledging the competence of the Community in environmental matters (see, among others: Rehbinder & Stewart, 1985; Krämer, 1987; Koppen, 1988), were key factors in this process.
25) It must be noticed, however, that here also the restriction was included, that "the Community shall take action relating to the environment to the extent to which the objectives (...) can be attained better at Community level than at the level of the individual Member States" (Art. 130 R(4)) (For detailed discussions of this so-called subsidiarity principle, see, among others: Krämer, 1987; Scheuing, 1989). From the point of view of the Community this provision may be regarded as an opportunity for the Member States to continue their 'one by one' approach to EC environmental regulation and, consequently, as a

potential obstacle to the further development of a coherent Community policy in the field of the environment as a whole.

26) In 1983 the Action Programm Physical Planning and Environment is published (Tweede Kamer, zitting 1982-1983, 17931, nr. 4).
27) Tweede Kamer, zitting 1984-1985, 18602, nrs. 1-2.
28) In the NEPP (1989) the following target-groups are selected; Agriculture, Traffic and Transport, Industry and refineries, Gas and electricity supply, Building trade, Consumers and retail trade, Societal organisations, Environmental trade and Research and education.
29) OJ, C 46, 17.12.1983.
30) Directive 87/217/EEC, OJ, L 85, 28.3.1987.
31) See for example the documents mentioned in note 16. For a short historical overview, (See: Johnson & Corcelle, 1989, p. 310-316).
32) OJ, C 54, 3.3.1989 (COM(88)708).
33) This is most clear in the three air quality Directives (80/779/EEC, OJ L 229, 30.8.1980; 82/884/EEC, OJ L 378, 31.12.1982; 85/203/EEC, OJ L 87, 27.3.1985).
34) One can think of Directive 85/337/EEC on environmental impact assessment (OJ, L 175, 5.7.1985) and Directive 79/409/EEC on the conservation of wild birds (OJ, L 103, 25.4.1979).
35) Respectively Document COM(88)338 final, and OJ, C 68, 24.3.1986: 80.
36) If private actors do not comply with a certain Directive because it has not or has not correctly been implemented, the Commission must in principle start a procedure against the Member State government (see, e.g.: Krämer, 1988; Dashwood, 1983, p. 181).
37) Directive 84/360/EEC, OJ, L 188, 16.7.1984.
38) The principle of this type of 'conceptual clash' is illustrated by the famous dispute between the UK and the other Member States concerning the choice between emission standards and environmental quality standards as the principal instrument to be used in the Directive on dangerous substances in the aquatic environment (76/464/EEC, OJ, L 129, 18.5.1976). Apart from economic interests, different approaches to pollution control were at stake here (see particularly: Haigh, 1987, p. 13-23).
39) An example of this is the implementation of Directive 80/779/EEC on air quality standards for sulphur dioxide and suspended particles (OJ, L 229, 30.8.1980) in the Netherlands. Formal compliance with the Directive was about four years late mainly because the Dutch Air Pollution Act (1970) did not from the outset include a system of air quality standards and low priority was given to introducing them as yet (Bennett & Liefferink, 1989, p. 56).

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UNDER THE RULE OF LAW

The quest for legality in the implementation of the European community's common agricultural policy

Menno van der Velde

The European Community is widely seen as a community of law. As such it is a continuation of the rule of law tradition which became part of the cultural heritage in a majority of the Member States after a long and arduous struggle. This community of law is valued as one of the more successful factors in the integration process.

In West European integration, law has been given a special part to play. Not only are the several steps in the integration process translated into treaties and other legal constructions to carry out the integration programme, but integration in the European Communities has been to a large extent an integration through law: the legal horizon being consistently pushed ahead of other interfaces of integration. The law of the European Communities has been used to forge linkages between the diverse West European cultures, separated by decades of fierce nationalism. The law of the Common Market is to bridge the artificial barriers between the national economies of a continent, fragmented by frontiers shielding off national preferences and policies. In this sense law is used as an integrating force, preceding integration along cultural, economic and politic interfaces.

This prominent position of law in the development of West European integration up to now, was made possible by the salient features of European Community law: the direct effect of Community law in the national legal systems, the direct access of individuals to the Community's Court of Justice in some cases, the power of the Court to strike down the rules made by the Community's legislators, the co-operation between the national and Community judiciaries, and the supervision of the acts of Member States by the Commission as an independent Community institution.

The relative success of the integration process in the legal domain gains relief if it is contrasted with other aspects of integration. Important ingredients of this integration process are the Common Market, the political co-operation and the transfer of authority from the national to the supra-national level.

Of these, the Common Market is riddled with countless barriers to free trade which found refuge in the discrepancies between the laws and administrative procedures of each Member State. Three decades of attempts at harmonization were not able to erase this fragmentation of the Common Market. Hence, the effort to make up for arrears, an effort embodied in the

Internal Market programme, which is to achieve in 1993 the goals set in 1957 and declared already achieved in 1969. A somewhat puzzling behaviour which is slightly masked by renaming part of the Common Market programme into the Internal Market programme for which a new time table could be set up.

But this somewhat puzzling behaviour of setting goals which were set before, is far more characteristic of the attempts at political integration which, taken together, constitute an endless list of declarations, solemn or not, which set goals that were not met, and deadlines that were allowed to pass in silence. Integration here proved harder than expected. Although the strenuous efforts at integration must be evaluated against the background of formerly warring states, the actual achievements have not brought the European Community very far. The building of the European Union is a forty year old collection of stumbling blocks scattered along the way from nowhere to never. The European Political Co-operation is a charade not fit to cope with the slightest pressure, a display of diplomatic weakness.

One of the most astonishing aspects of integration in the European Community is the fact that states, of which at least some have a standing tradition of a representative parliamentary democracy, did actually surrender this basic element of their political process in the transfer of authority to the Community. The European Community Council performs all essential functions in the legislative and executive field in the absence of any real influence of the chosen representatives of the peoples. In this way the national policy constellations that are deeply involved in the formulation and execution of Community policies, found no powerful forum to check and balance their nationally inspired Community work with an elected representation of the community of peoples.

This lack of democratic legitimation may be one of the main factors that caused the transfer of authority to a supra-national level to be blurred by a recapture of national authority on virtually all fields of Community enterprise. The Court of Justice may have proudly stated that the States participating in the European Community have permanently surrendered part of their sovereignty, since then authority has incrementally, but continuously, fallen back to the centers of gravity: the national political systems and their bureaucracies.

Amidst this collection of partial success and partial failure, the legal integration of the European Communities is seen as the one exception, standing out far more unequivocally as a success. There are several factors which explain this.

The independent position of the judiciary in most, if not all, Member States make the judiciary an autonomous force, less susceptible to the political pressures that guide the other participants in the integration process.

The direct access of individuals to the Court of Justice to seek recourse against decisions of Community institutions addressed to them as individuals, makes outsiders a party in the control of the legality of Community acts.

The influential position of the judiciary is given a place to stand on by the direct effect of parts of the Treaties and much of the secondary law of the Communities. The direct effect of European Community law obliges all judges in every Member State to apply this law in their verdicts whenever the cases they try come under the aegis of EC law. This makes litigation a mechanism for individuals to act as motors of integration (Kapteyn, 1989) and guardians of EC law.

The preliminary ruling procedure links the application of EC law by national judges to the case law of the Court of Justice by involving both national and Community judges in a co-operation in which the national judge solicits and obtains advice on the interpretation of EC law.

The absence of democratic control and the infection of the supra-national structure with nation states' intergovernalism adds both strain and importance to the role of law in the European Communities. As a binding factor and a means of communication in a wide ranging and partly unified, partly diversified intermediate state structure, such as the European Community, law should have a crystal clear formulation which will be able to convey its meaning across the distances in language, culture, time and space. It should contain the precisely formulated and delimited formulation of what is agreed upon, in order to function in the hands of many authorities who each operate from a different national tradition, including widely different legal systems, and in a national context that will continue to differ considerably from the contexts in the other Member States or regions of the European Community.

So far important parts of EC law lack this clarity. There are several influences which make for an increase in vagueness and ambiguity, at the expense of the ability to serve as a means of communication.

First of all many of the rules are the result of prolonged negotiation leading to the sort of compromise that glosses over the differences that remain, and thus are not resolved. Of course, the national legislative process partakes in this effect of politics too, but in the legislative process of the EC this effect is aggravated by its international setting. The legislative process of the EC is a continuous diplomatic conference, where the executive and the legislator are bargaining for time and discretion, while the judiciary has to apply their ambiguous legislation to conflicts as they arise. In this way the inability of the political process to produce clear legal texts is multiplied with the characteristics of the international negotiation process were diplomacy flourishes as the

art of vagueness. A third force to increase the ambiguity of the legal texts is the operation of a legislator in the mixed market economy. The combination of public law trying to encompass the market of private initiative, renders an economic law with a high degree of symbolism or texts that are not meant to be used in reality. Lastly, the authoritative texts of the European Community have to be understood and applied in different legal cultures, ranging from the common law to the various continental traditions. In these legal cultures it is not only the language and the thinking that differs, but the very same word may denominate a completely, or a slightly different concept, giving rise to all sorts of misunderstandings.

Under these conditions a closer scrutiny of the community of law is warranted. Member States have a key role in this Community, as they hold the keys to many doors. Their representatives in the Council decide on Community policies that may partly replace, partly overlap and partly interfere with national policies. In the line of these policies, the Council formulates the necessary EC legislation which holds supremacy over national law. So the national civil services and the national decentral authorities have to do at least two things at the same time: faithfully execute both Community and national policies. If direct effect of Community law is to mean anything, it first of all implies the application of Community law by central and decentral national authorities. The recourse of individuals to EC law in court actions comes only after the application of EC law by their national authorities. Integration, not litigation is to be the central issue.

The actual operation of this dual law system is best studied in the main fields of its activities. Of these, the fields of agriculture have produced a rich harvest of legal texts which give an insight in the administration of law by both the executive and the judiciary. I will turn to these fields to study to what extent a Member State and the Community institutions are bound by rules in the administration of the common agricultural policy.

The law of the common agricultural policy

From the beginning, agriculture has had a prominent place in EC law and practice. The European Economic Community Treaty lists[1] the adoption of a common agricultural policy as one of the main activities of the Community. Part Two of the Treaty even ranks agriculture among the very foundations of the European Economic Community, second only to the free movement of goods, and preceding the free movement of persons, services and capital.

Article 40,2 EEC Treaty prescribes that this common agricultural policy has to embrace a common organization of the agricultural markets. This indirect way of government influence on agriculture, e.g. through regulation of the markets for agricultural products, instead of direct intervention in production structure or circumstances, was in line with the national agricultural policies that preceded the EEC in some tone-setting Member States. It was also in keeping with the common market approach that was to be the center of the vortex of West European integration, after the failure of political integration in the fifties.

The emphasis given to market regulation placed the intervention buying mechanism at the heart of the common agricultural policy. Through this mechanism, traders in those agricultural products that are grown in the territories of the EEC have a title in law to sell all that produce at a guaranteed intervention buying price to the intervention buying authorities.

In the structure of the division of authority prevalent in the European Communities, these intervention buying agencies are national authorities, under the direction and supervision of their national ministries of agriculture, although they have to perform a function which is essential to the common policies of the EEC institutions. Of course Member States, and with them all their national agencies, are to perform their Treaty obligations diligently and in good faith. Lawyers never get tired of pointing out that these obligations stem from law generally (hence the community of law), from specific[2] Treaty provisions, and from explicit secondary[3] EEC law, set up especially with a view to the operation procedures necessary for the intervention buying mechanism (Vaughan, 1986).

Having set intervention buying thus at the center of EC day to day operations in the fields of agriculture, the definition of the products that are eligible for the right to be sold regardless of demand, becomes all important. These definitions are necessary not only to specify a certain minimum quality, but to specify the very substance of what can be brought under the umbrella of the common agricultural policy.

The common organization of the agricultural markets is split up according to some eighteen groups of agricultural products (Vaughan, 1986). The detailed structure of the intervention buying mechanism may differ from one group of products to another. Prominent among the regulated markets is the Common Organization of the Market in Milk and Milk Products. In terms of the financial burden carried by the EC, this particular market organization has taken about thirty to forty percent of total EC expenditure on market support throughout the existence of the common agricultural policy. Its actual influence is far greater, as dairy farming constitutes a crucial strand in the fabric of

European rural communities. To paraphrase Harris (1983, p. 92): Over fifty percent of farms in all member states (except Italy and the United Kingdom) are involved in dairying. "Second, dairying is very often a farmer's main cash enterprise, particularly in the upland and peripheral regions of the Community".

From the legal point of view also, the dairy sector has played an important role: it has been the testing ground for various remarkable innovations in EC law, as for example the co-responsibility levy, the non-marketing and herd conversion schemes of 1977 and the quantitative limitation of milk production since 1984. Then, for the first time[4], the limitless production opportunities shielded by the common agricultural policy were brought into specified legal bounds. I will come to that on page 306.

But first I will return to the heart of the intervention matter, the definition of eligible products. In the Common Organization of the Market in Milk and Milk Products, two products make large-scale intervention stock piling possible: butter and milk powder. The intervention mechanism rests on these processed products, rather than on the farm products, to siphon off excess milk production, and to store it for lean years which never come, or for subsidized export and further industrial processing to keep it permanently out of the market for human consumption in the EC.

NIZO-butter

Although some of the technical details of the regulations made to set up the intervention structure may be quite intricate, the crucial rules for the intervention buying of butter are very simple indeed. Article 1,3 of Council Regulation 985/68[5] specifies that in order to be eligible for intervention buying, butter has to be made of, among other things, *sour* cream.

In the beginning of the Seventies, Dutch dairy factories turned to a new process to make butter, based on *sweet* cream. The resulting butter is said to have a better quality, while its bye-product, sweet churned milk, can be used in many more products, such as ice cream and coffee-milk, than the traditional sour churned milk. So the new process is commercially far more interesting. It is called the NIZO-process, after the *Nederlands Instituut voor Zuivel Onderzoek* (Netherlands Institute for Dairy Research). The new process uses raw material that did not comply with the requirements of the EC regulation.

NIZO-butter constitutes a new technical development, and a marked improvement, but the rules set by EC law did not recognize this development. In 1979, 1983 and 1986, The Netherlands asked the Commission to initiate the

procedure to change the regulation, in order to abandon the requirement which excluded NIZO-butter from intervention. But the regulation remained unchanged until July 1987, when the requirement of sour cream was deleted[6].

In 1989, a leading member of the European Parliament, P. Dankert (1989) who had made a record investigating fraud in the EC, stated in Parliament that various Member States' agricultural authorities and dairy companies had swindled the EC out of several billion ECU. One of the main fraudulent operations was the selling of NIZO-butter to the Dutch Intervention Bureau, in the years between 1982 and 1987, when the EC regulations did not allow for that. The occasion for Dankert's statement was the annual debate on the report of the Committee on Budgetary Control in the procedure to grant the Commission discharge in respect of the implementation of the budget. The Commissioner who took part in the European Parliament's debate, stated that the Commission had found no proof that these irregularities had actually occurred (Schmidhuber, 1989). On the same day the Commission issued a press release, stating that it had no information whatsoever that Member States had taken NIZO-butter into intervention before 1987. Furthermore the Commission had decided to allow NIZO-butter into intervention as from 1987, because there was no way to distinguish this type of butter from the one manufactured according to the traditional process. Hence, the Commission found it overdone to present as a fact, what could only have been presented as a question. The most remarkable aspect of the Commission's first reaction was its insistence on the absence of any information. Lack of information is a characteristic of many operations that have the shadowy realms as their niche. The honourable Member of Parliament accused Member States (they lie and cheat, he said), while the Commission at that moment based, and had to base, its lack of knowledge on the information given by these same Member States.

I will concentrate on the Dutch reaction in this affair. The Dankert accusation became a heated dispute in Dutch national politics, where at that time campaigning for the national parliament had got underway. The European MP was a Dutch Social-Democrat, whereas the Dutch Minister of Agriculture was, as tradition prescribes, a Christian-Democrat. Both antagonists represented the two leading parties in Dutch national politics at that time. At issue however was a question of Dutch fulfilment of EC law obligations. The national parliament wanted information.

The Dutch Minister of Agriculture reported to the Dutch Parliament on May 1, 1989. In his report he stated that the accusations of European MP Dankert were based on presumptions that had no substance or were quite wrong (Minister of Agriculture and Fisheries, 1989, p.1). The Minister went on to explicate the Dutch intervention buying praxis as far as butter and milk

powder were concerned.

It was an astonishing report. The Minister first of all complained about the hazy nature of the EC regulations, regulations which are a product of the law making capacities of the Ministers of Agriculture meeting in the Council. The Dutch Minister stated that as all cream by nature is sweet, so all butter in essence is made of sweet cream. The only difference between traditional, EC conform butter and NIZO-butter, is the point in time at which the cream gets sour. In traditional butter, the cream becomes sour before churning gets started. In the NIZO-process, sweet cream is churned into sweet butter grains. These are then made sour. The Dutch report stated that the EC regulations clearly did not mention the moment at which the cream is made sour. By way of interpretation it might be said that the cream has to get sour before the butter is made. However the regulation does not specify at which moment the manufacture of butter starts (Minister of Agriculture and Fisheries, 1987, p.4). Thus the suggestion is raised that NIZO-butter is really in line with the EC regulation. It gets into line only a little bit later.

In this way a very simple rule (sour cream) is first stamped as being unclear, and then is stretched to imply something which is convenient for the national authority. However, the NIZO-process starts with sweet cream, and at the time the sour comes in, the cream has gone: it is butter that is made sour. Until 1987, the regulation unequivocally demanded sweet cream as raw material. So there is no room to argue that the regulation was vague on this point, there was only room to argue that a change of the law might be useful. The Netherlands government was aware of that, as is shown by its repeated request to the Commission to change the law.

In the absence of a change of the rules before 1987, the question remains how the law was implemented in practice, a practice which is mainly in the hands of a closely knitted set of interested parties (Van Waarden, 1984). The Minister's report states that national controlling measures were taken in addition to what was required by Community rules. The main controlling agency was a private organization representing the dairy industry's interest in quality surveillance. This private organization in its turn was once in a while controlled by the Ministry. Some of these investigations found NIZO-butter being offered to the intervention buying agency. The incidents were corrected by refusing these shipments.

In 1987, the affair ended in deadlock: Dutch dairy factories stated that they had made only a limited amount of NIZO-butter in the period under discussion, and that they had sold this butter legally on the market, and not to the Intervention Bureau. The market absorbed more butter than was made in the NIZO-process (Minister of Agriculture and Fisheries, 1987, p.10). The equip-

ment in their dairy factories could be used for both types of butter, so they tuned their production to the market when possible and to intervention when necessary. The fact that NIZO-butter is commercially a far more interesting product did not ring an alarm bell. The accusations of Dankert were deemed to be unwarranted or not proven, some people believed that large-scale intervention buying of NIZO-butter had taken place, but had left no trace in the records. Others gave more credit to the assurances given by the Minister and the industries, or invoked the election time fever as an explaining factor for much ado about nothing. The Netherlands Parliament left it to its Standing Committee on Agriculture to adopt a motion stating that serious doubts had been raised, but no consequences could be taken from that. In this way, the only place where the political responsibility of those in charge of the operation of the intervention system could be made effective, albeit only in one Member State, was overcrowded by the urge to play party politics and by the need not to burden the good name of the Netherlands in the European Community by further investigating into perhaps ill-founded but serious accusations.

However, in June, 1991, the Commission wrote a letter to the Netherlands government, stating that the Commission's investigation of the NIZO-butter affair had shown that the accusations of European MP Dankert were basicly right. The argument of the dairy industries, taken over by the Netherlands Minister in his report to the Netherlands Parliament, that the dairy factories could be used to process butter alternatively in the traditional way and in the NIZO way, was found by the Commission to be incorrect. All butter made in those years was NIZO-butter, as it is technically impossible to produce butter the old way with the new machines. The information given by the Minister to the Netherlands Parliament was based on information given to him by the industries at his simple request, without any legal guarantees as to its correctness.

The Netherlands Ministry of Agriculture repudiates the Commission's position in 1991, stating that in its opinion the Commissions findings are based on wrongly made assumptions. The Ministry expects that the Commission will change its position in this matter. At the time of writing no more evidence has been presented by the Ministry, as negotiations (!) between them and the Commission are still going on.

Meanwhile the report to the Dutch Parliament had given fantastic information indeed on the opportunities for mega and mini fraud. The Minister stated that the unclear rules made surveillance of the system very difficult. Especially because the end product, butter, did not reveal how it was made. Yet the report stated at the same time that intervention buying in the Netherlands was

based largely on the packaging of the butter. If it was placed in a box with a letter "I" printed on it, it was eligible for intervention. (The "I" would indicate that!) However some operators were clever enough to print the digit "1" on the box. This was an imprint required in the Federal Republic of Germany. The "I" and the "1" could be made to look so much alike that German "1" boxes could be sold to the Dutch Intervention Bureau. Some sly types went further than that and gave their boxes an inscription placed in a double lined cadre. This double line was easily taken for the required "I". What is astonishing about all this, is not the rather pathetic positioning of products to take advantage of the situation, but the fact that the Dutch control of the intervention buying system was so weak and haphazard. It rested mainly on these simple imprints. No records where kept. No certificates were demanded. There was virtually no effective control. Factories or traders selling to the Intervention Bureau were not required to state the nature of each shipment and the way it was made. On the rare occasions that a more than symbolic control effort was made, and hit a contravention of the rules, the offender was reprimanded, allowed to take the stuff away to sell it somewhere else, and allowed to come again at all times. This makes it hard to avoid the impression that the Intervention Bureau and the controlling agencies staged a free ride at the expense of the Communities, and their major concern was to get as many national fellow travellers on board the Community free ride as possible.

Sometimes the technical nature of the process to be regulated leads to a very technical and detailed set of rules which make sense only to those who belong to the very limited set of specialists who are conversant with the regulated domain. This leads to a two-fold problem. The very specialized nature of the set of rules requires you to be a specialist to operate the system, and you become a specialist only if you are an interested party. As an interested party you get into a situation where you have an interest in the most beneficial interpretation. This is of course a common phenomenon of all law, which makes it a valuable asset on the commodity market. But on this market there are supposed to be more parties with diverse interests, which, if not by an invisible hand, then by the hand of a disinterested trustee of the common good will lead to a balance of interest and a balanced deal.

In the case of the European Community, a very large part of the actual operation of the system takes place in the national sphere, far away from Brussels. Co-operation of national public authorities and national private interests to achieve an optimal outcome is likely. At the same time, these national authorities have to guard the EC interests in the same matter. Can they really do that in the same manner? One does not question the good faith

of the lion, if one questions the wisdom of appointing him as shepherd. Naturally all this can be within the bounds of perfect legality. Implementation can lead to a creative interpretation of an existing, sometimes detailed and hazy (if not sour) set of rules. And this creative interpretation can be a dynamic development of the operation of the law. But what to say of a interpretation, as suggested in the Ministers report, to change sour into sweet, or an application directly contrary to the express words of a regulation, even if they are very simple. Even if they are changed later on to cover a heretofore illegal operation?

Reported, publicly stated, the regulation in force is the communicated expression of the state of the law. And in this part of the law small words make a billion dollar difference. If the law has to be changed, revision procedures are available. If there is room, or necessity even for an anticipating interpretation of the law, the advent of a new rule should be publicly known, or at the very least the contra legem implementation should be made public. The day to day operation of EC law making is riddled with secrecy, behind closed door meetings resulting in scantly explained legislation. In this setting at least the outdoor activities and communications should remain meaningful. Changes known only to an inner circle of persons, enterprises and institutions immediately involved, cannot be part of the community of law. Shielding of the national application from the Community is in direct violation of various legal obligations. Negligence in the operation of national control or in the surveillance of national applications by Community authorities, which makes the discovery of possible fraud dependent on chance and the activities of non-appointed amateur investigators point to a structurally weak spot in the Community structure. A strengthening of this structure may be found in a new division of power, with a clear dividing line between responsibilities, and accountability for those responsibilities. Intervention buying as an essential element of the EC's agricultural policy, must be a full swing EC operation down from the apex in Brussels to the base at a local paying out station. EC payments should be made by EC civil servants, under the direct say of elected authorities, who have to answer to the budget authorities. And who have to bear the consequences of a failure to act adequately and promptly. Otherwise, the Community might be a masquerade of officials who do not know and do not want to know what really happens. And as long as they do not know, they seem to be not accountable, or the extent of their accountability cannot be ascertained. Then in the very reclusive niches hidden in the jungle of EC regulations, opportunities are seized that do not meet the eye, and if per chance they are caught by daylight, they are explained away without any immediate consequence whatsoever.

Dairy Quota

Intervention is an indirect way of regulating agriculture through manipulation of the market. The intervention system has been in operation for about three decades now. Gradually the pressure on the Community's budget got too much to be borne continuously, and attention focused on methods to limit EC expenditure on agricultural support. After some experimenting, which did not lead to impressive results, the Community moved to fix the amount of financial support that could be given. In the dairy sector the right to deliver milk products to the intervention bureaus in limitless quantities was abrogated. In 1984, dairy farmers were pinned down to the amount of milk that they had delivered to the market in 1981 (Petit, 1987).

The dairy quota system was designed as a modulation of the existing intervention system. The amount of milk eligible for intervention buying was not limited as such. Dairy farmers did not obtain a production licence. Instead, the method chosen was a levy on the delivery of milk and milk products above the historic quantity. The levy was set so high as to deter farmers from delivering more milk. As some rather low levies had been tried before without avail, this one became known as the super levy. The amount each individual farmer had delivered to the market in 1981, increased by one percent, was the amount each farmer could continue to deliver to the market without incurring the superlevy. This amount is known as the dairy quota. It represents the farmers share in the now quantatively delimited intervention system.

With the dairy quota, the common organization of the market in milk and milk products came home to the farm for the first time, and it came home to roost. Instead of operating behind the cloak of the market, the legal structure of the common market organization now involved farmers directly. The milk quota confronted farmers with several legal questions, one of which is the question to whom this right to deliver milk without having to pay the prohibitive levy could be transferred, if it could be transferred at all. The (im)possibility to transfer milk quota from one farmer to another, is one of the central issues in the superlevy. It is on this aspect of the quota system that I will concentrate now, as it presents the opportunity to study how Community law makers and administrators, and their national counterparts, go about designing and sustaining a crucial element of the imposed system. This central element, which one might suppose to have attracted much fore-thought and the continual attention of the authorities, turns out to be quite lively ridden with discrepancies.

Objective criteria

The original main characteristic of the quota system was that there should not and could not be trade in the quota rights themselves (Petit, 1987 and Court of Auditors, O.J. 1987 C 266, 12). The quota system was conceived as a regrettable administrative measure necessary for the continued operation of the common market organization. The thought that private operators might make a profit, solely by manipulating this necessary intensification of the legal intervention in dairy agriculture, was not cherished. Furthermore, a possibility to trade in quota would conceivably tie up large sums of money that would thus not be available for other, perhaps more productive uses. Also trade in quota would siphon milk quota from financially or structurally weak farms to stronger farms, and from weak regions to stronger regions. The distribution of milk production in the Community could thus be affected considerably, without much opportunities for controlling this change in distribution. As has been noted on page 300, dairy farming is seen to perform a crucial role in many areas of the Community, and not the least in the regions with a weaker social or economic structure.

Although there were thus various reasons why free trade in quota was not acceptable for the EC law maker, none of these were stated explicitly in the considerations leading up to the regulation that introduced the quota system[7]. The dairy quota were divided among the Member States, thus assuring by the very nature of administrative procedures that there would be no transfer of milk quota across the national borders between the Member States, borders that the EC had to abolish or is going to abolish. In the regulations implementing the new system, the dairy quota were given to the farmer who had delivered that quantity to the market in the reference year. The ban on trade in quota could of course not result in the complete impossibility to transfer quota. As the quota were assigned to the person who had delivered milk in the reference year, it was obvious that rules had to be made for the situation where a dairy farm got into the hands of another farmer. Council Regulation 857/84[8] stated that in case a holding would be bought, leased or inherited, the quota would be transferred to the buyer, lessee or inheritor of the holding, according to rules that had yet to be made.

The principal Community law maker, the Council, left it to the Commission to fill in the details. Commission Regulation 1371/84[9] then introduced the distinction between transfer of the entire holding and transfer of parts of the holding. In the case of transfer of the entire holding the dairy quota is transferred to the producer who takes over the holding. In the case of a partial transfer of a holding, the dairy quota is to be partitioned among the producers

who take over the holding.

For this partition the Commission gave a two-layered rule. First of all Community law prescribes that the quota should be partitioned in proportion to the areas used for milk production. However, in addition to its own Community rule, the Commission empowered the Member States to use "other objective criteria"[10].

The application of the quota system in the Netherlands led to a situation in which a large and continuing trade in milk quota has come into existence. Prices for quota compare favourably with the prices paid for land. There is virtually free trade in quota.

The Netherlands government at first applied the proportionality rule of the European Community, as it is understood in most countries. The rule for a partial transfer of a holding, leading to partitioning of the dairy quota among the producers who take over the holding, is interpreted as necessitating the proportional loss of quota with the loss of every hectare of land of the area used for milk production. The farmer remains entitled to the quota in proportion to the area used for milk production still in his possession[11]. Transfer of land led to transfer of quota: the representative of the Ministry of Agriculture investigated the transfer of land, and if he found it in accordance with the regulations, he assigned the corresponding quota to the new user or owner of the land. The transfer could be constituted only by the representative of the Ministry of Agriculture.

In 1986, the Netherlands implementation changed over to a system authorizing transfer of quota by consent of the parties involved, provided the agreement these parties make does not exceed 20,000 kilograms milk quota per hectare[12]. Given the average milk production in the Netherlands, this implies virtually a free hand to transfer all the available quota with available land as the transport mechanism. The opportunity at the same time to agree on the transfer of land with zero quota attached to it, opens the way to various constructions to freely transfer quota, getting at the heart of the system which was set up to prevent trade in quota. The representative of the Ministry of Agriculture merely registers the transfer as agreed by the parties, he does not look into its legality.

The system includes a control mechanism. The Minister of Agriculture can cancel the registered quota if an investigation proves that a transfer of land or a lease of land has been entered into by the parties with the sole intend to evade the maximum of 20,000 kg. of transferable milk quota per hectare. When farmers and their organizations inquired at the Ministry what this rule could mean, the Ministry declined to give information, as each clarification of the

rule would give interested parties more opportunities to devise new ways to evade the rules. Abidance by the rules was the responsibility of the farmers involved; the Ministry merely registered their agreement, it was not going to help them by clarifying what the rules meant. If the Minister wants to use his power to cancel quota he has to act within three years after the registration of the transfer of quota. When the Minister did use his power to cancel quota, it was not clear whether the quota he cancelled were the most obvious breaches of the system. Nor was it known whether the Ministry had in fact investigated all transfers of quota, and was able to correct all agreements that infringed on the rule that no quota could be transferred in defiance of the maximum of 20,000 kg. Under pressure from farmers organizations and the Netherlands Parliament, it was decided that all parties that were struck by the Ministers decision to cancel quota, would be given the opportunity to cancel their agreement, or to repair it. Cancellation would result in returning the quota to the former owner. Repair is possible by transferring the necessary land afterwards.

At the same time the rules were supplemented with rules prescribing a certain bond between the land and the quota involved: the land transferred with the quota should have been used for milk production at that farm for at least one year prior to the transfer, and should be used for that purpose for one year after the transfer[13].

In effect, under the old rules, parties were able to escape the supervision of the Ministry by making agreements that would lead to return of the land, without quota, in the period after the three year term of the Minister's power had elapsed. It was even more convenient to lease out the land with quota and to have the lease lapse after the three year period without return of the quota. Under the new rules, the use of land as a transport mechanism for quota would virtually result in the net transfer of quota after the prescribed one year continued use had lapsed. In any event, the farmers or other private parties involved were able to decide how much quota was attached to the land they were transferring.

In the official explanation of the change over to quota transfer by the parties consent within the 20,000 kg range, the Minister of Agriculture stated that the Netherlands implementation, of course, had to stay within the framework given by the European Community. As the strict proportionality rule had been abandoned, this can only imply that the new Dutch practice was allowed by the provision to use "other objective criteria". The Minister did not make clear how the subjective opinions of two private parties laid down in their agreement, could be brought under the heading of objective criteria. Nor was the Dutch system explained as subjectivity bounded by an objective 20,000 kg. limit.

In 1990, a case came up to the Court of Justice for a preliminary ruling[14], that brought the Court into contact with the operation of the Dutch system of quota transfer by consent. In this preliminary ruling case, a Dutch judge asked the Court how the European Community regulations had to be applied when both the lessor and the lessee of a piece of land wanted to have the quota that would be related to the land if the proportionality rule was applied. Furthermore, the judge wanted to know whether the other objective criteria that Member States may apply, should be based on verifiable factual circumstances.

In this case, the Netherlands government stated in its memorandum to the Court, that it was not applying the other objective criteria. The implementation of the quota system in the Netherlands was presented by the Dutch government as an implementation of the Community rule of strict proportionality, although the private parties involved could decide how much quota could go with the land. The report of the judge rapporteur in which the Dutch position is published, does not make clear how this inconsistency is explained by the Dutch government. The Commission followed a somewhat different track in its memorandum to the Court: the fact that the Dutch government did not make use of the possibility to prescribe other objective criteria, of necessity would lead to the conclusion that the strict proportionality rule would apply. However, the fact that the Community regulation empowers Member States to use other objective criteria, implies that they can leave it to the private parties themselves to divide the quota.

In this way, the Community institution that has to supervise the implementation of Community law by the Member States, devises a way out that covers both its own lack of supervision and the Member State's curious application of EC law. The only thing the Commission has to do to achieve this desirable result is to state that a regulation empowering Member States to devise other objective criteria, at the same time empowers these Member States not to devise any criteria at all, let alone objective ones, but to leave it to the subjective judgement of private parties.

In the oral proceedings on June 5, 1991, the Commission hastened to strengthen its position by the use of an obvious procedural trick: it is not necessary for the Court to decide on the Dutch system of quota transfer by agreement, because the litigation that led the judge to ask the preliminary ruling, involved two parties that did not agree at all on any quota division. On the other hand, an agreement between two private parties on the quota they transfer, will rarely give rise to litigation, as both parties will be satisfied by the opportunity to decide this important question all by themselves. In this way the issue will never come under judiciary scrutiny: if there is no agreement there is no need to look into the system based on agreements, and if there is an

agreement, there will be no litigation. Furthermore, the Commission tried to create a smoke-scream, by stating that it is unclear whether the Dutch system of quota transfer by agreement did really create the opportunity for the parties involved to decide that no quota at all would be transferred with the land. For this the Commission pointed to the provision in the Dutch rules that stated that the agreement has to be made on the basis of the areas used for milk production. The Commission wished to overlook the fact that the Netherlands government had stated itself that its system gave the opportunity to transfer land without quota, and the Commission overlooked also that its supervisory powers could by now have led to its knowledge on this crucial point.

The advocate-general, in his opinion, strongly stated that the power given to the Member States to use other objective criteria, requires the formulation of rules beforehand, rules that cannot be changed by private agreement, nor left aside by the opinion of the judge in every individual case. These explicit rules have to be made by the national legislator, and have to contain verifiable criteria based on the objective properties of dairy farming.

The mystification in the Posthumus case about what is really going on in some of the Member States on the issue of trade in milk quota, gives the impression that the Commission, the controlling authority in the Community, is hiding behind the practices of the Member States, while these are given the opportunity to twist the rules at their convenience.

It took seven years before this central issue reached the Court of Justice, and then only obliquely in a tenancy case. The quota system was conceived to operate for five years. Why such a short life time was foreseen for such a complicated and far reaching legal intervention is not quite clear, especially as no substantial change in the structure of Community dairy farming was either expected or sought. Anyway, the system got prolonged in 1988, but to stress its temporality, the extension was for only three years. Yet even now, seven years into the operation of what was originally a mere five-year system, considerable confusion exists as to one of its essential characteristics: can there be trade in dairy quota, or not?

Conclusion

Lax and lenient execution of treaty obligations by a Member State, even knowingly operating against the express wording, contents and intention of Community law, is one extreme of circumvention of the community of law. Moving towards another range of possibilities one meets the countless opportunities of variation in application of Community law, without going to the

extreme of outright violation. The mesh of combinations of national opportunities with Community law results from the combination of an established national jurisdiction with the slowly evolving Community jurisdiction.

What is at stake here is not the expressly granted or reserved space for regional variation, which will of necessity if not wisdom, be embedded in the legal structure of a Community of formerly completely independent states that have kept their sovereignty to a very large extent. An incipient public authority encompassing the semi-continental variation prevalent in Europe, will not only presume, but require the possibility to attune the agreed upon common rules to the local or regional circumstances.

What is at issue here is the question to what extent a surreptitious taking of freedom of action can be sustained by the system. Or whether this corrosion of the legality of the European Community's daily work eats away the core of the community of law, and disables the potential of Community at genuine integration, and genuine devolution of authority, because law as a reliable basis of understanding and communication becomes blurred by double talking and redouble crossing.

Notes

1) EEC Treaty Articles 3, sub d and 38,4.
2) EEC Article 5: "the Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of the Treaty or resulting from action taken by the institutions of the Community. They facilitate the achievement of the Community's tasks". This last phrase implies that member States are obliged to give the Commission the information it requires to check whether measures taken by Member States are conform to Community law. In the NIZO-butter case this will prove to be a salient point.
3) In European Community law terminology secondary law refers to the provisions adopted by the Community institutions on the basis of the Treaties and in order to implement them. See Kapteyn, 1989, p. 34.
4) I do not regard the EC's sugar regime as a meaningful contribution to limit the protection given by the common agricultural policy, as this regime limits only the internal market support and leaves it to the world market to carry the burden of EC surplus production.
5) O.J. 1968 L 291.
6) Regulation 1897/87 O.J. 1987 L 182.
7) Council Regulation 856/84 O.J. 1984 L 90, 10.
8) O.J. 1984 L 90, 13.
9) O.J. 1984 L 132.
10) Commission Regulation 1371/84 O.J. 1984 L 132, article 5,2.
11) *Beschikking Superheffing*, Article 14,3 Staatscourant 79, 1984.
12) *Beschikking Superheffing* 1985, (Staatscourant 118, 1985) Article 7 as amended by Wijziging *Beschikking Superheffing* 1985, Staatscourant 171, 1986.
13) *Beschikking Superheffing* 1988, Article 16, 3 as amended by the *Wijziging Beschikking Superheffing*, Staatscourant 114, 1989.

14) Case C 121/90, J.L. Posthumus versus R. and A. Oosterwoud, preliminary ruling asked by the Kantongerecht Beetsterzwaag.

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